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**Official Report Citation of California Supreme and Appellate Court Cases in the
PACIFIC REPORTER, VOL. 137.**

The left-hand column shows the page of this volume on which a case begins, against which are shown the volume and page of the State Report where same case is to be found.

Illustration: The case of *Jost v. King* is in Pac. Rep., vol. 137, p. 4. It can be cited as from the State Report by giving citation opposite "4" (Reporter page column) in this table, i. e., "166 Cal. 394."

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Illustration: The case of *Lewis v. Dean*, is in Pac. Rep., vol. 137, p. 341. It can be cited as from the State Report by giving the citation opposite "341" (Reporter page column) in this table i. e., "76 Wash. 596."

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Each syllabus paragraph in this volume is marked with the topic and section number under which the point will eventually appear in the American Digest System. The lawyer is led from that syllabus to the exact place in the Digest where we, as digest makers, have placed the other cases on the same point — ***This is the Key-Number Annotation***

National Reporter System—State Series

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WITH KEY-NUMBER ANNOTATIONS

VOLUME 137
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

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COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING
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OF CALIFORNIA AND COLORADO, AND CRIMINAL
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* Beginning October 13, 1913.

COURT RULES

SUPREME COURT OF OKLAHOMA

Adopted July 22, 1913

I. Terms. The regular terms of this court will be held beginning on the second Tuesday of January, April, July and October, each year, at 10:00 o'clock a. m., standard time. Special sessions may be held at any time upon call of the Chief Justice. The forenoon sitting shall convene at 10:00 o'clock and the afternoon sitting at 2:00 o'clock.

II. Assignment of Cases. All causes in which no notice for oral argument has been given shall stand for submission on the first day of the term; all cases standing for trial will be heard in the order assigned, unless the court, on proper motion and showing, shall order otherwise; provided, that in making up the trial docket the clerk shall so arrange the assignment of cases that those from each supreme judicial district may be heard together as nearly as may be.

III. Notice—Of Trial Docket—Of Orders. At least seventy (70) days prior to the commencement of each term of court, the clerk shall send to the attorneys interested a printed copy of the trial docket for the term following, showing the day on which each cause will be heard. All attorneys interested shall be notified by the clerk of all orders of the court concerning each case.

IV. Oral Arguments. Attorneys desiring to make oral arguments shall file notice thereof with the clerk of such intention within ninety (90) days after the commencement of the proceeding in error. If no such notice is served, causes will stand submitted on briefs. No motion shall be argued unless by direction of the court. One hour only, except with the consent of the court, shall be consumed in the oral argument of a cause by counsel of either party.

V. Motions—Requisites. All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion, supported by citation of the authorities relied upon; and, except in cases where all the facts relied upon are of record, such motions shall be supported by affidavit. No motion shall be considered unless reasonable notice has been given to counsel upon the opposite side of the case, except where, in the opinion of the court, an emergency exists.

VI. Motion to Advance Cause. Every motion to advance a cause shall contain a brief statement of the matter involved, with the reason for the application.

VII. Briefs, Civil—Service—Filing. In each civil cause filed in this court, counsel for plaintiff in error shall, unless otherwise ordered by the court, serve his brief on counsel for defendant in error at least forty (40) days before the case is set for submission. Counsel for plaintiff in error shall file with the clerk of this court fifteen (15) copies of such brief within the time above designated, and defendant in error shall, within thirty (30) days after the service of the brief of plaintiff in error upon him, file with the clerk of this court fifteen (15) copies of his answer brief, and serve same upon plaintiff in error; and all reply briefs, except as otherwise ordered by the court, must be filed by the date the case is submitted or called for argument. Proof of service must be filed with the clerk within ten (10) days after service.

In case of failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or reverse or affirm the judgment, in its discretion.

VIII. Citations. In all proceedings in this court, in citing cases from the courts of this state, counsel are required to cite the volume and page of the official state reports in which the case is reported. A failure to comply with this rule will render briefs subject to be stricken from the files.

IX. Rehearings. Application for a rehearing in any cause, unless otherwise ordered by the court, shall be made by a petition to the court signed by counsel and filed with the clerk within fifteen (15) days from the date on which the opinion in the cause is filed. Such petition shall state briefly the grounds upon which counsel relies for a rehearing, and show either that some question decisive of the case and duly submitted by the counsel has been overlooked by the court, or that the decision is in conflict with an express statute or controlling decision, to which the attention of the court was not called, either in brief or oral argument, or which has been overlooked by the court, and the question, statute, or decision so overlooked must be distinctly and particularly set forth in the petition. No oral argument will be allowed on an application for rehearing, except upon order of the court, but if such application is granted, the cause shall be assigned for rehearing, and the clerk shall notify both parties or their counsel of the

time when such rehearing will be had, and such time may be given for argument or brief as the court shall allow.

X. Rehearing—Stay of Mandate. After the expiration of fifteen days from the filing of an opinion, the clerk shall issue a mandate to the court in which the judgment was rendered, in accordance with the decision of this court, and no petition for rehearing shall stay such mandate unless the person applying for rehearing shall present such petition to and obtain from one of the justices who concurred in the opinion a stay of such mandate until said petition for rehearing shall be heard. The justice to whom such petition is presented shall examine the same, and if, in his opinion, a rehearing will probably be granted, he may make an order staying such mandate.

In any case in which a petition for rehearing is denied, or in which an opinion is rendered on rehearing, no further motions or applications for rehearing or review will be allowed, and the clerk shall not file any such motions or applications, except by leave of court first obtained.

XI. Affirmance—Proceedings Upon. Upon the affirming of a judgment, execution may issue at the option of the party, from this court, or, if such party elects, a writ of procedendo shall be issued to the court below upon the payment by the successful party of the costs incurred in this court.

XII. Dissenting Opinions. Any justice may file a dissenting opinion in any cause in which he is entitled to sit and in the determination of which he participates; but before any such dissenting opinion is filed, it shall be submitted in conference to the justices who concurred in the original opinion. No syllabus to a dissenting opinion shall be published.

XIII. Costs—Case-Made. In the taxation of costs in the Supreme Court, the clerk shall not tax any costs for expense of case-made, transcript, or record, unless the person claiming same shall, prior to the filing of the opinion in the cause, file with the clerk a verified statement of such expenses and showing that he has paid the same.

XIV. Original Cases—Affidavit. In all original actions or proceedings instituted in this court it shall be necessary for the plaintiff or applicant for the writ to state fully, by affidavit, the reasons why the action or proceeding is brought in this court instead of one of the inferior courts having concurrent jurisdiction.

XV. Non-Resident Attorneys. Any practicing attorney of any state or territory or the District of Columbia, having professional business in this court, may, on motion, be recognized for the purpose of presenting such cause in which he appears as counsel.

XVI. Clerk's Certificate to Transcripts. Transcripts may be certified by the clerk of the district court substantially in the following form:

State of Oklahoma, County of ss.

I, ..., clerk of the district court for said county, do hereby certify that the foregoing is a full, true, and correct transcript of the record in the above entitled cause.

In testimony whereof, I have hereunto set my hand and seal of the court, this day of, 19....

..... Clerk.

XVII. Verification of Case-Made. A certificate of the settlement of a case-made may be substantially in the following form:

I, the undersigned, judge of the district court of district for county, Oklahoma, hereby certify that the foregoing was presented to me as a case-made in the action above entitled (here cite the facts with reference to the appearance of parties and suggestion of amendments), and I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at in county, Oklahoma, this day of, 19....

..... District Judge.

Attest: Clerk.

XVIII. Motions—Notice of. Orders for amending or completing transcripts and case-made, or for reviving, reinstating, or dismissing causes, shall be made only upon written motions, stating the grounds thereof; and reasonable notice thereof must be served upon the opposing counsel.

XIX. Record—Access to. The record may be temporarily withdrawn by an attorney interested in the case for the purpose of enabling him to prepare his brief and abstract, and in all such cases the attorney receiving such record shall receipt for the same, and return it to the clerk within twenty days from its receipt, such attorney paying all charges of transmitting and returning such record. In no case shall the clerk allow an original opinion to be taken from his office.

XX. Numbering Pages. Counsel for appellant shall number the pages of the petition in error and the record, and index the record before filing the same.

XXI. Printing—When Not Required. The record and petition in error shall not be required to be printed, but when so desired, may be printed upon agreement of both parties, filed with the clerk of this court, and the expense of the same shall be taxed as costs in the case.

XXII. Contemptuous Language. No argument or motion filed or made in this court shall contain language showing disrespect for or contempt of the trial court.

XXIII. Remedial Writs—Exceptional Provision. Rule VII shall not apply to cases of writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and such other remedial writs as may be provided by law. In such case, briefs shall be prepared and

served in the form, manner and time as may be directed by the court in each cause.

XXIV. Attorneys — Temporary License. Whenever attorneys, who are residents of this state, file a written application with the clerk of this court for admission to practice as an attorney and counselor-at-law in the courts of this state, and show in such application that they have been admitted to practice in a court of record in another state or territory or of the District of Columbia, and that such order is still in force, it is ordered that such attorney or attorneys shall be permitted to practice in the courts of this state until the next meeting of the Bar Commission for the purpose of examining applicants or making recommendation upon such applicants.

XXV. Briefs—Requisites—Contents. The brief of the plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court. If the defendant in error or appellee shall claim that such abstract is incomplete for the purpose stated, his brief shall contain a counter abstract correcting any such omissions or inaccuracies. Where a party complains on account of the admission or rejection of testimony, he shall set out in his brief the full substance of the testimony, to the admission or rejection of which he objects, stating specifically his objection thereto. Also where a party complains of instructions given or refused, he shall set out in totidem verbis in his brief separately the portion to which he objects or may save exceptions. A party need not include in his abstract all the evidence in support of a claim on his part that it does not show or tend to show a certain fact, but when such a question is presented the adverse party shall print so much of the evidence as he claims to have that effect. The abstract shall state only the substance of those parts of the record the bearing of which upon the case can be clearly shown in this manner; such as

are purely formal or otherwise immaterial shall be omitted altogether, but quotations must be made with verbal accuracy whenever the decision of any question in controversy may be affected thereby. The abstracts shall refer to the pages of the record.

The brief shall contain the specifications of errors complained of, separately set forth and numbered; the argument and authorities in support of each point relied on, in the same order, with strict observance of rule VII. The brief of the appellee or defendant in error shall also be printed when so required of the plaintiff in error, and contain, with pertinent reference to the pages of the abstract, any point challenging the right of plaintiff in error to be heard; a full statement of any additional facts shown by the abstract and deemed essential; citations of authorities and discussion of alleged errors, in the same order as in the brief of the plaintiff in error.

XXVI. Authorities—Requiring Additional. The court may at any time after a case is submitted request counsel for either or both parties to an action to file with the court, within the time fixed by the court in its request, additional authorities, if any they have, upon any proposition involved in the action: provided, that when such request is made upon counsel for either party to the action, the same shall be made in writing, and a copy of the same shall be mailed to counsel for the opposite party to the action.

XXVII. Citation by Publication. Whenever in any case filed in this court it shall be made to appear to the clerk of this court by the affidavit of a plaintiff in error, his agent or attorney, that the defendant has no attorney of record, or that he is beyond the limits of the state, or that his residence is unknown, so that it is impracticable to serve citation upon him in the ordinary method provided by law, it shall be the duty of the clerk of this court, upon the plaintiff in error making provision for the payment of the expense thereof, to cause notice of the pendency of such cause to be published once each week for four successive weeks in some newspaper published in the county in which the case was tried.

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THE
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In re WINBIGLER'S ESTATE.
(L. A. 3,517.)

(Supreme Court of California. Dec. 3, 1913.
Rehearing Denied Jan. 2, 1914.)

**1. EXECUTORS AND ADMINISTRATORS (§ 21*)—
ADMINISTRATION WITH WILL ANNEXED.**

Under the direct provisions of Code Civ. Proc. § 1350a, the granting of letters with the will annexed, in a case where the testator appointed no executor, must be made in accordance with the rules for the granting of administration in ordinary cases of intestacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 106-115; Dec. Dig. § 21.*]

**2. EXECUTORS AND ADMINISTRATORS (§ 21*)—
RIGHT TO ADMINISTRATION.**

Under Code Civ. Proc. § 1365, providing that only those relations of a decedent entitled to succeed to his personal property or some portion thereof are entitled to administer the estate, the heir at law of a decedent, who made a will disposing of his entire estate, but appointing no executor, is not entitled to letters of administration with the will annexed unless he takes some part of the testator's personal estate under the will.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 106-115; Dec. Dig. § 21.*]

3. WILLS (§ 535*)—CONSTRUCTION.

A testator died leaving an estate of \$60,000, and provided by will that should his estate be worth \$40,000 at the time of his death, it should be divided as followed. He then, for reasons given, stated that he gave nothing to appellant, a niece, and gave legacies of sundry amounts to others, and made respondent residuary legatee. The will closed with the remark that, if the estate should be worth more than the above sum, "all heirs" should receive a larger amount. *Held* that, as the testator expressly disinherited appellant and gave his reasons, appellant cannot be considered as included in the term "heirs," although she was really his heir at law; the will being drawn by the testator himself, a layman.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157-1160; Dec. Dig. § 535.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge. In the matter of the estate of George W. Winbigler, deceased. Fannie S. Cake was granted letters of administration with the will annexed in preference to Fannie M. Reid, and the latter appeals. Affirmed.

Rehearing denied; Beatty, C. J., dissents.

Tobias R. Archer, of Los Angeles, for appellant. A. G. Rely, of Los Angeles, and A. C. Mouser, of San Diego, for respondent.

ANGELLOTTI, J. According to the briefs, the only question presented on this appeal is as to the correctness of the action of the court below in appointing one Fannie S. Cake administratrix with the will annexed of the estate of deceased, in preference to Fannie M. Reid, who was also an applicant.

[1] The will of deceased did not name an executor, with the result that "letters of administration with the will annexed must be issued as designated and provided for in granting of letters in case of intestacy." Code Civ. Proc. § 1350a.

[2] Appellant Fannie M. Reid is a child of a deceased brother of deceased (Ira Winbigler), and is entitled to letters under the provisions of section 1365, Code of Civil Procedure, in preference to respondent, a cousin of deceased, if she "is entitled to succeed to" the personal estate of deceased or some portion thereof; the section expressly providing that relatives of the deceased are entitled to administer only when they are entitled to succeed to his personal estate or some portion thereof. It is settled that, in view of these provisions, an heir at law of the deceased is not as such entitled to letters of administration with the will annexed, unless he takes under the will, i. e., of course, if the will effectually disposes of all the property of the deceased. See *Estate of Crites*, 155 Cal. 392, 101 Pac. 316, and cases there cited.

[3] The only question, then, is whether appellant is entitled, in view of the terms of the will, to take on distribution any of the property of deceased. Appellant's claim for a reversal is based entirely upon her contention that she is so entitled to take on distribution.

Deceased died leaving an estate of the value of \$60,000, a portion of the real property part thereof being subject to a mortgage on which is due \$7,000. His olographic will was as follows: "I George H. Winbigler of San Diego, California U. S. A. Being of Sound mind and good health make this my last Will and Testament. Should my Estate be worth the

Sum of Fourty thousand dollars at the time of my death, Then it shall be divided as given below To my Neice & Nephew, Son and daughter of my Brother Ira Winbighler I give Nothing. this is because they were so foolish as to get mad and have kept so for year at their rich uncle said. George H. Winbighler Who would have loved and helped them if they would have let him. To my Only and beloved Sister Mrs. Stella McComb of Fort Scott Kansas I give the sum of Three Thousand (\$3,500) five hundred dollars. If she should have died before I pass away, then this bequest shall be divided among her living children. To my beloved Niece Mildred McComb of Fort Scott Kansas daughter of my Sister Bell McComb the Sum of Three Thousand (\$3,000) dollars. To my beloved Niece Jennie O. Richards of Hamilton Montana and her son George Richards and her daughter Eugena Richards I give the Sum of Eight Thousand (\$8,000.00) Each to share alike. Should the said Jennie C. Richard have died before I pass away then the said George & Eugena Richard Shall have equal shares of the \$8,000. To My beloved Cousin Lollie Winbighler Eastman of Winchester Indiana Three thousand (\$3,000) dollars To my beloved Cousin Sallie Winbighler of Ansonia Indiana Three thousand (\$3,000) dollars For my burial & Monument the Sum of One thousand (\$1,000) dollar Shall be used. Now after all debts have been settled then the ballance of my Estate Shall be divided between my most beloved Cousin Mrs. Fannie S. Cake and Sister Lillian Winbighler my beloved Cousin, both of Los Angeles, Cal Now if my Estate Shall be worth more than the above Sum then all heirs, Shall receive the larger amount. Dated this 19 day of January, 1912."

Appellant is the person referred to in the will as a niece, the daughter of "my brother Ira Winbighler." Respondent is the Mrs. Fannie S. Cake who is one of the residuary devisees and legatees. The claim of appellant is substantially that the express provision that appellant and her brother, children of Ira Winbighler, shall take nothing, is limited to the contingency that the estate is not worth exceeding \$40,000, and that it was the expressed intention of the testator that if the estate was worth more than that amount all heirs at law of the deceased should at least share in the excess over \$40,000. It is further suggested that, the estate exceeding \$40,000 in value, the only operative part of the will is the last clause thereof, with the result that the whole property goes only to heirs at law of deceased, to the exclusion altogether of such of the devisees and legatees as are not heirs at law. The latter claim is, it appears to us, entirely without support in the language used.

While the will of deceased is not to be commended as being in all respects a model of clearness and precision, we think it is

clear enough therefrom that the testator intended to exclude the son and daughter of his brother Ira Winbighler from all participation in his estate in any event. This appears to have been his first thought, and the one upon which he placed special emphasis. The only possible doubt in the matter is caused by the use of the word "heirs" in the final clause. While appellant is technically an heir at law of deceased, we are of the opinion that the learned judge of the trial court was entirely warranted in concluding, in view of all the provisions of the will, that the word "heirs" was not used by deceased in the ordinary legal sense as including only those who would have succeeded to his property had he died intestate. Evidently the will is not the work of one skilled in the use of legal terms. Taking the whole will together as we must do, for the purpose of ascertaining the intent of the testator, such intent appears to us reasonably clear. The deceased was evidently making a division of his estate among those whom he desired to share in it, upon the assumption that it was worth at least \$40,000. If it was worth as much as \$40,000, he wished his sister Mrs. McComb to have \$3,500, and his niece, Jennie C. Richards, and her two children to have \$8,000, and so on; while any residue after payment of debts, funeral and monument expenses, was to be divided equally between respondent and his cousin Lillian Winbighler. If it turned out to be worth more than \$40,000, he wished those for whom he had already provided on the basis of a \$40,000 estate only to take the excess. It seems to us that this is an entirely reasonable construction of the will, and, in fact, the only reasonable construction that can be given to it. The meaning thus given to the words "all heirs" is one that, under the circumstances, may fairly be attributed to the testator, and so reading the will all portions thereof are consistent with one another.

The order appealed from is affirmed.

We concur: SLOSS, J.; SHAW, J.

In re MARTIN'S ESTATE. (S. F. 8,450.)
(Supreme Court of California. Nov. 20, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 17*)—
RIGHT OF ADMINISTRATION—RIGHT OF
WIDOW.

Ordinarily the widow is entitled to letters of administration, unless she waives her right.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

2. EXECUTORS AND ADMINISTRATORS (§ 17*)—
RIGHT OF WIDOW—WAIVER.

The rendition of an interlocutory decree of divorce against a wife before her husband's death would not take away her right to administer the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. EXECUTORS AND ADMINISTRATORS (§ 20*)—RIGHT OF WIDOW TO APPOINTMENT—DIVORCE—RESUMPTION OF MARITAL RELATION—SUFFICIENCY OF EVIDENCE.

Evidence in a proceeding by a widow, who was divorced by interlocutory decree before her husband's death, for appointment as administratrix held not to show the resumption of marital relations or the abandonment of the divorce suit before the husband's death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 83-105; Dec. Dig. § 20.*]

4. EXECUTORS AND ADMINISTRATORS (§ 17*)—APPOINTMENT—RIGHT OF WIDOW—DIVORCE.

The fact that, after a husband and wife had executed a contract embodying a mutual waiver of all rights in the other's estate, they had sexual intercourse, but without occupying the same habitation as husband and wife, would not show the abrogation of the contract so as to entitle the wife to letters of administration on the husband's subsequent death.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

Department 2. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Charles J. Martin, deceased. From an order granting a petition of Hipolite J. Martin for letters of administration, and denying the petition of Cora H. Martin, the latter appeals. Affirmed.

Will M. Beggs and R. C. McComish, both of San Jose, for appellant. Louis Oneal and William F. James, both of San Jose, for respondent.

MELVIN, J. Cora H. Martin, the widow of Charles J. Martin, and Hipolite J. Martin, his son, each filed a petition for letters of administration upon the estate of said Charles J. Martin, deceased. The court, pursuant to stipulation, heard both petitions together, and made an order granting the prayer of Hipolite J. Martin, and another denying the application of the widow. From these orders, she appeals.

[1] Under ordinary conditions, and unless she waives that right in some way, the widow is entitled to letters of administration. In this case it appeared that on August 29, 1911, Charles J. Martin and Cora H. Martin entered into an agreement, settling certain property rights, and containing a waiver by her of all claim of interest in his estate and all rights therein after his death. Later Charles J. Martin sued her for divorce, and on September 23, 1911, an interlocutory decree in his favor was entered. Martin died in April, 1912. The lower court reached the conclusion that the agreement was sufficient, if in force, to cut off the rights of Cora H. Martin to administer, and that in fact it was in full effect at the time of the death of Charles J. Martin.

It is only necessary to examine the contract and to consider the conduct of the spouses after its execution in determining

whether or not it was still in force when Martin died.

[2] The existence of the interlocutory decree would not take away the right of the widow to administer. Estate of Dargie, 162 Cal. 52, 121 Pac. 320. And appellant contends that her uncontradicted testimony establishes a reconciliation between herself and her husband, together with conduct which amounted to such resumption of marital relations as, under the authorities, amounts to an annulment of the contract whereby she agreed to forbear all claim of interest in her husband's estate. It is not necessary to repeat the language of the contract. That instrument contains a complete waiver by each party of all rights of any kind in the other's estate. Let us then examine Cora H. Martin's testimony regarding her relations with her husband after the entry of the interlocutory decree. She swore that very soon after the trial she met her husband in a candy store in San Jose. She was weeping, and he, calling her names of endearment, begged her not to cry. He asked permission to call upon her, and did call many times. According to her testimony, Mr. Martin declared his intention of returning to live with her when he should get back his property which had passed into the control of his children. She told of sexual relations between her and her husband occurring at frequent intervals between the time of the entry of the interlocutory decree and his final illness. A number of letters written by Mr. Martin to his wife during the early part of the year 1912 were introduced in evidence. These were couched in affectionate terms. She was addressed as "Dear Corita," and he signed "Your loving husband" or "Yours lovingly." In some of them there are expressions which might indicate a wish on his part for a reconciliation. They also contain admonitions to her to control her temper, and in one is the statement that he and she had not understood each other. Not one of them contains a request for the resumption of marital relations. Indeed, in one he writes, "If you think your comfort and happiness will serve you better by remaining South, why do so." Mr. Martin, according to appellant's statement, furnished her with money "on an average of from \$50 to \$75 a month" up to the time of his illness, which began about March 1, 1912, and also paid her bills. On the day before he was taken down with his last illness there was a conversation between them, a portion of which was related by Mrs. Martin, as follows: "He said to me, 'Cora, how do you feel about my coming back?' I answered, 'I want you to come back, and it is a duty you owe me.' He said, 'Yes; I know, dear, and I want to come back; I am going to try again, and, if I can arrange matters, I will be back next week.'" The witness also said: "During the various con-

versations between Mr. Martin and myself, in which we discussed returning one to the other, there were conditions imposed by me as they should be to a wife. The condition I imposed was a will. Once he suggested deeding me a portion of the Second street property; I expected one-third of his property, and, whenever he saw fit to give me that one-third, I was willing to receive him back as a loving wife should receive her husband. When he was taken down with his last illness, it had not been fully decided on what would be done."

[3] The lower court determined that, conceding "for the sake of argument" that the relations between Martin and his wife after the entry of the interlocutory decree were as stated by her, yet resumption of marital relations was not proven. In this we think the learned judge reached the proper conclusion. Neither Martin's visits, nor his letters, nor the payment of her bills, nor the sending of money to her, nor his words of endearment, nor the sexual intercourse amounted to the abandonment of the divorce proceeding, nor the abrogation of the antecedent contract between the spouses. Both petitioners cite the case of *Wells v. Stout*, 9 Cal. 479; but that case, which has been followed in this and other jurisdictions, does not help appellant. There the contention was made that, as Mrs. Stout gave birth to a child in 1852 (the contract was dated in 1850), access of her husband must be presumed; that access meant reconciliation; and that reconciliation avoided the agreement. The court found that reconciliation would have avoided the agreement, and, while deciding that there was no sufficient proof of the birth of a child, held that even proof of access would not necessarily establish such reconciliation as would avoid the deed of trust; the court saying: "To effect this end, the reconciliation must be permanent, and be followed by cohabitation. It must be a reconciliation which restores the former relations of the parties." This doctrine was reasserted in the later case of *Sargent v. Sargent*, 106 Cal. 546, 39 Pac. 931. Measured by this rule, the testimony of Mrs. Martin utterly fails to support her contention that the contract was set aside.

[4] Mere copulation without occupying the same habitation and dwelling there as husband and wife is by no means sufficient to sustain such a conclusion. *Sharon v. Sharon*, 79 Cal. 633, 22 Pac. 26, 131; *People v. Lehmann*, 104 Cal. 634, 38 Pac. 422. By her own statement Mrs. Martin indicates that there was no reconciliation in the sense in which that word is used in the decisions, for she was imposing conditions which must be met before she would permit her husband to live at her place of abode. And she made a statement which utterly destroys the theory of complete resumption of marital relations before the death of Charles J. Martin, because,

after detailing the chief condition that she must be assured one-third of his property by deed or will, she said: "When he was taken down with his last illness, it had not been fully decided on what would be done." This, taken in conjunction with the undisputed fact that after the trial of the action for divorce Mr. Martin lived with his daughter, is cogent proof that no conduct on the part of the spouses had set aside the contract by which Mrs. Martin waived her right to share in her husband's estate.

The orders from which these appeals are taken are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

JOST v. KING et al. (S. F. 6,110.)

(Supreme Court of California. Nov. 20, 1913.)

1. HIGHWAYS (§ 96*)—HIGHWAY OFFICERS—DUTIES.

The board of county supervisors passed a resolution declaring that a road along the line of a survey previously made was a public necessity, that probably enough money to construct it had been subscribed by individuals, that the property owners along the entire length had offered to deed the county a right of way across their land, and that the defendant supervisor was authorized to build and construct a good and substantial road following the line of survey. Held that, even though defendant voted for the resolution, the building of this road was not a part of his official duty; the resolution only amounting to an authorization to expend funds donated for a particular purpose, and, as the statutes make no provision for the construction, the supervisor, in constructing such road, is a mere volunteer.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. § 96.*]

2. HIGHWAYS (§ 97*)—OFFICERS — OFFICIAL BOND—LIABILITY.

Where a county supervisor in constructing a road was a mere volunteer, not acting in his official capacity, the sureties on his official bond cannot be joined in an action against him for damages for failure to complete the road, as the bond was given to indemnify against neglect of duty in the supervisor's official capacity only.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 318; Dec. Dig. § 97.*]

3. HIGHWAYS (§ 96*) — COMPLAINT — SUFFICIENCY.

In an action against a county supervisor for the nonconstruction of a road, the complaint, which alleged that plaintiff was in possession of property abutting on the proposed road and entitled to sell and dispose of it, and that if the road had been constructed he could and would have disposed of it at a profit of \$15,000, is bad for uncertainty, not showing plaintiff's interest in the abutting land.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. § 96.*]

4. HIGHWAYS (§ 96*)—COMPLAINT — SUFFICIENCY.

A complaint, seeking damages for the nonconstruction by a county supervisor of a proposed county road which, according to the resolution of the board, was to be built from private subscriptions, is bad for uncertainty, where it does not show whether the money expended by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff on the construction of parts of the road built by him was his own or that subscribed; the allegation being that plaintiff expended \$500 of the money subscribed.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. § 96.*]

5. HIGHWAYS (§ 96*)—LIABILITY OF OFFICER —FAILURE TO COMPLETE ROAD—DAMAGES.

In an action for damages for the nonconstruction of a proposed road, no recovery can be had upon a mere speculative estimate of the increase in the value of the realty which would result from the improvement.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. § 96.*]

6. HIGHWAYS (§ 96*)—COMPLAINT — INDEFINITENESS.

In an action for damages for the nonconstruction of a county road, the complaint, alleging that plaintiff was in possession and entitled to sell and dispose of land abutting on the proposed road and that had it been constructed he could have sold it at a profit of \$15,000, is bad for indefiniteness not showing a definite offer contingent upon the construction of the highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 313, 314, 316, 317, 319-322, 356; Dec. Dig. § 96.*]

Department 2. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by William P. Jost against William King and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Wm. Hoff Cook, of San Francisco, for appellant. Clarence F. Lea and G. W. Hoyle, both of Santa Rosa, for respondents.

MELVIN, J. Plaintiff appeals from a judgment rendered after the sustaining of defendants' demurrer to the complaint and plaintiff's refusal to amend. The complaint contains allegations that King was at all times mentioned therein a supervisor of the county of Sonoma; that the plaintiff "was in possession and entitled to sell and dispose of" a certain described tract of land in that county; and that on June 10, 1910, by a unanimous vote of the board of supervisors of Sonoma county a certain resolution was passed. The resolution is then fully pleaded as follows: "Whereas, it appears to be a public necessity for a county road to be built along the line of survey heretofore made by George H. Winkler, county surveyor, of a road extending from Guerneville to Monte Rio in Sonoma county, California, along the southerly side of Russian river, and whereas, there has already been subscribed by individuals living in the vicinity of said proposed road, an amount of money which will probably be sufficient to construct said road in a proper manner, and whereas, the property owners along practically the entire length of said proposed road have offered to deed to the county of Sonoma a right of way across their lands: Now, therefore, be it resolved, that

Supervisor King be, and he is, hereby authorized to build and construct as and for a county road, a good and substantial road following the line as surveyed by George H. Winkler, county surveyor, along the south side of Russian river, between Guerneville and Monte Rio. Said work of construction to progress and be proceeded with as money heretofore subscribed is paid into the Bank of Guerneville for that purpose; and be it further resolved, that upon the completion of the said road and upon the execution and delivery to the county of Sonoma of good and sufficient deeds to the right of way along said line of road, this board accept said road as and for a public county road of the county of Sonoma, on behalf of said county." There are averments that King began work on the road under the authorization of the resolution of the supervisors; that the moneys referred to in the resolution were at all times available for the construction of the road; but that soon after commencing said construction King, without good and sufficient reason, discontinued work thereon and declared his intention not to proceed further with the enterprise. The complaint sets forth the expenditure by plaintiff of "\$500 of the money subscribed, as stated in the aforesaid resolution, for the building and construction of said road," and charges that by reason of the noncompletion of the road plaintiff was damaged to that amount. There are averments of the necessity of the contemplated road as a means of egress and ingress from and to plaintiff's property and of plaintiff's dependence upon the resolution and upon King's action thereunder. Plaintiff pleads that the road should have been completed by March 1, 1911; that he relied upon King's completion of the work by that time; and that if it had been so completed he could and would have sold the property at a profit and gain to him of \$15,000; and that, by reason of King's acts in refusing and neglecting to construct and complete the road plaintiff was damaged in the sum of \$15,000, for which sum he also prays judgment. The surety company is sought to be joined as the sole bondsman upon King's official bond.

[1, 2] Defendants' demurrer to the complaint is both general and special. It specifies want of facts, misjoinder of parties defendant, and numerous alleged uncertainties. We need not discuss all of these specifications of the demurrer. Upon the ground of misjoinder, the demurrer was properly sustainable, and this is true even if we regard the action as one against King in his official capacity, although it does not clearly appear that he was so sued. In the title of the action he is mentioned personally and not in his official capacity, but from the body of the complaint it perhaps sufficiently appears that the pleader intended to allege a cause of action against him as a supervisor. But it does

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Indexes

not appear from any aspect of the pleading that the defendant was bound as a supervisor to do the work authorized by the resolution. This was not the ordinary proceeding for the construction of a public road, nor were the duties of the supervisor as outlined by the resolution merely ministerial. The resolution amounts only to an authorization to expend funds donated for a particular purpose. It is true that Mr. King voted for the resolution, but that fact did not make the road building a part of his official duty. He was to exercise his discretion regarding the sort of road to be built. No specifications of material or width or grades were mentioned in the resolution. He was to build a "good and substantial road" over a designated route. He was not limited in the matter of time or material. The duties of a supervisor and road commissioner are defined by statute. None of those duties so defined has reference to the building of a road with contributed funds over a route not yet the property of the county. It appears from the resolution that at the time of its passage, although practically all of the property owners along the route of the proposed road had offered to deed the necessary right of way, they had not done so. The resolution therefore referred to work to be performed where at that time the county could have no more than a license, and the pleading does not disclose any subsequent action by the landowners in deeding the rights of way. This was therefore not a command by the supervisors to a road commissioner to construct a public road upon land which had been acquired by the county either by purchase or condemnation. It was a mere authorization that he might undertake the supervision of a road intended as a gift to the county, and upon its completion and the filing of the necessary deeds for a right of way the board agreed to accept it as and for a public road. If one of the property owners along the route had refused to permit King upon the land of such owner, he would have been powerless to do anything under the resolution, but would have been compelled to await the board's further action. It is plain, therefore, that he was a mere volunteer and not bound under his official obligation. As his bond was given to indemnify against neglect of duty in his official capacity, it follows that there was a misjoinder in making the surety company a party defendant. *County of San Luis Obispo v. Farnum*, 108 Cal. 563, 41 Pac. 445.

[3] It does not appear by distinct averment that the plaintiff owned the land described in his complaint. It is alleged that he was "in possession of and entitled to sell and dispose of" the property. Later it is mentioned as "plaintiff's property as described in paragraph II hereof"—the paragraph where his possession and right to sell are mentioned. It is further alleged that, if the

road had been constructed, plaintiff "could and would have sold and disposed of his said land aforesaid" at a profit of \$15,000. It does not appear whether plaintiff possessed the land as tenant or owner, or whether his right to sell arose from ownership, agency, or option. The defendant was entitled to know the nature and extent of the interest of the plaintiff. A special demurrer took advantage of this deficiency in the pleading, and the demurrer was properly sustained on that point.

[4] The allegation with reference to the \$500 damages fails to show whether the amount expended was plaintiff's money or belonged to some one else. It is averred that "\$500 of the money subscribed, as stated in the aforesaid resolution, for the building and construction of said road, was paid out and expended by plaintiff, with the knowledge of said defendant King, in the construction and building of portions thereof, and, by reason of the noncompletion of said road as aforesaid by said defendant King, the plaintiff has been damaged in the sum of \$500." From this statement it does not appear whether plaintiff spent his own money or that of some subscriber or subscribers who are not here seeking any relief. The demurrer was therefore properly sustainable for this uncertainty.

[5, 6] The damage of \$15,000 is indefinitely pleaded. In one of the paragraphs of the complaint appears the statement that, if the road had been completed by March 1, 1911, "plaintiff could and would have sold and disposed of his said land aforesaid, at said time, at a profit and gain to him of \$15,000, but, by reason of the acts and misconduct of said defendant King as aforesaid, the plaintiff was prevented from so selling and disposing of his said land." Obviously the damages sought are merely speculative. There is no pleading of a definite offer of purchase of the land, contingent upon the building of the road, which was defeated by the failure to complete the highway. It is a mere speculative estimate of the increase in the value of realty which would result from the contemplated improvement. Damages based upon such an uncertainty are too remote for practical adjudication. Purely conjectural profits are not recoverable. *Paola Glass Co. v. Paola Glass Co.*, 56 Kan. 622, 44 Pac. 621, 54 Am. St. Rep. 598; *Hunt Bros. Co. v. San Lorenzo Water Co.*, 150 Cal. 55, 87 Pac. 1093, 7 L. R. A. (N. S.) 913; *Pendleton v. Cline*, 85 Cal. 143, 24 Pac. 659; *Witmer Bros. Co. v. Weld*, 108 Cal. 580, 41 Pac. 491. This allegation was also tainted with the uncertainty previously discussed arising out of the plaintiff's failure definitely to allege the kind of interest, if any, which he had in the property.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

SHORES et al. v. WITHERS. (S. F. 6,187.)
(Supreme Court of California. Nov. 25, 1913.)

1. LOST INSTRUMENTS (§ 2*)—ESTABLISHMENT AND RESTORATION.

Under Civil Code, § 3415, providing that an action may be maintained by any person interested in any private instrument in writing, lost or destroyed by conflagration or other public calamity, to establish and compel the reissuance of such instrument, where land was conveyed as security for a debt, and a deed of reconveyance executed and delivered, which was destroyed, the debtor's distributees were entitled to have such deed re-executed and delivered to them, whether or not, as claimed, the debt had not been paid, and the destroyed deed was delivered on condition that it should not be effective until such payment, since the owner of the destroyed instrument is entitled to be placed in a position in which he will not be compelled to establish his rights by secondary evidence, even though the instrument to be restored is voidable.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 6-20, 63; Dec. Dig. § 2.*]

2. LOST INSTRUMENTS (§ 2*)—RESTORATION—ACTIONS ON RESTORED INSTRUMENT—DEFENSES.

Under Civil Code, § 3415, providing that an action may be maintained to prove and compel the reissuance and execution of any private, lost instrument, if the maker of such restored instrument has a defense not apparent upon the face thereof, he may assert it precisely as he might have done had the document not been destroyed.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. §§ 6-20, 63; Dec. Dig. § 2.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by Ida F. Shores and another against Milton Withers. From an order denying a new trial, defendant appeals. Affirmed.

Costello & Costello, of San Francisco, for appellant. Frank V. Bell, of San Francisco, for respondents.

MELVIN, J. Defendant appeals from an order denying his motion for a new trial.

[1, 2] The action was one under the provisions of section 3415 of the Civil Code to compel the defendants to re-execute and re-acknowledge a certain deed destroyed by fire. The complaint alleges the conveyance to defendant by Leander Shores of certain real property in Tulare county to secure the payment of \$400; the subsequent repayment of that sum; the due execution, acknowledgment, and delivery of a deed by defendant to said Leander Shores; the fact that the last-named deed was not recorded; its destruction in the great fire at San Francisco, April 18, 1906; the death of Leander Shores and the distribution of his estate to the plaintiffs; the subsequent discovery by plaintiffs of the former existence and destruction of the deed; and the unsuccessful demand by them that defendant should replace the destroyed instrument with a similar deed to

them. Defendant acknowledged the making of the original deed of reconveyance, but denied the repayment of the indebtedness; and alleged that the deed was placed in the hands of Leander Shores with the express understanding that such act should not take effect as a delivery of the said deed and should not be placed of record until the sum of \$400, with interest, should be repaid to Milton Withers. The trial court found in accordance with the allegations of the complaint, including the repayment of the money by Shores to Withers.

Appellant's arguments with reference to his belief that his motion should have been granted refer principally to alleged errors committed by the court in rejecting testimony tending to establish the conditional delivery of the deed to Shores. Respondents contend, however, that that part of the evidence was entirely immaterial; that the only points at issue are the existence of an interest of plaintiffs in the deed sought to be restored, the execution, acknowledgment, and delivery of the instrument to the predecessor in interest of the plaintiffs, and the destruction of the said deed. All of these matters are either admitted or not seriously controverted by appellant.

The position of respondents is entirely correct. There is only one point of difference between these litigants, and that is whether or not the \$400, to secure which the original deed was given by Shores to Withers, had been repaid. That point is wholly immaterial here. The sole object of the proceeding is to restore the record. Other matters have no place in the controversy. If the plaintiffs are entitled to be placed in exactly the position which was occupied by their predecessor in interest, then the deed should be restored and delivered to them as ordered by the court. If the defendant has some defense to the apparent efficacy of the deed to pass title without qualification, he may assert it in a proper action offensive or defensive. Such instruments should be restored even if they be voidable. In re Jones, 17 Cal. App. 328, 119 Pac. 670. The party having a defense not apparent upon the face of the instrument may assert it precisely as he might have done if the document had not been burned. Foerst v. Kelso, 163 Cal. 439, 125 Pac. 1054.

There is no distinction to be made between public records and private instruments in this regard. The reason in one case is exactly the same as in the other. The owner of the destroyed instrument is entitled to be placed in a position in which he will not be compelled to establish his rights by secondary evidence.

The order from which the appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

BENENATO v. McDOUGALL et al.
(S. F. 6168.)

(Supreme Court of California. Nov. 25, 1913.
Rehearing Denied Dec. 24, 1913.)

1. CONTRACTS (§ 196*)—ARCHITECTS—SKILL.

An architect by every contract implies his possession of skill and ability, and agrees to exercise them reasonably and without neglect.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 856-860; Dec. Dig. § 196.*]

2. DAMAGES (§ 18*) — ARCHITECTS — NEGLIGENCE—PROXIMATE CAUSE.

Where plaintiff engaged defendants to draw the plans for the remodeling of a building, instructing them that the work should not amount to over \$7,000, and they skillfully drew plans, but informed plaintiff that they could not estimate with accuracy the cost of construction, he cannot recover damages because the cost of construction exceeded the limit, where several contractors refused to do the work for the price fixed, and the ones engaged refused to make an estimate, but did it on percentage, for the error, if any, by the architects, was not the proximate cause of his injury, as, in view of Civ. Code, § 19, he had notice of facts which would put him on inquiry before he let the contract.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 37; Dec. Dig. § 18.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by A. Benenato against C. C. McDougall and others. From a judgment of nonsuit and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Devoto & Richardson and Devoto, Richardson & Devoto, all of San Francisco, for appellants. Hiram W. Johnson and Percy E. Towne, both of San Francisco, for respondents.

MELVIN, J. Plaintiff appeals from a judgment of nonsuit, and from an order denying his motion for a new trial.

The defendants are architects who were employed by plaintiff to draw plans for the raising and alteration of a certain building of which plaintiff was lessee, and upon which he was bound under the terms of the lease to expend at least \$7,000. Damages were sought for the alleged negligence of defendants. It is averred in the complaint that defendants were employed by plaintiff to prepare the plans and specifications, and that they promised plaintiff such plans as would provide for a building to cost less than \$7,000; that they were instructed to keep the cost below \$7,000, as that was all the money plaintiff had for the purpose of raising and altering the building. The averment in regard to the damages is as follows: "Plaintiff alleges that defendants, disregarding the specific instructions given to them as aforesaid, carelessly and negligently drafted the plans and specifications by providing in said plans and specifications the most expensive lumber and hardware for the stores and flats into which the existing building

was to be altered and improved, as well as calling for greater and more elaborate alterations and improvements than were necessary and proper considering the amount to be expended, and providing for an elaborate finish of the same, and defendants, at the time of the delivery of said plans and specifications to plaintiff, and at all the times mentioned herein, well knew that the cost of the alterations and improvements on the existing building on the property leased, in accordance with the said plans and specifications drafted and presented to plaintiff by defendants, would exceed the sum of \$16,000."

[1, 2] While the plaintiff and his agent, Coleman, both testified that one of the defendants gave them assurance of a maximum cost of less than \$7,000, there was no allegation nor proof that the architects had any control of the letting of contracts. There was no pretense that the plans were not skillfully drawn; but the gist of the action seems to be that they involved an expense of construction beyond the estimate of the architects. If the defendants had entered into a contract to plan and construct the improvements at a given figure, there might be some basis for this suit; but such is not the pleading nor the proof. Plaintiff testified that he visited two contractors, each of whom declined to take a contract to do the work for \$7,000. He then visited Farnsworth & Marish, who refused to make a contract to do the work for any specific amount. However, he entered into an agreement with them to do a large proportion of the work on a percentage basis. Other contracts were made for various parts of the work; but in no case were the architects consulted, plaintiff and Coleman having charge of all agreements and money matters relating to the building. No contract of warranty, express or implied, was pleaded or sought to be proved; the whole theory of plaintiff being that the drawing of the plans requiring expensive constructive work amounted to negligence. This theory was not sustained by the evidence. No bids were called for; but the plaintiff took the whole matter of construction into his own hands. He was told by contractors that building conditions were such as to make it practically impossible to estimate with any degree of accuracy the cost of construction. Under the circumstances we cannot see that the mistaken estimate of the architects was the proximate cause of the loss sustained by plaintiff in being compelled to surrender his lease because he lacked financial ability to complete the work. Before the work commenced he had means of knowing and sufficient notice to apprise a prudent man of the fact that he could not complete the work for the sum of money which he had intended to invest. Section 19 of the Civil Code provides that:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." One to whom an architect gives an estimate of cost may not recklessly proceed, as did this plaintiff, to make contracts which may and probably would make the cost of construction far above that estimated, and then hold the architect responsible for the surplus expenditure.

Appellant cites many authorities which hold that an architect by every contract implies his possession of skill and ability and a promise to exercise them reasonably and without neglect. That is unquestionably the rule; but the fault charged here is not lack of architectural ability, but negligence in estimating probable cost. It is suggested that *Columbus Co. v. Clowes*, 1 K. B. (1903) 247, is similar in principle to the case at bar; but we fail to note any resemblance. In that case the architect took some one's word for the dimensions of the site which was to be covered by the building, carelessly refraining from taking actual measurements. His plan was therefore too small for the area to be covered. Nominal damages were allowed, as plaintiffs, having been unable to use any plans, owing to financial difficulty, never did construct any building on the real property which they had leased for that purpose.

We are of the opinion that the nonsuit was properly granted. The judgment and order are therefore affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

WILLIAMS v. HASSHAGEN (STATE SAVINGS & COMMERCIAL BANK

Intervener). (S. F. 6117.)

(Supreme Court of California. Nov. 19, 1913.)

1. BILLS AND NOTES (§ 96*)—CONSIDERATION—WHAT CONSTITUTES.

That a pledge of stock with the maker of an accommodation note was intended as indemnity constitutes no consideration for the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

2. BILLS AND NOTES (§ 493*)—ACTION—PRESUMPTION OF CONSIDERATION.

While there is a presumption of consideration arising out of the execution of a note, the presumption is rebuttable, and is the weakest possible evidence, and so is overthrown by direct testimony of the maker that there was no consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

3. BILLS AND NOTES (§ 96*)—CONSIDERATION—WHAT CONSTITUTES.

Where defendant executed an accommodation note in favor of a bank, the bank's cancellation of notes due from defendant's son and another constitutes no consideration, where de-

fendant did not know of them, for the minds of the parties to a contract must meet before there can be any such consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

4. BILLS AND NOTES (§ 96*)—ACCOMMODATION NOTES—RIGHT TO ENFORCE.

The party for whose accommodation a note is executed cannot enforce it against the accommodation maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

5. BILLS AND NOTES (§ 96*)—ACTIONS—CONSIDERATION.

Promises that defendant who executed a note should be reimbursed, and that she should lose nothing, constitute no consideration therefor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

6. BILLS AND NOTES (§ 96*)—ACTIONS—CONSIDERATION—WHAT CONSTITUTES.

Where defendant, at the solicitation of the cashier of a bank in which her son was interested, executed an accommodation note, a mere hope that it would benefit her son does not constitute a consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 165; Dec. Dig. § 96.*]

7. BILLS AND NOTES (§ 520*)—ACTIONS—EVIDENCE—FRAUD.

In an action on a note, given to a bank, evidence held sufficient to show that its execution was induced by the fraud of the bank's officers.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.*]

8. BILLS AND NOTES (§ 103*)—“FRAUD”—WHAT CONSTITUTES.

Where an accommodation note was executed by defendant in favor of a bank on request of its cashier, and on his express promise that she would be reimbursed and protected, the attempt of the bank to enforce the note is “fraud” within Civ. Code, § 1572, subd. 4, declaring that a promise made without any intention of performance constitutes actual fraud.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-240; Dec. Dig. § 103.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7666.]

9. BILLS AND NOTES (§ 103*)—ACTIONS—FRAUD—WHAT CONSTITUTES.

To entitle defendant to a cancellation of an accommodation note on the ground of fraud, it must appear that she executed it upon reliance on the misrepresentations of the payee, for Civ. Code, § 1568, declares that consent shall be deemed to have been obtained through fraud only, when it would not have been given had not such cause existed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 233-240; Dec. Dig. § 103.*]

10. BILLS AND NOTES (§ 520*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit on a note, where the maker sought cancellation on the ground of fraud, evidence held sufficient to sustain a finding that she signed the instrument in reliance on the fraudulent misrepresentations of the agent of the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.*]

11. BANKS AND BANKING (§ 116*)—AUTHORITY OF CASHIER.

Knowledge of the cashier and general manager of a bank is knowledge of the bank; and,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

when it took an accommodation note procured by his fraud, knowledge of the fraud is imputable to the bank, and it cannot claim as a bona fide purchaser even though the cashier received some personal benefit out of the transaction.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 116.*]

12. BILLS AND NOTES (§ 527*)—ACTIONS—EVIDENCE—SUFFICIENCY.

In a suit on a note, where defendant cross-complained, praying a cancellation of the note as obtained by fraud and without consideration, and seeking to recover from the payee bank payments on other notes belonging to her, which had been hypothecated as security for the note sued on, evidence *held* sufficient to support a finding in defendant's favor that the collateral notes were deposited as security for the note sued on, and had been paid to the bank, and that the bank had not paid the amount to the cross-complainant.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William R. Williams, Superintendent of Banks, against Adeline Hasshagen, in which the State Savings & Commercial Bank intervened. From a judgment for defendant, and also on her cross-complaint, plaintiff and intervener appeal. Affirmed.

F. A. Cutler and Arthur Crane, both of San Francisco, for appellants. Edward C. Harrison and Maurice E. Harrison, both of San Francisco, for respondent.

MELVIN, J. The superintendent of banks, having taken charge of the affairs of the State Savings & Commercial Bank, an insolvent corporation, commenced this action against Adeline Hasshagen upon a promissory note signed by her and payable to said banking corporation. The bank was permitted to intervene. The defendant pleaded want of consideration for the promissory note and fraud in its procurement, these same defenses being urged against the plaintiff and the bank, and in her cross-complaint she sought judgment for the cancellation of the note, for recovery of certain of her securities which had been hypothecated with the note, and for moneys which had been collected on said securities. The defendant was given a favorable judgment upon both defenses, and upon her cross-complaint the judgment was in her favor upon all of the issues. Both plaintiff and intervener appeal from the judgment and from an order denying their motion for a new trial.

The principal contention upon which the appellants ask for a reversal of the superior court's action is that the evidence fails to sustain the findings in favor of the respondent, both as to want of consideration and upon the issue of fraud. We will first examine the testimony relating to want of consideration, but first we will set down some facts which are shown without contradiction. Mrs.

Hasshagen was an old woman, 76 years of age, and not accustomed to business transactions. Her son was the president of the banking corporation. W. C. Hays was the manager of the bank. It was admitted that the promissory note, which was for \$34,000, together with a check for \$19,000 signed by the Hasshagens, was received by the State Savings & Commercial Bank in payment of four promissory notes of W. C. Hays, T. A. Bechtel, C. T. Hasshagen (respondent's son), and F. V. Kington, all officers of the bank, the aggregate amount of the notes being \$53,000. These notes were canceled on June 24, 1909, the date of Mrs. Hasshagen's note to the bank.

Upon the subject of want of consideration the old lady, testifying in her own behalf, said: "Mr. Hays, he came to my house and always begging that I sign the note. I said that I would come down to the bank at another time there. I went to the bank. He said, 'I assure you that you will not lose anything by it if you sign this note.'" "I did not receive any money or any property of any kind from Mr. Hays or from any one else for that note. I never knew that the bank held a note of Mr. Hays. I did not know at the time I signed that note that the bank held a note of Mr. Kington's or of Mr. Bechtel." Cross-examination: "I don't think there was anybody else but Mr. Hays present when I signed the note. Mr. Hays said to me 'Sign this note, and I promise you you will lose nothing by it.'" At another time during the trial she testified: "At the time I executed the promissory note here sued upon I had no knowledge of the failing circumstances of the State Savings & Commercial Bank. I knew nothing about its financial condition, my son didn't discuss his business with me. I did not know that the bank held any note of his. They all told me the bank was prosperous and I believed it." And again: "As a matter of fact I did not receive anything for the note. I never received any stock. I never talked with any one about having any of that stock assigned to me. I never saw any of the stock."

[1] Appellants assert that the stock of the bank which had been pledged as collateral security for the four notes was transferred to Mrs. Hasshagen, and that therefore the note was supported by a consideration. It is true that some days after the signing and delivery of the note the bank's secretary wrote to Mr. Harrison, who was Mrs. Hasshagen's attorney, informing him that the bank held his client's note for \$34,000, and that certain stock, certificates for which were delivered with the latter, was "to be held by Mrs. Hasshagen pending the settlement of the above note." There was no direct statement in the letter, nor was there any testimony at the trial, that this stock constituted a consideration for the note.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mr. Harrison testified to the possession by him, in Mrs. Hasshagen's behalf, of certain stock which he desired to vote with other stockholders in an effort to oust W. C. Hays from the directorate of the bank. Of this he said: "The certificates of shares of stock which I said were turned over to be utilized for that purpose was not derived by Mrs. Hasshagen by virtue of the \$34,000 note which she gave to the bank." The counsel for appellants refer to this stock as "pledged with respondent and returned." We can see no reason why the payee of a note should pledge its own stock with the maker unless there were some agreement by which the maker was to be indemnified against any claim on the note. But whether this was such an agreement of indemnity or not, the *pledge* of its stock to the maker of the note would not support the theory that said stock was given by way of *consideration* for the note.

[2] But appellants seem to rely upon the legal presumption of a consideration arising from the note itself, from the promise of Hays to reimburse Mrs. Hasshagen, from the benefit which she supposed her son would obtain from the transaction, and from the cancellation of the four promissory notes. While it is true that the execution of the note imports a consideration, the presumption that a consideration passed for the execution of the instrument is merely *prima facie*. It is disputable and may be overcome by direct proof. "But disputable inferences or presumptions, while evidence, are evidence the weakest and least satisfactory. They are allowed to stand, not against the facts they represent, but in lieu of proof of them. The facts being proven contrary to the presumption, no conflict arises; the presumption is simply overcome and dispelled." *Savings & Loan Socy. v. Burnett*, 106 Cal. 529, 39 Pac. 922.

[3-5] In the case here considered, in view of the evidence of the circumstances surrounding the making and delivery of the note, the presumption of a consideration is overcome. Of course the cancellation of the old notes would not amount to a consideration, if Mrs. Hasshagen knew nothing about them—and she swore that she was ignorant of their very existence. The minds of the parties to a contract must meet before there may be any such consideration. *Shadburne v. Daly*, 76 Cal. 359, 18 Pac. 403. The promises of W. C. Hays to "reimburse" the old lady, or to see that she lost nothing by signing the note, were not valid considerations. In the absence of fraud they might have amounted to an assurance that she was making an accommodation note for the payee, and that she would not be required to pay it. The party for whose accommodation the paper was made may not sue the accommodation party. 7 Cyc. 725, 726; *Coghlin v. May*, 17 Cal. 516.

[6] Nor did her hope that her son might profit by the use of the note in the purchase of stock from another bank amount to a consideration. Mere motive or inducement or hope of profit is not consideration. "If a motive alone were equivalent to a consideration, every promise made, free from fraud, duress, and the like, would necessarily be enforceable without any consideration." Page on Contracts, § 275. See, also, 9 Cyc. 820.

There was, therefore, sufficient evidence to support the court's finding that there was a want of consideration for the note.

[7] Fraud was also sufficiently established. We have adverted to the advanced age of Mrs. Hasshagen and her ignorance of business and her statement that she knew nothing of the existence of the notes which were discharged by the substitution of the note which she had signed and the securities which she had deposited. The court found upon evidence amply sufficient that Hays falsely represented to her that he intended to use her note for the purchase of stock of the National Bank of the Pacific; that his motive was to get her to deposit the securities and sign the note so that he might substitute them for the promissory notes of himself and his codirectors; that he concealed his design from her; that she was ignorant of his true purpose; that at the time of the practicing of the fraud upon her, Hays was the cashier and manager of the bank, and directed its affairs, and "that if said cross-complainant had not believed all said representations so made to her as aforesaid by said Hays to be true, or if she had known that her said promissory note and securities were being taken by said corporation in satisfaction of the said note of its said directors, she would not have signed the said note for \$34,000, or deposited her aforesaid securities with said bank." A few quotations from her testimony will suffice:

"Mr. Hays was always asking me to sign. I think I had signed other papers before for the bank at Mr. Hays' request, but he always came to my house, and he sat there and he begged and he begged with reference to some other papers, too, but this paper, Mr. Hays did not give me \$34,000. He didn't give me anything. He promised that I should have my money back again; that is what he promised me. The money that I signed for, or I should not sign the note. Because he would see I would not lose." "Q. * * * What use did you think Mr. Hays or the bank could put that note to? Why did you think he wanted you to sign? A. They wanted for to buy other stock in a bank; that is what they wanted it for. Q. It was your note, \$34,000, that would buy the stock? A. Yes, sir. They would fix it up, so he begged me so much to sign that. Q. Did you expect to get any money or any stock or anything else of value because you had signed that note, or did you expect afterwards that they would give you back the note? A. I thought I

would not lose anything; I thought Mr. Hays would pay me back again; that is what I thought. I thought Mr. Hays would pay me always; that is what he always told me." "A. * * * He always said I would not lose anything. For which reason I thought I would get everything back. That he would pay up everything again.

"Mr. Harrison: In other words, whatever your understanding of the transaction was resulted from Mr. Hays' statement to you that you would never lose anything; is that true? A. That is just what I thought; I should not lose anything. He didn't say exactly in what way I would not lose anything. He said he would do so well he would see I should not lose anything at all. He said they would do well. He did not give me any writing. He did not give me any contract in writing.

"Mr. Harrison: His honor wants to know what you expected Mr. Hays to do with the note? A. Well, I thought they would buy the bank; that is what he told me; he said they would buy the other bank; and he go there too; to fix it up.

"Mr. Harrison: He told you something about buying out some other bank did he? A. Yes, sir."

[8] This evidence sufficiently sustains the findings. The effort of the corporation to collect the note instead of returning it according to the promise of Hays is sufficient evidence of that fraud which arose from the making of a promise without intention of performance. Subdivision 4, § 1572, Civ. Code. The fraud practiced by Hays was also of the kinds mentioned in the three first subdivisions of that section.

[8, 16] Appellants deny the existence of any evidence that the note would not have been signed except for the representations of Hays. Of course, it is a necessary constituent element of actual fraud that the consent of the person defrauded would not have been given save for the false representations. Section 1568, Civ. Code. But the aged cross-complainant, after describing the importunities and promises of Hays, said: "Mr. Hays came there so often, and then he always asked me, and then he assured me that it was all right. I should not be afraid; it was all right. That is the reason I signed it." In addition to this direct statement there was evidence sufficient to justify the court in drawing the conclusion that the false statements of Hays must have been the inducing cause of Mrs. Hasshagen's action, and that without his misrepresentations no contract would have been made.

[11] Appellants suggest that Hays was a mere agent, and that his fraud is not imputable to his principal. It is to be remembered in the first place that the intervener is the corporation itself and not a transferee, for value. It is also to be kept in mind that

Hays was the manager, and had general charge of the business of the bank. He "controlled matters involving the policy of the bank and the managements of its affairs," as the president testified. It will be presumed in favor of third parties that he communicated his knowledge to his principal of any facts material to the transaction. His knowledge is presumptively that of the bank, and it makes no difference that he took some personal benefit from the fraud. *McKenney v. Ellsworth*, 132 Pac. 76; 10 Cyc. 1053-1055.

[12] The cross-complainant alleged that respondent hypothecated as security for the note sued upon certain promissory notes, among them a note of the Auburn Motor Car Company for \$3,000. The court found that this was true, and appellants contend that absolutely no evidence was introduced showing that the Auburn Motor Car Company note was deposited as security for the note in suit. Mr. Grange testified that Mrs. Hasshagen owned a certain note of the Union State Bank for \$12,500, secured by certain instruments, which were the same securities mentioned in the cross-complaint, including the note of the Auburn Motor Car Company. S. P. Young testified that there was in the bank a note of the Auburn Motor Car Company for \$5,000 on which \$2,000 was paid April 23, 1909, and \$3,000 July 9, 1909. The letter of the bank's secretary and cashier, Mr. Bechtel, dated July 13, 1909, written to Mr. Harrison and put in evidence by the corporation, shows Mrs. Hasshagen's right to a credit of \$3,000. These proven facts indicated that the bank had received \$3,000 upon Mrs. Hasshagen's account from the note of the Auburn Motor Car Company. There was no effort to show that this sum of \$3,000 had ever been paid to Mrs. Hasshagen, or that the credit was applicable to some other transaction, and we cannot say, under all these circumstances, that the evidence fails to sustain the finding with reference to this item.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

In re GOODFELLOW'S ESTATE. (S. F. 6474.)

(Supreme Court of California. Nov. 28, 1913.
Rehearing Denied Dec. 28, 1913.)

1. WILLS (§ 753*)—"SPECIFIC LEGACIES."

Testatrix's will bequeathed \$12,000 to G., and the second paragraph recited that testatrix's father intended to give \$20,000 for the establishment of a theological school, "and as his heirs have not yet been able to disentangle the estate so as to make this gift possible, therefore I wish my executors, after securing the \$12,000 for G., to proceed to obtain the sum of \$5,000 from my share" of her father's estate and place it in the care of a church conference; said conference being pledged never to use said \$5,000 except as part of an endowment fund for a school for Methodist ministers, and further provided, "I hereby express my hope that my

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

coheirs will all soon be able to add their respective shares" to this fund to carry out the purpose in which the father was interested. The fourteenth paragraph directed the executors to arrange to secure the \$12,000 for G's support and the \$5,000 for the endowment of the preachers' school, and then, as the fund will allow, to pay the other bequests, and that it should be distinctly understood that the executor should carry out these provisions by amicably arranging with the other heirs of the undivided estate of her father to sell and divide it as rapidly as was consistent. *Held*, that the bequest of \$5,000 for the theological school was a specific legacy within Civ. Code, § 1357, subd. 1, providing that a legacy of a particular thing specified and distinguished from all others of the same kind is specific.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6600-6604; vol. 8, p. 7803.]

2. WILLS (§ 753*)—CONSTRUCTION—SPECIFIC LEGACY.

Courts are as a rule not inclined to construe legacies as specific.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1939-1944; Dec. Dig. § 753.*]

3. CHARITIES (§ 81*)—CONSTRUCTION—SPECIFIC LEGACY.

Courts look with favor upon testamentary charitable gifts.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 63; Dec. Dig. § 81.*]

4. WILLS (§ 764*)—LEGACIES—"ADEMPTION."

The "ademption" of a specific legacy is the extinction or withdrawal of a legacy because of some act of testator equivalent to its revocation or clearly indicating an intention to revoke and is effected by the extinction of the thing or fund bequeathed or by a subsequent disposition of it from which an intention to revoke is presumed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1978; Dec. Dig. § 764.*]

For other definitions, see Words and Phrases, vol. 1, pp. 179-181.*]

5. WILLS (§ 767*)—LEGACIES—ADEMPTION.

There was an ademption of a specific legacy of \$5,000 for the purpose of establishing a theological school, which sum the will provided the executor should obtain from testatrix's share of her father's estate and place in the care of the church conference, where the father's estate was settled before testatrix's death and she had received her share thereof so that her executors could not proceed as directed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1986-1989; Dec. Dig. § 767.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

In the matter of the estate of Mary E. D. Goodfellow. From a part of the decree of distribution, Sara A. D. McKee and others appeal. Reversed, with directions.

J. S. Hutchinson, of San Francisco, for appellants. J. E. White, of San Francisco, for respondent.

MELVIN, J. This appeal is taken from that part of the decree of distribution which gives to the California Annual Conference of the Methodist Episcopal Church a legacy of \$5,000, together with interest.

Mary E. D. Goodfellow died testate Au-

gust 21, 1907. Her will was dated February 19, 1886. By the first provision of the will the sum of \$12,000 was bequeathed to William Goodfellow, husband of the testatrix; the income from that amount to be paid to him annually by the executors of Mrs. Goodfellow's estate. William Goodfellow predeceased his wife, so that legacy lapsed. The three provisions of the will with which we are here concerned are the second, the fourteenth, and the seventeenth, which are as follows:

"(2) It is well known that my father Revd. John Dempster intended to give \$20,000.00 toward establishing a theological school on the Pacific Coast, under the direction of the Meth. E. Church, and as his heirs have not yet been able to disentangle the estate, so as to make this gift possible, therefore, I wish my executors, after securing the \$12,000.00 for W. Goodfellow, to proceed to obtain the sum of \$5,000.00 from my share of Dr. Dempster's estate, and place it in the care of the Methodist Episcopal Conference which includes San Francisco of California within its bounds: Said conference being pledged never to use said \$5,000.00 except as part of an endowment fund for a school for Methodist ministers. And I hereby express my hope that my coheirs, viz., Clancey John Dempster, Sara Dempster McKee and Killian Van Rensselaer Lansingh, who was the husband of Mrs. Orea Dempster Lansingh and is now her heir and executor, will all soon be able to add their respective shares to this fund in order to carry out the purpose in which our father John Dempster was so much interested."

"(14) I direct that my executors shall first, and as soon as possible, arrange to secure the \$12,000.00 for support of William Goodfellow, and the \$5,000.00 for endowment fund of Preacher's School in California, then as funds will allow, pay the bequests to Mrs. N. G. Boyd and Sam Beer, first settling with my coheirs the debts I owe to the Dempster estate. I beg the consent of the other heirs of the estate to this plan of settling."

"(17) I wish to have it distinctly understood that my executors are to carry out these provisions by amicably arranging with the other heirs of the undivided Dempster estate, to sell and divide as rapidly as is consistent with the interest of all concerned, viz., my heirs and legatees."

The court found, among other things, that the legacy of the California Annual Conference of the Methodist Episcopal Church had not lapsed; that such theological school as is mentioned in provisions 2 and 14 of the will had been established under the direction of the conference which includes San Francisco; and that the board of trustees of the said conference had passed a resolution agreeing to accept the bequest upon the terms and conditions mentioned in the will. As a conclusion of law the court determined

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the said California Annual Conference was entitled to the legacy of \$5,000, with interest at the rate of 7 per cent. per annum from the date of the death of the testatrix. There were also the following findings which were amply supported by evidence or stipulated facts: "That, long prior to the death of the said decedent, the heirs of said Rev. John Dempster, mentioned in the second provision of said will, disentangled his estate, and the said decedent and the said other heirs received their full share thereof; that thereafter the said Clarence John Dempster and Killian Van Rensselaer Lansingh died; that neither of them, in his lifetime nor by will, nor otherwise, made any provision for such a theological school; that it is not the intention or desire of any of their heirs to do so; that said Sara Dempster McKee has never made any such provision and does not desire or intend to do so."

[1] Appellants are of the opinion that the legacy in question was adeemed by the action of the testatrix in receiving and disposing of her distributive share of her father's estate. It will be noticed that the very first direction to the executors is "to obtain the sum of \$5,000.00 from my share of Dr. Dempster's estate and place it in the care of the Methodist Episcopal Conference," etc. If this clause stood alone there would be no difficulty in classifying the legacy as being specific. It falls within the definition of a specific legacy as that "of a particular thing, specified and distinguished from all others of the same kind belonging to the testator." Section 1357, subd. 1, Civ. Code. The will specifies the particular \$5,000 and the use to which "said \$5,000.00" is to be applied. It does not come under the second subdivision of section 1357 of the Civil Code. Although a certain fund is indicated, there are no general words which support any gift except of the particular sum of money derived from the estate of the father of the testatrix. The legacy, so far as the second provision of the will is concerned, is therefore not a demonstrative legacy. The question then arises: Do the subsequent references to the legacy take it from this class? The seventeenth provision is a direction to the executors to arrange to secure the money for the support of the husband of the testatrix "and the \$5,000.00 for endowment fund of Preachers' School in California." This language is general, it is true, but it must be read in connection with the second provision of the will, and so read it does not enlarge the scope of the gift itself. It is merely an instruction to the executors with respect to the order in which they might pay these legacies. The whole of provision 17 is directed to a method whereby funds might be promptly derived from the estate of Dempster. It does not operate to make the legacy general or demonstrative. The words "\$5,000.00 for endowment fund" are merely descriptive and are not words of gift. The

seventeenth provision of the will emphasizes the position of appellants that the scheme of Mrs. Goodfellow's bounty was entirely based upon the supposition that the estate of her father would be undistributed at the time of her death. Reading the will by its four corners, we are impressed with the conviction that the testatrix desired to carry out her father's plan of devoting \$20,000 of his estate to the endowment of a theological school. She was willing to do her part out of the money inherited from him and for that reason dedicated \$5,000 out of the very moneys due her from his estate to that purpose, hoping and believing, however, that the other heirs would do their part to furnish the sum which her father had wished thus to apply. Her desire was to do with the money that he had accumulated exactly what he would have done, not to carry out any plan of her own with a part of her estate. She wanted to create a fund which, with the addition of moneys which she hoped would be contributed by her coheirs from the same source, would carry out her father's purposes. The legacy, it seems to us, was clearly specific.

[2, 3] We are not unmindful of the rule that courts in general are averse to construing legacies as specific, supported by such authorities as *Kenaday v. Sinnott*, 179 U. S. 618, 21 Sup. Ct. 233, 45 L. Ed. 339. We also have in mind the fact that courts look with favor upon charitable donations. *Estate of Willey*, 128 Cal. 12, 60 Pac. 471; *Estate of Dwyer*, 159 Cal. 687, 115 Pac. 242. But we fail to find any words of donation in this will referring to the legacy of \$5,000 except those directing that the sum raised from Mrs. Goodfellow's share in Dr. Dempster's estate be placed in the care of the conference, which should be pledged never to use said \$5,000 except as specified. If there had been general words of donation and the naming of the estate of Dr. Dempster as a source from which the legacy should be paid, there would be room for contention that the legacy was demonstrative; but we have no such will before us.

While the decisions are by no means uniform, the weight of authority supports the view that this was a specific legacy.

In *Chase v. Lockerman*, 11 Gill & J. (Md.) 185, 35 Am. Dec. 280, it was held that a bequest of moneys to be received from a decree in chancery was a specific legacy.

Smith v. McKittrick, 51 Iowa, 551, 2 N. W. 390, was a case where the court construed the bequest of "\$2,000 received from the estate of my father." It was held that the character of the bequest was specific.

In *re Zelle*, 74 Cal. 130, 15 Pac. 455, is authority for the interpretation of legacies to be paid out of the sale of certain bank stock as specific.

Other cases cited by appellants supporting this view are *Nusly v. Curtis*, 36 Colo. 464, 85 Pac. 846, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134; *Gilbreath*

v. Executors of Winter, 10 Ohio, 68; Georgia Infirmary, etc., v. Jones (C. C.) 37 Fed. 750; Smith's Appeal, 103 Pa. 561; Rogers v. Rogers, 67 S. C. 168, 45 S. E. 176, 100 Am. St. Rep. 721; In re Tillinghast, 28 R. I. 121, 49 Atl. 634; Ludlam's Estate, 13 Pa. 188.

Nearly all of the cases cited by respondent deal with wills in which, although the legacies were to be paid out of designated funds, the testators expressed separate and independent intentions that the legatees should receive the amounts bequeathed to them, at all events. Such was the ruling of the Supreme Court of the United States in a case in which a bequest of funds on deposit was made but part of the money in bank was expended after the making of the will, in the purchase of bonds. The change in the form of property did not defeat the evident purpose of the testator that his wife should receive a certain value from his possessions. *Kenaday v. Sinnott*, supra.

In *Tift v. Porter*, 8 N. Y. 516, the Supreme Court of New York (three of the justices dissenting) held that, where a testator who owned 360 shares of stock in a certain bank bequeathed 240 shares to one legatee and 120 shares to another, the legacies were not specific but demonstrative. It is conceded in the opinion that, if the language of the will had specified a certain number of "my shares" instead of a certain number of "shares," the legacies would have been specific, and the learned author of the opinion differentiates the case from *Ludlam's Estate*, supra. It will be seen at a glance that the will there considered was entirely different from the one before us.

In *Gelbach v. Shively*, 67 Md. 499, 10 Atl. 247, while holding that legacies payable to the brother and sister of the testator out of his share of his father's estate were demonstrative, yet the court decided that they were not to be satisfied out of the general assets of his estate. The father's estate had been distributed, and the brother and sister of George Gelbach, Jr., deceased, had received his share of that estate, in equal portions, in partial satisfaction of the bequests by him to them. The sum so received did not equal the amount of the legacies to the brother and sister specified in the will of George Gelbach, Jr., and the Supreme Court of Maryland held that the difference was not payable from the general assets of the estate. Surely that authority does not support the position of the respondent in this appeal.

In *Ives v. Canby* (C. C.) 48 Fed. 718, the will specified "two thousand dollars of the South Ward Loan of Chester, Pennsylvania." This was held to be a demonstrative legacy (the bonds representing the interest of the testatrix in the loan having been paid prior to her death). But the court said: "Had the legacy to the plaintiff been restricted to \$2,000 'of my South Ward Loan of Chester,' or had the testatrix given \$2,000 of the debt

belonging to her on one of the bonds in her possession at the date of her will, particularly describing the bond by number and date, showing that she intended to give to the plaintiff that amount of a specified debt, a different case would have been presented." It is evident that in *Ives v. Canby* the general words of bequest differentiated the legacy from those which, by narrowing the source of the bounty to a particular thing or things, are thereby made specific.

In *Welch's Appeal*, 28 Pa. 365, a legacy to a daughter was to be paid out of the profits upon certain real estate given to a son under the terms of the will. Before his death the testator deeded the property to the son. It was held that the legacy to the daughter was demonstrative and that it was not adeemed by the father's action. There was some doubt if the deed to the realty had ever been delivered to the testator's son. Nothing in that case is in conflict with our decision in the one at bar.

In *Kramer v. Kramer*, 201 Fed. 250, 119 C. C. A. 482, the court held that a bequest of a certain sum to be realized from policies of life insurance which should be in force at the time of the testator's death was demonstrative and was not cut down by his action, after the execution of his will, in making the beneficiary the payee of one of the certificates of insurance. The case is of no particular value in solving the principal problem now before us. Indeed, no one of the authorities brought to our attention by respondent is in substantial conflict with those which sustain the theory of appellants.

[4, 5] But respondent's counsel says that the question of ademption was not raised at the hearing below. While that term was not used in the pleadings, the issue of ademption was clearly raised and litigated. The petition stated fully the theory of appellants that the legacy had lapsed, and ademption is merely one of the ways in which a legacy lapses. One of the best definitions is that found in *Kramer v. Kramer*, supra: "Ademption of a specific legacy is the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it subsequent to the will, which prevents its passing by the will, from which an intention that the legacy should fail is presumed." This definition accurately fits the facts of the case at bar. Long before Mrs. Goodfellow's death, Dr. Dempster's estate had been finally settled; she had received her share of it; and therefore her executors could not "proceed to obtain the sum of \$5,000.00" from said estate "and place it in the care of the Methodist Episcopal Conference" and pledge said conference "never to use said \$5,000.00" except as an endowment fund for a school for Methodist ministers.

That part of the decree from which this appeal is taken is reversed, with instructions to the superior court to enter judgment in accordance with the views herein expressed.

We concur: HENSHAW, J.; LORIGAN, J.

EVA v. ANDERSEN. (S. F. 6177.)

(Supreme Court of California. Nov. 29, 1913.)

1. PLEADING (§ 205*)—GENERAL DEMURRER — OBJECTIONS REACHED—SALE OF CORPORATE STOCK—LIABILITY OF PURCHASER.

A complaint in an action by a seller of corporate stock against the buyer on his agreement to hold the seller free from any debts of the corporation for which he might be liable as stockholder, which alleges the payment by him of a specified sum in settlement of his liability as stockholder on account of an indebtedness of the corporation, evidenced by a note executed by it, alleges, as against a general demurrer, that the seller was liable as a stockholder within the buyer's agreement.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. § 205.*]

2. CORPORATIONS (§ 252*) — STOCKHOLDERS' LIABILITY—TIME OF ACCRUAL.

A stockholder's liability for debts of the corporation accrues on a debt being contracted by the corporation, and does not depend on the time when the debt is enforceable against the corporation, and the creditor need not resort to the assets of the corporation before proceeding against the stockholder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.*]

3. INDEMNITY (§ 11*)—ACCRUAL OF LIABILITY —SALE OF STOCK.

A right of recovery on a contract, whereby a buyer of corporate stock agreed to hold the seller harmless from any debts or liabilities of the corporation for which he might be liable as a stockholder, director, or other officer, arises as soon as a liability is incurred, since the contract is against liability and not against damages.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 21-25; Dec. Dig. § 11.*]

4. INDEMNITY (§ 15*)—CONTRACTS—ACTIONS — CONDITIONS PRECEDENT.

Where a buyer of corporate stock agreed to hold the seller harmless from any liabilities of the corporation for which he might be obligated as stockholder, the seller might pay a debt due from the corporation without any suit against him, and then maintain an action against the buyer on his contract, or, under Civ. Code, § 2778, subd. 1, he might sue on the agreement before payment, but in either case he must prove his liability as a stockholder.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.*]

5. INDEMNITY (§ 15*)—SALE OF STOCK—LIABILITY OF BUYER—COMPLAINT.

A complaint in an action by a seller of corporate stock on the buyer's agreement to hold the seller harmless from any liabilities of the corporation as stockholder, director, or other officer, which alleges that he paid in settlement of his liability as stockholder a specified sum on account of an indebtedness of the corporation, evidenced by a note given by it, is not defective for failing to allege that the note was due, or for failing to aver its face value, or that it was unpaid, since the action is not based on the note.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.*]

6. INDEMNITY (§ 15*)—SALE OF STOCK—LIABILITY OF BUYER UNDER CONTRACT WITH SELLER.

The complaint need not plead that the defense of limitations was not available against the indebtedness due from the corporation, because the statute merely furnishes a personal defense which may be waived by the person entitled to rely on it.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.*]

7. INDEMNITY (§ 10*)—ACTIONS—CONDITIONS PRECEDENT.

Notwithstanding Civ. Code, § 2778, subd. 4, providing that notice may be given to the person indemnifying, a buyer of corporate stock who agreed to hold the seller harmless from any liability of the corporation for which he might be obligated as stockholder was not entitled to notice of any action against the seller on his liability, or an opportunity to defend any suit, and, in view of subdivisions 5 and 6, prescribing rules of evidence under which a judgment recovered against a person indemnified may become prima facie or conclusive evidence of liability, the omission to give notice merely changed the burden of proof, and imposed on the seller suing the buyer, the necessity of establishing his liability.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 20; Dec. Dig. § 10.*]

8. INDEMNITY (§ 15*)—ACTIONS—EVIDENCE—BURDEN OF PROOF.

Where a person indemnified paid any sum on the theory that he is liable, he must show in a suit against the indemnitor that the liability existed, and that he was under obligation to pay the sum paid, but he need not await and defend an action to establish his liability before seeking relief against the indemnitor.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 36-40, 42-47; Dec. Dig. § 15.*]

Department 2. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by William J. Eva against Walter Andersen. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles N. Kirkbride, of San Mateo, for appellant. Randolph V. Whiting, of San Francisco, for respondent.

MELVIN, J. This appeal is taken from a judgment rendered upon defendant's failure to answer after his general demurrer to the complaint had been overruled.

In the complaint was alleged an agreement whereby William J. Eva, the plaintiff, sold to the defendant, Walter Andersen, forty-one shares of the capital stock of Andrew Smith Company upon the consideration expressed in a written agreement that defendant would hold plaintiff "free and harmless from any debts or liabilities of said company, for which he may be obligated or liable as a stockholder, director, or other officer of said corporation, up to the amount of \$2,000." The essential averment of the complaint is as follows: "Plaintiff on the 31st day of May, 1911, paid to the Bank of California, a corporation, as assignee of San Francisco National Bank, a corporation, the sum of two thousand seven hundred and twenty dollars (\$2,720.00) in full settlement of his liability as a stockholder of said Andrew Smith Company, a cor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

poration, for and on account of an indebtedness of said Andrew Smith Company, a corporation, evidenced by a certain promissory note of said Andrew Smith Company, a corporation, executed to the said San Francisco National Bank, on the 20th day of June, 1908." This is followed by an allegation that defendant failed after demand to pay the sum of \$2,000 and a prayer for that sum together with costs.

Defendant contends that his demurrer was improperly overruled for a number of reasons. These are that the indemnitor promised to pay no debts of the Smith Company but to hold the indemnitee free and harmless from the debts and liabilities of that corporation; that the complaint fails to show that the note was due from the corporation, or that the note did not run for more than three years, or the amount of the note; that the complaint fails to show that the note had not been previously paid, or that plaintiff had been called upon to pay it, or that he had paid it after notice to the indemnitor; that the complaint fails to show that plaintiff was a stockholder of the corporation at the time when the corporation incurred the indebtedness evidenced by the note; and that the complaint fails to show that plaintiff had become liable on any given date, or that judgment had been rendered against him, or that he had otherwise complied with the provisions of subdivisions 5 and 6 of section 2778 of the Civil Code. Plaintiff asserts that the complaint is sufficient as against a general demurrer. He insists that such a demurrer should not be sustained except when the complaint entirely fails to state some fact necessary to uphold the judgment, and that his complaint in the action at bar does set forth all such facts either directly or by reasonable inference. Citing *Lawrence National Bank v. Kowalsky*, 105 Cal. 44, 38 Pac. 517. He also calls attention to the rule that, as against a general demurrer, a complaint which alleges necessary elements of an action not directly, but by way of recital, is good. Citing *Fuller Desk Co. v. McDade*, 113 Cal. 360, 45 Pac. 694. He also invokes the familiar rule that where all essential facts are stated, but are imperfectly set forth, the particular defects may be reached by special demurrer only. We will examine the complaint in the light of these liberal rules.

[1] It will be noted that according to the complaint the payment of \$2,700 was made by plaintiff "in full settlement of his liability as a stockholder of said Andrew Smith Company." While this recital might have fallen before a special demurrer, as against a general demurrer it is a sufficient allegation that plaintiff was liable as a stockholder, with all that such a statement implies.

[2, 3] It is settled in California that a stockholder's liability accrues immediately upon a debt being contracted by the corporation. A creditor, therefore, need not re-

sort to the assets of the corporation before proceeding against the stockholder. *Hunt v. Ward*, 99 Cal. 613, 34 Pac. 335, 37 Am. St. Rep. 87. The indemnitor here held the indemnitee free and harmless not from damages but from liability or debts of the corporation for which he might be obligated as a stockholder. As the indemnity was against liability, the right of recovery on the contract arose as soon as the liability was incurred. In *Showers v. Wadsworth*, 81 Cal. 272, 22 Pac. 663, an action on a bond given to indemnify a sheriff against loss and liability which might be incurred by him in delivering certain property to the indemnifier, this court said: "The indemnity was against liability, and hence there was a right of recovery upon the contract as soon as the liability was incurred."

[4] This seems to be a complete answer to nearly all of the arguments of the defendant. It is true that, as appellant contends, the indemnitor did not agree to pay any debt or liability of the Smith Company, but he did agree to pay any such debt or liability for which plaintiff might be bound as a stockholder of that corporation. It is true also that if the corporation had paid any given debt plaintiff would have been relieved of any obligation to settle it, but the indemnity was not for damages growing out of a suit by a creditor of the Smith Company against the plaintiff on his stockholder's liability; it was upon the liability itself, and if he chose to pay the claim without suit he might do so or he even might sue before payment. Section 2778, subd. 1, Civ. Code. Of course in either case he would be under the necessity of proving that he was liable for the amount alleged, because of his position as a stockholder.

[5, 6] The answer to appellant's contention that the complaint is defective in not alleging that the note sued upon was due is that the pleading does not declare upon the note but upon an indebtedness evidenced by the note. The stockholder's liability depends not upon the time when the debt was enforceable against the corporation by the holder of the note, but upon the time when the indebtedness was incurred. *Hunt v. Ward*, supra; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.*, 103 Cal. 595, 37 Pac. 499. It was not necessary to allege that the note mentioned was not a three-year note. It was not necessary to plead even that the statute of limitations was not available against the indebtedness itself, because the statute furnishes a personal defense which may be waived by the person entitled to use it. Neither was it necessary to aver the face value of the note, because, as we have seen, the declaration was on the indebtedness and not the note. For the same reason it was not necessary for the pleader to state that the note was unpaid, because the statement of Eva's liability as a stockholder involved the existence of an unsatisfied indebtedness. The

statement of that liability of Eva, as a stockholder, for the payment of the corporation's debt, or his proportion thereof, while not a model of pleading, was nevertheless sufficient to carry the necessary implication that he owned stock in the corporation when the particular indebtedness involved was contracted by the Smith Company.

[7] It is the contention of appellant that, as there is no allegation of a suit and an opportunity on the part of the indemnitor to defend, he is entitled to regard the payment made by Eva as being merely voluntary. But, as we have indicated above, notice is not necessary in such a case as this, and much less is it necessary that the indemnifier be given an opportunity to defend any suit. While subdivision 4 of section 2778 of the Civil Code specifies that notice may be given to the person indemnifying, it does not make such notice compulsory. The two following subdivisions of that section merely declare rules of evidence under which a judgment recovered against the person indemnified may become prima facie or conclusive evidence of liability in his action against the person indemnifying. "The omission to give notice to the indemnitor does not go to the right of action against him but simply changes the burden of proof and imposes upon the indemnitee the necessity of again litigating and establishing all of the actionable facts." 22 Cyc. of L. and P., 106.

[8] It follows, from the foregoing discussion that the indemnitee was not bound to submit to a suit before paying the amount for which he was liable. This matter is settled by the provisions of our Code which we have cited above. Of course, if the person indemnified pays any sum upon the theory that he is liable as a stockholder to make such settlement, he is bound to show in a suit against the indemnitor that the liability existed, and that he was under obligation to pay it. This is the burden which he assumes, but he is not bound to await and to defend an action intended to fix his liability as a stockholder before he may seek relief on his rights existing under the contract of indemnity.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

BANCROFT et al. v. GOLDBERG, BOWEN & CO. (S. F. 6,459.)

(Supreme Court of California. Nov. 28, 1913.
Rehearing Denied Dec. 27, 1913.)

LANDLORD AND TENANT (§ 101*)—LEASE—CONSTRUCTION—LIABILITY OF PARTIES.

Where a lease provided that if any building situated on the premises should be torn down "in pursuance of a municipal order, or a law or ordinance, at any time after two years" from the date of the lease, it should terminate,

and the lessee should be relieved of his liabilities thereunder, the lessee who removed a building in compliance with an ordinance adopted more than two years after the making of the lease, thereby terminated the lease, though the removal might have been deferred for a few months without subjecting the lessee to the penalties prescribed by the ordinance.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 314, 315; Dec. Dig. § 101.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by H. H. Bancroft and others against Goldberg, Bowen & Co. From a judgment for plaintiffs, defendant appeals. Reversed, with directions.

Goodfellow, Eells & Orrick, of San Francisco, for appellant. Philip Bancroft, of San Francisco, and H. W. Ballantine, of Los Angeles, for respondents.

PER CURIAM. The following statement of facts, which is sustained by the record, is taken from the opinion of the District Court of Appeal for the First District in this case, filed December 27, 1912:

This is an appeal from a judgment against defendant taken more than 60 days after the entry of judgment, which was for the principal sum of \$750, and interest in the sum of \$50.30 and costs. Plaintiffs on the 30th day of June, 1906, by a written instrument of said date, leased to defendant, a corporation, certain premises, at a monthly rental of \$750 per month, until the 30th day of June, 1911. The lease contained the following provision: "It is furthermore understood that, as the said party of the second part has erected a building upon said premises at its own expense, the said building will, at the termination of this lease be and remain the property of the party of the second part. Moreover, it is expressly stipulated, that should that part of said building situated on the premises described on page one (1) of this lease, as distinguished from that part of the building situated on the land described on page two (2), be destroyed by fire or be torn down in pursuance of a municipal order, or a law or ordinance, at any time after two years from date, this lease shall immediately terminate, and the party of the second part shall be relieved of all its rights and liabilities thereunder." The premises were and are within the fire limits of the city and county of San Francisco as established by an ordinance duly adopted by the board of supervisors of said city and county of San Francisco at some time prior to the erection of the building thereon. This building was a wooden structure, and was erected by defendant on said premises between the 18th day of April and the 30th day of June, 1906. The building was also erected in violation of the provisions of a general

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

building ordinance of the city and county of San Francisco, adopted on February 5, 1903. This ordinance, as well as the ordinance fixing the fire limits, prescribes a penalty for any violation thereof. In January, 1909, an ordinance, No. 333, was adopted by the said board of supervisors, requiring all buildings erected prior thereto and subsequent to April 18, 1906, in violation of and contrary to the laws and ordinances of the city and county, to be demolished or removed on or before May 1, 1910. In April, 1909, the board of public works by order directed its inspector to serve notices for the removal of buildings as required by ordinance No. 333, which was done, and defendant was accordingly, on the 20th day of September, 1909, served with notice to demolish or remove its said building on or before May 1, 1910. In the month of November, 1909, defendant tore down the said building, and on the 30th day of November, 1909, abandoned the premises, and has paid no rent therefor since. The action was for the rent for December, 1909, and for which recovery was had as prayed for.

It should be added that ordinance 333 required the board of public works to serve notice upon all owners and leasees of property affected by the provisions of the ordinance, and required said board to enforce the provisions of the ordinance and to demolish or remove any building or structure affected by the ordinance, upon the failure of the owner or his agent to comply with its terms, at the cost of the owner, and made it a misdemeanor for any person, etc., to fail to comply with the provisions of the ordinance. The ordinance was made to take effect immediately.

It is claimed by defendant that the lease was terminated according to its terms upon the destruction of the building in November, 1909. We are of the opinion that this claim must be held to be well based. The building was torn down more than two years after the date of the lease, and, under the terms of the lease, the only question in this connection is whether it was torn down "in pursuance of a municipal order, or a law or ordinance," within the meaning of those words as used in the lease. The building was torn down by its owner, the lessee, in compliance with the provisions of an ordinance adopted more than two years after the execution of the lease, requiring all buildings erected subsequent to April 18, 1906, in violation of the existing laws of the city and county, to be demolished or removed on or before a certain date. This ordinance made it the duty of the owner of any building so erected to demolish or remove the same, and such owner was required to remove the same "on or before" a prescribed date, and was made subject to a penalty of

fine and imprisonment in the event of his failure to so demolish or remove it. The ordinance was a declaration of the policy of the board of supervisors that all temporary wooden buildings erected in violation of law within the fire limits after the great conflagration of April 18, 1906, to answer the immediate necessities of the people of the city, should be demolished or removed as speedily as was practicable, the date of May 1, 1910, being fixed as the limit within which such tearing down or removal must in any event be completed by the owner. It was a declaration to the effect that all such buildings so erected in violation of law were a menace to the safety of the city, no longer finding any possible warrant in the necessities of the people, and that they constituted public nuisances which should be abated as soon as was reasonably possible, in any event by May 1, 1910. Being officially notified of the action of the board of supervisors in this behalf, and served with notice to comply with the terms of the ordinance, the defendant demolished the building, as it was required to do. We do not see how it can be held otherwise than that this action on its part was "in pursuance of a municipal order, or a law or ordinance." That such action might have been deferred for a few months without subjecting defendant to the penalties prescribed by the ordinance of January, 1909, does not make it any the less action "in pursuance of" such ordinance. As suggested in appellant's brief, the tearing down of the building at any time after the adoption of the ordinance of January, 1909, "would be in compliance with both the letter and the spirit of the ordinance, and in furtherance of public and private duty." Taking the language of the lease literally, there would appear to be no question that the tearing down of the building was in pursuance of the ordinance of January, 1909, and that it terminated the lease. Under the circumstances there is nothing unreasonable in this construction, and to give the language a different construction would require the interpolation in the lease of words not written in the lease. The case of *Levin v. Pabst Brewing Co.*, 131 Pac. 118, is somewhat in point, and supports our conclusion herein.

In view of our conclusion upon the point discussed, it is unnecessary to notice the other contention in support of the claim that a reversal should be had.

Upon the findings judgment should have gone for defendant.

The judgment is reversed, and the trial court is directed to enter judgment in favor of defendant upon the findings already made.

BEATTY, C. J., does not participate in the foregoing.

SIMMONS v. SIMMONS. (L. A. 3,215.)

(Supreme Court of California. Dec. 3, 1913.)

1. TRIAL (§ 396*)—FINDINGS—CONFORMITY TO ISSUES—SUFFICIENCY.

Findings on issues not made by the pleadings will not support a judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

2. TRIAL (§ 396*)—FINDINGS—APPLICABILITY TO ISSUES.

In an action between a husband and wife, the complaint counted on an agreement whereby the husband was to furnish money for the improvement of the wife's property, and, in return, was to become entitled to an interest therein. The answer denied the agreement, and alleged that the moneys furnished had been gifts. *Held*, that the sole issue raised by the pleadings was whether the moneys furnished had been paid under the agreement alleged, and hence findings that the moneys had been loaned were without the issues and would not support a judgment for money loaned.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935-938; Dec. Dig. § 396.*]

3. JUDGMENT (§ 251*)—RELIEF—CONFORMITY TO ISSUES.

Under Code Civ. Proc. § 580, providing that the court may grant the plaintiff any relief consistent with the complaint and embraced within the issues, the relief must be consistent with the case made by the complaint, and relief entirely outside the issues cannot be granted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. § 251.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Alonzo G. Simmons against Charlotte Simmons. From a judgment for plaintiff, defendant appeals. Reversed.

Swaffield & Munholland, of Los Angeles, for appellant. Geo. M. Holton, of Los Angeles, and Newman Jones, of Riverside, for respondent.

SLOSS, J. The defendant appeals from a judgment whereby plaintiff recovered of defendant the sum of \$1,000, with interest. The evidence is brought up by a bill of exceptions.

The nature of the action is fairly defined in the following statement, made by plaintiff's counsel at the opening of the trial: "This," it was said, "is a suit brought by the plaintiff to obtain the decree of this court to the effect that certain property is community property. The legal title is in the wife. The husband is plaintiff. He seeks the decree of this [the superior] court that the property is community property by virtue of an agreement between the parties at the time when he put in some \$5,000 or \$6,000 into the property."

The complaint alleges that the parties are husband and wife, having intermarried in April, 1906. At the time of the marriage the defendant owned, as her separate property, a lot of land in the city of Long Beach. The lot, with the improvements thereon, was worth about \$4,000, and was subject to an

incumbrance of \$1,500. At the time of the marriage, it is alleged, the parties agreed that plaintiff would furnish to defendant moneys equal to the value of her said lot, less the incumbrance thereon, with which to build a dwelling house on said lot, and that the lot, with such house and other improvements, should thereafter be the community property of plaintiff and defendant. The plaintiff alleges that he has performed the agreement on his part, that he furnished the defendant with about \$5,600, with which she erected a dwelling house on the lot, but that the defendant repudiates the agreement, denies that the lot is community property, and claims that it, with the improvements, is her separate property, and that plaintiff has no interest therein. The prayer is for judgment that the lot is community property, that defendant be enjoined from selling or incumbering the same, and for general relief.

By her answer, the defendant alleges that the lot, at the time of the marriage, was worth \$3,500, and denies the making of the agreement set up in the complaint. She alleges that after the marriage the plaintiff made various gifts of money to her, and that she used a portion of said moneys in the erection of a dwelling house on said lot, and that it was understood that the house so erected should become a part of the land, and be defendant's separate estate. The answer admits that defendant has used a part of the moneys given her by plaintiff in erecting a house on the lot, admits that she claims said lot and improvements as her separate property, and that she denies that plaintiff has any interest therein.

The court made findings as follows: The facts alleged in the complaint regarding the marriage, defendant's separate ownership of the property, and its value at the time of the marriage were found to be true. The allegations that an agreement had been made, providing that money should be furnished by plaintiff, and that the lot should become community property, was found to be untrue. It was found that within two years the plaintiff had loaned the defendant \$1,000, which, with other moneys, she had expended in building a dwelling on the lot. All other moneys paid by plaintiff to defendant were found to be gifts, and the land, with its improvements, and all moneys except the said \$1,000 were found to be separate property of the defendant.

From these facts the court drew the conclusion of law that the plaintiff was entitled to recover \$1,000 from the defendant, and judgment was entered accordingly.

[1] The appellant makes the contention that the finding upon which the judgment rests, i. e., that the plaintiff loaned \$1,000 to the defendant, is outside of the issues presented by the pleadings, and hence does not authorize the judgment. The rule is well settled in this state that findings on issues

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not made by the pleadings must be disregarded, and cannot furnish support for a judgment. *Burnett v. Stearns*, 33 Cal. 469; *Gregory v. Nelson*, 41 Cal. 279; *Morenhout v. Barron*, 42 Cal. 591; *Ortega v. Cordero*, 88 Cal. 221, 26 Pac. 80; *Reed v. Norton*, 99 Cal. 617, 34 Pac. 333; *Elmore v. Elmore*, 114 Cal. 516, 46 Pac. 458; *Crescent Lumber Co. v. Larson*, 135 Pac. 502.

[2] It cannot be doubted that the issue whether money had been loaned by plaintiff to defendant was not among those raised by the pleadings. The complaint counted upon an agreement whereby plaintiff was to furnish money for the improvement of defendant's property, and, in return therefor, was to become entitled to an interest in the property. The purpose of the action was, as declared in the opening statement, to obtain a decree establishing that interest. The answer denied the agreement. While it admitted that moneys had been furnished, it asserted that they had been transferred as gifts, and not under the contract set up by plaintiff. The sole question raised by these pleadings was, then, whether the moneys furnished by plaintiff had been paid by him under the agreement on which he relied, or had been given by him to defendant. If the agreement had been established, plaintiff would have been entitled to judgment declaring his interest in the property as claimed by him. The court finding that there had been no agreement, plaintiff was not entitled to relief. The defendant's averment that the moneys received by her were gifts was an incidental part of her denial that they had been furnished to her under the contract which plaintiff alleged. The finding that plaintiff had loaned defendant \$1,000 was not responsive, either to any issue made by the pleadings or to the theory upon which the case was made and tried. The situation is closely parallel to that presented in *Elmore v. Elmore*, supra. There an action had been brought by the administratrix of a deceased wife against the husband. The complaint alleged that the deceased had furnished money to the defendant as her agent and trustee to purchase property for her; that he had made purchases, paying therefor in part with the money so furnished. The prayer was for an accounting and a conveyance of the property acquired with the money of deceased. The court found against the allegations of agency and trust, but entered a personal judgment against the defendant for \$6,500, the amount of money received by defendant from his wife. The judgment was reversed, on the ground that it was based upon a cause of action not set up in the complaint.

[3] Respondent cites a number of cases laying down the rule that a court of equity will give relief by way of money damages where, for any reason, the equitable relief sought cannot be granted. But in every such case facts alleged as giving the plaintiff a

right to judicial redress were established, and the court merely held that the inability to give a particular kind of redress did not prevent the giving of such redress as was proper. The relief was always "consistent with the case made by the complaint and embraced within the issue." Code Civ. Proc. § 580. Here, however, as we have seen, the relief granted was inconsistent with the complaint, and was entirely outside the issues.

The judgment is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

PARKSIDE REALTY CO. v. MacDONALD et al. (S. F. 6,107.)

(Supreme Court of California. Dec. 1, 1918.
Rehearing Denied Dec. 31, 1913.)

1. VENDOR AND PURCHASER (§ 82*)—MODIFICATION OF CONTRACT.

Where parties to a contract on June 9, 1904, agreed, one to sell and the other to buy real estate, an agreement on July 14th, signed only by the seller and merely extending the terms of the previous contract for the benefit of the seller, was not a new contract but a mere modification of the terms of the old one.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 138, 139; Dec. Dig. § 82.*]

2. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—CONSTRUCTIVE NOTICE.

An instrument not entitled to record, although recorded, is not constructive notice.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.*]

3. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—ACTUAL NOTICE.

The record of an instrument not entitled to go upon record may impart actual notice to one who has seen it of record.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.*]

4. PLEADING (§ 376*)—ISSUES—TENDER—ADMITTED FACT.

Where the cross-complaint, in an action to quiet title, averred that, immediately upon notice that the title had been perfected, the purchaser tendered the balance of the purchase price and demanded a conveyance, and the fact of tender was not denied but was admitted by stipulation, it was not necessary to consider whether the purchaser's letter was sufficient as a tender.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1225-1227; Dec. Dig. § 376.*]

5. VENDOR AND PURCHASER (§ 170*)—TENDER—INTERVENING PURCHASERS.

A purchaser was not bound to tender any of the purchase money to a vendor's grantees, although he knew that the vendor's deeds had been delivered to them, since there was no privity of contract between himself and them.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 344-348; Dec. Dig. § 170.*]

6. VENDOR AND PURCHASER (§ 102*)—CONTRACT—ABANDONMENT.

The fact that a vendor, pending the contract, had transferred the land to third par-

ties was not, in and of itself, an abandonment of the contract with the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 175-177; Dec. Dig. § 102.*]

7. VENDOR AND PURCHASER (§ 170*)—NECESSITY OF TENDER.

For a purchaser to put the vendor in default it is necessary for him to make a tender of the balance to the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344-348; Dec. Dig. § 170.*]

8. APPEAL AND ERROR (§ 173*)—NECESSITY OF OBJECTION BELOW.

The objection that a purchaser's offer to perform was not made with sufficient detail cannot be made for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

9. APPEAL AND ERROR (§ 173*)—DEFENSES BELOW—LACHES—NECESSITY.

While the defense of laches need not be pleaded and the court may in a proper case deny relief on that ground sua sponte, yet, where the trial court's attention has not in some way been called to that subject, an appellant may not ask relief on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

10. SPECIFIC PERFORMANCE (§ 105*)—REMEDIES OF PURCHASER—LACHES.

The parties to a contract for the sale of land extended its terms to enable the vendor to quiet title, and after a decree quieting title was entered December 20, 1904, on service of summons by publication, notice thereof was given to the purchaser within 30 days, who, after advice of counsel that title was satisfactory, on March 15, 1906, tendered the balance of the purchase price, and though sued by the vendor March 29, 1906, did not ask affirmative relief by cross-complaint until November, 1909. *Held*, in view of the purchaser's record of the contract, the vendor's failure to tender a deed or to rescind the contract, and the absence of any prejudice to third parties, that the purchaser was not guilty of such laches as would bar a recovery.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325-341; Dec. Dig. § 105.*]

11. VENDOR AND PURCHASER (§ 133*)—VENDOR'S TITLE—SATISFACTION OF PURCHASER.

Where a vendor agreed to make his title satisfactory to the purchaser and his attorney, the question was not whether the title was in fact a good or marketable title but whether it was acceptable to the purchaser and his attorney.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 234-237; Dec. Dig. § 133.*]

12. JUDGMENT (§ 142*)—SETTING ASIDE JUDGMENT—STATUTE.

Under the express provisions of Code Civ. Proc. § 473, a person served by publication may come in at any time within a year and have the judgment set aside and defend.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 253; Dec. Dig. § 142.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Parkside Realty Company against L. D. MacDonald, with cross-complaint by defendant MacDonald against plain-

tiff and against Catherine Black and others. Judgment for MacDonald on his cross-complaint, and the defendants thereto appeal. Affirmed.

J. J. West, of San Francisco (Morrison, Dunne & Brobeck, of San Francisco, of counsel), for appellants. U. S. Webb and W. H. Cobb, both of San Francisco, for respondent.

MELVIN, J. The plaintiff and all of the defendants, except the successful cross-complainant L. D. MacDonald, appeal from the judgment and from an order denying their motion for a new trial.

In March, 1906, the plaintiff commenced an action against MacDonald to quiet its alleged title to 33 lots in Outside Land Block 1158, situated in the city and county of San Francisco. Defendant MacDonald demurred; and, the records of the case having been destroyed by fire, an amended complaint was filed, pursuant to stipulation of the parties, on the last day of October, 1906. To this complaint MacDonald filed an answer and later a cross-complaint, wherein he made the plaintiff and all of the other appellants now appearing here defendants. In his cross-complaint he alleged that he had purchased the 33 lots from E. J. Lynch under a contract of sale; that he had offered to carry out the said contract but had been prevented from doing so by Lynch; that he was and always had been ready, able, and willing, since the balance of the purchase price under the contract had been due, to pay the same and receive a conveyance of the property; and that the plaintiff, Parkside Realty Company, and all of the other defendants to his cross-complaint had taken their deeds to the property with full knowledge of and subject to his rights. All of the interested parties answered the cross-complaint, and upon the issues joined a trial was had with the result that the court found the said MacDonald to be the owner of said property, entitled, upon depositing with the clerk of the court the balance due under the contract, to a conveyance thereof from all of the appellants.

The original contract between MacDonald and Lynch was made June 9, 1904. By it MacDonald bought from Lynch the property in question for \$2,600, paying \$100 at the time and agreeing to pay the balance on or before July 9, 1904, should the title prove satisfactory. MacDonald was to have 30 days for the examination of the title, and in case it should prove unsatisfactory Lynch was to have 30 days to clear it. Time was of the essence of the contract, and the \$100 paid thereon was to be forfeited in case of default in payment of the balance due after the title should be perfected. Within the 30 days allowed under the contract, MacDonald found the title to be defective. Lynch, realizing that it would be impossible to overcome the objection to the title within 30 days,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

entered into another agreement, before the termination of the original contract. In pursuance of this agreement MacDonald paid to Lynch the further sum of \$500 on account of the purchase price, and upon the perfection of the record title to said property and notice thereof to him he was to pay the balance of \$2,000. Lynch agreed to perfect the title within a reasonable time, say 90 days, and to make the title satisfactory to MacDonald and his attorneys, Messrs. Jordan, Treat & Brann, and to convey the property unincumbered upon payment of the balance of \$2,000.

By the writing of July 14, 1904, the obligation of Lynch to convey was to terminate if MacDonald should fail to make the final payment. Time was not made of the essence of the latter agreement, and there was no provision therein for the forfeiture of the part payments in case of default by the purchaser. Lynch employed MacDonald's attorneys, Messrs. Jordan, Treat & Brann, who brought suit against several persons for the purpose of correcting the defect in the title. The summons was served upon one of the defendants, Rodman, by publication. Judgment was entered on December 20, 1904. Lynch notified MacDonald of the successful outcome of the suit and demanded the balance of the purchase money, but the title was not then perfected to the satisfaction either of MacDonald or of his attorneys; the latter advising him that no perfect title would exist until one year from the entry of the judgment. MacDonald refused to pay, but the court found that his refusal did not cancel the contract of sale. The rest of the transaction may be described by quoting certain findings of the court: "That on the 15th day of March, 1906, said L. D. MacDonald was notified by Jordan, Treat & Brann, the attorneys for E. J. Lynch in the suit to quiet title above referred to, that the judgment rendered therein had become final and conclusive, and that the title to said property was satisfactory to them, and that it would then be safe for him to pay the balance of the purchase price of said property. That this was the first and only notice given to MacDonald of the perfection of said title, after the judgment to quiet title became final, and the first and only notice that the title was satisfactory to Jordan, Treat & Brann. That immediately after receiving such notice, to wit, on March 15, 1906, said L. D. MacDonald tendered to said E. J. Lynch the balance of the purchase price of said property, to wit, \$2,000, and demanded of said Lynch a conveyance to himself of said property, but said Lynch refused to accept the balance of said purchase price, and refused, and still refuses, to carry out his said contract with said MacDonald, and refused, and still refuses, to convey said property to said MacDonald, and such conveyance has not been made." The court further found that on June 15, 1905, the contract of

June 9, 1904, and the agreement of July 14, 1904, were acknowledged by MacDonald and recorded. The court also found that E. J. Lynch never tendered a deed of the property to said L. D. MacDonald or notified him of the cancellation of his contract.

The various conveyances by which the other appellants acquired their alleged interests were made after June, 1905, and it is found that all of these grantees had knowledge of MacDonald's contract before purchasing.

The case of Collischon v. MacDonald was tried with this one, and the same judgment was made applicable to both causes.

[1] Appellants contend that the contract of June 9, 1904, was rescinded by that of July 14th, and that, as the latter, signed only by Lynch, was not entitled to be recorded, there was no notice to the subsequent purchasers. But the agreement of July 14th was not a novation. By the contract of June 9th Lynch agreed to sell and MacDonald to buy. In the later agreement there was no contract of purchase and sale but merely a modification of the terms. Furthermore, these terms were modified by Lynch alone for his own benefit. In such cases the question of novation is always one of intention. The rule is well expressed in 29 Cyc. 1134, as follows: "The question is always one of intention, and a mere change in the amount of the debt, the terms and mode of payment, the rate of interest, or the nature of the securities does not effect a novation, unless the intention of the parties to novate the obligation is clearly shown." The agreement with reference to the extension of time was not a novation or a new contract. *Oakland Paving Co. v. Barstow*, 79 Cal. 47, 21 Pac. 544. The contract of June 9th was acknowledged by MacDonald, and the agreement of July 14th was not acknowledged at all. It does not clearly appear whether or not Lynch acknowledged the first writing. Much learning is expended by counsel in an effort to determine whether or not the vendee had a right to record these writings. The fact remains that they were attached together physically and were recorded. The stipulation of facts contains the following statement: "The plaintiff and the defendants in said action, other than L. D. MacDonald, prior to purchasing their respective interests in the property described in the pleadings therein, searched the records in the recorder's office of the city and county of San Francisco, state of California, and there found and read the contracts between L. D. MacDonald and E. J. Lynch, dated respectively June 9, 1904, and July 14, 1904, and recorded June 15, 1905, in liber 50 of covenants, at page 314. That other than above said parties had no additional notice of said contracts except the constructive notice from the recordation of said contracts."

[2, 3] Under the circumstances it makes no

difference whether the writings were in a technical sense such as might properly be recorded. The reading of the instruments was actual notice to the intending purchasers, whether the documents were lawfully of record or not. The Supreme Court of Indiana has correctly dealt with a similar problem as follows: "We agree with appellee's counsel that an instrument, not entitled to go upon record, is not constructive notice, although recorded. *Reeves v. Hayes*, 95 Ind. 521, page 531; *Watkins v. Brunt*, 53 Ind. 208; *Taylor v. City of Fort Wayne*, 47 Ind. 274; *Kennedy v. Shaw*, 38 Ind. 474; *Lockwood v. Slevin*, 26 Ind. 124; *Deming v. State ex rel.*, 23 Ind. 416; *Reed v. Coale*, 4 Ind. 283. But we do not agree that such an instrument may not impart actual notice to one who has seen it of record, for the law is that, if the purchaser does actually see the instrument of record, it constitutes notice. *Musick v. Barney*, 49 Mo. 458; *Hastings v. Outler*, 24 N. H. 481; *Gilbert v. Jess*, 31 Wis. 110; *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737. It is difficult to imagine any reason why this should not be the law, since it is immaterial where the purchaser sees the instrument, whether on the record or elsewhere." *Walter v. Hartwig et al.*, 106 Ind. 123, 128, 6 N. E. 5, 7.

The next contention of appellants is that the purported tender made by MacDonald was not sufficient. All of the evidence on the subject is contained in the following stipulation: "Said MacDonald tendered said \$2,000 by letter received by said Lynch in regular course of mail, and said letter is in words and figures following: 'March 15, 1906. To S. M. Snyder and Edward J. Lynch: The undersigned hereby tenders and offers to pay you \$2,000 on account of purchase of 33 lots in block 1158 outside lands in the city and county of San Francisco, state of California, as per contract of purchase dated June 9, 1904, and July 14, 1904. The undersigned hereby demands a deed to said property. Yours, etc., L. D. MacDonald.'"

Appellants cited with much emphasis the case of *Doak v. Bruson*, 152 Cal. 21, 91 Pac. 1001, as authority for their belief that no sufficient tender is shown. Perhaps if there had been merely an allegation of a tender and a denial thereof, a showing of the sending of the letter and its receipt would not amount to sufficient proof of such tender.

[4] But in MacDonald's answer to plaintiff's complaint and in his cross-complaint he avers that, immediately upon notice from Jordan, Treat & Brann that the title was perfected, he tendered to Lynch the balance of the purchase price and demanded a conveyance. Appellants in their answer aver that "no such offer or demand was made by said MacDonald until about the 15th day of March, 1906." In the stipulation of facts quoted above is the statement that MacDonald "tendered" the money by letter. The fact of a tender having not been denied by

the pleadings and having been admitted by stipulation, the sufficiency of the letter in and of itself need not be considered.

[5-7] There was no compulsion upon MacDonald to tender any of the money to Lynch's grantees, although he knew that deeds had been delivered to them. There was no privity of contract between him and them. The fact that Lynch had transferred the land to third parties was not in and of itself an abandonment of the contract with MacDonald. *Shively v. Semi-Tropic Land & Water Co.*, 99 Cal. 261, 33 Pac. 848; *Garberino v. Roberts*, 109 Cal. 128, 41 Pac. 857. It was necessary for him to make a tender to Lynch in order to put the latter in default.

[8] Appellants make the objection that the offer to perform was not made with sufficient detail. There was no demurrer to the cross-complaint. The objection may not be taken here for the first time. *Duff v. Fisher*, 15 Cal. 381.

Appellants invoke the doctrine of laches. They call attention to the following facts: The decree quieting title was entered December 20, 1904, and within 30 days MacDonald was notified of that judgment. In March, 1906, he was told by Messrs. Jordan, Treat & Brann that they were satisfied with the title. On March 15, 1906, he offered by letter to pay the balance of the purchase price. He was sued by Lynch on March 29, 1906, and answered the amended complaint (filed in October of that year) in November. But he did not seek affirmative relief by cross-complaint until November, 1907. Respondent makes two answers to this contention: First, that the question of laches, while not one which need be raised by pleading, is nevertheless a subject which may not be brought to the court's notice for the first time on appeal, and the record does not show that the subject was called to the attention of or considered by the lower court (citing *Larkin v. Mullen*, 128 Cal. 454, 60 Pac. 1091); second, that he was acting within his rights with due diligence and was not guilty of laches. Both positions are well taken.

[9] While it is true that the defense of laches need not be pleaded and that the court may in a proper case deny relief sua sponte to a seeker for relief in equity who has been guilty of laches (*Stevinson v. San Joaquin, etc., Co.*, 162 Cal. 143, 121 Pac. 398), it is also true that, where the court's attention has not been in some manner drawn to the subject, the appellant may not first seek for relief on appeal.

[10] But, even if this point be waived, we do not find that respondent was guilty of laches. After the judgment quieting Lynch's title, MacDonald relied upon the advice of his attorneys to the effect that the said judgment might be assailed successfully by Rodman within one year. His act of recording the contract was an evidence that he

intended to assert his rights to the property, if any he had. Lynch had not tendered him a deed and demanded payment nor offered to repay either of the installments and to rescind the contract. His answer to the complaint fully sets forth his claims of interest and his continued willingness to pay the balance of the purchase price of the property. The lis pendens was notice to everybody that he stood upon the terms of his contract. There was nothing in his conduct indicating an intent to waive his rights. Nor does it appear that his neglect sooner to become the aggressor and to demand specific performance caused any one to be prejudiced. Under the circumstances he was not guilty of such laches as would bar recovery. *Ex-Mission L. & W. Co. v. Flash*, 97 Cal. 632, 32 Pac. 600; *Furman v. Craine*, 18 Cal. App. 47, 121 Pac. 1007.

[11] Appellants insist that the judgment against Rodman and others gave Lynch a marketable title and that he was bound to accept it in spite of the advice of his attorneys. But the court found upon proper evidence that Lynch agreed to make the title satisfactory to MacDonald and his attorneys, Messrs. Jordan, Treat & Brann. Therefore the question was not whether the title was in fact a good or marketable one but whether it was acceptable to the respondent and his attorneys. *Allen v. Pockwitz*, 103 Cal. 88, 36 Pac. 1039, 42 Am. St. Rep. 99; *Church v. Shanklin*, 95 Cal. 627, 30 Pac. 789, 17 L. R. A. 207.

[12] We cannot say that Mr. Brann's advice to his firm's client was without justification. On the contrary, it was that of a careful lawyer. It was to the effect that a person served by publication may come in at any time within a year and have the judgment set aside. To justify such advice we need only cite section 473 of the Code of Civil Procedure.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

MERCHANTS' NAT. BANK OF SANTA MONICA v. BENTEL. (L. A. 3192.)

(Supreme Court of California. Dec. 3, 1913.)

1. BILLS AND NOTES (§ 396*)—LIABILITY OF INDORSER—NECESSITY OF PRESENTMENT AND DEMAND.

Presentment to the maker, as well as demand for payment, is essential to fix the liability of the indorser of a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022-1028; Dec. Dig. § 396.*]

2. BILLS AND NOTES (§ 404*)—PRESENTMENT AND DEMAND—TIME.

Upon a note, assumed to mature, for the purpose of presentment to charge the indorser, after one year from its date, as provided by Civ. Code, § 3135, a demand more than four

months after such maturity was too late to charge the indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1091-1099, 1101-1103; Dec. Dig. § 404.*]

3. BILLS AND NOTES (§ 267*)—INDORSEMENT BY PAYEE—EFFECT.

An indorsement by the payee of a note is a contract in writing the effect of which is controlled by the law, and which cannot be changed to a guaranty by the oral agreement of the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 620, 629; Dec. Dig. § 267.*]

4. PAYMENT (§§ 17, 18*)—TAKING NOTE—EFFECT.

Taking a note either of the debtor or of a third person for an existing debt is not payment, unless it is expressly so agreed, and in case of failure of payment the creditor may ignore such note, and sue upon the original debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 70-77, 78-85; Dec. Dig. §§ 17, 18.*]

5. MONEY LENT (§ 6*)—IMPLIED CONTRACT—SUFFICIENCY OF PLEADING.

A complaint alleging no promise except that expressed in the original note, given by the debtor when the money was borrowed, and not alleging indebtedness in any other manner, was not sufficient to state a cause of action on the debtor's implied contract.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. §§ 8-10; Dec. Dig. § 6.*]

6. LIMITATION OF ACTIONS (§ 25*)—NOTE.

Under the express provision of Code Civ. Proc. § 337, an action on a note is barred after four years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 113, 118-131; Dec. Dig. § 25.*]

7. BILLS AND NOTES (§ 129*)—LIMITATION OF ACTIONS (§ 48*)—NOTE—STATUTE.

Civ. Code, § 3135, declaring that the apparent maturity of a note payable at sight or on demand with interest shall be one year after date, or, if without interest, six months after date, extends the maturity of such notes only for the purpose of prescribing the time within which they may be presented in order to fix the liability of the indorser, and does not extend the time for payment, or prevent the running of the statute of limitations in favor of the maker.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 283-292; Dec. Dig. § 129.* Limitation of Actions, Cent. Dig. §§ 259-265, 351; Dec. Dig. § 48.*]

8. LIMITATION OF ACTIONS (§ 127*)—NEW CAUSE OF ACTION—AMENDED COMPLAINT.

Where a former complaint stated only a cause of action against defendant upon his indorsement of the note of a third person, or upon an alleged guaranty of payment by him, an amended complaint, sufficient only on the theory that it was a suit upon defendant's note to plaintiff, stated an entirely new cause of action, so that limitations ran until the amended complaint was filed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

Department 1. Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by the Merchants' National Bank of Santa Monica against George R. Bentel.

Judgment for defendant, and plaintiff appeals. Affirmed.

Tanner, Taft & Odell, of Los Angeles, for appellant. H. O. Millsap, of Los Angeles, for respondent.

SHAW, J. The plaintiff appeals from a judgment given against it upon sustaining a demurrer to the complaint. This is the second appeal in the action. Upon a former trial judgment was given for the plaintiff, and upon appeal by the defendant, the judgment was reversed and the cause remanded for a new trial. See *Merchants' Natl. Bank v. Bentel*, 15 Cal. App. 170, 113 Pac. 708. The present appeal is from a judgment given after the cause was remanded.

The grounds of demurrer assigned were that the complaint did not state facts sufficient to constitute a cause of action, that the action was barred by section 337 of the Code of Civil Procedure, and that the complaint was uncertain and ambiguous in certain specified particulars.

The facts alleged are as follows: (1) On August 23, 1906, the defendant borrowed of plaintiff \$5,000, and gave to plaintiff his promissory note of that date, thereby promising to pay said sum to plaintiff one day after said date. (2) "The defendant remained indebted to plaintiff according to the terms" of said note until January 24, 1907. He then paid the plaintiff \$1,000 and the interest on said note, leaving due thereon a balance of \$4,000. At the same time he substituted for said note and delivered to plaintiff instead thereof a promissory note of one W. H. Barlow, payable to said defendant on demand, with 9 per cent. interest per annum at Barlow & Bragdon's offices, dated July 8, 1906, for \$8,000, of which \$4,000 then remained unpaid. He indorsed this note at the time of the delivery by a general indorsement, merely writing his name on the back thereof. (3) There was at that time no agreement or understanding that the note of Barlow should be accepted in payment of the said indebtedness of the defendant to plaintiff. It was then understood and agreed that this said indebtedness should continue, and that he would pay the same to plaintiff. His indorsement was intended by him and accepted by plaintiff as and for a guaranty to plaintiff that the Barlow note would be paid in satisfaction of defendant's debt to plaintiff. (4) On November 27, 1907, at the office of Barlow, "plaintiff demanded of said Barlow that he pay said note, and thereafter on the same day notified defendant that said note was not paid, and demanded that he pay the same." (5) No part of said sum of \$4,000 due from defendant to plaintiff has been paid, except the interest up to September 13, 1907.

[1] If the complaint is regarded as an attempt to set forth a cause of action against the defendant upon his indorsement of the Barlow note, it fails to state sufficient facts.

There is nothing to show that presentment for payment was waived or excused. Such presentment to the maker, accompanied with a demand for payment, is essential to fix the liability of the indorser of a promissory note upon his indorsement. *Applegarth v. Abbott*, 64 Cal. 459, 2 Pac. 43; *Kellogg v. Pac. Box Factory*, 57 Cal. 829; *Haber v. Brown*, 101 Cal. 451, 36 Pac. 1035; *Cousins v. Partridge*, 79 Cal. 229, 21 Pac. 745; *Jones v. Nicholl*, 82 Cal. 32, 22 Pac. 878; 7 Cyc. 959; 4 Am. & Eng. Ency. of Law, 352; 2 Daniel, Neg. Ins. § 871; 2 Randolph on Com. Paper, § 758. The complaint avers that payment was demanded of Barlow, but it lacks the allegation that the note was presented to him at the time of said demand or at all. This is essential to make a valid presentment. 2 Randolph, Com. Paper, § 1131.

[2] Furthermore, the only demand alleged was made more than four months after the apparent maturity of the note, assuming that it became mature, for the purposes of presentment to charge the indorser, after the expiration of one year from its date, as provided in section 3135 of the Civil Code. This was too late to be of any effect to charge the indorser upon the indorsement. *Cousins v. Partridge*, supra; *Jones v. Nicholls*, supra; *Beer v. Clifton*, 98 Cal. 326, 33 Pac. 204, 20 L. R. A. 580, 35 Am. St. Rep. 172; *Wills v. Booth*, 6 Cal. App. 201, 91 Pac. 759.

[3] The allegation that the indorsement was intended and accepted as a guaranty must be disregarded. An indorsement by the payee of a promissory note is a contract in writing, and its effect is controlled by the law, and cannot be changed by the oral agreement of the parties. *Goldman v. Davis*, 23 Cal. 256. It follows that the complaint cannot be considered as a statement of a cause of action upon the indorsement, or upon the alleged guaranty. Upon either theory it fails to state sufficient facts.

The appellant practically concedes this proposition. Its theory is that the complaint states a cause of action upon the original debt created by the transaction of borrowing and lending on August 23, 1906. It is argued on its behalf that the debt arose upon the implied agreement of the borrower to repay the money borrowed, that the giving of defendant's note for the sum borrowed did not extinguish that debt, but merely extended the time of payment thereof until the maturity of that note, and that the substitution thereafter of the Barlow note for his own note, it not being taken as payment, did not extinguish the original debt or his own note, but again extended the payment of both to the time of the maturity of the Barlow note. Upon this theory, counsel say, the facts stated show a cause of action upon the debt of \$4,000 due from the defendant to plaintiff, and therefore, that the complaint states facts sufficient to constitute a cause of action. The authorities in this state support this proposition. *Higgins v. Wortell*, 18 Cal. 333;

Griffith v. Grogan, 12 Cal. 322; Welch v. Allington, 23 Cal. 322; Brown v. Olmsted, 50 Cal. 165; Comptoir v. Dresbach, 78 Cal. 21, 20 Pac. 28; Jenne v. Burger, 120 Cal. 446, 52 Pac. 706; London Bank v. Parrott, 125 Cal. 473, 58 Pac. 164, 73 Am. St. Rep. 64.

[4] The rule is said to be that "taking a note either of the debtor or of a third person for a prior existing debt is no payment, unless it be expressly agreed to take the note as payment." Comptoir v. Dresbach, supra. And the cases hold that upon failure to pay such note, the creditor may ignore it and sue upon the original debt. Higgins v. Wortell, supra; Jenne v. Burger, supra. Upon the authority of these decisions we should hold that the complaint is sufficient in this respect and states facts sufficient to constitute a cause of action upon the original note.

[5] The complaint cannot be regarded as a statement of a cause of action on the implied contract. No promise is alleged except that expressed in the original note given when the money was borrowed, nor is the indebtedness alleged in any other manner. If the complaint is good, it is because it states a cause of action upon the note of August 23, 1906, due one day after its date.

[6] The third amended complaint was filed on October 25, 1911. If that date is taken as the beginning of the action, it is barred by the four years' limitation of section 337. The theory of the appellant that the substitution of the Barlow note extended the original time until the maturity of that note, and that the latter, being payable on demand and bearing interest, did not mature under section 3135 of the Civil Code, until July 8, 1907, one year after its date, would not prevent this result, since the third amended complaint was filed more than four years after the expiration of that year.

[7] It may be well to say, however, that the decisions are that section 3135 is to be taken as extending the maturity of such a note only for the purpose of prescribing a time within which the note may be presented in order to fix the liability of the indorser, and that it does not extend the time of payment, or prevent the running of the statute of limitations, so far as an action upon the note itself against the maker is concerned. Jones v. Nicholls, supra; Cousins v. Partridge, supra; Machado v. Fernandez, 74 Cal. 362, 16 Pac. 19.

[8] An examination of the records in the case show that the former complaint stated nothing more than a cause of action against Bentel upon his indorsement of the Barlow note, or upon an alleged guaranty of payment by him. No mention was made therein of the note executed by him to plaintiff, or of any other debt antecedent to or contemporaneous with the indorsement and guaranty of the Barlow note. As we have seen, the third amended complaint cannot be regarded as stating a cause of action upon that in-

dorsement or upon that guaranty. It is sufficient only upon the theory that it is a suit upon the defendant's note to plaintiff. It, therefore, states an entirely new cause of action different from that embraced in the former pleading, and the action thereon must be deemed to have been commenced on October 25, 1911, the date the last amended complaint was filed. Campbell v. Campbell, 133 Cal. 33, 65 Pac. 134; Lambert v. McKenzie, 135 Cal. 100, 67 Pac. 6. The period of limitation began to run on August 24, 1906, or at the latest on January 24, 1907, the day the Barlow note was substituted, and it continued to run until October 25, 1911, a period of more than four years, before the suit upon the present cause of action was begun. It is therefore barred, and the demurrer was properly sustained.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

BORDEN v. BORDEN. (L. A. 3,217.)

(Supreme Court of California. Dec. 3, 1913.)

1. DIVORCE (§ 133*)—DESERTION—SEPARATION BY MUTUAL CONSENT.

Separation by mutual consent, within Civ. Code, § 99, providing that separation by consent with or without the understanding that one of the parties will apply for a divorce is not desertion, may be implied from circumstances disclosing consent, or showing that the separation was not against the will of the spouse suing for divorce on the ground of desertion.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-448; Dec. Dig. § 133.*]

2. DIVORCE (§ 147*)—DESERTION—QUESTION OF FACT.

The court, in a suit for divorce on the ground of desertion, must determine whether there was an absence of consent to living apart, which is essential to constitute desertion justifying a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 489-493; Dec. Dig. § 147.*]

3. APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding sustained by ample evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

4. DIVORCE (§ 37*)—DESERTION—CONSENT TO SEPARATION—EVIDENCE.

Under Civ. Code, § 101, providing that consent to a separation is revocable, and if one of the parties in good faith seeks a reconciliation and restoration, but the other refuses, the refusal is desertion, a wife suing for divorce on ground of desertion must show, on it appearing that the separation was by mutual consent, that she in good faith sought a reconciliation and restoration, and that the husband refused and persisted in the refusal for the statutory period.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 107-134, 136-138; Dec. Dig. § 37.*]

5. DIVORCE (§ 127*)—GROUNDS—EVIDENCE—SUFFICIENCY.

Where, in an action by a wife for divorce on the ground of desertion, she testified that,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

after the separation by mutual consent, she asked her husband to return to her, and that he refused to do so, and the testimony of the only corroborating witness was not a sufficient corroboration as required by Civ. Code, § 130, a finding that no desertion was shown was warranted.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. § 127.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Helen M. Borden against Gail Borden. There was a judgment for defendant, and, from an order denying a new trial, plaintiff appeals. Affirmed.

Collier & Clark, of Los Angeles, for appellant. Chase, Overton & Lyman, of Los Angeles, for respondent.

ANGELLOTTI, J. This is an action for divorce on the ground of desertion. Judgment was given decreeing that plaintiff is not entitled to a divorce. We have an appeal here by plaintiff from an order denying her motion for a new trial.

Though defendant filed an answer denying the allegation of desertion, he in no way opposed the claim of plaintiff to a divorce on that ground on the trial, and the findings of the judge of the trial court show that he was of the opinion that there was a sufficient showing of both connivance and collusion to warrant him in denying a divorce. Civ. Code, §§ 111, 112, 114. It is not necessary to go into the question whether the learned judge was correct in this conclusion, for we are satisfied that the order denying a new trial must be affirmed for another reason.

This action was commenced June 16, 1911. The allegations as to desertion were contained in paragraph 2 of the complaint and were "that during the month of July, 1909, and without any cause or provocation whatsoever, * * * the defendant willfully deserted and abandoned the plaintiff herein, and for more than one year last past has continued to willfully and without cause desert and abandon the said plaintiff." The trial court found "that each and all of the allegations contained in paragraph 2 of the complaint are untrue." If this finding has sufficient support in the record, it precludes a reversal, regardless of all questions of connivance and collusion.

The parties, who have been husband and wife ever since December 5, 1893, separated on July 29, 1909, and have never lived together since the last-named date. On June 8, 1909, they had entered into a most carefully prepared written agreement, to "operate as and be a complete adjustment and settlement and division of all property rights of the parties." By this agreement certain real and personal property of apparently considerable value was set apart to plaintiff, and defendant agreed to pay to plaintiff during her life, or until, in the event of a divorce,

she remarried, \$500 per month for her support and maintenance, and the further sum of \$150 per month for the support, maintenance, and education of their minor daughter, so long as such daughter elected to live with the mother and until she became of age. It was expressly declared that the agreement was not intended as an agreement for separation or for divorce, and was to be binding whether the parties lived together or apart. On July 29, 1909, defendant left the family home, telling plaintiff that he thought it would be better that they separate entirely. The evidence shows that the parties had not been living happily together for many years prior to this separation. Plaintiff, in response to a question by the court as to how they came to separate at that time, said "because we could not get along together." She at no time claimed to have objected in any way to the proposed separation.

[1] A review of the record satisfies us that there is ample support for a conclusion that the separation in July, 1909, was by mutual consent of the parties. It is not necessary that such a consent should be expressed in writing, or even expressed in words. It may be implied from circumstances which tend to show the plaintiff's consent, or that the separation was not against her will. See *McMullin v. McMullin*, 140 Cal. 115, 73 Pac. 808. "Separation by consent, with or without the understanding that one of the parties will apply for a divorce, is not desertion" (section 99, Civ. Code); a separation, proper in itself, becoming desertion only when the intent to desert is fixed during such separation (section 100, Civ. Code).

[2] As said in the case last cited, "it is for the court trying the case to determine from all the facts and circumstances appearing in the case whether or not there was an absence of that consent to living separate and apart which is essential to constitute a desertion."

[3] We repeat that ample support is to be found in the record for the conclusion that the separation in July, 1909, was by mutual consent of the parties. Accepting this as a fact, as we must in view of the finding of the trial court, there was no desertion at that time (section 99, Civ. Code), and the separation could become desertion only by reason of something transpiring thereafter.

[4] The only thing capable of changing the character of the separation that is suggested by the evidence is a possible effort on the part of plaintiff for reconciliation and restoration. Section 101, Civil Code, provides that "consent to a separation is a revocable act, and if one of the parties afterwards, in good faith, seeks a reconciliation and restoration, but the other refuses it, such refusal is desertion." It may be conceded that plaintiff was entitled to show such an effort for reconciliation and restoration notwithstanding the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

absence of specific allegation in that behalf in the complaint; the ultimate fact of desertion being alleged. *Howard v. Howard*, 134 Cal. 346, 66 Pac. 367. So conceding, however, there could be no desertion until the seeking of reconciliation and restoration, until the offer is made and refused or not accepted. "So long as the parties were living apart by agreement, there was no desertion. When, however, a reconciliation and restoration were, in good faith, sought by the plaintiff and refused by defendant, such refusal became desertion." *Howard v. Howard*, supra. The desertion does not begin until such offer and refusal. The section (section 101, Civ. Code) says "such refusal is desertion." As said in *Sargent v. Sargent*, 106 Cal. 544, 39 Pac. 932, the only effect of the section "is to put the recalcitrant spouse in default, and to give to the other a right which he did not have under the previously existing circumstances; a right which, if such refusal be persisted in for the statutory period, will ripen into a cause for divorce." It is provided by section 107, Civil Code, that willful desertion must continue for one year before it is a ground for divorce.

[5] While plaintiff testified that in December, 1909, she asked defendant to return to her, and that he then refused to do so, there is in the record ample warrant for a conclusion that there was no sufficient corroboration of her statements in that regard. She further testified that she again spoke to him about it in July, 1910, when he was in Los Angeles. This, however, was less than a year prior to the commencement of this action, and it is unnecessary to determine whether these statements were sufficiently corroborated. The testimony of the only witness called to corroborate plaintiff's testimony, viz., Louise Grijalva, is certainly not of such a nature as to warrant us in holding that it required the trial judge to conclude that it was a sufficient corroboration of plaintiff's testimony as to any offer of reconciliation and restoration made as much as a year prior to the commencement of this action. Section 130, Civil Code, in terms provides that "no divorce can be granted * * * upon the uncorroborated statement, admission or testimony of the parties." It thus appears that, regardless of the question whether the trial court was bound to accept as true the testimony of plaintiff and the witness called by her for corroboration purposes, as is earnestly urged by learned counsel for plaintiff, it cannot be held that the conclusion of the trial court, that no desertion constituting ground for divorce was shown, is without sufficient support in the record, in view of the rule requiring corroboration of the plaintiff's testimony. Therefore we are not warranted in disturbing the finding, and, as said before, that finding precludes a reversal. Nothing said herein is to be taken as an intimation that the question

of the amount of credit to be given to the witnesses was not solely one for the trial court.

The order denying a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

LONG v. RYAN et al. (L. A. 3433.)

(Supreme Court of California. Dec. 8, 1913.)

1. DEEDS (§ 61*) — DELIVERY ON DEATH OF GRANTOR.

Where an owner of land executes a deed and delivers it in escrow, directing the depository to hold it during his lifetime and at his death to deliver it to the grantee, such delivery is effectual and takes effect upon the death of the owner, where the delivery in escrow was made without any condition by which the owner might regain control of the deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*]

2. DEEDS (§ 61*)—DELIVERY—ESCROW—ABSOLUTE DELIVERY.

Where an owner of land executed a deed and delivered it in escrow under written instructions requiring the depository to hold the deed until 1910, at which time, if the owner should be living, to return it to her, and, in the event of her death during the interval, to deliver it to the grantees, the owner retained such control over the instrument that the delivery was ineffectual to pass title, notwithstanding her death prior to 1910.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 140, 141; Dec. Dig. § 61.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Stephen G. Long, administrator, against Mary N. Ryan and another. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Affirmed.

Edwin A. Meserve, of Los Angeles (Shirley E. Meserve and J. D. Taggart, both of Los Angeles, of counsel), for appellants. J. B. McLaughlin, of Los Angeles, for respondent.

SHAW, J. The defendants appeal from the judgment and from an order denying a new trial.

The action was brought to annul and cancel a deed purporting to have been executed on July 22, 1905, by the decedent, Sarah M. Ryan, conveying certain parcels of land to her two daughters, the defendants herein. On the day of its date the deed was delivered in a sealed envelope by the grantor to the Title Insurance & Trust Company as custodian, with directions for its delivery upon certain contingencies to happen within a fixed period. The contingencies did not happen within the time fixed, and there were several extensions made by her. Finally, on July 16, 1907, the deed being in the possession of the custodian, she indorsed upon the envelope instructions for delivery in substance as follows: This deed you will hold until July 22, 1910, at which time, if I be then living,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

you will deliver the same to me, but if I should die in the meantime, you will thereupon immediately upon my death deliver said deed to my daughters Mary N. Ryan and S. Maude Ryan.

On September 26, 1908, she died intestate, leaving surviving as her sole heirs the two daughters aforesaid and one son. Thereafter the custodian delivered the said deed to the daughters, who placed the same of record and now claim title thereunder.

The court found that the grantor did not at any time intend to part with her title to the property described in said deed, or with the dominion and control over the deed, during her lifetime, but intended to and did retain control over said deed and the title to said property during her lifetime, and that she intended that the deed should not be delivered, and that no title to the property should pass thereunder until after her death. Upon this the court concluded that the deed never was delivered and gave judgment that it be canceled.

[1] It has been many times declared by this court that where the owner of land signs a deed therefor to one person and thereafter delivers such deed to a third person, with directions to such third person to hold the same during the lifetime of such grantor and upon the grantor's death to deliver it to the grantee, intending at the time of such delivery to the custodian to part forever with all right or power thereafter to repossess, retake, or control the deed, such delivery is effectual and valid, and upon the death of the grantor the estate goes, by virtue thereof, to the grantee, who may then compel delivery, if necessary. *Bury v. Young*, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186; *Wittenbrock v. Cass*, 110 Cal. 1, 42 Pac. 300; *Rulz v. Dow*, 113 Cal. 494, 45 Pac. 867; *Kenney v. Parks*, 125 Cal. 150, 57 Pac. 772; *Schuur v. Rodenback*, 133 Cal. 88, 65 Pac. 298; *Howlin v. Castro*, 136 Cal. 605, 69 Pac. 432; *Canale v. Copello*, 137 Cal. 24, 69 Pac. 698; *Wilhoit v. Salmon*, 146 Cal. 446, 80 Pac. 705; *Keyes v. Meyers*, 147 Cal. 704, 82 Pac. 304; *Estate of Cornelius*, 151 Cal. 550, 91 Pac. 329; *Moore v. Trott*, 156 Cal. 355, 104 Pac. 578, 134 Am. St. Rep. 131; *Husheon v. Kelley*, 162 Cal. 660, 124 Pac. 231.

But these decisions declare that it is essential to the validity of such delivery that it shall be made without any conditions whereby the grantor may again obtain control of the deed. In *Bury v. Young* the court says: "The essential requisite to the validity of a deed transferred under circumstances as indicated in this case is that, when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time." And again: "There are well-considered cases holding that, even though the grantor delivers the deed to the deposi-

tary, reserving the right to recall it, yet if he dies without recalling it, and the deed is then delivered, such delivery is complete and entire and carries title. We are not disposed to indorse that doctrine." In *Wittenbrock v. Cass*, referring to *Bury v. Young*, the court said: "It was further held that the essential requisite to the validity of a deed transferred under such circumstances is that, when placed in the hands of a third party, it has passed beyond the control of the grantor for all time." In *Moore v. Trott* the court, referring to the delivery to a third person, says that such delivery is valid, "provided always, and this is the essential condition of the validity of such transfers, that the delivery is absolute so that the deed is placed beyond the power of the grantor to recall it or control it in any event."

[2] The present case cannot be distinguished in principle from *Kenney v. Parks*, supra. There the husband signed and acknowledged a deed purporting to convey land to his wife and delivered it to a third person, with directions that, if his wife should survive him, the deed should be delivered to her, but with the intent that, if he survived his wife, the deed was not to pass the title and was to be returned to him. This intent was not expressed in the written directions, but the court held that it was necessarily implied, and, as a consequence, that the husband did not part absolutely and unconditionally with all control over the deed, and that it was not valid. In the present case the intent that the title should not pass upon the condition of the survival of the grantor until after July 22, 1910, was expressed in the writing itself. Her intent, therefore, must have been that upon that contingency there should be no delivery of the deed, and that it should be ineffectual to pass title, but that such title was to remain vested in the grantor. This sustains the finding of the court aforesaid and establishes the fact that there was no valid delivery of the deed within the rule established by the cited decisions. The contention that the finding aforesaid is not sustained by the evidence is based solely upon the theory that it was made upon an erroneous construction of the effect of the written directions given by the grantor to the custodian. We think the court could not have construed them otherwise and that this finding was correct.

The appellants in their reply brief urge that the court erred in its rulings upon the evidence during the trial. We do not find it necessary to consider these points. The alleged errors do not at all affect the facts upon which our conclusion is based and which necessarily control the decision of the case.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

TOUSLEY v. PACIFIC ELECTRIC RY. CO.
(L. A. 3222.)

(Supreme Court of California. Dec. 8, 1918.)
Rehearing Denied Jan. 2, 1914.)

1. RAILROADS (§ 347*)—INJURIES AT CROSSINGS—NEGLIGENCE—QUESTION FOR JURY.

In an action against an interurban railway company for injuries to a traveler in a collision at a street crossing, evidence held to sustain a finding of actionable negligence in the operation of the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1124-1137; Dec. Dig. § 347.*]

2. RAILROADS (§ 350*)—INJURIES AT CROSSINGS—NEGLIGENCE—QUESTION FOR JURY.

Whether the speed of an interurban train at a crossing was so excessive as to be negligence depends on the particular circumstances, and where reasonable men may differ whether the speed showed a want of reasonable care, the question of negligence in maintaining the speed is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

3. APPEAL AND ERROR (§ 1005*)—VERDICT—CONCLUSIVENESS.

A verdict sustained by evidence and approved by the trial court is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3880-3876, 3948-3950; Dec. Dig. § 1005.*]

4. NEGLIGENCE (§ 93*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.

The negligence of an owner in driving his automobile is not imputed to his guest, having no control over its operation.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147-150; Dec. Dig. § 93.*]

5. TRIAL (§ 337*)—INSTRUCTIONS—VERDICT.

Though the jury should follow the instructions, a verdict contrary to an erroneous instruction is not against the law, and will not be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 790; Dec. Dig. § 337.*]

6. RAILROADS (§ 351*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

An instruction, in an action against an interurban electric railroad company for injuries to a traveler in an automobile in a collision with a car at a crossing, that if plaintiff was riding in the machine owned and driven by a third person, and had no control over it, the carelessness of the driver, contributing to the accident, could not be imputed to plaintiff, but to sustain the defense of contributory negligence, it must appear that it was his personal failure to exercise ordinary care that caused his injuries, and that if at the time of the accident he used ordinary care, he was not guilty of contributory negligence, when considered as a whole, correctly submitted the issue of contributory negligence of plaintiff personally, as distinguished from that of the driver of the machine, and that to defeat a recovery, plaintiff must have been guilty of want of ordinary care contributing to his injuries, provided he had no control over the driver.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.*]

7. NEGLIGENCE (§ 72*)—CONTRIBUTORY NEGLIGENCE—ACTS CONSTITUTING.

The conduct of plaintiff, on finding himself in sudden peril by the negligence of defendant, must be judged in view of the circumstances, and, to avoid contributory negligence, he must

exercise the care that an ordinarily prudent person would use under similar circumstances.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 99, 100; Dec. Dig. § 72.*]

8. TRIAL (§ 191*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction in part as to the facts, and on matters within the exclusive province of the jury, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by D. Augusta Tousley against the Pacific Electric Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

J. W. McKinley, of Los Angeles (R. C. Gortner, of Los Angeles, and W. W. Webster, of Pasadena, of counsel), for appellant. E. B. Drake, of Los Angeles, for respondent.

ANGELLOTTI, J. Plaintiff obtained judgment against defendant for \$2,500, in an action brought by her to recover damages for personal injuries alleged to have been received through the negligence of defendant. We have here an appeal by defendant from such judgment, and from an order denying its motion for a new trial.

The injuries suffered by plaintiff were received in a collision between an automobile in which she was riding as a guest of its owner and a two-car interurban train of defendant running from the city of Long Beach to the city of Los Angeles. The accident occurred about 2 o'clock p. m. on Sunday, May 7, 1911, at the crossing of Hill street over the double tracks of defendant at the northerly city limits of Long Beach. A Mr. Loftus, the owner of the automobile, was driving, and seated with him on the front seat was the grandson of plaintiff, while Mrs. Loftus and plaintiff occupied the rear seat. They had been proceeding northward from Long Beach to Los Angeles along American avenue, and on reaching Hill street it was necessary to turn into that street and go over the tracks of defendant, which there crossed Hill street. On approaching the crossing, Loftus reduced the speed of his machine, turned to make the crossing, and at a rate of speed from two to four miles an hour, ascended a slight grade of about 18 inches to the westerly track. According to his testimony, it was not until he had partially passed over that track that he became aware of the approach of defendant's train on the easterly track. The train was then only some 250 or 300 feet away, coming at a rate of speed variously estimated at from 35 to 50 miles an hour. The evidence was such as to fully warrant the conclusion that it was traveling at the rate of as much as 40 miles an hour, or nearly 60 feet a second.

According to his testimony, Loftus put on his emergency brake and disconnected his clutch, but the machine moved forward far enough to be struck by the train and to be thrown over 30 feet away.

[1, 2] It is earnestly contended by defendant that there is no foundation in the evidence for any finding of negligence on its part. Except where its tracks crossed streets, defendant was operating its train over its own private right of way. For certainly much more than 1,000 feet from Hill street southerly the tracks of defendant were straight and on level ground. There was nothing at Hill street to interfere with the vision of any one approaching the tracks on either side for that distance except the trolley poles located in the 9-foot space between the two tracks, at intervals of about 90 feet, and a little station building about 8x10 feet in size on one side of the westerly track, about 1,000 feet away. The trolley poles averaged about 12 inches in diameter. There was evidence indicating that to one standing near the westerly rail of the westerly track at the Hill street crossing, these poles presented a continuous obstruction to the vision from a point say 400 or 500 feet distant, so far as the easterly track was concerned, the poles so running together as the distance from one so standing near the rail referred to increased as to present to his vision an impenetrable wall from a point 400 or 500 feet distant. Of course the further to the west from such rail that one stood, the further away would be the point at which the poles would so run together as to completely obstruct his view of the easterly track. There was evidence from which it might properly be concluded that the station or waiting room would, for a moment, prevent one approaching the westerly track from seeing a car on the easterly track in its vicinity. As we have said, this accident occurred on a Sunday afternoon. The crossing was one much used by automobiles going to and from Long Beach, and naturally there was more of this on Sunday than on other days. Apparently there was no device at the crossing to warn those approaching it of the proximity of cars of the defendant. There was testimony of such a nature as to legally support a conclusion that no whistle was sounded or bell rung until the warning whistle was given when the approach of the automobile was discovered by the motorman on the train, which was apparently at or after the time that Loftus saw the train and was endeavoring to stop his machine. As we have said, the jury was warranted in concluding that the train was going at the rate of 40 miles an hour, or about 60 feet a second.

[3] We do not think that it can fairly be held, as matter of law, that the defendant was not guilty of negligence in view of the circumstances stated. It is said that the only negligence asserted is the excessive

speed of the train, and that a rate of speed of 35 or 40 miles an hour for an interurban train at and near the point where the accident occurred is not so excessive as to constitute negligence. As was said in *Bilton v. Southern Pacific Co.*, 148 Cal. 443, 447, 83 Pac. 440, 442: "There can be no doubt that the question as to whether or not a rate of speed at a crossing is so dangerous or excessive as to constitute negligence must depend upon the particular circumstances there existing, and if the circumstances are such that reasonable and impartial men may well differ as to whether the speed maintained at the particular place showed a want of reasonable care, the question as to whether the railroad company was guilty of negligence in maintaining such speed is one for the jury" (citing authorities). It is true that in the *Bilton* Case the evidence was of such a nature as to show a more dangerous crossing than that in the case at bar. But we do not feel warranted in holding that the circumstances appearing in this case were not such that reasonable and impartial men might not well differ on the question of defendant's negligence. We have here a public street in a fairly populated neighborhood, the photographs in evidence showing at least six houses fronting on American avenue within 1,000 feet, crossing the tracks of defendant; a crossing much used by automobiles and other vehicles, especially on Sundays; a crossing apparently without any device to warn those approaching it of the proximity of trains or cars of the defendant; a line of poles 12 inches in diameter at intervals of 90 feet between the two tracks, which necessarily must more or less obstruct the vision of one approaching the crossing, so far as the track on the other side is concerned, from a point a few hundred feet from the crossing; a small waiting room or station about 1,000 feet from the crossing which had the effect of shutting out, for a moment at least, from the view of one approaching the crossing from the westerly side anything on the easterly track of defendant just below such structure; the failure to sound a whistle or give other indication of the approach of the train until within 200 or 300 feet of the crossing. The evidence was such as to legally support a conclusion that all these circumstances existed. Assuming the situation to have been as described, as we must do, in view of the verdict, we are clearly of the opinion that it may not be held, as matter of law, that defendant was not guilty of negligence. And, if this be so, the findings of the jury, and the conclusion of the learned trial judge on motion for new trial, so far as this question is concerned, are conclusive upon us.

[4] It is claimed that the driver of the automobile and plaintiff were both guilty of contributory negligence. In response to a special interrogatory submitted, the jury found that Loftus used ordinary care at

the time of the accident. No interrogatory was submitted as to plaintiff, but the general verdict in her favor necessarily, in view of the instructions to the jury, implies a finding in her favor on the question of contributory negligence. It is unnecessary here to consider the question of the correctness of the finding as to Loftus. As already stated, plaintiff was simply a guest of Mr. Loftus on this ride, and he was in no way subject to her control or under her supervision or direction as to the manner in which the automobile should be operated. Under such circumstances, any negligence of Mr. Loftus could not be imputed to her. As said in *Fujise v. Los Angeles, etc., Ry. Co.*, 12 Cal. App. 207, 211, 107 Pac. 317, 319: "In order that contributory negligence shall prevent the recovery of damages for a personal injury, it must appear that the negligence is that of the injured person, or of some one over whom he exercises some control." The only question in this connection, so far as plaintiff is concerned, is whether she exercised ordinary care for her own safety. See *Thompson v. Los Angeles, etc., Railway Co.*, 134 Pac. 709; *Fujise v. Los Angeles Ry. Co.*, supra; *Bresee v. Los Angeles T. Co.*, 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059. We have considered the evidence bearing on this question, and find no warrant whatever for holding that, as matter of law, she was in any way negligent.

[5] It is claimed that the verdict and special verdict are against law simply because they are in violation of two certain instructions given to the jury on the question of contributory negligence. It is manifest from a reading of these instructions that they could in no degree have prejudiced defendant's cause. An objection of this character assumes that an instruction relied on is not correct as matter of law, but that under it the party objecting was nevertheless entitled to a verdict, and that for the failure of the jury to observe it, he is entitled to a reversal. This was the rule declared by this court in *Emerson v. County of Santa Clara*, 40 Cal. 543, and one or two subsequent cases. This rule has been entirely discredited and overruled in later cases. The rule now is "that while the jury should conform to the instructions of the court upon matters of law, if it appear to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such erroneous instruction." See *O'Neill v. Thomas Day Co.*, 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970. "The fact that the court erroneously instructed the jury to the contrary does not make the verdict against law." *O'Neill v. Law Union, etc., Co.*, 135 Pac. 1124.

[6] Complaint is made of a portion of an instruction given on the subject of contributory negligence, reading as follows: "But in law, to sustain the defense of contributory negligence on the part of the plain-

tiff, Mrs. Tousley, it must appear from the evidence that it was the personal failure of the plaintiff to exercise ordinary care that caused her injuries." This was a portion of a somewhat lengthy instruction informing the jury substantially that if plaintiff was riding in an automobile then owned and driven by Mr. Loftus, and if she had neither control of nor right to control him, the carelessness of the driver, if any, contributing to the injuries of plaintiff, could not be imputed to her so as to constitute contributory negligence on her part; but in such case, to sustain the defense of contributory negligence on her part, it must appear as above stated. The portion complained of was immediately followed by this: "And you are therefore instructed that if you believe that at the time of the accident the plaintiff used ordinary care—that is, the care that an ordinarily prudent person would have exercised under the same or similar circumstances—then you cannot find that she has been guilty of contributory negligence." The instruction, fairly taken as a whole, means no more than that to sustain the defense of contributory negligence on the part of Mrs. Tousley, she personally, as distinguished from the driver of the car, must have been guilty of want of ordinary care contributing to her injuries, if, of course, the jury found that she was but a guest of the driver, and had no control or right of control over him. We do not think that it is fairly susceptible of the construction claimed for it by defendant, or that it could have been understood by the jury in any other way than we have stated.

[7] We see no good objection to the instruction marked "Court's 27." Fairly considered, it told the jury no more than is conceded by learned counsel for defendant to be the law, viz., that the conduct of the plaintiff when she found herself placed in sudden peril by the negligence of the defendant, if she was so placed, was to be judged in view of the circumstances and surroundings, and not by the standard applicable to one not conscious of being in a position of danger. The jury was told that she was required to use ordinary care to protect herself, which, it was further told, was the care that an ordinarily prudent person would use under the same or similar circumstances, considering the danger, proximity of the car, speed of the car, her position in the automobile, and all other circumstances proven to have occurred at the time of the accident. "It must be remembered that a person in great peril, when immediate action is necessary to avoid it, is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." *Harrington v. Los Angeles, etc., Ry. Co.*, 140 Cal. 521, 74 Pac. 17, 63 L. R. A. 238, 98 Am. St. Rep. 85.

[8] We are of the opinion that the trial

court was justified in refusing to give defendant's requested instruction No. 26. The instruction was clearly in part an instruction as to facts, an instruction upon matters that it was within the exclusive province of the jury to determine, in view of the evidence.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.

LOFTUS v. PACIFIC ELECTRIC RY. CO.
(L. A. 3221.)

(Supreme Court of California. Dec. 3, 1913.
Rehearing Denied Jan. 2, 1914.)

1. RAILROADS (§ 327*)—CROSSINGS—CARE REQUIRED OF TRAVELERS.

An electric railroad track on the company's private right of way, except at street crossings, is of itself a sign of danger, and a traveler approaching the track with intent to cross it must look and listen to ascertain whether cars are approaching.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1056; Dec. Dig. § 327.*]

2. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—QUESTION FOR COURT OR JURY.

Whether one sustaining a personal injury was guilty of contributory negligence is for the jury, and is for the court only where the facts are undisputed, and then only where on such facts reasonable minds can draw but one conclusion.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

3. RAILROADS (§ 348*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

A conflict in the evidence on the issue of the contributory negligence of a traveler struck by an interurban car at a street crossing must be substantial; and where the established facts make it plain that a traveler, looking and listening, must have seen or heard the approaching train, the testimony that he looked and listened, but did not hear or see, will not support a verdict in his favor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.*]

4. RAILROADS (§ 350*)—INJURIES IN COLLISIONS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether a traveler struck by an interurban car at a street crossing was guilty of contributory negligence *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by William M. Loftus against the Pacific Electric Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

J. W. McKinley and R. C. Gortner, both of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

SLOSS, J. This is an action to recover damages for personal injuries sustained through the alleged negligence of defendant. The plaintiff was driving an automobile which collided with one of defendant's electric cars. The plaintiff recovered judgment in the sum of \$2,000, and the defendant appeals from said judgment and from an order denying its motion for a new trial.

In the collision which gave rise to this action, Mrs. D. Augusta Tousley, who was riding in plaintiff's automobile as his guest, also suffered injuries, on account of which she brought an action against defendant. The defendant's appeals in that action, which resulted in a judgment in favor of plaintiff therein, have just been disposed of in *Tousley v. Pac. Elec. Ry. Co.* (L. A. No. 3222) 137 Pac. 31. So far as the points here involved are concerned, the evidence in the record now before us is identical with that shown in the *Tousley Case*. We may, therefore, refer to the opinion in that case for a general review of the facts surrounding the collision.

But two points are made by the appellant. It is claimed, first, that there was no evidence to justify the finding that the defendant had been guilty of negligence. The views expressed in the *Tousley Case*, where the question is fully considered, furnish a sufficient answer to appellant's claim in this connection.

The only other contention urged is that, on the evidence, the plaintiff was, as matter of law, guilty of contributory negligence, and that, accordingly, his right of recovery should not have been submitted to the jury. While plaintiff's negligence was not a matter for decision in the other case, much light is thrown upon the issue by what is said in the opinion in that case. It appears, as is there pointed out by Mr. Justice Angellotti, that the evidence was such as to justify the inference that a person on or over the westerly rail of the westerly track would not be able to see a car approaching the crossing on the easterly track until it had come to within 400 or 500 feet. There was also evidence that the car of defendant was going at the rate of 40 miles an hour, or about 60 feet a second. At this rate it would traverse 400 feet in seven seconds, or thereabouts. The plaintiff, according to his testimony, slowed down and looked before he got onto the west track, but saw no car approaching. He looked again when he got "about the middle of the west track," and saw the electric car, "about three or four pole lengths down." (The poles were 90 feet apart.) He then, as he testifies, used every effort to stop his automobile, but failed to do so in time to avert a collision. The extreme front of the automobile extended some six feet beyond the driver's seat. The electric car had an "overhang" of 23 inches beyond the rails, the steps extending 4 inches

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

further. The space between the tracks was 9 feet. Assuming that the tracks were standard gauge—4 feet, 8½ inches—it was necessary for the front of the automobile to traverse a distance of only about 3 feet in order to bring it to the line covered by the extreme width of the electric car. It cannot be said that the plaintiff was necessarily at fault in not bringing his automobile to a stop in this distance. He testified that he was going at a rate of two or three miles an hour, and there was evidence that his automobile, or one like it, could, if moving at a rate of three miles an hour, be brought to a stop "within three or four feet."

[1] The claim of contributory negligence must, then, rest upon plaintiff's prior conduct in approaching the defendant's track as he did. It is unnecessary to enlarge upon the well-settled rule that a railroad track is in and of itself a sign of danger, and that one approaching such track with intent to cross it is bound to exercise his faculties of sight and hearing in order to ascertain whether a train is approaching. *Herbert v. S. P. Co.*, 121 Cal. 227, 53 Pac. 651; *Zibbell v. S. P. Co.*, 160 Cal. 237, 116 Pac. 513. While these requirements of care have usually been applied to persons seeking to cross the track of a steam railroad, they are also fairly applicable to crossings over the track of an electric railway, constructed and operated as the defendant's road was. *Heltman v. Pac. El. Ry. Co.*, 10 Cal. App. 397, 402, 102 Pac. 15; *Simoneau v. Pac. El. Ry. Co.*, 159 Cal. 494, 504, 115 Pac. 320, Ann. Cas. 1912C, 1205.

[2] Ordinarily, of course, the question whether a plaintiff has been guilty of contributory negligence is one of fact for the jury. It becomes a question of law for the decision of the court only where the facts are undisputed, and, even then, only where, on those facts, reasonable minds can draw but one conclusion on the issue of plaintiff's negligence. *Herbert v. So. P. Co.*, supra; *Johnson v. S. P. R. R. Co.*, 154 Cal. 285, 97 Pac. 520; *Hoff v. L. A. P. Co.*, 158 Cal. 597, 112 Pac. 58; *Zibbell v. S. P. Co.*, supra. "It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury. * * *" *Seller v. Market St. Ry. Co.*, 139 Cal. 268, 271, 72 Pac. 1006.

[3] These observations are subject to the qualification that, in this class of cases as in others, the conflict of evidence which creates a question of fact for the jury must be substantial and real. If the established facts and conditions are such as to make it plain that a plaintiff, looking and listening, must have seen or heard an approaching train, his testimony that he looked and listened, but did not see or hear, is not enough to support

a verdict in his favor. *Zibbell v. S. P. Co.*, supra, and cases cited.

[4] We think the present case is not one in which it can be said that the uncontradicted evidence forces the conclusion that the plaintiff approached the track without exercising the care which an ordinarily prudent man, situated as he was, would have exercised. Before he turned his automobile to cross the track, he brought his machine to a stop, or nearly to a stop, and, as he testified, looked and listened to ascertain whether a train was approaching. At that time the train was still at such a distance and so placed as, under the evidence, to justify the inference that it could not be seen or heard by one in plaintiff's position. As he advanced, after turning to cross the tracks, the point beyond which the easterly track was hidden by the line of poles was constantly coming nearer to him, as was the train. Under all the circumstances, there is nothing unreasonable in the inference that the train could neither be heard nor seen by plaintiff from the time he first slowed down until he reached the point, on the west track, where, as he says, he became aware of the fact that a train was approaching. This being so, the jury had the right to believe, from the plaintiff's story, that he took advantage of every opportunity to learn of the possible approach of a train, and that, notwithstanding his precautions, he could not, and did not, know that a train was nearing the crossing until he was in a position of danger from which he was unable, by the exercise of ordinary care, to extricate himself. *Bilton v. S. P. Co.*, 148 Cal. 443, 83 Pac. 440. The question of contributory negligence "was one upon which reasonable men might well differ. This being so, it was a question for the jury." *Hoff v. L. A. P. Co.*, supra. The court did not, therefore, err in submitting this issue to the jury, and the verdict thereon cannot be said to be contrary to the evidence.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

IN RE WALDEN'S ESTATE.

MONRO et al. v. LATIMER et al.
(L. A. 3418.)

(Supreme Court of California. Dec. 3, 1913.
Rehearing Denied Jan. 2, 1914.)

1. APPEAL AND ERROR (§ 1011*)—FINDINGS—REVIEW.

A finding by the trial court as to matter of heirship, in a proceeding to determine the right of succession when based on conflicting evidence, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3963-3989; Dec. Dig. § 1011.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—ABUSE OF DISCRETION.

Even though all the testimony was given by deposition, a finding of fact by the trial court will not be disturbed on appeal unless an abuse of discretion appears.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. EVIDENCE (§ 295*)—HEARSAY—DECLARATIONS—HEIRSHIP.

Statements by members of decedent's family concerning family history and relationship, made after the controversy as to the right of the estate of decedent had arisen, and in reply to questions propounded to elicit evidence, are inadmissible; such declarations being admissible to prove pedigree or relationship only when made naturally and spontaneously before any controversy arises.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1153; Dec. Dig. § 295.*]

4. JUDGMENT (§ 736*)—CONCLUSIVENESS—MATTERS CONCLUDED.

A decree distributing the estate of a decedent is not conclusive on the question of the heirs of the sole distributee, where she subsequently died, and plaintiff claimed to be entitled to her estate even though plaintiff, if the heir of the sole distributee was entitled to share in the estate of the first decedent, for right to inherit from the distributee could not have been determined in that proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1264, 1265; Dec. Dig. § 736.*]

5. NEW TRIAL (§§ 104, 105*)—RIGHT TO NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The trial court, in its discretion, may deny a new trial sought on the ground of newly discovered evidence, where it is merely cumulative, or tends only to impair the credibility of the evidence of the prevailing party.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 218-223, 229; Dec. Dig. §§ 104, 105.*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Matilda Walden, deceased. Proceeding between Martha Monro and others and William Latimer and others to determine the succession. From a judgment for plaintiffs, defendants appeal. Affirmed.

Elon G. Galusha, of Los Angeles, for appellants. C. M. Stephens, Geo. P. Adams, William T. Kendrick, Leland S. Bower, Williams, Goudge & Chandler, Charles Cassat Davis, Ball & Ball, and Trusten P. Dyer, all of Los Angeles, for respondents.

SHAW, J. This is an application, under section 1664 of the Code of Civil Procedure, to have the succession to the estate of Matilda Walden determined. The court adjudged that Martha Monro was a niece of the decedent, and was entitled to one-half of the estate, and that the five children of Jane Ross, deceased, who was also a niece of the decedent, were entitled to the remaining half. William Latimer and five other persons, claiming as descendants of James Latimer, a deceased uncle of the decedent, have ap-

pealed from this judgment and from an order denying their motion for a new trial.

The decedent, Matilda Walden, a childless widow, was the last survivor of the five children of William Wilson and Martha Wilson. The names of the five brothers and sisters were John Wilson, George Wilson, Matilda Wilson, Eliza Wilson, and James Wilson. John, George, and Eliza died childless. The controversy in this case arose over the question whether or not James, the other brother, died without issue. The court decided that he had children, of whom the said Martha Monro and the children of Jane Ross aforesaid are the only survivors. These, being the next of kin, were awarded the succession to the estate. The principal contention of the appellants is that this decision is not sustained by sufficient evidence.

[1, 2] There is no ground upon which this court can interfere with the decision of the court below upon this question. The fact that James Wilson was a brother of the decedent, and that the above-mentioned persons are his surviving child and grandchildren, was established by the testimony of said Martha Monro, Robert Ross, Sarah Warren, Robert Wilson, Eliza Roe, Thomas Jones, Richard Kells, and John Morton. There is nothing in this case to distinguish it from the ordinary case where a decision is rendered upon conflicting evidence. While it is true that the witnesses did not, upon cross-examination, sustain themselves to the entire satisfaction of the appellants, nevertheless, their testimony, if true, was sufficient to prove the validity of the claims of the respondents, and the decision of the court below as to their credibility is conclusive upon this court. Even if we concede the claim of the appellants that the appellate court may weigh the evidence where all of the testimony is given by deposition, it is not of such a character that we would be justified in reversing the decision of the trial court upon the ground that it was an abuse of discretion. Unless such abuse appears, the finding must stand.

[3] The testimony of the appellants' witness Miss Leckey to conversations she had in Ireland with members of the Wilson family, in which it is claimed they made statements concerning the family history and relationship, was properly excluded by the court below. The conversations took place after this controversy over the succession to Matilda Walden's estate arose. Such declarations are not admissible to prove pedigree or relationship, except when they are made by the members of the family as natural or spontaneous declarations on the subject and before any dispute has arisen over the question or any claim has been made to the establishment of which the declarations would be material. Estate of Hartman, 157 Cal. 213, 107 Pac. 105, 36 L. R. A. (N. S.) 530, 21 Ann. Cas.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1302; 2 Wigmore on Ev. § 1483. Here it appears that the purpose of the conversations was to obtain evidence concerning the heirship to this estate, and hence they were without the sanction which the law requires in order to make them admissible.

[4] The record shows that a statement signed by Matilda Walden was "offered in evidence," and it then proceeds as follows: "The paper was produced from the court files in the estate of John Wilson, which estate was distributed to decedent as the only heir of John Wilson in 1898, and the decree of distribution was offered in evidence." It appears to be assumed that this is a sufficient statement that the decree was made by a court of competent jurisdiction in a proceeding regularly and duly had before it. It does not appear that the decree was actually received in evidence, and counsel differ upon this point. Assuming that it was so received, appellants make the following as their sole argument thereon: "The decree of distribution in the estate of John Wilson is conclusive on the heirs of John Wilson, deceased, including Martha Monro. Quirk v. Rooney, 130 Cal. 508 [62 Pac. 825]." The case just cited declares the principle that a decree of distribution, duly made, is conclusive upon those who may thereafter claim the property as heirs of the person whose estate was thereby distributed. But it also recognizes the rule that such a decree is not conclusive as to the facts on which such heirship depends when they arise collaterally in another action. That case was a second appeal; the previous case appearing as *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565. In the case last cited it appeared that the court, in distributing the estate of one Bryan Lynch to Catherine Clark, had found and adjudged that she was the sister and sole heir of Bryan Lynch, in effect, adjudging that, as to that heirship, there were no other brothers or sisters, or descendants of any, living at the death of Lynch. Yet it was there averred and proved that a brother Patrick and the children of a sister Nancy had also survived Bryan, and that the children of Patrick were entitled to a part of the property by virtue of a trust declared therein by Catherine Clark's grantee. In the present case the right to inherit the estate of John Wilson is clearly not the same thing as the right to inherit the estate of Matilda Walden. The latter right could not have been adjudicated until after it accrued. When such an issue was presented for adjudication, it must necessarily have been determined upon the evidence then presented. The fact of relationship, upon which it depends, may be the same as in the case of the estate of John Wilson; but the former adjudication as to John Wilson is not conclusive as to kinship upon the inquiry as to Matilda Walden, although it may have been admissible as evidence on the subject. It is

to be presumed that there was no contest over the question upon the settlement and distribution of the estate of John Wilson, since the appellants have not presented any record disclosing such contest.

[5] We cannot say that the court below abused its discretion in denying the motion for a new trial so far as it was based on newly discovered evidence. All of the new evidence presented comes within the well-established rule that the trial court may, in its sound discretion, refuse a new trial upon this ground, where the new evidence is merely cumulative, or where it tends merely to impair the credibility of the evidence of the prevailing party. *Chalmers v. Sheehy*, 132 Cal. 462, 64 Pac. 709, 84 Am. St. Rep. 62; *People v. Goldenson*, 76 Cal. 352, 19 Pac. 161; *Wood v. Moulton*, 146 Cal. 322, 80 Pac. 92; *Stoakes v. Munroe*, 36 Cal. 388; *People v. Weber*, 149 Cal. 350, 86 Pac. 671. These comprise all the questions presented in the briefs.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

In re PRAGER'S ESTATE. (L. A. 3502.)

(Supreme Court of California. Dec. 3, 1913.)

1. WILLS (§ 782*)—COMMUNITY ESTATE—ELECTION OF WIDOW.

The second paragraph of a will directed that all realty owned at testator's death, located outside a certain city, be distributed to persons named, and provided that, if any of them be dead at testator's death, then the share to which such person would be entitled should be distributed to his heirs; and the third paragraph provided that all the rest of testator's estate, including all realty owned in such city and all personal property, was given to his wife absolutely. The total value of testator's real estate was \$630,321, and the real estate situated outside the city was valued at \$179,928, all of this being community property; and there was other community property, largely personalty, valued at \$16,000, and two lots within the city valued at \$54,000. The separate property consisted of land in the city appraised at \$380,000. Held, that the widow was not required by the will to elect whether she should take her interest in the community property or take under the will, but could take both.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

2. WILLS (§ 486*)—PROPERTY DEVISED—PRESUMPTIONS.

It is presumed that a will was made with knowledge that testator's power of disposition did not extend to his widow's interest in the community property but only to his separate property and an undivided half of the community property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016-1022; Dec. Dig. § 486.*]

3. WILLS (§ 782*)—ELECTION BY WIFE.

That a provision made for testator's wife is very liberal would not justify the conclusion that it was intended to be in lieu of her interest in the community estate as survivor, so as to require her to elect; she only being

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bound to elect where the will clearly shows an intention to make the gift to her stand in lieu of her interest in the community property.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

4. WILLS (§ 740*)—ESTOPPEL BY AGREEMENT.

An agreement, between testator's widow and the beneficiary, made for a consideration in compromise of a disagreement as to the rights of the parties under the will, by which the beneficiary waived her objection to the widow's claim to take under the will, as well as one-half of the community property, would estop the beneficiary from denying such claim by the widow.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1888-1896; Dec. Dig. § 740.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

In the matter of the Estate of Charles Prager, deceased. From a decree of settlement and distribution, Fannie Prager Cohn, a devisee, appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, for appellant. O'Melveny, Stevens & Milliken and Oscar Lawler, all of Los Angeles, for respondent.

SLOSS, J. Fannie Prager Cohn, one of the devisees under the will of Charles Prager, deceased, appeals from a decree of settlement of final account and of distribution.

The will, so far as its terms are material here, provides as follows: "Second. I direct that all of the real property owned by me at the time of my death, situate without the corporate limits of the city of Los Angeles, be distributed to the following named persons, share and share alike, to wit: My brother, Morris Prager; my nephews Lesser, Michael and Harry Prager; and my nieces, Eva and Bella Prager, and Regina Feintuch, Fannie Cohn, Celia Cohn, and Rosa Eppstein, provided, however, that should any of said persons in this paragraph named be dead at the time of my decease, then and in that event I direct that the share to which said person would be entitled, if living, be distributed to his or her heirs at law by right of representation." The third paragraph gives to one of the nephews certain jewelry; the fourth bequeathed \$1,000 to Helen Jane Lawler. Then follows this provision: "All the rest, residue and remainder of my estate, of every kind and character, including all real property owned by me within the corporate limits of the city of Los Angeles, and mortgages, notes, bonds and other personal property of every description, I give, devise and bequeath unto my wife, Mary J. Prager, absolutely." The widow and Oscar Lawler were named as executrix and executor. By a codicil the testator bequeathed three legacies of \$15,000 each, but made no other change in the disposition of his property.

Charles Prager died on the 14th day of September, 1911. The total value of the estate, as shown by the appraisement, was

\$630,321.67. The real property situate outside of the city of Los Angeles, covered by paragraph second of the will, was appraised at \$179,928.50. All of this was community property. There was other community property consisting principally of a note secured by mortgage and two bonds, said note and bonds, together, being of the appraised value of \$16,000, also two parcels of land in the city of Los Angeles, appraised at \$54,000. The separate property of the decedent consisted of land in the city of Los Angeles, appraised at \$380,000.

Very shortly after the testator's death, the widow, Mary J. Prager, through her attorney and coexecutor, Mr. Lawler, informed the devisees named in the second paragraph that she claimed the right to succeed to one-half of the community property, in addition to taking what was given her by the will. Most of the said devisees at once conceded the validity of this claim. For a considerable period during the administration, two of them, Mrs. Fannie Prager Cohn and Mrs. Celia Prager Cohn, opposed the position of the widow, contending that she was put to her election to take under the will or as survivor of the community. Mrs. Celia Cohn finally abandoned her opposition, and Mrs. Fannie Cohn, the appellant, remains as the only one of the devisees now contesting the widow's claim.

By a decree of partial distribution, the real property outside the city of Los Angeles was distributed as follows: One-half thereof to Mary J. Prager, as surviving widow of the decedent; and the other one-half in equal shares of an undivided one-twentieth each to the ten persons named in paragraph second, or their assigns. Thereafter, the specific and pecuniary legacies having been satisfied, the court made the decree here appealed from, by which the residue of the estate (with the exception of one item of property not ready for distribution) was distributed to the widow. The claim of the appellant, Fannie Cohn, is that the widow, by taking under the decree of partial distribution one-half of the community property not devised to her, had manifested her election to forego the benefits given her by the will.

[1] Reading the will by itself or in the light of the circumstances shown by the record, we find no ground for holding that the widow was called upon to surrender either her interest in the community property or the devises and bequests given her. The rules of law governing the question of election in cases like the present have been declared in numerous decisions of this court.

[2] The testator is presumed to have made his will with knowledge that his power of testamentary disposition did not extend to the surviving wife's interest in the community property. The presumption is further that he did not intend to devise or bequeath

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the one-half of the community property which, upon his death, would vest in his widow irrespective of any attempt that he might make to dispose of it by will. In the absence of anything in the instrument to indicate a contrary intent, the testamentary dispositions must accordingly be understood as intended to cover only the property which the testator had the right to devise or bequeath; i. e., his separate property and an undivided half of the community property.

[3] The mere fact that provision, however liberal, is made in the will for the wife is not enough to justify the conclusion that such provision was intended to be in lieu of her interest as survivor of the community. *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Estate of Silvey*, 42 Cal. 211; *King v. Lagrange*, 50 Cal. 328; *Estate of Frey*, 52 Cal. 658; *Estate of Gwin*, 77 Cal. 313, 19 Pac. 527; *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655; *Estate of Smith*, 108 Cal. 115, 40 Pac. 1037; *Estate of Wickersham*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437; *Estate of Vogt*, 154 Cal. 508, 98 Pac. 265. The widow's obligation to elect arises only where the testator has, by the terms of the will, clearly manifested the intention to make the testamentary gift to her stand in lieu of her interest in the community property. The provision may be "declared in terms to be given in lieu of" the right as survivor of the community (*Morrison v. Bowman*, 29 Cal. 337), or the language of the will may be such as to show clearly an intent to dispose of the whole of the community property in such manner that "the widow cannot take the moiety given her by law without, to that extent, defeating the plain intent of the testator" (*Estate of Vogt*, supra; *Estate of Stewart*, 74 Cal. 98, 15 Pac. 445; *Estate of Smith*, supra).

The will before us does not declare that the gifts to the widow shall be in lieu of her community right. Neither do its provisions show an intention which would be frustrated by permitting the widow to take both her moiety of the community property and the residue given to her. The property given to the widow included both separate and community estate. Some of the community property (i. e., the land outside the city of Los Angeles) was devised to the persons named in paragraph second. There is nothing to indicate that the latter provision was intended to operate as a gift of more than the share which was subject to the decedent's testamentary disposition. Applying the presumptions of which mention has been made, the will discloses a simple and consistent scheme, which may be carried out in every respect without affecting the widow's right to claim her lawful interest in the community property. In every case in which the widow has been held to be put to her election, the will contained language which, when read in the light of the circumstances, showed plainly that the testator was undertaking to dispose of the

entire community property, and that his intention could not be given effect if one-half of such property were withdrawn from the operation of the will. This case presents no such features. On the contrary, it is in every material respect like a number of those, above cited, in which this court concluded that no duty of election arose.

But, in any event, the decree must be sustained upon another ground. In addition to her claim that, under the will, she was entitled to both her community interest and the residuary legacy and devise, the widow relied upon, and set up in her petition for distribution, an agreement made between her and the beneficiaries under paragraph second whereby, for a good consideration, the latter agreed that she should take under the will as well as in her capacity as survivor of the community. The court found in favor of these allegations; its findings being in brief as follows: In order to settle and compromise the conflicting claims of the widow and said Fannie Prager Cohn, it was agreed by the widow and all of the beneficiaries under paragraph second that said Fannie Prager Cohn would admit the right of the widow to take all of the property of the estate claimed by her; that the parties to the agreement would all join in a petition for partial distribution of the property outside of the city of Los Angeles, in the proportions of one-half to the widow and an undivided one-twentieth to each of said beneficiaries or his or her assigns; that all of the parties would execute to Herman Cohn, husband of Cella Cohn, an option to purchase said property for \$185,250, such sum, when paid, to be divided among the parties in the proportions named in the petition for distribution to be filed. As one of the considerations passing to Fannie Cohn for making said compromise and settlement, it was agreed that Herman Cohn would pay to said Fannie a share of the profit which he might realize on said option; such share to be \$16,750, if such profit should amount to \$64,500. A further consideration was the assignment by the widow to Cella and Fannie Cohn for \$5,000 and interest of Lesser Prager's interest in the estate; such interest having been theretofore purchased by the widow. This agreement was carried out in all its parts. The parties petitioned for partial distribution, which was granted as already stated. The parties to the settlement united in an option to Herman Cohn, authorizing him to purchase the property so distributed at any time within six months for \$185,250. An assignment of the interest of Lesser Prager was executed by the widow to Herman and Nathan Cohn, designated by their respective wives to receive the same, and deposited in escrow with instructions to deliver upon payment of the agreed sum of \$5,000 and interest. It was subsequently paid for and delivered. Herman Cohn sold his option at a profit of \$64,500 of which Fannie Cohn received \$16,750.

She also received moneys accruing on account of the interest of Lesser Prager, assigned as aforesaid, as well as her share of the sum of \$185,250 paid as the purchase price of the lands outside of the city of Los Angeles.

[4] Whatever may have been the original legal rights of the widow, it is too plain for discussion that this settlement and compromise, whereby the appellant, in consideration of the option and transfer, agreed to waive her objection to the widow's claims, operated, when fully executed, to estop and preclude said appellant from claiming that the widow was not entitled to succeed to one-half of the community property and to take as well the residue of the estate. And such was the conclusion of law drawn by the court from the facts above recited. The appellant does not question the propriety of this conclusion; her only contention in this regard being that the facts found are not supported by the evidence. The contention is without merit. The making of the agreement of compromise, so far as it was not covered by documentary evidence, was fully set forth in the testimony of Mr. Lawler, who was corroborated on essential points by several of the beneficiaries, as well as by Herman and Nathan Cohn; the latter being the husband and authorized agent of the appellant. There was, indeed, little, if any, substantial contradiction of this testimony, but, if there had been, the determination of the trial court on conflicting evidence is, of course, not open to attack here. The execution of all the terms of such agreement was likewise established by clear proof.

The decree is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

W. B. McGERRY & CO. v. MARSICANO.
(Civ. 1,274.)

(District Court of Appeal, First District, California. Oct. 21, 1913.)

1. BROKERS (§ 85*)—COMMISSIONS — CUSTOMARY RATE—RESOLUTION OF BROKERS' BOARD.

In an action for broker's commissions in negotiating a long lease of real property, evidence that shortly after 1906 the real estate board of brokers in San Francisco, where the services were performed, established a scale of commissions for negotiating leases of real property, and that the rate fixed was $2\frac{1}{2}$ per cent. of the first year's rental and $1\frac{1}{2}$ per cent. on the rental for the remainder of the term, was admissible as showing a customary rate; there being other evidence that such charge was reasonable, usual, and customary.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106-115; Dec. Dig. § 85.*]

2. APPEAL AND ERROR (§ 1010*) — REVIEW — QUESTIONS OF FACT.

Power to determine questions of fact is vested exclusively in the trial court in civil cases, and its determination is controlling on the

appellate court when substantial evidence exists to support the finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Appeal from Superior Court, City and County of San Francisco; Clarence A. Raker, Judge.

Action by W. B. McGerry & Co. against Patrizio Marsicano. From a judgment for plaintiff and from an order denying defendant's motion for a new trial, he appeals. Affirmed.

John J. Roche, of San Francisco, for appellant. Sullivan & Sullivan and Theo. J. Roche, all of San Francisco, for respondent.

KERRIGAN, J. This action was brought to recover the sum of \$8,865 for services performed by the plaintiff corporation as broker in negotiating a lease of real property in San Francisco belonging to defendant. Judgment went for plaintiff for the full amount demanded in the complaint. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

The lease negotiated by plaintiff was for a period of twenty-five years, and by its terms the rent for the first five years was to be \$1,500 per month, or \$18,000 a year; for the second period of five years the monthly rent was to be \$1,750, aggregating for that period \$105,000; for the third period of five years the monthly rental was \$2,000, making for that period of time the sum of \$120,000; for the remaining ten years of the lease the monthly rental was \$2,200, amounting in that time to \$264,000. The total of the rent thus reserved to the defendant under the lease amounted to the sum of \$579,000. In addition to the obligation to pay this amount, the lessee was to erect a building upon the leased land which, at the expiration of the term, was to become the property of the lessor. Furthermore, all taxes and other charges against the property were to be paid by the lessee. Plaintiff's claim for compensation for its services in negotiating said lease was based upon a percentage of $2\frac{1}{2}$ on the first year's rental, amounting to the sum of \$450, and $1\frac{1}{2}$ per cent. on the rental for the remainder of the term, amounting to \$8,415, making a total of \$8,865. This amount was claimed by the plaintiff to be the reasonable value of the services rendered by it for the benefit of the defendant. It was claimed by the defendant at the trial as it is now claimed here, that when he employed the plaintiff to effect the lease it was agreed that no commission was to be paid by him, but that the plaintiff should look to the lessee for compensation for its services. Plaintiff denied that any such agreement existed, and the evidence produced at the trial pro and con upon this question made a substantial conflict, the determination of which by the trial court, counsel for defendant concedes, is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

binding upon this tribunal under a well-established rule.

[1] It is contended, however, by defendant that the evidence was entirely insufficient to justify the decision of the court in allowing the plaintiff more than \$1,500, the amount of the first month's rent under the lease, which the president of the plaintiff corporation admitted it was willing to take rather than have a lawsuit and the attendant expense of the employment of attorneys.

The evidence shows that shortly after the earthquake and fire of 1906 the real estate board of brokers in San Francisco passed a resolution, attempting to establish a scale of commissions to be charged by brokers for negotiating leases of real property; and the president of the plaintiff acknowledged, when his deposition was taken prior to the trial, that the plaintiff's charge in this case was based upon that resolution. Defendant insists that a customary rate cannot be shown in this manner, and cites the case of *Laver v. Hotelling*, 115 Cal. 613, 47 Pac. 593, where a charge made by an architect upon such a basis was held to be unwarranted as to those who had not made the resolution a part of their contract; and that no one is held to make it a part of his contract unless charged with knowledge of it. In that case the judgment was upheld upon the ground that there was evidence that the customary and reasonable rate of charge was the same as the one established by the resolution of the architects' association. The very character of evidence held to be necessary in the *Laver* Case was produced by the plaintiff in this case. Four witnesses, real estate brokers, including the president of the plaintiff (the person who negotiated the lease), testified that the usual and customary charge and a reasonable charge in San Francisco for services such as those rendered by plaintiff, at the time of their rendition, was $2\frac{1}{2}$ per cent. on the first year's rental and $1\frac{1}{4}$ per cent. on the rental for the remainder of the term. Defendant's counsel admits that, standing alone, the direct evidence of these witnesses would support the finding of the court as to the value of the services rendered; but claims that, taken in connection with their cross-examination, the basis of their estimates of value cannot be upheld; that such estimates are fallacious and cannot be relied upon because based upon grounds illusory and unsubstantial. In this he is partly supported by the record as to some of the witnesses; but the testimony of witness McGerry is positive as to the charge being reasonable, usual, and customary, and this witness was not cross-examined upon this point, and his testimony is nowhere in the record at all impaired. Besides this, the defendant had an opportunity of presenting witnesses to prove that the charge was not reasonable nor customary, but he failed to produce a single witness to disprove this claim of the

plaintiff. From all the testimony presented the trial court found the sum sued for to be a reasonable charge, and we are constrained to say that the record presents sufficient evidence to support this conclusion.

[2] The power to determine questions of fact is vested exclusively in the trial court in civil cases, and its determination is controlling when substantial evidence exists to support its finding. *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

NICHOLS v. DAVIS et al. (Civ. 1167.)

(District Court of Appeal, Third District, California. Oct. 21, 1913.)

1. ATTACHMENT (§ 122*)—AFFIDAVIT—AMENDMENT BY ATTORNEY.

Since Code Civ. Proc. § 558, provides that an attachment affidavit may be made by or on behalf of the plaintiff, where it is necessary to make an amendment thereto in order to prevent a dismissal of the attachment on motion, such amendment may be made by plaintiff's attorney on plaintiff's behalf.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.*]

2. ATTACHMENT (§ 122*)—AFFIDAVIT—AMENDMENT—STATUTES—CONSTRUCTION.

Code Civ. Proc. § 558, authorizing an amendment of an attachment affidavit to prevent the sustaining of a motion to discharge the writ, authorizes the supplying by amendment only of that which has been omitted from the original affidavit by reason of inadvertence or oversight, provided the original affidavit is not absolutely lacking in a substantive particular so as to make it so absolutely void as not to be amendable.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.*]

3. ATTACHMENT (§ 122*)—AFFIDAVIT—AMENDMENT.

In an action against two defendants, an original attachment affidavit recited "that said attachment is not sought and the said action is not prosecuted to hinder, delay, or defraud any creditors of the said defendant." Held, that an amendment of the clause changing the word "defendant" to the plural and adding "or either of them" was allowable.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.*]

4. ATTACHMENT (§ 122*)—AFFIDAVIT—AMENDMENT.

An original attachment affidavit averred that defendants were indebted to plaintiff in the sum of \$10,000 over and above the legal set-off and counterclaim on seven express contracts for the direct payment of money, with interest at 7 per cent. and payable in California, and that payment of the same had not been secured. A motion to quash the writ having been made, plaintiff filed an amended affidavit which described the express contracts as seven notes and referred to the verified complaint on file for a more particular description thereof, alleging that the contracts were made and were payable within the state, that payment of the same and each of them and each part of them had not been secured, etc., that plaintiff was absent from the county where the action was being

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tried and would not return for four days, and that affiant made the affidavit for and at plaintiff's direction and was familiar with the facts. *Held*, that the original affidavit was not so defective as to be a nullity, and that the amendment was properly filed as merely extending and particularizing what was attempted to be stated in the original.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.*]

5. ATTACHMENT (§ 109*)—AFFIDAVIT—NEGATIVE PREGNANT.

The statute authorizing attachment requires that the affidavit allege that the contract sued on was made payable in California and that payment of the same has not been secured by any mortgage, etc. Action having been brought on several notes, an attachment affidavit recited that payment of the notes and that each part of them had not been secured, etc. *Held*, that such allegation was not objectionable as a negative pregnant but sufficiently alleged that none of the contracts were secured.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 240; Dec. Dig. § 109.*]

Appeal, from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Elmer E. Nichols against J. O. Davis and another. From an order denying defendants' motion to dismiss certain writs of attachment, they appeal. Affirmed.

J. E. Pemberton, of San Francisco, Keyes & Martin, of Berkeley, and J. O. Davis, for appellants. J. A. Elston, of Berkeley, and Geo. Clark, of San Francisco, for respondent.

CHIPMAN, P. J. Defendants appeal from the order denying their motion to dismiss certain writs of attachment upon several grounds, of which only the following are urged in defendants' opening brief: That the affidavits used at the hearing "show affirmatively that there was security in the shape of a lien on personal property"; that the affidavit originally filed was so defective as not to admit of amendment under section 558 of the Code of Civil Procedure, as amended in 1909 (Stats. 1909, p. 253); that the amended affidavit is fatally uncertain.

1. Plaintiff is the assignee of certain promissory notes assigned to him by the payee, the First National Bank of Berkeley. The pleadings in the action are not in the record, but we infer from what elsewhere appears that the notes in question were signed by both defendants. In his affidavit, defendant J. O. Davis deposed that the "said notes are in equity the obligations of the said Keystone Construction Company, and that plaintiff and the said First National Bank of Berkeley at the time of the filing of suit on said notes had full notice of such facts"; that, at the time of the execution of said notes, the said company was engaged in the performance of certain contracts with the city and county of San Francisco, involving a large amount of money, stating the particulars; and that said company, at the request of said bank, assigned to it the said contracts as security for the promissory notes of said company and other of its debts "which debts the notes

sued upon herein are in equity a part." How this equity arises is not shown.

Witness Naylor, vice president of the bank, testified that the Keystone Construction Company "was never in any way connected with the transactions of the loaning of the money by said bank to J. O. Davis"; that "it was never at any time intended by the parties to the said assignments (of the Keystone Company contracts) that the same should be deemed security for the payment of the promissory notes hereinbefore mentioned; that it was at all times understood between the said bank and the said company that the assignments should constitute merely authorities to collect such moneys as might be collected by the said bank from said city and county of San Francisco." Other statements are made by the deponent further explaining the relation of the parties, all of which controvert the claim made by defendants that these Keystone Construction Company assignments were intended as security for the notes in suit.

2. It is contended that the affidavit filed on the issuing of the writs was "a worthless affidavit, one which was in legal effect only blank paper," and would not, under section 558, Code of Civil Procedure, "justify the filing of a new affidavit by another affiant in such a case as this," citing *O'Connell v. Walker*, 12 Cal. App. 694, 108 Pac. 668. In that case the objection arose out of the statement as to security which was in the alternative. The indebtedness sued upon accrued and the action was commenced, as we understand the case, before the amendment of section 558 in 1909, and besides the question of the right to amend did not arise in the case.

The only cases we have found decided on appeal referring to the amendment of the statute are *Jensen v. Dorr*, 157 Cal. 437, 441, 108 Pac. 320, and *Fairbanks, Morse & Co. v. Getchell*, 13 Cal. App. 458, 110 Pac. 331. In the latter case the notary who executed the jurat resided in and was commissioned as a notary of Kern county. The affiant was in the city of Los Angeles, and the notary called him up over the telephone and took his statement and admitted the oath while the affiant was in Los Angeles. The court, for reasons given, said: "Inasmuch, however, as the act of Kaye (the notary) in administering the oath was a nullity and the purported affidavit void, it follows that there was nothing to amend. The authorized amendment of the affiant contemplates the existence of an affidavit. There could be no irregularity in that which had no existence."

[1] Upon the point that in the present case the amended affidavit was improperly made by the plaintiff's attorney, the case cited shows that an affidavit may be made by or on behalf of the plaintiff. Code Civ. Proc. § 538. We see no reason why an amended affidavit also may not be made on behalf of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff. Said section 538 reads as follows: "If upon such application, it satisfactorily appears that the writ of attachment was improperly or irregularly issued it must be discharged: Provided that such attachment, shall not be discharged if at or before the hearing of such application, the writ of attachment, or the affidavit, or undertaking upon which such attachment was based shall be amended and made to conform to the provisions of this chapter."

[2] In construing this section in the case cited, Mr. Justice Shaw, speaking for the court, said: "Under this proviso the attaching party may by amendment supply that which, by reason of inadvertence or oversight, was omitted from the affidavit, but the provision cannot be construed as authorizing the filing of an affidavit in support of a writ theretofore issued in the absence of that which constitutes the substance of the act required as a prerequisite to the issuance thereof." In that case there was in effect no affidavit at all; hence there was nothing to amend, and the statute gives authority only to amend what was in existence. That was as far as the case called for decision. We can conceive of an affidavit not absolutely void yet lacking in some substantive particular but showing an honest attempt to follow the statute. It is not always easy to distinguish between matter of form merely and substance in dealing with statutory remedies and with statements required in affidavits. We should hesitate to differ from our learned brother, and it may be that his construction of the statute is a safe and sound one. In the case in hand, however, such construction may be accepted and the order appealed from, in our opinion, upheld.

[3] The original affidavit read: "That said attachment is not sought, and the said action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the said defendant." In its amended form it reads the same down to the word "defendant," which is put in the plural, "defendants," and the words "or of either of them" added. This we think, was allowable.

[4] The first affidavit read: "Elmer E. Nichols, being duly sworn, says: That he is the plaintiff in the above entitled action; that said defendants in the said action are indebted to him in the sum of ten thousand (\$10,000) dollars gold coin of the United States over and above all legal set-offs and counterclaims upon seven express contracts for the direct payment of money," with interest at 7 per cent., and payable in this state, and that payment of the same has not been secured, etc. In the amended affidavit these several seven promissory notes are described, and it is stated, "For a more particular description reference is made to the verified complaint on file herein which is referred to and made part of this affidavit;"

and "that such contracts were made and are payable in this state and that the payment of the same and each of them and each part of them has not been secured," etc.; that "the plaintiff is absent from Alameda county, Cal. (where the action was being tried), and will not return for four days. Affiant makes this affidavit for and at the direction of plaintiff, and affiant is familiar with the facts." This amended affidavit extends and elaborates and particularizes what was attempted but was perhaps imperfectly stated in the original affidavit. There was not in that affidavit an entire "absence of that which constitutes the substance of the act required as a prerequisite to the issuance" of the writ.

[5] 3. We do not think the criticism is well founded that "from aught that appeared from the affidavit the payment of some of the promissory notes had been secured." It is urged that the phraseology with reference to the security is the "negative pregnant found anywhere in the books." Among the facts to be stated in the affidavit the statute reads: "And that such contract was made payable in this state and that payment of the same has not been secured by any mortgage," etc. The language used in the affidavit is: "That payment of the same [the contracts just previously mentioned] and of each of them and of each part of them has not been secured," etc. Where there is a single contract or promissory note it would be sufficient to allege, in the language of the statute, "that the payment of the same has not been secured," etc., without adding "nor has any part thereof been secured."

It seems to us that, where several contracts are the subject of the action, it would be a sufficient compliance with the statute to allege "that such contracts were payable in this state, and that the payment of the same has not been secured by any mortgage," etc. Here the affiant has gone further and alleged "that each of them and each part of them has not been secured," etc. The rule with regard to a negative pregnant, as also an affirmative pregnant, has reference more particularly to a pleading which must not be ambiguous. An affidavit in an attachment is not strictly a pleading but is more a matter of evidence and is to be given a fair and reasonable construction in arriving at its meaning. So construed the affidavit plainly enough states that said contracts have not been secured nor has either of them nor has any part thereof been secured. There is in fact no implication or admission that one or more of the contracts is not secured.

In our opinion the original affidavit was not a nullity; that it was capable of amendment and as amended it was sufficient to justify the writ.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

PFOH v. PORTER et al. (Civ. 1,145.)
(District Court of Appeal, Third District, California. Oct. 21, 1913.)

1. SALES (§ 272*)—FRUIT UNPICKED—WARRANTY.

Where defendants purchased plaintiff's grapes on the vines before they were ripe, and defendants' agent informed plaintiff that the price he had agreed to pay was for grapes fit for table use, a warranty would be presumed that the grapes to be delivered under the contract should be good merchantable grapes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 747; Dec. Dig. § 272.*]

2. SALES (§ 201*)—UNPICKED FRUIT—EXECUTORY CONTRACT—DAMAGES FROM ELEMENTS—LOSS.

Where plaintiff sold grapes on the vines to be subsequently picked, packed, and delivered to a railway station, and there taken by defendant at a specified price per ton, and, before the grapes were picked or packed, they were seriously damaged by a heavy rain storm, the contract was executory only at the time the grapes were injured, and the loss fell on the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529-541; Dec. Dig. § 201.*]

3. PLEADING (§ 237*)—COMPLAINT—AMENDMENT TO CONFORM TO PROOF.

The court did not err in refusing an application to amend the complaint to conform to the proof so as to set up a contract of absolute sale where the evidence was insufficient to show that a sale had in fact been made.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

4. TRIAL (§ 70*)—RECEPTION OF EVIDENCE—VACATION OF SUBMISSION—ADDITIONAL EVIDENCE.

The court did not err in denying a motion to reopen the case for the submission of additional evidence, where it did not appear that the motion was supported by affidavit or other proof, justifying plaintiff's omission to present the evidence before the case was submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 677-679; Dec. Dig. § 70.*]

5. TRIAL (§ 70*)—RECEPTION OF EVIDENCE—VACATION OF SUBMISSION.

It was not error to deny a motion to set aside the submission of the case for the introduction of further testimony which, if introduced, would not have changed the result.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 677-679; Dec. Dig. § 70.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Action by Thomas Pfoh against Edwin G. Porter and another. Judgment for defendants, and plaintiff appeals. Affirmed.

J. R. King, of Gridley, for appellant. Geo. F. Jones, of Oroville, for respondents.

BURNETT, J. The action was brought to recover the sum of \$496.35, alleged to be due on one original and two assigned claims for grapes sold to defendants. The three counts of the complaint are similar in their allegations as to the terms of the contracts, and as to the injury done to the grapes by rain, as follows: "That on or about the 20th day of August, 1912, at Gridley, county of

Butte, the said defendants entered into a contract with said plaintiff, whereby defendants agreed to buy and plaintiff agreed to sell all of his Thompson seedless grapes then on the vines of the property of plaintiff consisting of about 4½ acres, * * * amounting to about 25 tons, at \$15 per ton, and it was further agreed that plaintiff was to deliver said grapes at the East Gridley Northern Electric Railway station, when said defendants furnished boxes therefor. That on or about the 4th day of September, 1912, and while said grapes so purchased by said defendants were still on the vines, a heavy rain storm occurred, and as a direct result thereof, the said grapes were badly damaged and some of them were wholly destroyed; that after said storm plaintiff delivered about three tons of grapes to said defendants at the station above named in said contract, and said defendants accepted the same, but refused to accept the remainder of the grapes they had so purchased, or any part thereof." There is no dispute that defendants paid for the grapes that were accepted but the controversy is over those alleged to have been rejected.

Defendants, in their answer, admitted the contract as alleged in the complaint, but averred that "by the further terms of said agreement plaintiff specifically agreed that said grapes should be, at the time of delivery to said East Gridley Northern Electric Railway station, good merchantable grapes and fit and suitable for table use." Defendants also repeated the allegations as to the storm, and alleged "that said rain storm did render the grapes unfit and unsuitable for table use and not merchantable, and consequently they were not in a suitable condition to comply with the terms of the contract of sale."

The court found that the contract was as claimed by defendants, and that as a result of the said rain storm "the grapes which had not been picked were badly damaged, and some of them were wholly destroyed, and they were rendered unfit and unsuitable for table use, and the said grapes were not sound and merchantable at the place of production contemplated by the parties to the contract."

There can be no doubt that the evidence supports these findings, and they, in turn, support the judgment for defendants. As to the quality of the grapes, indeed, the pleadings scarcely leave anything to be supplied, since plaintiff with refreshing candor avers that said grapes were "badly damaged, and some of them entirely destroyed." If they were "badly damaged," it could hardly be said that they were sound and merchantable, or fit for table use. Defendants, however, did not rest upon the admissions of the complaint, but called witnesses whose testimony to the point is sufficient to meet the requirement of the rule.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mr. Dalton, who was working for plaintiff, testified that he was engaged, after said storm, in hauling the grapes to the railway station, and that "they were mouldy," and that he did not "consider them good merchantable grapes." Other disinterested witnesses also testified to the same effect. Defendant Porter testified that "some of them were good grapes, as I told them, when they went to pick, I told them not to put anything in but good grapes; and I told Mr. King and Mrs. King, 'You have packed grapes for Gallagher and Harris and you know what they will take and what they won't take,' and I said, 'Don't put anything in there but what you know they will take, and it will be all right, I will take them.'" It seems he was buying for Gallagher and Harris to whom he was to ship them in Oakland. Porter went on further to say that no good merchantable grapes were delivered to defendants after said storm at said railroad station, and that he paid for all the grapes that were delivered according to the contract.

It may be said also, without quoting further from the testimony, that Porter's explanation of his dealings with plaintiff and the assignors in reference to said grapes leaves nothing to be desired on the score of justice and equity. We must accept his statements as true, and accordingly hold that he acted within his legal rights in declining to accept the damaged grapes, unless, perchance, there was in the contract no warranty, either express or implied, of their quality.

But the court was legally justified in holding that the warranty was one of the express terms of the contract, or that it should be inferred from the other terms and conditions. Mr. Porter indeed testified that: "They were to be grapes that was fit for table use; that was explicitly understood. * * * The agreement was that I was to give them \$15 per ton for all good grapes delivered at the Northern Electric cars at what is called East Gridley. This contract was made on the 25th day of August, on Sunday. The way that was I had been down to Pfoh's two or three different times to see him about his grapes, and made him an offer of \$12.50 a ton, and he wouldn't consider it, and I told him I couldn't pay any more than that for the grapes unless they were grapes that were fit for table use. * * * I said: 'I will come and look at them, Mr. Pfoh, and if they are fit for table use I think I can give you more.' He knew what I was buying the grapes for and so did all the balance of them. I told them." Even the plaintiff would not deny that he warranted the grapes to be merchantable and fit for table use. He was questioned by counsel, and he gave answers as follows: "Do you state positively that you did not warrant the grapes to be merchantable and fit for table use? A. Well— Q. (Int.) Do you or do you not? A.

From the way I looked at it is, the way Mr. Porter bought these grapes, he bought them on the looks of them."

[1] But, regardless of any express agreement to that effect, under the authorities, a warranty is presumed from the nature of the transaction between the parties. In considering this branch of the subject, as well as any other, we must, of course, accept the facts as shown by the evidence favorable to respondents' position.

[2] In principle the case is identical with *Blackwood v. Cutting Packing Co.*, 70 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199, and *Waltl v. Gaba*, 160 Cal. 324, 116 Pac. 963. Here there was no sale, but a mere agreement to sell. Indeed, it is so alleged in the complaint. At the time of the contract there was no delivery of the grapes nor payment of the price. The grapes were in fact not in a condition in which the buyer could be called upon to accept them. They were not ripe, and therefore not ready for delivery. The amount of the grapes was unknown, but was to be ascertained by weighing them at the time they were ready for delivery. In fine, there are present all the substantial elements of an executory contract that are found in the said *Blackwood* and *Waltl* Cases. In the former, it is said: "It seems well settled that the question as to whether the title has passed is one as to the intention of the parties. And such intention is, as a matter of course, to be gathered from the language of the parties, considered in the light of all the circumstances of the case." It is further declared that, in the absence of anything showing a contrary intent, there are certain circumstances which have a controlling force. The court proceeds to enumerate those existing in that case. One of them was that, at the time of the contract, there was neither delivery of the goods nor payment of the price. The contract there provided that the fruit was bought "at three cents per pound f. o. b. (free on board cars at) Haywards." It was held that the delivery of the goods and the payment of the price were conditions concurrent. The same is true here. The court declared: "And, if the condition of payment is not waived, the title does not pass until the price is paid. *Peabody v. Maguire*, 79 Me. 572, 12 Atl. 630; *Evansville R. R. Co. v. Erwin*, 84 Ind. 464; *Turner v. Moore*, 58 Vt. 456, 3 Atl. 467; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Hoffman v. Culver*, 7 Ill. App. 454."

Other circumstances are said to be more specific criteria of the question. Of these, one was that the goods were not in a condition in which the buyer could be called upon to accept them, as the seller was to give the necessary cultivation to the orchard, pick the fruit, pack it in suitable boxes, and deliver it to the carrier at Haywards. *Benjamin on Sales* (b. 2, c. 3) is quoted to the effect that "where by the agreement the ven-

dor is to do anything to the goods for the purpose of putting them into that state into which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property."

There was, it is true, in the Blackwood Case another circumstance that probably does not exist here, namely, some uncertainty as to the identification of the goods. This arose from the fact that the contract of sale was for "not less than 75 tons and not exceeding 200 tons per annum." It was therefore held that segregation and weighing were necessary to identify the goods. The agreement here related to the whole crop. In that respect it differs from the Blackwood Case, but the other mentioned circumstances are decisive. It is to be observed also that in the Blackwood Case it was held that it was not a sale, although the written contract between the parties recited that the Cutting Packing Company "bought of M. C. Blackwood his crop of apricots," and Blackwood "sold" his crop of apricots to the Cutting Packing Company. In that respect the case was stronger for the asserted vendor than the one here.

The subject was thoroughly discussed in the Walzl Case, supra, in which the Supreme Court adopted the opinion of the District Court of Appeal of the First District, prepared by the late Mr. Justice Hall. From the syllabus we get the following concise statement of the principal facts and of the main point decided by the court: "The plaintiffs, who were the owners of a band of sheep located near Kings City, entered into a written contract which stated that they 'have this day sold' to the defendants, 'all of our spring wool clip of 1906 at 18 cents per pound, also the fall wool clip of 1905 at 14 cents per pound. The fall wool, which is stored * * * at San Francisco, the spring wool to be delivered at Kings City depot in consideration thereof we accepted a deposit of \$250 part of payment of said sale, the balance to be paid on the delivery of wool.' At the time the contract was executed the spring wool was on the bodies of the sheep. Held, that the contract was not one of present sale, but constituted a mere agreement to sell and buy; that the contract was entire, and did not pass title to any of the wool to the purchasers, and that the latter were under no obligation to pay for any of the wool until the delivery to them of all of it." There is a reaffirmance of the doctrine of the Blackwood Case, and the court declares that "if the sheep had been destroyed by act of God before the spring wool had been sheared, and the wool thus lost, it would hardly be contended by any one that the buyer should bear the loss of the wool, or could be compelled to pay for it. * * *

He would not bear such loss, because the title to the wool had not vested in him, and by the terms of the contract was not intended to vest in him until it had been sheared and delivered at Kings City."

In what is known as the Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863, the United States Supreme Court held that the following contract did not pass the title, but must be construed as an executory contract of sale: "We have, this 31st day of July, 1863, sold unto Mr. L. our crops of cotton, now lying in the county aforesaid, numbering about 2,100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed. Mr. L. agreeing to furnish at his cost the bagging, rope, and twine necessary to bale the cotton ungned, and we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars. This cotton will be received and shipped by the house of D. & Co., New Orleans, and from this date is at the risk of Mr. L. This cotton is said to have weighed an average of 500 lbs. when baled." After reciting the rules already stated herein that must be applied in ascertaining whether the contract constituted a sale, the court, through Mr. Justice Strong, declared: "They are in most cases held to be conclusive tests. Though not supported by all the decisions, they certainly are generally accepted in England, and by most of the courts in this country. * * * In our judgment, therefore, the contract of July 31, 1863, must be regarded as only an agreement to sell, and not as effecting a transfer of the ownership. It left the property in Elgee, where it was before."

We consider the cases cited by appellant not inconsistent with the foregoing, in view of their peculiar facts. For instance, it is clear that the distinguishing feature of *Bill v. Fuller*, 146 Cal. 50, 79 Pac. 592, is the fact that the vendee was responsible for the unmerchantable condition of the fruit. It is so declared in the opinion, as follows: "The fact that they had been allowed to remain so long on the trees, and thus become unfit for the market, was the fault of the defendant, and he should not be allowed to take advantage of that fault."

[3] After the cause was submitted, plaintiff gave notice of motion for leave to file an amended complaint "according to the evidence proved in said cause." It does not appear, except in the opinion of the trial court, what was the specific amendment desired, but it is at least clear from said opinion that the judge considered the proposed amendment irrelevant. He states that the proposition was "to set up a contract of absolute sale," but that "unfortunately for him there was nothing in the testimony that would warrant the court in allowing such an amendment." The trial judge was legally justified in taking this view of the evi-

dence, and, having reached the conclusion from the testimony of the witnesses that there was no sale, of course, it followed that the motion to amend should be denied. At least, in the state of the record, it cannot be said that there was any abuse of discretion therein.

[4, 5] It seems also that a motion was made to reopen the case, that plaintiff might offer additional evidence as to certain words that appeared on the checks received in evidence, and also that defendant Porter had admitted that he bought said grapes from plaintiff and his assignors. There is nothing to show that this motion was supported by affidavit or other evidence that might justify appellant's omission to present the evidence before the cause was submitted. Besides, it is quite clear that the evidence, if received, would not have produced a different result, the trial judge saying: "The motion to set aside the submission and introduce further testimony in view of what has already been said would be useless and therefore is denied."

Another motion seems to have been made for the court to set aside the judgment for the reason that the judge, in his opinion, had referred to the complaint as verified when, as a matter of fact, it was unverified. But it is apparent that only the trial judge could determine whether that circumstance was a decisive factor in the determination of the cause. In denying the motion, he necessarily decided that the mistake was of no consequence. We cannot say that he erred.

We have referred to these assignments of error although we are not directed to the portion of the transcript containing the record concerning them. We have examined all the points, indeed, made by appellant, but we see no reason for disturbing the judgment of the lower court and it is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. WING. (Cr. 436.)

(District Court of Appeal, First District, California. Oct. 20, 1913.)

1. BURGLARY (§ 41*) — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 404*)—EVIDENCE—IDENTIFICATION OF OBJECTS.

Where some of the articles admitted in evidence as being from the burglarized store were positively identified as being taken therefrom, and others were shown to be of a similar brand and make to those in the store, the articles were sufficiently identified to be admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.*]

3. CRIMINAL LAW (§ 959*)—CONTINUANCE—SUBSEQUENT APPLICATION.

There was no abuse of discretion in denying accused's fourth application for a continuance of a motion for new trial, where the court had already granted three applications, the last of which carried the case up to within one day of the time which the court could have granted, under Penal Code, § 1191, requiring the court to pronounce judgment within a certain time after verdict, and accused had reasonable opportunity to prepare for the hearing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2406-2411; Dec. Dig. § 959.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

James Wing was convicted of burglary, and appeals from the judgment of conviction and from an order denying his motion for a new trial. Affirmed.

J. K. Ross, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was charged by information with the crime of burglary. He was found guilty of that offense in the first degree, and sentenced to imprisonment for a term of eight years. From the judgment and from his motion for a new trial, defendant prosecutes this appeal.

For a reversal of the judgment defendant depends principally upon his point that the evidence does not sustain the verdict of the jury. This position is not maintainable. A certain business concern was burglarized in San Francisco on the night of July 8, 1912. In September of the same year a detective of the police department, while investigating another charge against the defendant, found in his possession the articles stolen on the night of July 8th. Defendant admitted that he received these goods on July 18th, but at the trial claimed that he had purchased them from a man named Dewey. The articles admitted in evidence against the defendant were amply identified as those which were stolen on July 8th from the said concern, and, as defendant came into possession of them ten days later, the fact of his being in possession of recently stolen property was clearly before the jury. Dewey, the man from whom defendant claimed to have purchased this property, was not satisfactorily identified, nor was he called as a witness by the defendant. Moreover, a witness for the people testified that the defendant had told him that he had bought the goods in Fresno a year before, and defendant was also contradicted in his testimony that on the night of the commission of the crime he was in the city of Stockton by the proprietress of the hotel where he lived, who testified that on the night of July 8th he occupied his room in the hotel conducted by her in San Francisco.

[1] The jury evidently gave no weight to the defendant's testimony that he was in

Stockton on that night, and believed the testimony of the hotelkeeper. That circumstance, with the fact that he had in his possession the property shortly after it was stolen, together with the further circumstance that he had made contradictory explanations or statements of how he had come into its possession—not mentioning other suspicious incidents—were, we think, amply sufficient to support the verdict of the jury.

[2] The exhibits which were admitted in evidence were sufficiently identified as being the property of the concern burglarized. Some of them were positively identified as being taken from the store; others were shown to be of a similar brand and make to those handled in the store burglarized, in common, however, with other stores. The rulings of the court in admitting this evidence were not erroneous by reason of insufficient identification. *Woodruff v. State* (Tex. Cr. R.) 20 S. W. 573; *Mitchell v. State*, 94 Ala. 68, 10 South. 518; *Underhill on Crim. Ev.* §§ 47, 379.

Defendant is mistaken in saying that the trial court failed to instruct the jury as to the law upon circumstantial evidence. The record shows that the jury were carefully and fully instructed on that subject.

[3] The court committed no abuse of its discretion in denying defendant's last application for a continuance of the hearing of his motion for a new trial. It had already granted three continuances of the motion, the last of which took the matter up to within one day of the time which the court could have granted defendant, under the provisions of section 1191 of the Penal Code, without nullifying the verdict. The continuance requested was for an indefinite time, and, if it had been granted for more than one day, the terms of section 1191 of the Penal Code would, as just stated, have been violated, and the court rendered powerless to pronounce judgment. The purpose of this section was to expedite the hearing of appeals in criminal cases, and, the defendant having been given a reasonable opportunity to prepare for the hearing of his motion, it follows that the denial of a further postponement was proper.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

PEOPLE v. WING. (Cr. 437.)

(District Court of Appeal, First District, California. Oct. 20, 1913.)

1. BURGLARY (§ 41*) — SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction for burglary.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94-103, 109; Dec. Dig. § 41.*]

2. CRIMINAL LAW (§ 1035*) — PRESENTATION BELOW.

Accused cannot complain on appeal that the court ordered one of his witnesses into custody on a pending misdemeanor charge in the presence and hearing of the jury which tried accused, thereby discrediting such witness, where accused did not call the person as a witness or assign the court's action as misconduct.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2633-2638, 2643, 2644; Dec. Dig. § 1035.*]

3. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR—IMPROPER ARGUMENT.

Where accused testified on cross-examination that he had been convicted of a felony, it cannot be said that a statement in argument by the district attorney that accused was in the habit of planning burglaries was prejudicial, though the district attorney had no right to go into the details of other criminal operations by accused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

James Wing was convicted of second degree burglary, and appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

J. K. Ross, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted of the crime of burglary in the second degree, and sentenced to serve a term of five years in the state penitentiary, the sentence to run concurrently with a previous sentence for a similar crime. This is an appeal by the defendant from the judgment and from an order denying his motion for a new trial.

[1] Defendant makes the point that the verdict is contrary to the evidence.

Very briefly the evidence introduced by the people shows that a room of the prosecuting witness was burglarized on the 7th day of September, 1912, and from it there were taken wearing apparel, jewelry, a razor, and a pawn ticket for a diamond ring. Notwithstanding that the defendant and a friend of his called Kelly occupied rooms in another building in San Francisco (the crime being committed in that city), the defendant just prior to the 7th day of September rented a room in the Hotel Belvedere adjoining the room of the prosecuting witness, and on the morning of the burglary, at about 11 o'clock, the defendant and associates of his were seen near the room of said witness, and at about that time one of the defendant's callers was noticed leaving the building with a large bundle, which looked like a bundle of clothes. On the same day, when the defendant was questioned by detectives of the police department concerning the crime, he claimed to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

know nothing about it; yet when he was searched part of the stolen jewelry was found on his person, and the wearing apparel was later found in the rooms which he occupied with Kelly. True, he offered an explanation of how he came into possession of the articles; but the jury evidently disbelieved his explanation, and adopted as true the evidence introduced by the people, drew legitimate inferences therefrom, and arrived at their conclusion of the guilt of the defendant. We think it is plain that the evidence supports their verdict.

[2] Defendant's next point is stated to be that the jury received evidence out of court. It is based upon the assertion that the court ordered one of the defendant's witnesses into custody of the sheriff on a misdemeanor charge pending in the superior court on appeal, and that this was done in the presence and hearing of the jury, and discredited the witness to such an extent that the defendant was prevented from using her evidence.

Of course, the defendant was not prevented from calling such person as a witness, although he may have considered it more prudent not to do so, and, leaving out of consideration the conflict in the affidavits introduced by the people and defendant respectively on the latter's motion for a new trial upon this feature of the case, the defendant, not having called such person as his witness, nor assigned the alleged action of the court as misconduct, is in no position now to complain.

[3] Defendant also assigns as prejudicial error the conduct of the district attorney, who, in his argument to the jury, used the following language: "He [referring to the defendant] was in the habit of getting burglaries committed—planning burglaries. Twelve men chosen as jurors have tried him and convicted him of a felony."

It appears that the defendant took the stand in his own behalf, and on cross-examination it was shown that he had been convicted of a felony. While we think the district attorney had no right to go into the details of the other case, still we are unable to say that the observation of the district attorney prejudicially affected the defendant's case, and this must have been the view of the defendant, for the incident was not assigned as misconduct, nor was the court requested to instruct the jury to disregard the remarks.

There are other assignments of error in defendant's brief; but each of them has less merit than those already discussed, and are consequently unworthy of detailed notice.

The judgment and order appealed from are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

HOWELL v. BENT et al.

(Supreme Court of Montana. Nov. 29, 1913.)

1. JUDGMENT (§ 951*)—PRESUMPTIONS TO UPHOLD JUDGMENT—MATTERS CONSIDERED.

In an action for damages by diversion of a stream, it appeared that in a previous suit in which plaintiff and defendant had participated, involving the right to the use of such water, a decree was entered establishing plaintiff's right as prior both in time and right to the rights of any of the defendants, and enjoining interference with plaintiff's rights. *Held*, that in the absence of the pleadings in such suit and of any evidence to the contrary, it would be presumed that the court had properly before it, not merely the relative rights of the parties in order of time, but the possibility of interference with the plaintiff's right by diversion above him, and that there was foundation for the decree in all its substantial particulars.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.*]

2. JUDGMENT (§ 717*)—CONCLUSIVENESS—MATTERS CONCLUDED.

In a prior suit to which plaintiff and defendant were parties, involving their water rights and the possibility of interference with plaintiff's right by diversion above him, plaintiff's prior right was established and defendants were enjoined from interference therewith. Rev. Codes, § 7917, declares that only that is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually or necessarily included therein. *Held* that such former judgment necessarily determined that at that time the waters of the creek did not sink and become lost between the ranches of the parties, so that evidence to the contrary was not admissible until a change in the conditions subsequent to the decree was shown.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1248; Dec. Dig. § 717.*]

3. TORTS (§ 22*)—JOINT LIABILITY.

When two or more parties act, each for himself, in producing a result injurious to another, they cannot be held jointly liable for the acts of each other.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.*]

4. WATERS AND WATER COURSES (§ 152*)—JOINDER OF PARTIES—STATUTES.

Rev. Codes, § 4852, providing that in actions to protect water rights plaintiff may join all persons diverting the water parties defendant, so that the rights may be settled in one action, authorizes only a suit in equity to settle the relative priorities and rights of all the parties to the water, in which damages are a mere incident, and does not authorize a single action at law for the entire damage, either with or without an apportionment to each of his share of the damage.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

5. APPEAL AND ERROR (§ 1170*)—HARMLESS ERROR—ERROR NOT AFFECTING RESULT.

Under Rev. Codes, § 6593, providing that the court shall disregard error which does not affect the substantial rights of the parties, where the judgment is correct and could not, in the same action, be otherwise, so that errors assigned do not affect it, the court cannot reverse therefor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4076, 4098, 4101, 4454, 4540-4545; Dec. Dig. § 1170.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes 137 P.—4

Appeal from District Court, Yellowstone County; Sydney Fox, Judge.

Action by T. N. Howell against Wallace Bent and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. M. Johnston and H. J. Coleman, both of Billings, for appellant. Nichols & Wilson, of Billings, for respondents.

SANNER, J. Action by T. N. Howell to recover from Wallace Bent, Bert Bent, Michael Wrote, Tony Garcia, George Crosby, John Sadring, Charles Ingram, C. M. Young, W. R. Bainbridge, James Pauley, Tillman C. Graham, A. W. Adams and Curtis Beeler, as defendants, for injury to and loss of crops on account of the alleged wrongful diversion of the waters of Sage creek. Sage creek is a small stream which rises in Montana and flows into Wyoming, and upon it or its tributaries all the parties reside or have lands which require artificial irrigation for the successful raising of crops. The appellant possesses a right to 110 miner's inches of the waters of Sage creek for the irrigation of his lands, which lie in the state of Wyoming some miles below the lands of respondents, and this right is prior and superior to any that may be asserted by the respondents or any of them. For the purpose of utilizing his right the appellant has, since August 1, 1890, maintained a dam across said creek about a mile above his place, and also a ditch, tapping the creek at that point, of sufficient size and character to divert and conduct the water to his land. It is alleged that in the year 1908 the appellant tilled and cultivated 160 acres of his land in a good, husbandlike manner, constructed laterals from his main ditch so as to distribute the water over the land, planted and seeded a large portion of the land to alfalfa and wheat, and in all respects properly cared for the same. The burden of the complaint is set forth in paragraph 8 as follows: "(8) That said defendants, and each of them, in the years 1908, 1909, and 1910, had ditches tapping said Sage creek and its tributaries above the intake of plaintiff's said ditch; that when it became necessary to irrigate said crops of wheat and alfalfa in the year 1908, said defendants and each of them tapped said Sage creek and diverted therefrom all of the waters of said Sage creek and its tributaries, and thereby deprived plaintiff of the use of any of the waters of said Sage creek and its tributaries for the irrigation of said crops, which deprivation and wrongful use of said water by said defendants continued throughout the entire irrigating season of that year; that plaintiff notified said defendants and each of them of his right to the said waters of Sage creek and its tributaries, and that they and each of them were diverting the same from plaintiff to his damage, and demanded that they allow said water to flow down said Sage creek in suffi-

cient quantity to allow him to divert therefrom 110 miner's inches thereof, to which he was entitled; that notwithstanding such notice and demand from plaintiff, said defendants and each of them, from the commencement of the irrigation season and throughout the whole season, wrongfully and unlawfully diverted all of the waters of said Sage creek and its tributaries, and thereby deprived plaintiff of the use of any of said waters in that year; that by reason of said wrongful acts of said defendants, the plaintiff's aforesaid crops of wheat and alfalfa were entirely ruined and destroyed, and said alfalfa killed, and plaintiff suffered the entire loss of said crops by reason thereof and for no other reason." To the complaint four separate answers were filed; one by Wallace Bent and Bert Bent, one by Beeler and Adams, one by Young, Ingram and Sadring, and one by Bainbridge. These answers differ slightly in detail, but the general effect of each of them is to raise an issue upon the material allegations of the complaint. The trial was to the district court sitting with a jury, and after dismissal by appellant as to Tillman C. Graham, the verdict was for the respondents. Judgment on the verdict was entered, and appellant in due time presented his motion for new trial, which was denied. The cause is before us upon appeal from the judgment, and from the order denying the motion for new trial.

The brief of appellant assigns 16 alleged errors. One of these relates to the pleadings, 4 to the instructions, and the remainder to rulings upon the evidence. No good purpose could be served by discussing these assignments in detail, because, for reasons presently to appear, the judgment must be affirmed in any event. Suffice it to say that we see no error in any of these rulings, except the admission of testimony to the effect that the waters of Sage creek sank and were lost between the ranches of respondents and that of appellant. We think this subject was not open to inquiry as between the parties to this action.

[1, 2] The complaint alleges, and the respondents have admitted, that on May 28, 1906, in the Circuit Court of the United States, Ninth Circuit, District of Montana, in an action involving the right to the use of the waters of Sage creek, wherein one W. A. Norris was plaintiff, the appellant herein was intervener, and the respondents or their predecessors in interest were defendants, such proceedings were had that the judgment and decree of that court was duly entered establishing the right of appellant to 110 miner's inches of the waters in said Sage creek and its tributaries as of August 1, 1900, and prior both in time and right to the rights of any of defendants. In and by this decree the defendants were enjoined from in any manner interfering with the rights of the present appellant, but were commanded to allow a sufficient amount of water to flow

down to satisfy his claim whenever needed by him. While it is true the pleadings in that action are not before us, the decree itself—as admitted by the respondents—is of such a character that we must presume, in the absence of anything to the contrary, that the court had properly before it, not merely the relative rights of the parties in order of time, but the possibility of interference with the right of Howell on account of diversions above him. If at that time the waters of Sage creek sank and were lost between the ranches of respondents and that of appellant, no assertion of rights to such waters by respondents or their predecessors in interest, and no diversion of such waters by the respondents or their predecessors in interest, could constitute an interference with Howell. In such a situation there would have been no occasion for the injunctive portion of the decree. As we cannot presume the decree to have been without foundation or meaning in any of its substantial particulars, it follows that the Circuit Court of the United States in entering the decree necessarily determined that at that time the waters of Sage creek did not sink and become lost between the ranches of respondents and that of appellant. Rev. Codes, § 7917; *Lokovich v. City of Helena*, 46 Mont. 575, 129 Pac. 1063. This conclusion is strengthened by the testimony in the record before us, as well as by the decision of the case in the Circuit Court of the United States in the first instance (*Morris v. Bean* [C. C.] 148 Fed. 423), and in the Circuit Court of Appeals, where it was intermediately affirmed (*Bean v. Morris*, 159 Fed. 651, 86 C. C. A. 519). It being the adjudicated fact that when the decree of the Circuit Court of the United States was entered, the waters of Sage creek did not sink and become lost, no evidence to the contrary was admissible until a change in the conditions subsequent to the decree was shown.

[3, 4] But the error is of no avail because the plaintiff was not entitled to judgment. The complaint leaves one in some uncertainty as to whether the pleader intended to charge that the respondents acted jointly or severally in diverting the water. If jointly, it is not sustained by any evidence; if severally, then the complaint, the evidence presented by the appellant, and the instructions given to the jury at his instance were consistent, but were grounded upon a theory wholly untenable. It is well settled that when two or more parties act, each for himself, in producing a result injurious to the plaintiff, they cannot be held jointly liable for the acts of each other; nor, in the absence of statutory authorization, can they be sued in one action for the entire damage, either with or without an apportionment to each of his share of the damage. In pursuing their course, counsel for appellant doubt-

less proceeded upon the assumption that such authorization is to be found in section 4852, Revised Codes; but, as early as 1895, the law was declared otherwise in *Miles v. Du Bey*, 15 Mont. 840, 39 Pac. 313. That case arose squarely upon the interpretation of section 1260, fifth division, Compiled Statutes 1887, which is identical with section 4852, Revised Codes, and in deciding it this court held that an action like the one at bar will not lie, and that the section in question authorized the proceeding here employed only in a suit in equity to "settle the relative priorities and rights of all the parties to the water, or the use thereof, of the stream mentioned," in which the damages claimed are a mere incident. See, also, *Blaisdell v. Stephens*, 14 Nev. 17, 33 Am. Rep. 523; *Beach v. Spokane Ranch & Water Co.*, 25 Mont. 379, 65 Pac. 106.

[5] We fully realize that the foregoing consideration is not made a matter of specific argument in the briefs before us, but it is argued that the judgment should be reversed and a new trial directed because of the errors assigned. If—as is the case—the judgment is correct, if it could not in this action be other than it is, then the errors assigned could in no wise affect it; and we are forbidden as well by the statute (Revised Codes, § 6593) as by the rules of reason, to order a reversal (*Knipe v. Washoe Copper Co. et al.*, 37 Mont. 161, 95 Pac. 129). Accordingly the judgment and order appealed from are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

McDONALD et al. v. KUMMER et al.
(Supreme Court of Colorado. Dec. 1, 1918.)

1. DEEDS (§ 112*)—DESCRIPTION OF PROPERTY—REFERENCE TO MAP.

Where land is described in a deed according to a plat or map, the deed is to be construed in connection with such plat or map for the purpose of identifying the property, though this does not exclude other means of identification not in conflict with the map.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 323, 324; Dec. Dig. § 112.*]

2. DEDICATION (§ 19*)—CONSTRUCTION AND OPERATION OF PLAT.

A recorded plat of a tract of land divided into lots through which was a street showed the boundary of the lots as excluding the street. The owner's statement filed therewith stated that he had reserved for the use of the public forever a roadway or street through the tract, and, after giving the measurements of the lots, stated that such measurements ran from the center of the street, but that such described roadway was reserved for such use forever. *Held*, that the statement was not in conflict with the map, but, if it was, the map controlled, and the lots did not include any part of the street, whether the title to the street by dedi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cation was in the county or whether it was reserved forever for public purposes.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

3. DEDICATION (§ 19*)—DESCRIPTION OF PROPERTY—"WEST HALF"—"HALF OF LOT."

Where the owner of a tract of land divided it into lots and filed a plat showing that the boundary of the lots excluded the street, one who thereafter purchased half of a lot on the east side of the street, described in his deed merely as the "west half" of the lot, acquired one-half the length of the lot from the side of the street, the one-half of the street itself not being included as a part of his moiety, notwithstanding his contingent right of reversion under Mills' Ann. St. 1912, § 7221, providing that when any street or alley designated on the plat of any city or town or subdivision of, or addition to, any municipal corporation, shall be vacated, the fee of the lands included within the street or alley, and all right, title, or interest of the state and the municipal corporation, shall vest in the owners of the abutting lots to the center of the street.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.*]

For other definitions, see Words and Phrases, vol. 8, p. 7482; vol. 4, pp. 3207, 3208; vol. 8, p. 7676.]

4. BOUNDARIES (§ 20*)—DESCRIPTION OF PROPERTY—BOUNDED BY STREET OR HIGHWAY.

The rule that a conveyance of land described as bounded by a highway or street will be construed to mean the middle of such highway or street, unless such construction is contradicted expressly or by necessary implication, does not apply where the title to the street is in the government or municipality, or where the grantor is a corporation holding a street for public purposes and disposing of the adjacent lots for private use.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 123-130, 132; Dec. Dig. § 20.*]

Error to District Court, Jefferson County; Charles McCall, Judge.

Action by Henry McDonald and another against William Kummer and another. Judgment for defendants, and plaintiffs bring error. Reversed, with directions.

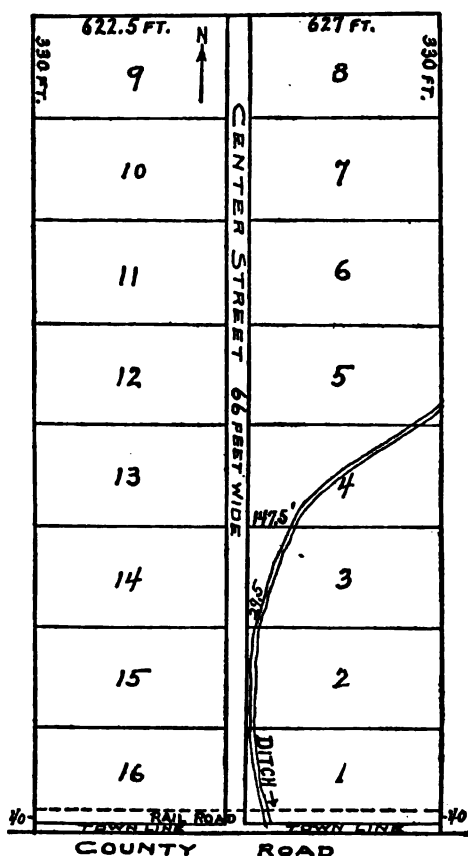
A. O. Pattee, of Edgewater, and William A. Dier, of Golden, for plaintiffs in error. Samuel W. Johnson, of Denver, for defendants in error.

SCOTT, J. This is an action to determine and settle a disputed boundary line. The case was tried on an agreed statement of fact. From this it appears that on the 5th day of December, 1887, one William G. Smith, who was then the owner of the premises involved, filed for record with the county clerk and recorder of Jefferson county his plat and statement duly acknowledged. This statement was as follows: "Know All Men by These Presents: That I have subdivided the east one-half (E. ½) of the southeast quarter (S. E. ¼) of section thirty-four (Sec. 34), township three south (T. 3 S.), range sixty-nine west (69) into five (5) acre tracts as indicated below by the plat and survey made by E. L. Berthoud, and I have reserved for the use of the public forever, a roadway

or street through the center of said land running north and south one hundred and sixty (160) rods long by four (4) rods wide (east and west), said 5-acre tracts being twenty (20) rods fronting on said street by forty (40) rods deep (east and west). Said measurements running from the center of said street, but the above-described roadway being reserved for the said use forever. Signed at Golden, Colorado, this 5th day of December, A. D. 1887. [Signed] William G. Smith."

The plat shows the roadway or street, from north to south through the center of the tract with eight tracts or lots apparently of equal size on either side of the street, and numbered from 1 to 16, inclusive. The premises in question consist of lots numbered 1 and 2, lying on the east side of the dedicated street, called Center street; lot 1 being in the southeast corner of the tract, and lot 2 adjoining lot 1 on the north, the west end of both lots abutting on Center street.

Plat and statement:



By various mesne conveyances, the plaintiffs in error, plaintiffs below, are the owners of the west half of lots 1 and 2, and the defendants are owners of the east half of said lots. The plaintiffs' portions of these lots abut on Center street. The plaintiffs claim

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that their interest should be one-half the lots measured eastward from the side line of the street, while defendants contend that this measurement should be from the center of the street. The conveyances in each case being for "the west half" of the given lot and for the "east half" of such lot. The trial court sustained the contention of defendants and fixed the dividing line midway between the center of the street and the east end line of the lots.

There was a further stipulation of the parties as to certain acts and conduct as follows: "That a survey of said tracts one (1) and two (2) was made by one Charles C. Smith, and a survey was made by Irving B. Williams, as stated in said petition; and that upon said survey there is a dispute as to the location of the line between the west half and the east half of said lots one (1) and two (2), the distance between said surveys being one (1) rod or sixteen and one-half (16½) feet, thereby leaving a strip of land 16½ feet wide and forty (40) rods long between said surveys which the petitioners and respondents, each respectively, claim to own and be entitled to by virtue of the plat and the conveyances as aforesaid. That both of said surveys agree as to the location of the center of said Center street, as to the four (4) corners of said tracts one (1) and two (2), Smith's subdivision. That said Center street has been opened and used by the public for a long time prior to the purchase of the respective interests of these litigants, and is still used as a public highway to accommodate the owners of tracts further north than tracts one (1) and two (2). That some time prior to the purchase by the respondents of the east half of said tracts one (1) and two (2), as alleged in the petition, their grantor, one John Robb, caused a survey of said tracts one (1) and two (2) to be made by one Cawkins in the presence of Henry McDonald, one of the petitioners, and that Cawkins established the division line between the tracts of petitioners and respondents twenty (20) rods east of the center of the said Center street, and at virtually the same place as established and located in April, 1912, by Irving B. Williams, as stated in the petition. That thereafter a furrow was ploughed by said Robb and one William Bruce, said furrow or plough line endeavoring to follow the line as established by said Cawkins. That said furrow or ditch was in existence at the time respondents purchased the east half of said tracts one (1) and two (2), and that respondents exercised ownership and possession over all the land east of said ditch or plough line until about the 2d day of May, 1911, at which time petitioners secured the services of Charles C. Smith and established a new line sixteen and one-half feet east of the aforesaid ditch line, established by said Cawkins, which practically agrees with the line established by the said Williams. That the petitioners,

over the objections of the respondents, established this line and caused a fence to be erected on said line, paying for the material and labor therefor. That said fence still stands as marking the boundary between said tracts as established by said Smith on the 2d day of May, 1911, from said date; said petitioners having been in possession of said strip of land. That on the 11th day of April, 1912, Irving B. Williams was employed by said respondents and established the line sixteen and one-half (16½) feet west of the said Smith's survey line marked by said fence. That on the 15th day of April respondents served petitioners with a notice to the effect that, if petitioners did not willingly join with the respondents in building a fence or moving the old one to the new line established by said Williams, within three days they would proceed to do so. In consequence of said notice, petitioners proceeded to bring the action herein."

There does not appear to be sufficient in this agreed statement of fact upon which to base an estoppel as to the claims of either party or to throw light upon the matter to be determined.

The plat filed shows the boundary of the several lots to exclude the street. While the east line of the platted tract is a part of the east section line of section 34, yet there is nothing in the record to indicate that this line is upon a highway, or that any part of the east end of the lots in question is used for highway purposes, as in case of the west end and where two rods therefrom, before the sale of any of the lots by Smith, were so dedicated to the use of the public for highway purposes, being one-half of the width of Center street. What is said in this opinion is with the understanding that no part of the east half of the lots are or have been dedicated or used for highway purposes. It will be observed from the agreed statement that Center street is in general use for public purposes.

[1] It has been held to be a general rule that, where land is described in a deed of conveyance according to a certain plat or map, the deed is to be construed in connection with such plat or map for the purpose of identifying the property intended to be conveyed, although this does not exclude other means of identification, not in conflict with the map. *Kretschmer v. Hard*, 18 Colo. 223, 32 Pac. 418.

[2, 3] There is no testimony in this respect offered, other than the statement of Smith filed therewith, and above set out, and such statement is clearly not in conflict with the map, for it declares the street so platted on the map is reserved to the use of the public forever. It is, however, contended that the last sentence of this statement, "Said measurements running from the center of said street, but the above-described roadway being reserved for the said use forever," is in conflict with the map and fixes the measurement

by which the lots are to be conveyed. We cannot agree to this contention, for in this sentence is found an additional and specific reservation to the public of the described and platted roadway or street. But if it be said that this statement is in conflict with the map, then, under the authority cited, the map must govern. This statement clearly shows the intent to dedicate the street to the public, and the map or plat shows the lots to be no part of the street so dedicated. It is reasonable to assume that Smith, in a sale of the lots, did not, and did not intend to, sell any part of the street, but only the lot or lots as platted. It is likewise reasonable to assume that the grantees in such cases could have no other or different understanding. We must therefore conclude that, when the plaintiffs and their grantors purchased the west half of these lots, the purchase was for such part of the lots as is described by the plat, and did not include one-half of the width of the street.

[4] Counsel for defendants in error cite many authorities in support of the well-established principle that a grant or conveyance of land described as bounded by a highway or street will be construed to mean the middle of such highway or street, unless such construction is contradicted either expressly or by necessary implication. But they overlook the fact in this case that the tracts are not so described and the further fact that such construction is at least contradicted by necessary implication. The description is for one-half of the lot, described only by number.

The reason for the rule of law just stated is that the adjacent proprietor is *prima facie* owner of the soil, subject to the easement in favor of the public, and this upon the presumption that the ground was originally taken from the adjoining owners, and for the sole purpose of being used as a thoroughfare.

The rule is, however, qualified by the exception that, where the title to a street is in the government or municipality, a deed of land bounded by such street will carry title only to the line and not to the center of the street; and where the grantor is a corporation, holding a street for public purposes and disposing of the adjacent lots for private use, the boundary of the private property by that held for public purposes will be the dividing line between the two, the same as when one lot is bounded by another. 5 Cyc. 907. So that in this case, whether the title to the street by the dedication was in the county, or whether it was "reserved forever" for public purposes, it was clearly not conveyed by the deeds of Smith.

By section 7221, Mills' Ann. Stat. 1912, it is provided: "Whenever any street or alley designated on the plat of any city or town, or any lands laid out as the site of any city, town, or village, or addition to, or subdivision of any municipal corporation or any

tract of land laid out in lots or blocks and whether the same be within the limits of any municipal corporation or not shall be vacated, the fee of the lands included within such street or alley, or so much thereof as may be vacated, and all right, title or interest of the state or the inhabitants thereof, or of such municipal corporation, shall be deemed and taken to vest in the proprietors of the abutting lots, and parts of lots, each abutting owner taking to the center of the street or alley or to the extent that the street or alley may be vacated." Under this statute there can be no question but that, when the street so platted in this case shall be vacated, if such vacation shall ever occur, then the title to the land occupied thereby shall be vested in the abutting owners, and not in the original grantor.

It does not necessarily follow that, in case of a sale of the half of a lot abutting on the street prior to the time such vacation is made or contemplated, measurement thereof should be made from the center of the street. The right of reversion is solely a contingent one, based upon the happening of the vacation of the street, and, until the fact of vacation occurs, the abutting owner can have no title to any part of the street. Until such time the use and title is in or reserved to the public. It would be, therefore, manifestly unjust to say, in a case of the equal division of a lot, one end of which abuts on the street, that the one who purchased such abutting end shall be held to include, as a part of his moiety, that portion of the street which may or may not fall to him, dependent solely upon the vacation of the street; while the one purchasing that half not so abutting should have title with exclusive private use and occupancy to an amount of land greater and to the extent of one-half of that part of the street than may fall to the abutting owner in case of vacation.

This view is sustained by the very similar case of *Fraser v. Ott*, 95 Cal. 661, 30 Pac. 793. In the case of *Burbach v. Schweinler*, 56 Wis. 386, 14 N. W. 449, it is said: "By the description of the premises according to the plat, the alley which appears thereon, and which may fall within the metes and bounds of the premises described, is necessarily excluded from the grant and the covenants of the deeds, and it would make no difference whether by the law, at the time the plat was made, the alley was a mere public easement, or the fee-simple title to the land was vested in the county or any other body or person for the public. Whatever the alley was by the plat, that is excluded."

In the case of *Wetmore v. Story*, 22 Barb. (N. Y.) 414, an injunction was asked by the owners of certain lots to enjoin the construction of railway tracks in the street upon which such lots abutted, and the right to maintain such private action was based on the claim of title to the land occupied by the street to the center thereof, by reason of the

ownership of the lots in question. Upon this point the court said: "In cities, the pristine or (if there be any such) the existing owners of the strata of the streets cannot exercise any acts of possession, for their individual benefit, over the devoted soil. The many uses to which it may be appropriated preclude that. They have not, therefore, any possession which can raise a presumption of title."

The judgment is reversed, with instruction to the court to establish a boundary line as between the plaintiffs and defendants, midway between the east and west boundaries of lots 1 and 2, and exclusive of the street.

MUSSER, C. J., and GARRIGUES, J., concurring.

PEOPLE ex rel. MOORE v. PERKINS et al.
(Supreme Court of Colorado. Nov. 3, 1918.
Rehearing Denied Dec. 1, 1913.)

1. MUNICIPAL CORPORATIONS (§ 46*)—CHARTERS—"AMENDMENT."

Const. art. 20, §§ 4, 5, respectively, provide that the people of the city of Denver shall have the exclusive power of making, altering, revising, or amending their charter, and that qualified electors numbering not less than 5 per cent. may petition the council for the submission of any charter amendment or for a charter convention. *Held*, that as the constitutional provision did not incorporate any of the inhibitions as to the amendment of legislative bills, the term "amendment," as used therein, means an amendment in its unqualified and unlimited scope.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.*]

For other definitions, see Words and Phrases, vol. 1, pp. 368-370; vol. 8, pp. 7573, 7574.]

2. MUNICIPAL CORPORATIONS (§ 48*)—CHARTERS—WHAT CONSTITUTES—"AMENDMENT."

The term "amendment" being defined as any alteration made or proposed to be made in a bill or motion by addition, change, substitution, or omission, proposals to alter the charter of Denver so as to change the government from one by mayor and legislative council to one by commissioners, and to provide for nonpartisan elections, are amendments, and do not constitute a new charter, where the old charter was left in force as to such matters as civil service, fire and police departments, fiscal management, public health, public utilities, etc., and the new provisions did not provide a complete scheme of city government, and hence such provisions may be submitted by a petition of voters, and do not need to be submitted upon the report of a charter convention, as provided by Const. art. 20, § 5.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

3. MUNICIPAL CORPORATIONS (§ 48*)—CHARTERS—AMENDMENT.

Where proposed amendments, providing for a commission form of government for the city of Denver and for nonpartisan elections, were submitted separately, the fact that the amendment providing for nonpartisan elections was contingent upon the adoption of the commission form of government, and was not self-execut-

ing, does not render it so invalid that the manner of submission deprived the voters of lawfully exercising their right of franchise.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

4. MUNICIPAL CORPORATIONS (§ 46*)—CHARTER—AMENDMENTS.

An amendment to the charter of a city is not invalid because it is not self-executing and is to go into effect upon a contingency.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.*]

5. MUNICIPAL CORPORATIONS (§ 46*)—CHARTER—SUBMISSION OF AMENDMENTS.

Denver City Charter, § 179, provides that the official ballot shall by proper words show the nature of the instrument to be voted on, and shall give the voter the right to indicate his choice by placing a cross mark upon his ballot. Two amendments, one providing for the adoption of the commission form of government, and the other for nonpartisan elections, were submitted separately, although the provision for nonpartisan elections was contingent on the adoption of the commission form of government. *Held*, that, where the ballot gave the voters the right to vote on each proposition the fact that one amendment was contingent on the other did not render the submission invalid under the charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.*]

6. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL FUNCTIONS.

The wisdom of constitutional provisions is not a question for the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

7. MUNICIPAL CORPORATIONS (§ 46*)—CHARTER AMENDMENTS—MODE OF SUBMISSION.

Though the mode of the submission of amendments to the charter of Denver disclosed a strong partiality for the adoption of the measure, and was, to a certain extent, unfair in its caption, that fact will not render the adoption invalid, where over 25,000 votes were cast for or against the amendment, and there was no suggestion that any voter was misled.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.*]

8. MUNICIPAL CORPORATIONS (§ 48*)—CHARTER AMENDMENTS—SUBMISSION.

Amendments to the city charter of Denver, providing for the commission form of government and for nonpartisan elections, do not embrace more than one matter requiring the submission of numerous questions to the voters, even though the provisions of the first amendment necessarily abolished old offices and created new ones, and the second, as part of the scheme of nonpartisan elections, changed the election machinery and the time for holding elections; the changes all being germane to the central ideas of the amendments.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 127, 128, 130-133; Dec. Dig. § 48.*]

9. MUNICIPAL CORPORATIONS (§ 46*)—CHARTER AMENDMENTS—PUBLICATION.

The city council of Denver fixed the time for a special election for the submission of charter amendments by ordinance. The clerk published the text of the amendments with his call for the election for three successive weeks; the first publication being on the day the ordinance was enacted. *Held*, that, even though the city charter required the publication of or-

dinances before they became effective, the call for the election was sufficient; Const. art. 20, § 5, requiring the council to call such elections, not requiring it to be done by ordinance, and placing the duty of publication on the clerk, and hence the fact that the call was made by ordinance may be disregarded; it not being even required by the charter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 123-125; Dec. Dig. § 46.*]

White and Garrigues, JJ., dissenting.

En Banc. Error to District Court, City and County of Denver; John H. Denison, Judge.

Quo warranto by the People on relation of Marcellus F. Moore against J. M. Perkins and others. Writ denied, and relator brings error. Affirmed.

C. H. Redmond and McKnight & Henry, all of Denver, for plaintiff in error. I. N. Stevens, John A. Rush, James A. Marsh, Paul Knowles, and William R. Kennedy, all of Denver, for defendants in error.

HILL, J. This is an action in quo warranto in the name of the people on relation of Marcellus F. Moore. Its object is to test the title of the defendants in error to the offices of commissioners of the city and county of Denver. By this method it is sought to have declared void the enactments which purport to create the so-called commission form of government and the nonpartisan system of election for this city and county.

The trial court sustained the validity of these enactments, as well as the validity of the election of the defendants in error as such commissioners under the nonpartisan system of elections provided for therein. There is no dispute concerning the facts. They disclose that a charter had been framed and was adopted by the people of the city and county of Denver in March, 1904, in conformity with the provisions of article 20 of the state Constitution. This charter provides for a board of supervisors consisting of 7 members, to be elected at large, also a board of aldermen of not less than 16 nor more than 21, to be elected by wards. It also provides for the election of a mayor and certain other executive and judicial officers, and for the appointment of certain other executive officers. In other words, it provides for a complete system of municipal government by what has heretofore been recognized as the mayor form, consisting of two legislative bodies, with a power of veto resting in the mayor, etc. The plaintiff in error, prior to the attempted change, was an alderman duly qualified and the term for which he was elected has not expired.

Upon February 14, 1913, a special election was held within and for the city and county of Denver, at which were submitted separately by prior initiation of certain electors in the manner, so far as details are concern-

ed, as provided for by the charter, two certain propositions in writing. Each was designated therein "Amendment to the charter of the city and county of Denver." One of these propositions, by repeal of certain sections of the old charter, the amendment of others, and the adding of new sections, purports to make certain changes in the form of government from the mayor form so called, as above described, to the commission form so called, with five commissioners to take the place of the mayor and legislative council. They are also to perform certain other duties. The other purports, by the same method, to enact what is commonly known as the nonpartisan system of election. This includes what is called the preferential system of voting. The result of the election was for the adoption of each of these designated amendments, and the regular procedure provided for by the then charter appears to have been followed in declaring them adopted. Upon May 20th, following, as provided for in one of the amendments, another election was held. This was conducted under what is termed the nonpartisan system of elections, as authorized in the other amendment. At this election, the defendants in error, except James F. Markey, were, in the manner provided by this amendment, duly elected to the offices of commissioners. Mr. Markey was elected to the office of auditor, which had been created by one of the amendments. They all qualified and assumed to enter upon the duties of their respective offices. This resulted in the ouster of the plaintiff in error and certain other officers then holding certain offices in existence under certain sections of the old charter, which sections the latter enactments purport to amend or repeal.

It is claimed that these so-called amendments are invalid for the reasons following: First, that they constitute a new or revised charter, which could only be submitted or adopted through the medium of a charter convention; second, that if they are amendments, the manner of submission to the electors was such as to afford no opportunity to the voters of lawfully exercising their right of franchise, and that they were consequently not legally adopted; third, that the call for the election at which they were submitted was not published, as required by the Constitution. If these enactments are amendments to the charter which was in existence at the time of their purported adoption, it becomes unnecessary to consider the question of how a new charter can be secured, for which reason we will first consider the question of whether they are amendments.

[1, 2] The authority for the adoption of the charter which these enactments purport to amend, as well as the manner in which it can be amended, is to be found in article 20 of our state Constitution. This court has re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

peatedly held that this article is a grant of power to the inhabitants of the city and county of Denver, and that it authorizes them to do what it specifically states they can do, and such other matters as must be necessarily implied from the language used.

The material parts of sections 4 and 5 necessary to be considered in this controversy read as follows:

"Sec. 4. The charter and ordinances of the city of Denver as the same shall exist when this amendment takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the city and county of Denver; but the people of the city and county of Denver are hereby vested with and they shall always have the exclusive power in the making, altering, revising or amending their charter and, within ten days after the proclamation of the Governor announcing the adoption of this amendment the council of the city and county of Denver shall, by ordinance, call a special election, to be conducted as provided by law, of the qualified electors in said city and county of Denver, for the election of twenty-one taxpayers who shall have been qualified electors within the limits thereof for at least five years, who shall constitute a charter convention to frame a charter for said city and county in harmony with this amendment. Immediately upon completion, the charter so framed, with a prefatory synopsis, shall be signed by the officers and members of the convention and delivered to the clerk of said city and county who shall publish the same in full, with his official certification, in the official newspaper of said city and county, three times, and a week apart, the first publication being with the call for a special election, at which the qualified electors of said city and county shall by vote express their approval or rejection of the said charter. If the said charter shall be approved by a majority of those voting thereon, then two copies thereof (together with the vote for and against) duly certified by the said clerk, shall, within ten days after such vote is taken, be filed with the secretary of state, and shall thereupon become and be the charter of the city and county of Denver. But if the said charter be rejected, then, within thirty days thereafter, twenty-one members of a new charter convention shall be elected at a special election to be called as above in said city and county, and they shall proceed as above to frame a charter, which shall in like manner and to the like end be published and submitted to a vote of said voters for their approval or rejection. If again rejected, the procedure herein designated shall be repeated (each special election for members of a new charter convention being within thirty days after each rejection) until a charter is finally approved by a majority of those voting thereon, and certified (together with the vote for and against) to the secretary of state as aforesaid, whereupon it shall become the charter

of the said city and county of Denver and shall become the organic law thereof, and supersede any existing charters and amendments thereof.

"Sec. 5. The citizens of the city and county of Denver shall have the exclusive power to amend their charter or to adopt a new charter, or to adopt any measure as herein provided. It shall be competent for qualified electors in number not less than five per cent. of the next preceding gubernatorial vote in said city and county to petition the council for any measure, or charter amendment, or for a charter convention. The council shall submit the same to a vote of the qualified electors at the next general election not held within thirty days after such petition is filed; whenever such petition is signed by qualified electors in number not less than ten per cent. of the next preceding gubernatorial vote in said city and county, with a request for a special election, the council shall submit it at a special election to be held not less than thirty nor more than sixty days from the date of filing the petition; *provided*, that any question so submitted at a special election shall not again be submitted at a special election within two years thereafter. In submitting any such charter, charter amendment or measure, any alternative article or proposition may be presented for the choice of the voters, and may be voted on separately without prejudice to others. Whenever the question of a charter convention is carried by a majority of those voting thereon, a charter convention shall be called through a special election ordinance as provided in section four (4) hereof, and the same shall be constituted and held and the proposed charter submitted to a vote of the qualified electors, approved or rejected, and all expenses paid, as in said section provided. The clerk of the city and county shall publish, with his official certification, for three times, a week apart, in the official newspaper, the first publication to be with his call for the election, general or special, the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which is to be submitted to the voters. Within ten days following the vote the said clerk shall publish once in said newspaper the full text of any charter, charter amendment, measure, or proposal for a charter convention, or alternative article or proposition, which shall have been approved by a majority of those voting thereon, and he shall file with the secretary of state two copies thereof (with the vote for and against) officially certified by him, and the same shall go into effect from the date of such filing. He shall also certify to the secretary of state, with the vote for and against, two copies of every defeated alternative article or proposition, charter, charter amendment, measure, or proposal for a charter convention. * * * No charter, charter amend-

ment or measure adopted or defeated under the provisions of this amendment shall be amended, repealed or revived, except by petition and electoral vote."

It will be observed from the language used in both sections 4 and 5 that the people of Denver were given the exclusive power to amend their charter. Section 5 in substance provides that it shall be competent for qualified electors in number not less than 5 per cent., etc., to petition the council for any measure or charter amendment or for a charter convention. This is followed with a method as to what shall then be done. As we interpret the language there used, it means that they may petition for *any* amendment; that in the manner used, the word "amendment" is unqualified and unlimited, and that they are entitled in this manner to have submitted anything included within the definition of the word "amendment," unless there is something to be found elsewhere in article 20 which would tend to limit or confine its meaning to a narrower scope. We have been unable to find anything elsewhere in the article which would tend to sustain such a claim. This limits the question as to whether these two amendments constitute a new charter, or whether they are in fact amendments to the existing charter. We are of opinion that they come within the definition of the word "amendment," when unlimited in its scope as here used. Webster's New International Dictionary, 1911 edition, defines the word "amendment," "In public bodies: Any alteration made or proposed to be made in a bill or motion by adding, changing, substituting or omitting."

When the former charter is considered in connection with the changes brought about by these enactments, it is convincing of the fact that they are amendments only. A new charter would be an instrument complete within itself. When these amendments are considered alone, they fall far short of such an instrument, and will be found to cover but a portion of the questions necessary to be included in a charter for the government of any municipality. For instance, they fail to cover or change the question of the appointment of many appointive officers and employes, provided for in other portions of the charter; they fail to make any provisions concerning their duties or for their salaries; such matters as civil service, the fire and police department, the public health, the fiscal management of municipal affairs, finances, public utilities and the control thereof, franchises and public improvements, or most of them, are left untouched with the exception of a few instances where it is provided that a commissioner shall become the head of certain departments, which were heretofore in control of certain boards or some elective officer. The charter, prior to amendment, appeared to cover all questions of municipal government. It consisted of approximately 360 sections. The two amend-

ments under consideration amend approximately 20 sections, add 20 new sections, and repeal about 20 sections, possibly by implication certain paragraphs in some few other sections, leaving approximately 300 sections untouched, and without the greater part of which no charter for any municipality would be anywhere near complete.

It is true that the amendments are, in a way, a departure from the system heretofore provided for the management of the municipality. In this respect, they are different and are new, so far as the number of officials is concerned; but, regardless of this, they are germane to the subject of municipal government, that is the only proper subject embodied in the charter, and they pertain to and affect this subject, each covering a separate and distinct branch thereof. This brings them within practically all the definitions of the word "amendment," as defined in all the authorities cited. The fact that in a way they present something new or different in the management of municipal affairs in no way militates against their being amendments. It is common knowledge that commission government, in some form, has, within the past few years, been adopted in many cities in the United States, but, regardless of this, they still continue to be municipalities, and their charters pertain only to local self-government. When these changes are analyzed, it will be found that the difference is not so great as the term used might imply; for instance, under the old system there were two legislative bodies, consisting of about 25 members; under the new, but one legislative body, consisting of 5 members. In each instance they are elected by the people. The new body enacts ordinances, etc., the same as the old; in this respect their powers and duties are identical. Under the old system, a mayor was elected by the people, with a power of veto; under the new system, the commissioners elect one of their number as mayor, but without any power of veto. Under the old system, certain city offices were created with the incumbents thereof designated to perform the duties pertaining to certain county and precinct offices, as provided by article 20; while under the new system, the commissioners are designated to perform the duties pertaining to most, if not all, of these county offices, and the number of city offices wherein the incumbents were designated to perform the duties of county and precinct officers has been materially reduced. It will thus be observed that about the only changes of any consequence are the reduction in the number of officials heretofore provided for the management of the city's affairs, and the withdrawal from the mayor of the power of veto; but in a way this power has been vested in three members of the commission, as that number can defeat any proposed legislation.

In *Livermore v. Waite*, 102 Cal. 113, 36 Pac. 424, 25 L. R. A. 312, cited by counsel

for plaintiffs in error, it is said: "The significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed." This covers the amendments under consideration. The lines of the original instrument cover the question of local self-government for the city and county of Denver. The amendments include such additional changes within the lines of the subject covered by the original instrument, viz., local self-government, as are thought will improve or better carry out the purposes for which it was framed.

By the adoption of article 20 to our state Constitution, we embodied therein radical changes by consolidating the city and county of Denver and allowing it to designate the persons therein who should perform the duties pertaining to county offices, as well as granting to it the right to make its own charter, a power theretofore resting in the Legislature. The validity of this amendment has been sustained. *People v. Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34; *People v. Cassidy*, 50 Colo. 503, 117 Pac. 357.

In *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066, as well as in *Londoner v. People*, 52 Colo. 15, 119 Pac. 156, we held that article 20 was intended to grant home rule to the city and county of Denver and other municipalities, and to bestow upon them every power possessed by the Legislature in making their charter. This being true, if the matter was still in the hands of the Legislature, and a legislator was drafting the title to a bill concerning this subject, if he followed the repeated suggestions of this court, he would make it broad enough upon the general subject to include all appropriate matters pertaining thereto. In such case, any matter pertaining to local self-government covered in the general title would be germane by way of amendment.

This court, as well as the court of appeals, has repeatedly sustained sundry and different kinds of amendments to the former charter, some of which made radical changes in the management of its affairs. *Cunningham v. Denver*, 23 Colo. 18, 45 Pac. 356, 58 Am. St. Rep. 212; *In re City of Denver*, 18 Colo. 288, 32 Pac. 615; *Darrow v. People*, 8 Colo. 426, 8 Pac. 924; *Carpenter v. People*, 8 Colo. 116, 5 Pac. 828; *Brown v. City of Denver*, 7 Colo. 305, 3 Pac. 455; *City of Denver v. Barron*, 6 Colo. App. 72, 89 Pac. 989.

It should also be borne in mind that in its method of enacting laws and amendments thereto, the Legislature is limited by certain restrictions contained in the Constitution. Article 5 provides that no law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house so as to change its original purpose. Also, that no bill except general appropriation bills shall be passed containing more

than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed. No such provisions are to be found in article 20 in providing for initiated amendments to a charter. This is further evidence of the correctness of our conclusion that the word "amendment" as therein used was intended to be unqualified and unlimited in its scope.

Article 20 authorizes the city and county of Denver to make its charter, which, in a sense, is its constitution concerning local affairs; the state Constitution provides the method by which it can be amended. This does not include the restrictions placed upon the Legislature in the enactment of laws, or any restrictions other than the word "amendment" would imply. This makes the rules pertaining to amendments to constitutions more applicable to those under consideration than amendments pertaining to general laws; such being the case, the principles recognized by this court in *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, are applicable, wherein Mr. Justice Elliott, in speaking for the court, calls attention to this distinction and the reasons therefor, as follows: "The power of the General Assembly to propose amendments to the Constitution is not subject to the provisions of article 5, regulating the introduction and passage of ordinary legislative enactments. A proposed amendment to the Constitution need not be restricted, like an ordinary legislative bill, to a single subject; the only restriction is, that 'amendments shall not be proposed to more than one article of this Constitution at the same session.' Const. art. 19, § 2. It is not essential that the subject of a proposed amendment shall be expressed in its title; a proposed amendment need not have any title except as it designates the article of the Constitution to be amended. In changing a proposed amendment to the Constitution during its passage through either house, it is not necessary that such change should be printed, nor that the original purpose of the proposed amendment should be strictly adhered to. *Koehler v. Hill*, 60 Iowa, 543 [14 N. W. 738, 15 N. W. 609]. Section 2 of article 19 prescribes the method of proposing amendments to the Constitution, and no other rule is prescribed. It is not, therefore, by the 'legislative' article, but by the article entitled 'amendments,' that the legality of the action of the General Assembly in proposing amendments to the Constitution is to be tested. Article 19 is *sui generis*; it provides for revising, altering, and amending the fundamental law of the state, and is not in *pari materia* with those provisions of article 5, prescribing the method of enacting ordinary statutory laws. The distinction is obvious. When an ordinary legislative bill, free from constitutional objection, is intro-

duced and passed by both houses of the General Assembly, as provided by article 5, it becomes, when approved by the Governor (or without his approval when passed by a two-thirds vote of both houses), a valid and binding law; thus, an act of ordinary legislation is fully and finally consummated, and thus a statutory law is brought into existence by virtue of the power vested in the legislative department of the government. But, in proposing an amendment to the Constitution, the action of the General Assembly is initiatory, not final; a change in the fundamental law cannot be fully and finally consummated by legislative power. Before a proposed amendment can become a part of the Constitution, it must receive the approval of a majority of the qualified electors of the state voting thereon at the proper general election. When thus approved, it becomes valid as part of the Constitution, by virtue of the sovereign power of the people constitutionally expressed."

In *Falconer v. Robinson*, 46 Ala. 840, it was held that an act is amended when it is, in whole or in part, permitted to remain, and something is added to or taken from it, or it is in some way changed or altered to make it more complete or perfect, or to fit it the better to accomplish the object or purpose for which it was made or some other object or purpose.

In *Cantini v. Tillman* (C. C.) 54 Fed. 969, it is said: "Nothing is more common than to amend by striking out one section and by inserting another, or by striking out several sections and by inserting one or several; and if it be competent to amend by striking out and inserting one, two, three, four sections, clearly it is competent to strike out all the sections, and to insert others, in *pari materia*. Striking out all after the enacting words and inserting is nothing but an amendment, and is governed by the same rules as other amendments." See, also, *Hammond v. Clark*, 136 Ga. 813, 71 S. E. 479, 38 L. R. A. (N. S.) 77; *Brake v. Callison* (C. C.) 122 Fed. 722; *State v. Wright*, 14 Or. 365, 12 Pac. 708.

A proposed change from the commission form to the mayor form was under consideration in *State ex rel. Hindley et al. v. Superior Court*, 70 Wash. 352, 126 Pac. 920. The city of Spokane had by charter convention adopted the commission form of government; thereafter the requisite number of citizens who desired to go back to the mayor form petitioned the council to call a special election for that purpose; they refused. The court held the method which controlled was provided for in their charter. The portion involved reads: "This charter may be amended by a majority vote on such amendments. The provisions of this charter, with respect to submission of legislation to popular vote by the initiative, or by the council of its own motion, shall apply to and include the proposal, submission, and adoption of amend-

ments." In that case, as here, it was urged that amendments referred to and provided for in their charter were only such revisory or supplemental changes as the showing of the present charter might suggest, and should not be held to refer to amendments which alter or annul the basic plan or principle upon which the city government was founded. This contention was not sustained. The commissioners who for this reason had refused to call the election were compelled to do so. Without being understood as approving or rejecting all the reasons given, we are of opinion that the conclusion reached by the Washington court was sound, and that there, as here, where the word "amendment" is used without limitation, any matter which is germane to the principal subject, to wit, that of municipal government, is proper to be submitted as an amendment. The case of *State ex rel. v. City of Portland et al.* (Or.) 133 Pac. 62, is also relied upon by defendants in error, but upon account of the difference between their Constitution and charter provisions and ours we think it is unnecessary to attempt to apply its principles to the facts under consideration.

In *City and County of Denver et al. v. New York Trust Company et al.*, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101, the Supreme Court of the United States sustained the validity of section 264a, which was an amendment to this charter initiated by the people and voted on at the May, 1910, election. This section was in relation to certain public utilities; it created a public utilities commission, and designated its first members instead of leaving them to be elected in accordance with the provisions of section 198 of the charter; it also prescribed a different mode of acquiring a municipal water plant than that provided in article 9 of the charter. It authorized the issuance of bonds, and contains many other provisions upon the water subject. The voter was required to accept or reject it in its entirety; he was given no opportunity to vote for or against its different provisions, or for or against the commissioners named in the act. In commenting upon this subject, the court said: "But it may be added that we think all the provisions of the amendment have such a relation to the principal subject, namely, the public utilities of the city, as to permit their inclusion in a single amendment. Of the other two branches of this objection it is enough to say that the amendment supersedes pro tanto the original provisions of the charter with which it is not in accord. The purpose in adopting it was to introduce something new—to make a change in existing provisions—and being adopted conformably to the constitutional and charter requirements, the new or changed provisions became at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict." We are not unmindful of the language used in this case, which counsel for

plaintiff in error claim sustains their contention that this is a new or revised charter. It is: "In the briefs some reference is made to *Speer v. People*, 52 Colo. 325 [122 Pac. 768], where the Supreme Court of the state recently had before it a proposed amendment radically and extensively changing the form of the city government. The opinions rendered in the case disclose some differences of opinion upon the question whether what was proposed could be regarded as a mere amendment, but the question was not decided, and nothing was said in the opinions that tends to sustain the objection now made to § 264a." By this language, we do not understand that the question here was under consideration in that case, or that it was meant to intimate that a change could not be made, by amendment, from the mayor form to the commission form. According to our views, the language hereinabove first quoted would indicate that the court was of opinion that such changes could be made for the reason that, in referring to section 264a, it states: "The purpose in adopting it was to introduce something new—to make a change in existing provisions." As we understand it, the object of all amendments is to make changes, something different, or something new, or to eliminate something if desired.

[3, 4] The contention that the manner of their submission was such as to afford no opportunity to the voters of lawfully exercising their right of franchise is not well taken. The claim that the two amendments, by their terms, are made interdependent, so that neither may be effective unless both are adopted, is not altogether sustained by the record. The adoption of the commission government amendment does not appear to be dependent upon the adoption of the nonpartisan election amendment. It is true that its last paragraph says: "The foregoing amendment shall not go into effect until at the same election when it is adopted or at some subsequent election an amendment shall be adopted providing for commissioners to assume the duties herein provided for, and designating the time when said commissioners shall take office, and it shall then go into effect when said commissioners do take office." This means that it shall not take effect until some provision be made for the election of commissioners, and not then until they shall assume the duties of their offices. In this respect this amendment was not self-executing. We do not understand that this fact makes it void. 8 Cyc. 752; *Ex Parte Wall*, 48 Cal. 279, 17 Am. Rep. 425.

It is true, as contended, that the adoption of the first portion of the nonpartisan election amendment, viz., that providing for the election of commissioners, was contingent upon the adoption of the commission government amendment. We do not understand that this makes it void ab initio.

In *Dillon on Municipal Corporations* (5th Ed., vol. 2), at page 905, it is said: "Municipal ordinances, otherwise valid, may, like

an act of the Legislature, be adopted to take effect in future and upon the happening of a contingent event."

In *Cooley, Constitutional Limitations* (7th Ed.), at page 164, the author states: "But it is not always essential that a legislative act should be a complete statute which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event."

In *State v. Noyes*, 30 N. H. 279, it is said: "It is not at once apparent that there can be any sound objection to the enactment of laws to take effect upon the occurrence of future events, such as the Legislature may prescribe."

In *Pueblo County v. Smith*, 22 Colo., at page 541, 45 Pac., at page 360 (33 L. R. A. 465), this court said: "It will be conceded that the powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority, except as the principle may be modified by the second maxim. It is, however, not essential that the law should take effect immediately upon its leaving the hands of the Legislature. Its operation may, under certain limitations, be made to depend upon a contingency." To the same effect in principle are: *People ex rel. Rhodes v. Fleming et al.*, 10 Colo. 553, 16 Pac. 298; *State v. Parker*, 26 Vt. 357; *Bull v. Read*, 13 Grat. (54 Va.) 78; *Burnside v. United States*, 7 Oranch, 382, 3 L. Ed. 378; *Peck v. Weddell*, 17 Ohio St. 271.

[5, 6] It is claimed that the form of the ballot violates the provisions of section 179 of the charter, which provides that the official ballot shall, by proper words, show the nature of the instrument to be voted on, and shall give to each voter the right to place a cross mark upon his ballot, showing clearly his intention to vote for or against any measure, charter amendment, proposal for a charter convention, or any ordinance, and, in case any separate or alternative proposition be submitted the ballots shall be prepared so as to enable the voter to express his intention in regard to each proposition. By this method, it was intended that each voter should have the right to vote for or against each measure, charter amendment, or ordinance or for or against a charter convention. We think the substance of this section was complied with in this respect. The fact that the going into effect of a portion of one of the amendments was contingent upon the adoption of the other did not make it a non-compliance with this section. Whether, when applied to a portion of the one amendment, it would be a mere futile and senseless procedure, as contended for by counsel, is a matter with which we have no concern. By the adoption of article 20 the whole people of the state saw fit to delegate to a very limited number of the inhabitants of the city and

county of Denver the power to initiate proposed amendments to their charter. The authorities all seem to hold that the going into effect of such an amendment can be made contingent upon the happening of other events. In case this small per cent. of the electors is enforcing futile and senseless proceedings, and will persist in so doing, as counsel argue, the remedy lies with the people to amend the Constitution in a manner which will prevent it. This court is not possessed of that power. In *People v. Cassiday*, supra, in referring to article 20, which grants this privilege, we said: "It is not only a part of the Constitution, but it is there to stay, until the authority which voted it in shall vote it out. It, as any other part of the Constitution, is to be given force and effect according to its plain intent, purpose and meaning."

[7] It is claimed that the language upon the ballot submitting the amendment providing for commission form of government is calculated to mislead the voter. An examination of the ballot when considered with the result of the election shows this contention to be incorrect. The ballot discloses that there were four separate and distinct propositions submitted. The first was for or against a nonpartisan system of election. The second was for or against initiated amendment that gives immediate nonpartisan commission government to the city and county of Denver. The third was for or against the holding of a charter convention to adopt a nonpartisan commission form of government for the city and county of Denver. (The validity of such a designation we give no opinion concerning.) The fourth pertains to the property and rates of a telephone company. The electors voted to adopt the first, second, and fourth, rejecting the third. It is not contended that the vote upon each was not sufficient to disclose an intelligent expression of the people upon these questions, though the submission clause to the amendment concerning commission government might appeal to us as disclosing a strong partiality for the adoption of that measure, and, to a certain extent, be unfair in its caption, or was somewhat in the manner of a campaign document, as counsel suggest. It is not alleged that it misled any voter, but, to the contrary, it stands practically admitted that there was a decided expression by the electors upon all of these questions. This same contention was raised in *People v. Sours*, supra, pertaining to the title under which article 20 of the state Constitution was submitted, in which case it was said: "There is no proof that any elector was deceived by the title under which the amendment was submitted." Not only is this the case here, but the record shows that 26,842 votes were cast for or against this amendment. This fact, coupled with the absence of any allegation that any elector was deceived or misled by the submission clause,

is sufficient to convince us that there is no valid foundation for this contention.

[8] It is claimed that while the form of submission purports to submit only two amendments, there were, in fact, a large number of distinct and separate amendments submitted and voted upon as one amendment. In this respect great stress is placed upon the argument wherein it is claimed that the two amendments were interdependent, which contention has heretofore been disposed of. It is claimed that, inasmuch as the commission form of government amendment makes regulations concerning the duties of the commissioners as the city council, and provides that the doing of certain things shall be a sufficient cause to declare the office vacant, and that, as it eliminates the veto power of the mayor and provides for a reduction in the number of other officers, these and other matters were separate and distinct propositions, upon which the people had a right to express themselves separately. It is also claimed that the section in the election amendment which changes the time for city elections, and the section which prohibits political parties from naming candidates as such, and the section which increases the term of office of the election commission, are distinct and separate questions upon which the elector had a right to be heard separately.

We are of opinion that the matters above referred to are but incidents to the main objects sought to be accomplished by the amendments. The commission amendment provides for the commission form of government. To do this it was necessary to make changes in the charter, so as to adapt its provisions to the conditions involved by the change. This could not be accomplished by declaring that the city and county of Denver should have a commission form of government, consisting of five commissioners, one of whom, selected by themselves, should have the title of mayor. To obtain the object sought, it was necessary to abolish many offices, to create others and provide their duties, and to make other changes thought necessary in order to perfect a complete government under the commission system. We are of opinion that the changes referred to were germane to the principal subject and were made as incidents thereto. In *People v. Sours*, supra, it was said "that if an amendment embraces more than one subject, said subjects need not be separately submitted if they are germane to the general subject of the amendment, or if they are so connected with or dependent upon the general subject that it might not be desirable that one be adopted and not the other."

If a bill were introduced in the Legislature entitled "An act in relation to elections," making a change in the dates thereof, it could not consistently be maintained that it was not covered by the title. We think this rule is applicable here, and that

the change of the date of election was germane to the election amendment; also, that the portion involving the terms of the election commissioners was germane to this amendment. By other provisions, arrangements are made which will ultimately abolish the election commission, and substitute in lieu thereof one election commissioner, who, with the commissioner of safety and the auditor, will thereafter perform the duties now being performed by the election commissioners. It was necessary to make some arrangements concerning this question; it was but an incident to the main question. As said upon this subject in *Wolfe v. Bronson*, 115 Mo. 271, 21 S. W. 1125: "If all the provisions of the bill have a natural relation and connection, then the subject is single, and this too though the bill contains many provisions." To the same effect is *State ex rel. Hudd v. Timme*, Secretary of State, 54 Wis. 318, 11 N. W. 785, wherein it is said: "We think amendments to the Constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. Tested by this rule, the propositions submitted to the electors contained but one amendment. It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the Legislature. It was so spoken of by the legislative bodies which passed it, as well as by the electors who ratified it. To make that change it was necessary, in order to prevent the election of members of assembly, half of whom would never have any duties to perform, that a change should be made in their tenure of office, as well as in the times of their election, and the same may be said as to the change of the tenure of office of the senators." These cases were cited with approval by this court in *People v. Sours*, supra, which is in harmony with the views herein expressed. To the same effect are: *State ex rel. v. Allen*, 178 Mo. 555, 77 S. W. 868; *State ex rel. v. Riplinger*, 30 Wash. 281, 70 Pac. 748; *City of Eugene v. Willamette Valley Co.*, 52 Or. 490, 97 Pac. 817.

As heretofore stated, it should be borne in mind that the method provided for the adoption of amendments like those under consideration is not confined to the limits prescribed in the Constitution for the adoption of amendments to legislative enactments. When this fact is taken into consideration, together with the fact that the going into effect of such amendments can be made contingent upon the happening of some other event, the case of *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311, is not in conflict with the

views herein expressed. It involved the issuance of bonds for 11 distinct and separate purposes having no connection with each other, which, as the court held, made it the submission of that number of distinct and separate questions concerning which it was held that the voter had the right to express his choice separately upon each. At the election under consideration there were four amendments submitted, with the privilege given the voter to exercise his choice for or against each. According to our views, all the provisions in the commission government amendment which have been called to our attention have a natural relation and connection with that subject; likewise all those in the nonpartisan election amendment have a natural relation and connection with that subject, making them proper to be thus submitted each as one amendment. This makes unnecessary any consideration of whether sundry and separate matters having no relation to each other can in this manner be submitted as one amendment.

[9] It is claimed that the call for the election at which these amendments were submitted was not published for the time prescribed by section 5 of article 20 of the Constitution, and for this reason that the election is void. The date for the election was fixed in an ordinance which was signed by the council and mayor on January 24, 1913. This ordinance was published January 25th. The clerk published the text of the amendments, with his call for the election, upon January 24th, again on January 31st, and also upon February the 7th, making three publications, a week apart, as required by the Constitution. But it is claimed that the first publication upon January 24th was a nullity, for the reason that the ordinance which fixed the date for the election did not become effective until January 25th, because section 13 of the charter provides that no ordinance shall take effect until published, etc.; that the two publications made thereafter were the only legal ones; that a constitutional provision is mandatory and must be strictly followed, hence these facts make the election void. The fallacy with this contention necessary to consider is in its assumption that, as the date fixed for the election was in an ordinance, this action by the council in fixing the date was of no force and effect until the ordinance, as an ordinance, was in force. An examination of article 20 of the state Constitution will disclose that it makes no provisions for the calling of special elections like the one under consideration by ordinance. Section 5 provides that, whenever petitions providing for the submission of amendments to the charter, etc., are signed by qualified electors in number not less than 10 per cent., etc., with a request for a special election, the council shall submit it at a special election to be held not less than 30 nor more than 60 days from the date of filing the petition, but it does not

state that it shall be by ordinance. Section 4 provides that a special election shall be called by ordinance for the election of delegates to the first charter convention. Section 5 provides, first, for the calling of elections at which shall be submitted any measure, charter amendment, or the question of holding a charter convention. It then provides that, when the question of a charter convention is carried at such election, a charter convention shall then be called through a special election ordinance, etc., by providing in both instances that the call for the election, where a charter convention is to be held, must be by ordinance, and omitting it in the same act as to calls for elections like the one under consideration is convincing of the fact that such a requirement was not intended in elections of this kind. Section 179 of the charter does not provide that the call for such an election shall be by ordinance, while section 20 of the charter provides that any measure, charter amendment, or proposal for a charter convention may be submitted to a vote of the qualified electors in the manner provided by the Constitution, which it must be conceded would in any event be controlling. The Constitution not having provided that the call for this election be by ordinance, does the fact that it was included in an ordinance make the call inoperative and of no force and effect until the ordinance became effective as an ordinance? We do not think so. The council was not charged with the duty of giving notice of the election; that duty was imposed upon the clerk. Its duty was limited to those matters provided for by article 20 of the Constitution and certain provisions of the charter, none of which provide that the act under consideration be by ordinance. The call for this election could have been by resolution or in some other appropriate manner, and when thus provided for it would be effective at once. It is the act in compliance with the mandate of the Constitution, and not the form, which should be looked to in order to ascertain if the constitutional requirement has been complied with. The pleadings disclose that the act of the council in calling the election and fixing the date therefor was on or before January 24th, that being the date it is alleged that the ordinance was signed by the mayor and council. Such being the case, the allegation that it was done by ordinance can be treated as surplusage or considered as immaterial, under the well-known rule, that when a thing is done in compliance with the mandate of the Constitution, the doing of other things in excess of that requirement, in connection with that required, can be eliminated, and need not be considered. This principle was involved in *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, where the court had under consideration an amendment to the Constitution which the General Assembly undertook to propose by bill. It was urged that while this was unnecessary, yet, as the General Assem-

bly undertook to submit it in this manner, they were bound to observe the formalities required in the enactment of laws. The court held that its statutory character did not affect the validity of the proposed amendment included therein, since as the court said, "Amendments may be proposed in any form or manner so long as the requirements of section 2 of article 19 are observed." A case more directly in point is that of *Hellman v. Shoulters*, 114 Cal. 136, 44 Pac. 915, 45 Pac. 1057, where the validity of certain actions of the council, not required to be but which were taken by ordinance, were involved before they became effective as an ordinance. The question and conclusion arrived at as stated in the syllabi are: "The street law provides a complete scheme of procedure for street work, and the city charter cannot make a different procedure by requiring more or less publication of notice, and a publication of notice of intention to make a street improvement for two days only, as provided by the street law, is sufficient, though it be in the form of the publication of an ordinance, which the city charter requires to be published for ten days before it can take effect, the ordinance being equivalent to a resolution so far as the street law is concerned, and being the basis for the two days' notice provided for by that law, whether effective as an ordinance or not." To the same effect in principle are: *City of Napa v. Easterby*, 76 Cal. 222, 18 Pac. 253; *McEneaney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540.

It will thus be observed that the constitutional provision pertaining to the publication of the call for this election was in all respects strictly complied with.

Perceiving no prejudicial error the judgment is affirmed. Affirmed.

WHITE and GARRIGUES, JJ., dissent.

WHITE, J. Public duty requires each member of this court to freely speak his own convictions on the questions to be determined in any case, and when one of these members, like myself, has the misfortune to differ in a fundamental respect from the conclusions of the majority, to explain with frankness, and undeterred by consequences, the grounds of that difference. In this case the difference extends only to the *manner* of exercising the powers conferred upon the people of the city and county of Denver by article 20 of the Constitution, and *in no sense as to what those powers are*. There can be no doubt that the constitutional provision mentioned gives to the people of that municipality the fullest measure of self-government, and grants to them every power previously possessed by the General Assembly in making, changing, and amending its charter. But as the General Assembly, in the exercise of the power of making charters for municipalities, including the city of Denver, was limited by

the provisions of the state Constitution, and was required to follow certain procedure therein prescribed, the people of the city and county of Denver are also limited, and required to observe certain modes of procedure in making, changing, or amending a charter for that corporate entity. They can neither create the organic law of the municipality, nor change, alter, nor amend the same, *except in the manner prescribed or permitted by the organic law of the state*. Indeed, in the exercise of the powers conferred, the people of the municipality are actually and truly the agent of all the people of the state, and can do no act in making a charter, changing or amending the same, except in the manner, at the times, and under the conditions prescribed or permitted in the constitutional provision, which constitutes their power of attorney. Section 4 thereof invests the people of the city and county of Denver with exclusive and continuing power to make, alter, revise, or amend their charter. Section 5 re-grants and reinvests the power so invested by section 4, and invests the citizens of the municipality with the additional power to adopt "any measure." It also invests them with the power to refer, by petition, any measure passed by the council to a vote of the qualified electors, and to initiate ordinances by petition. This language, unmodified by other language of the Constitution, would constitute general grants of power, and thereby invest, by implication, all powers necessary for the exercise of the powers granted, and the people of the municipality would have been at liberty thereunder to prescribe and adopt their own modes of procedure. But the same sections of the fundamental law prescribe the modes of procedure, except in a few minor matters, whereby the powers granted may be exercised; and it is elementary that where the means for the exercise of granted powers are also given, no other means or different powers can be implied, either on account of convenience or of being more effectual. Cooley's Const. Lim. (6th Ed.), p. 42; Field v. People, 2 Scam. (Ill.) 79.

As the mode of procedure prescribed by section 4, in the exercise of the powers there granted, extends only to the adoption of a first charter, and section 5 prescribes the procedure in the exercise of the other powers enumerated in section 4 and reaffirmed in section 5, the adoption of a first charter was a condition precedent to the exercise of the powers granted in section 5. Indeed, such is, in substance, the mandate of the Constitution; for it is provided in section 4 that, until the people of the municipality adopt a charter as therein prescribed, the charter and ordinances of the city of Denver, as they existed at the time the new municipality was created, should be the charter and ordinances under which the new entity should be governed. But the power to adopt a first charter was exercised in March, 1904, and thereby the people of the municipality subjected

themselves to the provisions of article 20. So the powers involved in the case at bar fall within those enumerated in section 5, and the legality of their exercise must be measured by the modes of procedure therein prescribed or permitted, which includes by express reference certain of the provisions contained in section 4. It therefore becomes necessary to consider the two sections together. When so considered, there is found therein a constitutional mandate that a first charter be formulated by 21 taxpayers, elected at large from the municipality, who shall have been qualified electors within the limits thereof for at least five years. Furthermore, that any new charter shall be formulated in like manner by like qualified taxpaying electors. In either case, the formation of a charter or a new charter, respectively, was and is a condition precedent to the right of the qualified electors within the municipality to vote upon the approval or rejection thereof. The union of the acts required to be performed by the several agencies designated was and is essential to impregnate them with life under the fundamental law. Stating the matter somewhat differently, it is manifest that, while qualified electors, whether taxpayers or not, and without regard to the length of time they have been such electors, may petition the council for a charter convention, and may thereafter vote upon the adoption or rejection of a charter submitted, it is only taxpayers of the municipality who have been qualified electors within the limits thereof for at least five years that are empowered to frame and submit a charter. Not so, however, as to the formulating and requiring the submission of "any measure" or a "charter amendment." This may be done by the required number of qualified electors, whether taxpayers or not, and without regard to the length of time they have been such electors. Therefore, it being provided that a "new charter" can be framed only by taxpaying electors of long residence, while "any measure" or a "charter amendment" may be framed by any elector, it is not conceivable that that which is authorized by the one method may be accomplished by the other. Clearly, there is a marked distinction between what is meant by a "new charter" on the one hand, and "any measure" or a "charter amendment" on the other. While it is not imperatively necessary to determine the exact meaning of the word "measure" as used in the constitutional provision, or whether it is synonymous with "charter amendment" as therein used, it is proper to say that rules of construction require that the two terms be ascribed distinct meanings. It is a cardinal rule in the construction of a law, whether constitutional or statutory, that words shall not be regarded as cumulative or useless, but that every word shall, if possible, be given some meaning. McClain v. People, 9 Colo. 190, 11 Pac. 85. Moreover, it is significant that throughout the constitutional provision

the words "amendment" and "convention" are always preceded by the qualifying word "charter," that is, "charter amendment" and "charter convention," while no such adjective is prefixed to the word "measure." Thus it is clearly evident that the word "measure," as therein used, is not in a strict sense a "charter measure." From the society in which the word is found, it would seem that it was intended thereby to cover matters not strictly governmental in their nature, such, perhaps, as entering into contracts and the acquiring and operating public utilities, etc. The conclusion I have here reached, as to the distinction between the modes of amending a charter and of revising it in extenso or making a new one, is fortified by and in harmony with the language of the Supreme Court of the United States in considering this identical matter in *City and County of Denver v. New York Trust Co.*, 229 U. S. 123, 143, 33 Sup. Ct. 657, 666, 57 L. Ed. 1101, where it is said: "Article 20 of the state Constitution, under which the present home rule charter was adopted, while investing the people of the city (section 4) with 'exclusive power in the making, altering, revising, or amending their charter,' makes a distinction (section 5) between the modes of amending it and of revising it in extenso or making a new one, the difference being that an amendment may be initiated by petition and directly voted upon and adopted by the electors, while a revised or new charter requires the intervention of a charter convention."

Indeed, it is elementary that, when in a constitution one complete method of procedure is prescribed for making a new instrument and a different procedure for making amendments to the former, the particular method prescribed for enacting an amendment cannot be employed in enacting a new instrument. From the use, therefore, of the different terms "amendment" and "new charter," and from the entirely different methods prescribed for molding them into shape and for their submission, it is inevitable that by "amendment" is meant something substantially less than a "new charter"; and the conclusion is irresistible that the particular method prescribed for molding into shape and submitting "an amendment" cannot be employed for molding into shape and submitting a substantially different thing, to wit, a "new charter." The rule and the reasons therefor are tersely expressed in *Jameison on Constitutional Amendments*, where, in paragraph 574-c, p. 610, it is said: "Obviously, as we have before remarked, while it may, without absurdity, be claimed that the maxim (*expressio unius*) operates to prohibit the doing of the *same* thing in a different way from that prescribed by law, it cannot be claimed to prohibit the doing of a *different* thing in a different way. Now, it is very clear on the face of the constitutional provisions authorizing amendments through the agency of the legislature, as compared

with those authorizing the calling of conventions, that the purpose of the former is different from that of the latter; in other words, the thing authorized to be done by the one class of provisions is a different thing from that authorized to be done by the other."

Having seen that there is a marked distinction between a "new charter" and a "charter amendment," as used in the constitutional provision, it is essential to ascertain what that difference is; and for this purpose one should reason in the light of the constitutional and legislative history of the country. Moreover, in judging of the meaning of the terms, it must be remembered that the Constitution is not the beginning of law, "but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." *Coolley's Const. Lim.* (7th Ed.) pp. 94, 95.

By the common law of America, originating with our system of constitutional government, and out of the same necessities which gave the latter birth, a method of organic legislation was early recognized and has been universally followed. That method is to require complete revision, or even alterations of a very thorough character, to be made by conventions expressly chosen for that purpose, and to confine changes therein, made by amendments initiated by proposals through other agencies, to improvements within the lines of the original instrument. As said in *Livermore v. Walte*, Secretary of State, 102 Cal. 113, 118, 36 Pac. 424, 426 (25 L. R. A. 312): "The very term 'constitution' implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term 'amendment' implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."

This distinction is recognized in *City and County of Denver v. New York Trust Company*, supra, where the Supreme Court of the United States, in upholding, as an amendment to the first charter of the city and county of Denver, a provision pertaining to the acquisition, maintenance, and operation by the municipality of a water plant, says: "It does not alter the form of the city government, or make extensive changes in the existing charter." And, further, in speaking therein of *Speer v. People*, etc., 52 Colo. 325, 122 Pac. 768, where this court had under consideration the charter provisions involved in the case at bar, that court said that, "the Supreme Court of the state re-

cently had before it a proposed amendment radically and extensively changing the form of the city government."

These distinctions are also recognized by text-writers upon constitutional questions. Dodd's Rev. and Amend. of State Constitutions, pp. 261, 262; Jameson on Const. Conventions (4th Ed.) 562. Moreover, they are based upon cogent reasons of public policy. As said in *Ellingham v. Dye* (Ind.) 99 N. E. 1, 7: "The idea of the people thus restricting themselves in making changes in their Constitutions is original (in American constitutional government), and is one of the most signal evidences that amongst us liberty means, not the giving of rein to passion or to thoughtless impulse, but the exercise of power by the people for the general good, and therefore always under the restraints of law." They are intended to prevent injustice and confusion arising from sudden and far-reaching changes in the organic law. Indeed, "The great men who bullded the structure of our state in this respect had the mental vision of a good Constitution voiced by Judge Cooley, who has said: 'A good Constitution should be beyond the reach of temporary excitement and popular caprice or passion. It is needed for stability and steadiness; it must yield to the thought of the people; not to the whim of the people, or the thought evolved in excitement or hot blood, but the sober second thought, which alone, if the government is to be safe, can be allowed efficiency. * * * Changes in government are to be feared unless the benefit is certain.' As Montaign says: 'All great mutations shake and disorder a state. Good does not necessarily succeed evil; another evil may succeed and a worse.'" 23 Amer. Law Review (1889) p. 311; *Ellingham v. Dye*, supra.

The whole people of the state, in formulating and inserting article 20 into the Constitution, had in mind the lessons of history, and were sensible of the dangers of haste and immaturity in organic legislation. They therefore imposed upon municipalities operating thereunder the duty of protecting the individual citizen against the evils of hasty and frequent changes in the organic municipal law. The time-honored method of requiring that substantial and far-reaching changes of the organic law be made only through the medium of conventions, thus insuring deliberation and skill in drafting the same, is commanded. Moreover, rules for ascertaining the true intent of the voters are prescribed, to the end that justice may prevail and that tyranny and imposition, by either majorities or minorities, may not exist. The people of the state perceived that a single amendment to a charter altering a detail in city government might be so propounded directly to the voter as to admit of an intelligent expression of his choice by yea or nay, but to submit, in the same manner, that which is substantially a new char-

ter, embodying a number of fundamental changes, and embracing a variety of distinct questions, would be repugnant to the principles of natural justice and violative of well-recognized rules. The appreciation of these fundamental principles by the framers of the article is further manifest by the constitutional mandate that a first charter be adopted through the intervention of a charter convention. Clearly, if it was ever intended that so radical a change in the charter of the municipality could be made by amendment as that included in the instruments under consideration in the case at bar, the people of the municipality would not have been precluded from formulating their first charter by means of an amendment to the charter of the city of Denver existing when article 20 became effective. Moreover, to permit the substantial revision of a charter, or the substitution of a new one, upon petition and direct vote destroys its organic character; for it then becomes subject to be overthrown with the same facility as other legislation. Clearly, the framers of article 20 used the term "organic law" of the municipality and the word "amendment" in their true constitutional sense. To ascribe to the word "amendment" as there used an unqualified meaning necessarily abrogates the distinction between a "new charter" and a "charter amendment." This cannot be done, in my judgment, without destroying by judicial pronouncement, the effect of express language of the Constitution.

Having ascertained that under the constitutional grant of power to petition for a charter amendment, electors of the municipality are permitted to petition *only* for such an amendment as is *within the lines* of an existing charter, and which does not undermine its fundamental principles or destroy its substantial entirety, I shall proceed to determine whether the so-called amendments under consideration in the case at bar are of that character. Courts, in ascertaining the nature of a written instrument, are governed by its legal effect, regardless of what it may be denominated. A proposal, therefore, the legal effect of which is to destroy all the fundamental principles and the substantial entirety of an existing charter, and substitute therefor a radically different frame of government, is not an amendment in the constitutional sense. Such is the effect of the so-called amendments under consideration. This clearly appears by bringing into juxtaposition the existing charter, with the so-called amendments. The former establishes a typical form of representative government, of which the underlying principles and substantial features are: The division of the functions and powers of government into three separate and distinct departments common to constitutional government; the division of the territory of the city and county into wards and precincts, with the right of local representation in the legislative body, consisting of two

branches requiring independent action and clothed with the self-protecting power of punishing and expelling its members; a chief executive invested with the veto power, and the recognition of the rights of political parties and the general laws of the state concerning elections, including the nomination of candidates and the form of ballots. On the other hand, the so-called amendments create a form of government known in the United States but slightly, if at all, at the time of the adoption of article 20; destroy the underlying principles theretofore common to representative municipal government; unite the functions and powers of the separate and distinct departments thereof, and empower the authorities that impose taxes to collect and expend the same; abolish the right of local representation by wards in the legislative body; annul the veto power invested in the executive; destroy the rights of political parties, as such, in the nomination of candidates, and circumscribe the elective franchise by means of the preferential system of voting.

While the so-called amendments are germane to municipal government, they are in no sense germane to, nor *within the lines of* the existing charter. On the contrary, they destroy each and every of the fundamental principles thereof; wipe out, as an entirety, the existing frame of government, and substitute therefor another radically different in every substantial respect. The provisions of the existing charter which remain unaffected do not constitute the frame or form of government in any respect. They would necessarily be a part of any charter framed with due regard to the rights of the public. Provisions which would be proper in *any* charter are not the distinguishing features of government, and therefore cannot be employed as a criterion in determining whether a proposed change is in reality a new charter or an amendment to an existing charter. The distinguishing feature of a charter of a municipality, or of the organic law of a state, is essentially the form and frame of government prescribed therein. The incidental accessories in carrying on government of whatever form are substantially common to all, and do not constitute the characteristics by which they are classified.

I am not impressed with the argument of the majority opinion dealing with amendments to statutes, nor do I conceive that the cases cited in support thereof have any relevancy whatever to the matters here involved. This is clearly so, because of the constitutional provision relating to statutes that every bill shall contain one subject, which shall be clearly expressed in its title. Under this provision it is not required that an amendment to an act of the General Assembly, to be valid, shall be germane to the subject-matter of the act, but only that it shall be germane to the subject expressed in the title thereof. Now, the charter of the

city and county of Denver is the organic law thereof and constitutes the instrument that may be amended. That charter, therefore, is the subject of legislation, and a "charter amendment" to it, therefore, to be proper, must be germane to the plan or scheme of government therein prescribed. And herein, to my mind, the majority opinion is most unsound, contrary to authority, and far-reaching in its evil effect. It declares, substantially, that any proposed change in the organic law of the municipality which is germane to *any* plan or scheme of municipal government constitutes a proposed amendment, and hence that by an "amendment" an existing plan of government may be replaced by another entirely different. If this be true, there can be no distinction between a "new charter" and an "amendment" of an existing charter, and the constitutional provisions prescribing a separate mode of procedure in the enactment of each are coalesced. If any measure germane to the subject of municipal government may be properly classed as an amendment to *any* charter for municipal government, as held in the majority opinion, then an "entire charter" is only an amendment, for it relates to municipal government. So, in the case at bar. If these so-called amendments had been framed by a charter convention and all of the unrepealed provisions of the existing charter embodied therein, and the entire instrument so framed, designated a charter, it would be, nevertheless, in legal effect, only an amendment. This necessarily follows, because the majority opinion holds that there is nothing in article 20 that limits the meaning of the word "amendment," and that such word, in its broad sense, includes any alteration made or proposed to be made by "adding, changing, substituting, or omitting"; and therefore an existing charter of a municipal government may be changed by amendment, provided the proposed change relates to the subject of municipal government. Such is the holding of the majority opinion, notwithstanding the organic law of the state has recognized a clear distinction between a charter and a charter amendment, and prescribed different modes of procedure for the enactment of each. I cannot give my assent to such reasoning. The word "amendment" as used in the Constitution is preceded by the word "charter." That, of itself, limits the meaning of the word "amendment" so that the subject of municipal government embraced in the word "charter" is necessarily confined to the existing charter sought to be amended. To be proper and legal, under the constitutional provisions in question, a charter amendment must be germane, not to *any* plan of municipal government, but to the *specific* thing amended, that is, the existing plan or charter of municipal government. This is why, in *Livermore v. Waite*, supra, it is said that an amendment to the organic law must be confined to such matters as are

within the lines of the original instrument, and which do not undermine its fundamental principles or substantial entirety. Such also are the considerations which have prompted text-writers on constitutional subjects to declare that amendments should be confined to such matters as are simple and do not affect the whole scheme of government.

Authority, by way of analogy, in support of the foregoing views, is found in cases determined by this court, dealing with the power of the General Assembly to change the charter of the former city of Denver. At an early date it was decided that such charter, as it existed, at the date of the admission of the state, was preserved by the Constitution. And therefore the General Assembly did not have power to take away that charter or to make a new one for the municipality *but did have power to amend the same*. In *Cunningham v. City of Denver*, 23 Colo. 18, 20, 45 Pac. 356, 357 (58 Am. St. Rep. 212), cited in the majority opinion, it is said: "The city of Denver was incorporated under a special charter in 1861, and the right of cities so incorporated to maintain their corporate existence is recognized by the Constitution, while the power of the Legislature to amend such special charters is implied from this and other provisions of our state Constitution, the only limitation being that only such amendments can be made as are revisory or amendatory thereof." In *Re City of Denver*, 18 Colo. 288, 32 Pac. 615, also cited in the majority opinion, it is said, that to make an "amendment free from constitutional objection, it must be of such character as to be fairly considered as revisory or amendatory of the charter existing prior to the adoption of the Constitution."

While it is true that amendments made by the General Assembly to the charter of the city of Denver, existing at the time the Constitution was adopted, were frequently sustained by this court and the Court of Appeals, no such amendments destroyed the fundamental principles or the substantial entirety of the existing charter. It may also be true, as said in the majority opinion, that, if the matter of legislation for the city and county of Denver now existed in the General Assembly, it could, by amendment, do that which is sought to be done by the amendments in question. But, however that may be, it does not, in any sense, support the conclusions of the majority, nor militate against my own herein expressed. Municipal corporations emanate only from the people of the whole state, and the entire subject of legislation, whether state or municipal, was invested in the General Assembly, or reserved in all the people of the state. Therefore the subject of municipal legislation, until the embodiment of article 20 in the Constitution, was vested in the General Assembly under certain constitutional limitations. Special charters of municipalities organized prior to the adoption of the Constitution could be

amended, but not destroyed. As to other municipalities the power of the General Assembly was supreme. Thus the power to amend charters to certain municipalities existed as well as the power to enact charters for other municipalities and to amend the same. But, in the exercise of these powers, the Constitution made no distinction between the modes of procedure in the enactment by the General Assembly of charters for municipalities and the enactment of amendments thereto. In either case the powers were vested in the General Assembly, and it could exercise them only through and by means of a legislative bill containing but one subject, and that clearly expressed in its title. It was confined to the same process of procedure, whether enacting a new charter or a charter amendment. Not so, however, as to the exercise of the power vested in the people of the city and county of Denver under article 20. While every power previously possessed by the Legislature in making or amending charters for such municipality was bestowed upon the people thereof, the manner of its exercise was changed. In the adoption of a charter, they must follow a prescribed procedure entirely different from that which may be pursued in the adoption of a charter amendment. While it is true, as stated in the majority opinion, that no such restrictions as are placed upon the General Assembly in enacting legislation are found in article 20 in providing for initiated amendments to a charter, nevertheless, other constitutional restrictions and provisions, equally binding and equally certain, are found therein.

The majority opinion concedes the inapplicability of *State ex rel. v. City of Portland et al.* (Or.) 183 Pac. 62, relied upon by defendants in error, and declines to attempt to apply it to the case at bar. Nevertheless, it seeks to fortify its conclusions by *State ex rel. Hindley et al. v. Superior Court of Washington*, 70 Wash. 352, 126 Pac. 920. In my judgment, the latter case is also inapplicable. While it is held therein that sections 82 and 125 of the Spokane city charter, authorizing the submission of initiated amendments, do not limit amendments to such as are revisory, or prescribe supplemental changes as to the working of the charter adopted, but authorize the submission of amendments providing for return to the system of council form of government, though altering and annulling the basic principle upon which the charter was founded, the holding is based upon the doctrine clearly not recognized in this state (In *re City of Denver*, supra), that the classification of amendments is always a political question, to be determined by the people. Moreover, the Constitution and laws of the state of Washington, under which that decision was rendered, clearly disclose that the legislative power of the whole state enlarged the meaning of the word "amendment" as applicable

to municipal charters so as to include therein "any matter within the realm of local affairs or municipal business." Art. 11, § 10, Constitution of the state of Washington: section 1, c. 186, Laws of Washington, 1903, p. 393. Obviously the framers of this law had in mind that the word "amendment" was ordinarily confined to changes within the lines of an existing charter; otherwise there would have been no necessity for enlarging its meaning as used in the statute beyond its meaning as used in the Constitution. So it perhaps may be said with propriety that under these provisions of the law of that state the courts had no power to draw a line between amendments, or classify them in any way, as the matter had been determined by the people of the entire state. Not so, however, under the Constitution and laws of this state. Clearly article 20, the only expression of the entire people upon the subject, contains nothing that can be so construed. And whatever may be the desire of the people of the city and county of Denver they cannot, by charter enactment or otherwise, enlarge or change the meaning of the words written into the fundamental law by the whole people of the state. That it may be advisable to change the charter of the city and county of Denver to the extent contemplated by these proposed amendments may be true; but, if so, it should be brought about only through the procedure prescribed by the fundamental law. Since the adoption of article 20 there has never been a time when the people of that municipality might not have made any change consistent therewith, which they desired, by following the mode of procedure therein prescribed. But to permit them to deviate from the slow and orderly process prescribed in the making of such fundamental changes in the organic law of the municipality will not justify a construction of the Constitution which does violence to its express terms and clear intent.

I adopt the language of Bronson, C. J., in *Oakley v. Aspinwall*, 3 N. Y. 547, 568, as follows: "It is highly probable that inconveniences will result from following the Constitution as it is written. But that consideration can have no weight with me. It is not for us, but for those who made the instrument to supply its defects. If the Legislature or the courts may take that office upon themselves, or if under color of construction, or upon any other specious ground, they may depart from that which is plainly declared, the people may well despair of ever being able to set boundary to the powers of the government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid adherence to the fundamental law, I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be

avoided, or some good to be attained by pushing the powers of the government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined, and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of consequences. If the law does not work well, the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or the judiciary in enlarging the powers of the government opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the government are just what those in authority please to call them."

The views I have herein expressed are in conformity with and supported by the holding of Mr. Justice Gabbert, concurred in by Mr. Justice Garrigue, in *Speer v. People*, 52 Colo. 325, 348, 122 Pac. 768, where this court had under consideration proposed changes in the charter of the city and county of Denver substantially the same as those here involved, except that the former proposal contained certain provisions not embodied in those before us relative to the election and salaries of county and juvenile judges and the establishment and maintenance of a school for dependent children. That learned justice therein held that a new charter cannot, under article 20, be proposed by petition; that the proposed amendment was, in legal effect, a new charter; and that the people of the city and county of Denver had no power to adopt the same, except through the intervention of a charter convention. Moreover, he held that a proposed amendment, which embraces several distinct propositions, cannot legally be submitted as one amendment in such form that it can only be voted for or against as a whole, and that the proposed amendment under consideration was vulnerable to that objection. While these questions were not determined therein, the majority of the members of the court declining to express an opinion thereon, the reasoning of Mr. Justice Gabbert is so clear and convincing as to greatly augment the force of my dissenting opinion, notwithstanding that he now concurs in the majority opinion herein announced. The value of that support is readily apparent when his views therein expressed are brought into juxtaposition with the majority opinion, containing, as it does, the sole reasons for the court's present holding.

While the other questions involved and determined in this case are fundamental, I shall express no opinion thereon. I have not given them such consideration as would justify me in either approving or disapprov-

ing the holdings of the majority in respect thereto. Moreover, if my views upon the main question were adopted by the court, a determination of the other questions would be unnecessary. I am authorized to state that Mr. Justice GARRIGUES fully concurs in the views I have expressed herein.

MUNTZING v. HARWOOD.

(Court of Appeals of Colorado. Dec. 8, 1918.)

1. QUIETING TITLE (§ 44*)—QUITCLAIM DEED—ADMISSIBILITY.

In a suit to quiet title to real property, the intestacy of the ancestor of certain heirs being conceded, a quitclaim deed by such heirs to plaintiff was admissible, over objection that it was not sufficiently proved that the grantors were the lawful and only heirs of the ancestor; such fact being proved by the deposition of a disinterested witness.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

2. QUIETING TITLE (§ 12*)—POSSESSION—CONSTRUCTIVE POSSESSION.

Where, in a suit to quiet title, neither party was in actual possession, plaintiff had constructive possession by virtue of his record title.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.*]

3. TAXATION (§ 810*)—EVIDENCE—TAX DEED.

In a suit to quiet title, a tax deed on which defendant relied, and which was void on its face, was inadmissible.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1606-1608; Dec. Dig. § 810.*]

4. APPEAL AND ERROR (§ 1078*)—ASSIGNMENTS OF ERROR—WAIVER.

An assignment of error, not referred to in appellant's brief, will be deemed abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.*]

Appeal from District Court, Washington County; H. P. Burke, Judge.

Action by C. E. Harwood against August Muntzing. Judgment for plaintiff, and defendant appeals. Affirmed.

Egbert More, of Akron, for appellant. Isaac Pelton, of Akron, for appellee.

HURLBUT, J. July 23, 1909, appellee, as plaintiff, instituted an action against appellant, to quiet title to land in Washington county. Judgment was rendered for plaintiff, and the cause is here by proper appeal.

Complaint was in usual form, to which defendant filed an answer containing a general denial, also a defense based upon a treasurer's tax deed, alleged to have been duly recorded. To this answer plaintiff replied, denying defendant's title, and alleging that the tax deed was void on its face for a number of reasons therein set forth.

[1] Appellant contends that the trial court committed reversible error in admitting in evidence, over his objection, a certain quitclaim deed conveying title to appellee. The deed recites that the grantors therein are the

children and sole heirs at law of John H. Gear, deceased. It is conceded that said Gear was the father of said grantors, and held the title to the premises at the time of his death. The deposition of one W. D. Eaton was admitted in evidence, without objection. He was a disinterested person, and not related to either party. It appears therefrom that Gear died in Washington, D. C., in July, 1900, and was the owner of, or had some title to, the land in question at the time of his death; that he left surviving him as his sole heirs at law Ruth G. Rand, Margaret G. Blythe, and his wife, Harriet F. Gear, the latter dying intestate in Burlington, Iowa, in October, 1902, leaving as her sole heirs at law said Ruth G. Rand and Margaret G. Blythe; that the quitclaim deed in question was submitted to deponent for his inspection, and he identified the signatures of Ruth G. Rand and Margaret G. Blythe, grantors therein. Defendant objected to the introduction of said quitclaim deed in evidence, in these words: "I make the objection to the last deed (exception C) offered in evidence, as incompetent and immaterial in the way of evidence, and that it does not appear that it conveys any title, that is to say, my proposition is that it requires something more than the showing that a person died intestate to enable good title to these lands to be conveyed by the deed of the heirs, and that this last deed, the quitclaim deed of these assumed heirs, is incompetent and immaterial to establish that fact." It would appear from this that appellant made no point on the proof of intestacy of John H. Gear, but rather by inference conceded it. The objection appears to be directed to the question of failure of proof on behalf of appellee, showing that the grantors in the deed were the lawful and only heirs at law of John and Harriet Gear. In the absence of any evidence to the contrary, we think the evidence found in the deposition, coupled with the recitals in the deed, sufficiently shows that the grantors therein named were the sole heirs at law of both John and Harriet Gear, and that both the last two persons died intestate. Under the laws of this state said grantors inherited the property in issue, and the deed executed by them conveyed the title to appellee. Against defendant's failure to prove any title whatever to the premises, this showing was sufficient to entitle plaintiff to the relief prayed for in his complaint. *Gage v. Cantwell*, 191 Mo. 698, 91 S. W. 119. The record shows that John H. Gear at the time of his death was the owner of the premises through mesne conveyances from the government of the United States.

[2] There is no showing by the record that either party was in actual possession of the premises at any time. Plaintiff, however, was in constructive possession thereof by virtue of the title vested in him through such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

conveyances. *Empire R. & C. Co. v. Bender*, 49 Colo. 522, 113 Pac. 494.

[3] Under the record as it now appears, defendant is practically out of court. He attempted to establish his pleaded title to the premises by offering in evidence a tax deed void on its face, which, upon objection, was excluded by the court. This being the case, he could not call upon plaintiff to prove either his title to, or possession of, the premises. In *Empire R. & C. Co. v. Bender*, supra (being an action to quiet title like the one before us), defendant there relied upon a title emanating from a tax deed void on its face, which, when offered in evidence, was rejected by the court. The court said: "The moment defendant's alleged adverse title failed, as it did when it offered in support of it a tax deed void on its face, it had no further interest in the cause, and could raise no other issue. That part of its answer denying plaintiff's title and possession, under such condition, was in law a nullity. It is only when a defendant has shown by his answer that he has an interest in the property adverse to plaintiff, such as will entitle him, on proper proof, to some relief in connection therewith, that he is in position to put plaintiff to proof of his possession and ownership under the statute. To illustrate, if defendant had answered only a general denial, that would not have put plaintiff to proof, but would have been equivalent to a disclaimer, and judgment must have gone for plaintiff on the pleadings. So in this case, when the defendant failed to establish its alleged adverse title, it was in effect out of court, and its offer to show naked legal title in a third person was wholly irrelevant and immaterial. It is only because of his adverse interest that a defendant is permitted to question a plaintiff's rights at all. *Wall v. Magnes*, 17 Colo. 476 [30 Pac. 56]; *Lambert v. Shumway*, 36 Colo. 350 [85 Pac. 89]; and *Weston v. Estey*, 22 Colo. 341 [45 Pac. 367]."

[4] We notice that the first assignment of error challenges the ruling of the court in rejecting the tax deed offered in evidence by defendant. That assignment is not in any way referred to in appellant's brief. It may therefore be considered as abandoned, and it will be presumed that the court ruled properly in excluding the deed from evidence.

The judgment appearing in all respects to be right, the same will be affirmed.

HESELL v. NEAL et al.

(Court of Appeals of Colorado. Dec. 8, 1913.)

1. VENDOR AND PURCHASER (§ 143*)—OPTION CONTRACT—BREACH.

Where, on the arrival of the time fixed for performance of an option to purchase land, the vendee was unable to perform, and made no request for an abstract, he was not thereafter entitled to excuse his default by claiming a

failure of the vendors to tender a completed abstract showing merchantable title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 267-270, 311; Dec. Dig. § 143.*]

2. VENDOR AND PURCHASER (§ 3*)—CONTRACT—CONSTRUCTION—OPTION.

A contract, reciting that the vendors had received \$500 from the vendee, part of the purchase price of certain land, full consideration to be paid according to specified conditions, and if the payment of a specified amount in cash was not made or tendered on a specified day, the receipt was to be void and both parties released from all obligations and the amount received forfeited as liquidated damages, was only an option, and not a contract for the sale of land.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 8; Dec. Dig. § 3.*]

Appeal from District Court, Denver County; Carlton M. Bliss, Judge.

Action by James L. Neal and another against James Hessel, to cancel an option contract for the sale of real property. Judgment for plaintiffs, and defendant appeals. Affirmed.

George F. Dunklee and Walter L. White, both of Denver, for appellant. William H. Wadley, of Denver, for appellees.

CUNNINGHAM, P. J. Appellant and appellees entered into the following agreement: "Denver, Aug. 17th, 1909. Received of James Hessel the sum of five hundred (\$500.00) dollars, being part purchase price on the following described property in Weld county, Colorado, being the entire section known as and numbered thirty-six (36) in township five (5) north of range sixty-five (65) west of the 6th P. M., less four acres sold for a right of way, and containing 636 acres. Full consideration to be nine thousand five hundred forty (\$9,540.00) dollars, terms as follows: Fifty-four hundred and forty (\$5,440.00) dollars more in cash upon delivery of warranty deed on or before October 17th, 1909, and the balance of thirty-six hundred (\$3,600.00) dollars to be secured by first mortgage on said section thirty-six, due on or before one year with interest at 9% per annum payable at maturity. Deferred payments to be secured by note and deed of trust on said property. Abstract of title to be furnished showing a good merchantable title and a good and sufficient warranty deed to be delivered to the purchaser. If said payment of \$5,440.00 is not made or tendered on or before said date, viz., October 17th, 1909, then this receipt to be void and of no effect, and both parties released from all obligations herein; and, in that event, the said \$500.00 paid on this date is to be forfeited as liquidated damages. In case title is found defective and cannot be corrected within a reasonable time, then this deposit of \$500 is to be returned and this receipt shall be null and void. Taxes for the year 1909, to be paid by present owners. James L.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Neal, William D. Thomas, Present Owners." October 17th, the last day provided for the transfer of the land described in the foregoing agreement, and the payment of the money, fell upon Sunday. On Saturday, October 16th, appellees called at appellant's office for the purpose of carrying out the conditions provided in the agreement, but appellant was not in. They called again on Monday, and offered to carry out their part of the agreement. The evidence shows clearly that appellant was unable to raise the money, but asked for an extension of time. This the appellees declined to grant. Thereafter, appellant placed the agreement of record, and this suit was brought by appellees to have the same declared void and their title quieted. Appellant answered, alleging the performance on his part of all the conditions of the agreement, pleading a tender, and alleging his ability and willingness to pay the money which, by the agreement, he was required to pay. But on the trial his own testimony showed that he was, even then, unable to raise the money, and that on October 29th, when he had made a written, and his only, demand for an abstract, he did not have the money with which to meet his obligations under the agreement.

[1] Appellant seeks to excuse his failure to comply with the conditions of the agreement requiring the payment of \$5,440 on October 17th by the fact that the appellees did not voluntarily, and without any request on his part, tender an abstract showing good, merchantable title, until within a day of the time, or a day after the time, the contract expired, and he insists that no sufficient abstract was ever tendered, and that therefore he has never been in default. This contention is wholly without merit. The evidence shows that appellees, on Monday, October 18th, tendered an abstract certified down to within three days of that time, and produced a patent, which had just been issued, running from the state to themselves, for the land in question. The land was situated in Weld county, and it was not reasonable to expect that an abstract to land situated in another county could be tendered in Denver, where all the parties lived, certified down to the hour at which it was tendered. Moreover, appellant did not, at the time the abstract was produced, base his refusal to pay the money which the contract required he should pay upon any defect in the title or the insufficiency of the abstract, but solely upon his financial inability to meet his payments. His own testimony shows conclusively that the allegations in his complaint that he has "always been ready and willing, and still is ready and willing, to pay the purchase price mentioned and set forth in said contract" were false, and it also shows that his attempted defense, based on the alleged failure of appellees to tender

good title, is wholly without merit, and the merest subterfuge.

[2] The agreement is nothing more than an option to purchase. Under it appellees could not require appellant to do anything, and if he failed to pay the \$5,440 on October 17th, it is specifically provided in the agreement that the receipt is to become void and of no effect, and that both parties should be released from all obligations thereunder, and it was further provided that the \$500 paid at the time the receipt was signed should constitute liquidated damages. Under these circumstances, the judgment of the trial court, canceling the option agreement and quieting title to the land therein described, and in this action involved, in the plaintiffs, was eminently proper, and the same will be affirmed.

Judgment affirmed.

GERMANIA LIFE INS. CO. OF NEW YORK CITY v. KLEIN.

(Court of Appeals of Colorado. Dec. 8, 1913.)

1. INSURANCE (§ 151*)—LIFE INSURANCE—CONTRACTS.

A life policy which stipulates that insurer issues the policy in consideration of the representations made in the application which is made the basis of and a part of the contract makes the application a part of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 308-311; Dec. Dig. § 151.*]

2. INSURANCE (§ 256*)—LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION.

Where statements in an application for life insurance are false and material to the risk on which the policy is based, the false statements avoid the policy whether the representations were the result of intention or of mistake or whether made in good faith or not.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.*]

3. INSURANCE (§ 292*)—LIFE INSURANCE—MISREPRESENTATIONS IN APPLICATION.

A statement made in an application for a life policy that the applicant had not had any of diseases inquired of and had never consulted a physician, while as a fact she had consulted a physician who had treated her for carcinoma of the liver without advising her of the gravity of her disease, is a false statement invalidating the policy issued in consideration of the statements in the application, whether deemed a representation or a warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 691, 692; Dec. Dig. § 292.*]

4. TRIAL (§ 296*)—INSTRUCTIONS—INCONSISTENT INSTRUCTIONS.

Where two instructions are irreconcilable and one of them is wrong, the instructions are bad as a whole.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

5. INSURANCE (§ 290*)—LIFE INSURANCE—REPRESENTATIONS AS TO AGE.

A misrepresentation by an applicant for life insurance of her age by representing that she was 50 years old at her nearest birthday, while in fact 63, defeats only the policy pro tanto, and insurer is liable to the amount of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the insurance which the premium paid would have purchased at the age of 63.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 671; Dec. Dig. § 290.*]

6. TRIAL (§ 141*)—INSTRUCTIONS—SUBMISSION OF ISSUE TO JURY.

Where a fact defeating a recovery by plaintiff was established by uncontradicted evidence, it was error to submit the issue to the jury as one in dispute.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

Appeal from District Court, Pueblo County; J. E. Rizer, Judge.

Action by Julia Klein against the Germania Life Insurance Company of New York City. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

F. A. Williams and G. Q. Richmond, both of Denver, for appellant. James A. Park and Benj. F. Koperlik, both of Pueblo, for appellee.

KING, J. This was an action, brought to recover on a life insurance policy, in which the verdict and judgment were for the plaintiff.

On the 22d day of September, 1905, Pauline Klein made written application to the Germania Life Insurance Company of New York for \$1,500 insurance on her life. Among other things, she stated that she was 50 years of age at her nearest birthday; a resident of the city of Pueblo, Colo.; had not had any of the diseases inquired of in the medical examination; had never consulted a physician; had never removed to benefit her health, and did not contemplate a change of residence. The application was accepted and policy issued at the home office in New York under date of October 19, 1905, and policy delivered to the insured at Pueblo about the last of October. Immediately thereafter she returned to Philadelphia, Pa., whence she had come during the previous June, and at which place she died on January 10, 1906. Death was caused by carcinoma of the gall bladder.

The defense to the action on the policy was in substance that insured had understated her age by 13 years; that she had secured the insurance by false representations of facts material to the risk; that the statements and representations made in her application were warranties; and that there was a breach of such warranties.

[1] The policy states that "the Germania Life Insurance Company of the City of New York, in consideration of the representations made in the application for this policy, which application is hereby made the basis of and a part of this contract and of the payment, * * * does hereby promise and agree," etc. By this provision of the policy it is plain that the application as a whole is made the basis of and a part of the con-

tract. What constitutes the application is declared and agreed upon as follows: "It is hereby declared and agreed that all the statements and representations contained in the foregoing application and those contained in the declarations made to the medical examiner, which, together with this declaration of agreement, constitute an application to the Germania Life Insurance Company of New York for an insurance upon the life of the undersigned Pauline Klein in the amount of fifteen hundred dollars, are offered to the said company as a consideration of the contract applied for, each of which statements and answers, whether written by his or her own hand or not, every person whose name is hereto subscribed adopts as his or her own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the company in reply to its inquiries, and upon which, should the insurance applied for be granted, the company's contract will be founded." The application proper, including this declaration and agreement, and also the answers made to the questions asked by the medical examiner, were subscribed by Pauline Klein, so that, by the express terms of both the policy and the application, all these statements, representations, and declarations, by whatever name they may be called, became a part of the contract of insurance and the basis upon which the policy was issued.

The evidence conclusively showed, and the jury found, that, at the time of making the application, insured was 63 years of age at her nearest birthday instead of 50 years of age, as stated in her application, and for that reason the verdict was returned and judgment rendered for \$898.42, the amount of insurance which the premium actually paid would have purchased at the age of 63 years.

The evidence as conclusively showed that, for at least four years before she made her application, the insured had been consulting a physician for some ailment or disease, and that from about April 4, 1904, to the time of her death, with the exception of the few months she resided or visited in Colorado, she had been treated for carcinoma of the liver. Dr. C. H. Lefcowitch, a practicing physician of Philadelphia, a graduate of Jefferson Medical College of that city, and for some years assistant surgeon to the Philadelphia Polyclinic Hospital, testified that he was physician for said Pauline Klein from September 12, 1901, to November 28, 1905; that prior to April 4, 1904, he had treated her at various times for gastrointestinal derangement, and from said April 4th for carcinoma of the liver, and had been consulted by her just previous to her departure for Colorado; that upon return of the insured to Philadelphia he treated her

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from November 21st to November 26th, inclusive, for the same disease. From about December 1, 1905, to the time of her death she was attended by Dr. Fussell, assistant professor of medicine at the University of Pennsylvania, chief of the medical dispensary of and lecturer on diseases of the liver at that institution, and also physician to some hospitals in that city, a practicing physician of 22 years' experience. The disease was diagnosed by him as carcinoma of the liver and so treated. However, an autopsy performed by him and his associates disclosed that the carcinoma was of the gall bladder, with secondary deposits or infiltration into the liver and duodenum; that the gall bladder was entirely destroyed, and that death ensued from carcinoma of that organ instead of the liver; that what during life had been regarded as a malignant tumor of the liver was a prolapsed and prolonged lobe of that organ, projecting into the abdomen below the ribs, but it was not carcinomatous, at least until of a recent date, and not the cause of her death. The testimony of both Dr. Lefcowitch and Dr. Fussell was by deposition, and for that reason the verdict of the jury is not conclusive on this court as to the veracity of those two witnesses, even though it be conceded that the opinion of either of them as to the time the fatal disease originated conflicts with other opinion evidence.

The testimony of Dr. Lefcowitch that he had been consulted by and had treated the insured at various times for several years, and that for at least a year prior to the time her application for insurance was made had regarded and treated the disease as chronic carcinoma, is neither disputed by any other witness nor in any substantial respect discredited in the slightest degree. His veracity is in no degree impeached by the slight inaccuracy of his diagnosis. The fact of consultation was conclusively established, and the jury should have been so instructed.

Under this condition of the contract of insurance and of the evidence, the court instructed the jury that under the provisions of the policy the statements of Pauline Klein contained in the application and her declarations to the medical examiner were not warranties but representations only, and if false would not affect the validity of the policy unless they related to statements material to the risk and were fraudulently made with intention to deceive, and, unless they found that such false statement had been made with such intention to deceive, the verdict should be for the plaintiff, and also instructed the jury that, even though the statement that she had consulted no physician was false, the policy would not thereby be avoided, unless the jury further found that in making such statement she had not made the answer in good faith.

[2] As we view the case, it is not necessary for us to determine whether the statements and declarations contained in the application are warranties or representations only, as the latter term is used to distinguish statements and declarations that are express warranties from those which are not. For the purpose of determining this case, it will be assumed that by virtue of the clause in the policy which recites that, "in consideration of the representations made in the application for this policy," the company "does hereby promise and agree," etc., the statements and declarations contained in the application are made representations and not express warranties. A false statement or declaration of a fact material to the risk, and upon which the policy is based, will avoid the policy, whether that misrepresentation be the result of intention or of mistake, and whether made in good faith or not so made. Such misrepresentation is as fatal to the policy as a breach of warranty. 1 May on Insurance, § 181; 3 Cooley's Briefs on Law of Insurance, pp. 1950a to 1954d; Trav. Ins. Co. v. Lampkin, 5 Colo. App. 177-183, 38 Pac. 335; Sun Fire Office v. Wich, 6 Colo. App. 103, 39 Pac. 587; Des Moines Life Ass'n v. Owen, 10 Colo. App. 131, 134, 50 Pac. 210; Nat. Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 476, 98 Pac. 634, 20 L. R. A. (N. S.) 840; Northwestern L. A. Co. v. Tietze, 16 Colo. App. 205, 64 Pac. 773; Am. Bond & Trust Co. v. Burke, 36 Colo. 49, 58, 85 Pac. 692; 2 Cooley's Briefs on Law of Insurance, p. 1166.

The foregoing authorities, including the decisions of the highest courts of this state, we regard as conclusive on the proposition that, if representations made in answer to specific questions material to the risk are untrue, the policy will thereby be rendered void, and that it is immaterial whether such answers be considered warranties or representations, or whether they were made with intention to deceive the insurer or without such intention.

[3] In our opinion no inquiry was made in the instant case, or can be made, more material to the risk and more essential to properly advise the company contemplating or considering the issuance of a policy, and which would more probably influence it in determining whether it would enter into the contract, than the question as to whether the applicant had consulted a physician, or what physician she had consulted. It is in evidence that this answer was relied on by the company in approving the application. If the applicant had truthfully answered that she had consulted and been treated by Dr. Lefcowitch, inquiry could have been made of him, and it will be presumed that the company would have been informed that he had diagnosed her case as carcinoma of the liver and had so treated it, and there is little reason to doubt that such information would have so influenced the defendant in this case

that it would have declined the application. It appears that the applicant had not been advised, by the doctor she consulted, of the gravity of her ailment or disease as diagnosed by him; but the fact of the consultation of a physician or its materiality does not depend upon the gravity of the subject of the interview as regarded by the patient; and while such a representation may at times be found and held to have been immaterial to the risk and, if false, not prejudicial because the consultation was in fact, both from the viewpoint of the patient and of the physician consulted, for a merely temporary ailment, that fact cannot avail plaintiff in this case, where the materiality of the representation has been so fully and conclusively shown by the evidence. That statements as to consultations of or attendance by physicians under such circumstances are material to the risk, and if false avoid the policy to the same extent as if they had been express warranties, is supported by both reason and authority. 25 Cyc. 801, 806; 2 Cooley's Briefs on Law of Insurance, p. 1166; Metropolitan Life Ins. Co. v. Brubaker, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 287; 3 Cooley's Briefs on Law of Insurance, p. 2156a; Rigby v. Metropolitan Life Ins. Co., 240 Pa. 332, 87 Atl. 428; Owen v. Metropolitan Life Ins. Co., 74 N. J. Law, 770, 67 Atl. 25, 122 Am. St. Rep. 413; Bryant v. Mod. Woodmen, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. (N. S.) 330, 21 Ann. Cas. 365; Schwarzbach v. Ohio Val. Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Kasprzyk v. Metropolitan L. I. Co., 79 Misc. Rep. 263, 140 N. Y. Supp. 211; Trav. Ins. Co. v. Lampkin, 5 Colo. App. 177, 38 Pac. 335; 3 Cooley's Briefs on Law of Insurance, pp. 1953c, 1959; Mattson v. Mod. Samaritans, 91 Minn. 434, 98 N. W. 330. There should be no deviation from this rule as to untrue answers in an application in regard to matters material to the risk and which are within the knowledge of the applicant.

[4] The instruction that the false representation of a matter material to the risk would not avoid the policy, unless made with intention to deceive and defraud the insurer, was erroneous. 2 Cooley's Briefs on Law of Insurance, p. 1166, and cases cited. The contention made by appellee that this instruction was cured by another or others is untenable. That feature or phase of the first instruction was aggravated by other instructions, except in so far as the second instruction was diametrically opposed to and inconsistent with the first, and in so far as those two instructions are inconsistent and irreconcilable with each other, and one of them wrong, they make the instructions bad as a whole.

[5] The representations as to her age and consultation of physicians were of matters

presumably within the personal knowledge of the applicant (the first approximately) and were so grossly false that, whether attributed to ignorance so dense as to be almost incredible, or to an intention and design to deceive and defraud, being material, they constituted fraud in law. The first misrepresentation, by the terms of the contract, defeated the policy *pro tanto*, the other in its entirety.

[8] In view of the conclusion we have reached that a material false representation made by the insured to the insurer was shown by uncontradicted evidence, it was error to submit that question to the jury as a question in dispute. *Des Moines Life Ass'n v. Owen*, 16 Colo. App. 60, 63 Pac. 781; *City of Denver v. Murray*, 18 Colo. App. 142, 70 Pac. 440; *Weston v. Livezey*, 45 Colo. 142, 100 Pac. 404; *Webster v. Rhodes*, 49 Colo. 203, 112 Pac. 324. An instructed verdict for defendant should have been rendered.

The judgment is reversed, and cause remanded, with instructions to enter judgment for the defendant.

Reversed.

PARKS et al. v. ROTH.

(Court of Appeals of Colorado. Dec. 8, 1913.)

1. TAXATION (§ 810*)—ACTION TO QUIET TITLE—DEFENSES—EVIDENCE.

Where in a suit to quiet title defendants claimed under a tax deed, but offered the deed in evidence only as color of title, and not as proof of the title pleaded, they failed to establish title in themselves as a defense to the action.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.*]

2. TAXATION (§ 742*)—TAX DEED—INVALIDITY.

Where land sold for taxes was bought by the county, and the county clerk assigned the certificate of sale more than three years thereafter, a tax deed showing such facts was void on its face.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1481-1484; Dec. Dig. § 742.*]

3. TAXATION (§ 805*)—LIMITATIONS.

In a suit to quiet title to real property as against a tax title, the short statute of limitations (Mills' Ann. St. § 3904) is not available as a plea in bar.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1593-1597; Dec. Dig. § 805.*]

4. JUDGMENT (§ 951*)—EVIDENCE—JUDGMENT ROLL.

A certified copy of a decree without the judgment roll is inadmissible as proof of title to real property under the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808-1812; Dec. Dig. § 951.*]

5. TAXATION (§ 805*)—TAX DEED—SUBSEQUENT PAYMENT OF TAXES—LIMITATIONS.

Where a tax deed was recorded April 22, 1901, and the first taxes thereafter paid by defendants under their tax title were paid in 1902 for the year 1901, and thereafter the taxes for the years 1903, 1904, 1905, and 1906, the payment in 1902 could not be counted as a payment for one of the seven successive years required to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

establish title under the seven-year statute of limitations.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. § 806.*]

6. QUIETING TITLE (§ 29*) — DEFENSES — LACHES.

Where, in a suit to quiet title plaintiff proved a fee-simple title in himself from the government, and the land was vacant and unoccupied, defendants having done nothing on the land from any sense of security resulting from plaintiff's inactivity in failing to assume actual possession, plaintiff's right to relief was not barred by laches.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 63; Dec. Dig. § 29.*]

7. TAXATION (§ 800*)—QUIETING TITLE—LIMITATIONS.

Where a tax deed is invalid on its face, plaintiff is not required to tender subsequent taxes paid by the purchaser as a condition to the right to maintain a suit to quiet title; it being only necessary that the taxes so paid be refunded, in order to make the decree effective.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1586; Dec. Dig. § 800.*]

Appeal from District Court, Yuma County; H. P. Burke, Judge.

Action by Jacob Roth against Clement G. Parks and another. Judgment for plaintiff, and defendants appeal. Affirmed.

R. H. Gilmore, of Denver, for appellants. Isaac Pelton, of Akron, for appellee.

HURLBUT, J. On December 27, 1909, appellee as plaintiff instituted an action against defendants to quiet title to land in Yuma county. Plaintiff recovered judgment, from which this appeal is prosecuted.

Defendants' answer pleads seven defenses, namely: (1) General denial; (2) title under tax deed recorded April 22, 1901; (3) the short statute of limitations (section 3904, *Mills' Annotated Statutes*); (4) decree of the county court of Yuma county quieting title to the land in defendants' grantors as against appellee, who was defendant in the county court proceedings; (5) the seven-year statute of limitations, based upon color of title made in good faith to vacant and unoccupied land, and payment of all taxes legally assessed thereon for seven successive years (section 4090, *Revised Statutes 1908*); (6) laches of plaintiff in not instituting his action to quiet title at an earlier day; (7) the failure of plaintiff, before beginning this suit, to make tender of all taxes paid by defendants. Plaintiff's replication denies all new matter, and alleges the tax deed pleaded by defendants to be void on its face, stating reasons; that the decree of the county court pleaded by defendants was wholly void for want of jurisdiction in the court of the defendant or of the subject-matter; that no summons or process was ever served upon Roth, defendant therein; that the attempted service was by publication, and no affidavit was ever filed in said action, upon which an order of publication of summons could be based, etc. This appeal can be speedily determined, as sub-

stantially all the objections urged by appellants to the proceedings in the trial court have been heretofore passed upon adversely to their contentions, by either our Supreme Court or this court.

[1] As to the second defense, the tax deed pleaded by defendants to defeat plaintiff's cause of action was not offered in evidence at the trial in proof of their title. It was offered by them, however, and admitted without objection, as color of title only. By not offering in evidence the tax deed as proof of the tax title pleaded, defendants wholly failed to establish that defense. Appellants say that appellee made no attempt to prove any defects in the tax deed; and, as the law presumes a tax deed to be valid unless defects appear therein, appellants' title will be conclusively presumed to be established, etc.

[2] Even if we for a moment concede appellants' reasoning to be sound, we at once discover, by an inspection of the tax deed, that it is void on its face for several reasons, one of which is that the land had been bought by the county at the sale, and the county clerk assigned the certificate of sale more than three years thereafter. This fact appeared on the face of the deed. It is unnecessary to cite authorities in this jurisdiction which hold such deeds to be void on their face. Both the Supreme Court and this court have heretofore held that under issues such as here formed the failure to offer in evidence, as muniment of title, the tax deed upon which defendants rely for title is tantamount to a failure to establish such title. *Empire R. & C. Co. v. Irwin*, 23 Colo. App. 206, 128 Pac. 867, and cases cited.

[3] As to the third defense, pleading the short statute of limitations, supra, in bar of plaintiff's cause of action, it is settled in this state that in this kind of an action the same is not available as a plea in bar. *Munson v. Marks*, 52 Colo. 553, 124 Pac. 187; *Carnahan v. Hughes*, 53 Colo. 318, 125 Pac. 116; *Empire R. & C. Co. v. Mason*, 22 Colo. App. 612, 126 Pac. 1129.

[4] The fourth defense pertains to the county court decree of Yuma county. A certified copy of this decree was offered in evidence at the trial, and objected to by plaintiff for the reason that the same was offered in proof of title without the judgment roll. The objection was sustained. This was not error. *McLaughlin v. Reichenbach*, 52 Colo. 437, 122 Pac. 47.

[5] The fifth defense was founded upon the seven-year statute of limitations above mentioned. The tax deed was recorded April 22, 1901. The first taxes paid thereafter by defendants were paid in 1902, for the year 1901, followed by payment of taxes, by them, for the years 1903-1906. The payment in 1902 of the taxes of 1901 cannot be counted as payment of taxes for one of the seven successive years mentioned in the statute. *Evans v. Howell*, 23 Colo. App. 219, 128 Pac. 879. It

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is clear, therefore, that defendants did not pay the taxes for seven successive years under color of title, which was only obtained upon recording of the deed on April 22, 1901, and that the defense failed of proof.

[6] The sixth defense, pleading laches of plaintiff, is not tenable. Plaintiff proved fee-simple title in himself from the government. It is admitted that the land, during all the time subsequent to the recording of the tax deed, was vacant and unoccupied. That being the case, and neither party being in possession, plaintiff was in constructive possession, which followed in the wake of title from his fee-simple ownership. Defendants did nothing on the land from any sense of security resulting from plaintiff's inactivity in failing to assume actual possession. Under these circumstances this defense is not established. *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604; *Vanderpan v. Pelton*, 22 Colo. App. 357, 123 Pac. 960; *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249; *Indiana & A. L. & Mfg. Co. v. Milburn*, 161 Fed. 531, 88 C. C. A. 473; *Compton v. Johnson*, 240 Ill. 621, 88 N. E. 991.

[7] The seventh defense, founded upon plaintiff's failure to tender to defendants the taxes and interest paid by them, prior to the beginning of this suit, cannot be upheld. *Empire R. & C. Co. v. Lanning*, 49 Colo. 458, 113 Pac. 491; *Empire R. & C. Co. v. Irwin*, *supra*.

The foregoing observations dispose of this appeal adversely to appellants. We find nothing in the record justifying a reversal. The judgment will be affirmed.

Judgment affirmed.

CITIZENS' STATE BANK OF CHAUTAUQUA et al. v. SHAWNEE FIRE INS. CO.†
(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 93*)—POLICY—VALIDITY—PRINCIPAL AND AGENT.

An agent of an insurance company with power to issue policies insured a property on which the bank of which he was cashier held a mortgage for about one-half the amount of the insurance, attaching a clause making the loss, if any, payable to the mortgagee as its interest should appear. *Held* that, in the absence of fraud or collusion, the company could not deny liability on account of its agent's relation to such mortgagee.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 123; Dec. Dig. § 93.*]

2. PRINCIPAL AND AGENT (§ 157*)—DUAL RELATION—FRAUD.

The rule that one cannot serve two masters does not apply when loyalty to one involves no breach of duty to the other. Fraud is not necessarily to be presumed from mere duality of relation.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 588; Dec. Dig. § 157.*]

3. INSURANCE (§§ 146, 328*)—POLICY—VALIDITY—MORTGAGED PROPERTY.

A mortgage clause that the loss, if any, shall be payable to the mortgagee as his interest may appear, "subject to the terms and conditions of the policy," does not relieve the insurer from liability upon a policy containing a condition that it shall be avoided by proceedings to foreclose any mortgage on the property; the insuring of a mortgage lien being sufficient indication that the company must have contemplated a possible or probable foreclosure. When an insurance contract prepared by the insurer contains ambiguous or inconsistent provisions, it will be construed so as to uphold rather than defeat the indemnity.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 292, 294-298, 794-822, 825; Dec. Dig. §§ 146, 328.*]

Appeal from District Court, Shawnee, County.

Action by the Citizens' State Bank of Chautauqua, Kansas, and another against the Shawnee Fire Insurance Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Mulvane & Gault and D. R. Hite, all of Topeka, for appellant. W. H. Sproul, of Sedan, W. S. Roark, of Topeka, Carr W. Taylor, of Hutchinson, and Lee Monroe, of Topeka, for appellees.

WEST, J. The two principal questions presented by this appeal are: The authority of an agent, and the legal effect of a mortgage clause in a policy of insurance. An agent of the insurance company with authority to write policies and make contracts for insuring property wrote and issued a policy insuring the owner against loss on a certain building in the sum of \$750. The agent was at the time cashier of a bank which held a mortgage of \$350 on the insured property. The policy was accepted and the premium paid to and retained by the insurance company. Among the conditions in the policy was one to the effect that, if with the consent of the company an interest under the policy should exist in the favor of a mortgagee, the condition thereinbefore contained should apply to such interests as should be written upon, attached, or appended to the policy; another was that the policy should be void if any change other than by the death of the insured should take place in the interest, title, or possession of the property, whether by legal process, judgment, voluntary act of the insured, or otherwise. The policy also contained a provision that it should be void "if foreclosure proceedings be commenced or notice given of sale of any property covered by this policy, by virtue of any mortgage or trust deed." The mortgage clause made the loss, if any, payable to the mortgagee as his interest might appear, "subject, however, to all the terms and conditions of this policy."

The defendant contends that, as it was neither alleged nor proved that it had notice or knowledge that the agent was acting for the bank and its benefit in issuing the policy,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† Rehearing denied January 16, 1914.

It is not bound by the act of one who in trying to serve two masters could in law serve neither; also, that in view of the conditions of the policy and the mortgage clause the institution of foreclosure proceedings avoided the policy.

The plaintiff argues that, as the agreed statement of fact shows that the adjuster denied liability upon the ground that the policy had become void by reason of the mortgage and the foreclosure proceedings, this amounted to a waiver by the company of the defense that its agent acted without authority. As to the second defense, the plaintiff insists that the retention of premiums by the company and its failure to cancel the policy amounted to a waiver of its rights under the mortgage clause.

[1, 2] Concerning the authority of the agent, it may be said that the rule invoked by the defendant, while founded on the inherent frailty of human nature and the experience of mankind and supported by abundant decisions, does not apply to the facts of this case so as to relieve the insurance company from liability on its policy. There is nothing inherently wrong in acting for two parties whose interests are dissimilar if all concerned so desire, and when an agent for one party voluntarily acts for his principal and also for another whose rights do not conflict in the transaction, and no question arises as to his right to recover compensation from both, no fraud has been intended and no wrong done, and especially when the principal has retained the proceeds and benefits of the transaction, no reason exists why the mere fact that the agent assumes to act in a dual capacity should result in loss to either of the parties. Upon what principle should the insured be made to suffer loss because the one who wrote and issued the policy on behalf of the company was also in some matters agent of the former? If he acted fairly with each and did exactly what one not thus circumstanced would have done with the approval of his principal, what is there in the mere dual relation that should penalize one party for patronizing the other? *Rockford Ins. Co. v. Winfield*, 57 Kan. 576, 47 Pac. 511, is relied on. But in that case the agent was cashier of one bank and president of another, which banks had taken warehouse receipts for the grain upon which the agent issued the policy. The company, however, not knowing the relation of the agent to the property insured, refused the risk, but the notice of refusal did not reach the agent until two or three days before the fire, and the agent did not notify the insured until after the loss. It was said in the opinion that the assured was indebted to the banks in a sum exceeding the value of the property covered by the policy and that the latter was really issued for the use and benefit of the banks; also, that the doctrine of dual agency as there announced is subject to certain exceptions. In *Wilson v. Insurance Co.*, 90 Kan. 855, 133 Pac. 715, a

property owner contracted with an agent representing several insurance companies to insure for a certain amount—not designating which company should issue the policy—and paid the premium and arranged with the agent to hold the policy and thereafter keep the property insured. It was held that the action of the agent in agreeing to hold the policy and keep the property insured was not repugnant to his duty to the company, there being no fraud or collusion, and that the maxim that “no man shall serve two masters” does not prevent the same person’s acting as agent for certain purposes of two or more parties when their interests do not conflict and when loyalty to one is not a breach of duty to the other. Here the fact that the agent was cashier of a bank which held a mortgage for about half the amount of the insurance did not prevent his acting with fidelity to his principal, and there is no reason to suppose that the risk would have been refused had all the facts been fully disclosed. On the other hand, the company might with justice have complained had its agent permitted this business to go to a rival.

“An exception to the general rule exists however, where the interests of the two principals are not conflicting and loyalty by the agent to one of them is not a breach of his duty to the other, as when the agent exercises no discretion in the matter, but acts merely to bring the parties together, and they themselves settle the terms of the agreement between them. Furthermore, the rule does not disqualify one who is agent of one party for one purpose from acting for an adverse party for an entirely different purpose.” 31 Cyc. 1449.

Many authorities go to the extent of holding that the mere duality of relation is in law a fraud and that the maxim that from a wrong no action can arise applies. But decisions are also numerous to the effect that the law will not presume a fraud where none exists, and that a wrong in fact and not merely in theory is necessary to strike down a contract executed by an agent of both parties thereto, and this we deem the sounder doctrine.

“A person may act as agent of two or more principals in the same transaction, if his duties of each are not such as to require him to do incompatible things.” *Mechem on Agency*, § 67.

The point is sought to be made that, because the adjuster denied liability on the ground that the mortgage and its foreclosure had avoided the policy, this was a waiver of the agent’s lack of authority, and *Redinger v. Jones*, 68 Kan. 627, 637, 75 Pac. 997, and later decisions to like effect, are cited. But having already concluded that the agent rightfully acted for the insurance company, this question becomes immaterial and its decision unnecessary.

[3] The remaining question is whether the mortgage, together with the conditions of the

policy avoided the latter. It is urged with force that the mention in the clause of a mortgage presupposed a possible or probable foreclosure, and that under the former decisions it was for the benefit of the mortgagee, who is not to be denied a recovery because of certain conditions in the policy. It is well settled that, whatever distinction may be drawn between the "open mortgage clause" and the "union mortgage clause," a policy with either attached inures to the benefit of the mortgagee to the extent of his interest. *Insurance Co. v. Coverdale*, 48 Kan. 446, 29 Pac. 682; *Insurance Co. v. Boardman*, 58 Kan. 339, 49 Pac. 92; *Dodge v. Hamburg-Bremen Fire Ins. Co.*, 4 Kan. App. 415, 46 Pac. 25; *Delaware Insurance Co. v. Truskett*, 65 Kan. 861, 70 Pac. 1131.¹ In the *Coverdale* Case the loss, if any, was made payable to the mortgagee in general terms, not merely as its interest should appear. The mortgage clause also provided, among other things, that the insurance as to the interest of the mortgagee should not be invalidated by any act or neglect of the mortgagee or owner. It was held the owner could not maintain an action on the policy unless the mortgage was paid, without obtaining authority from the mortgagee, and that the mortgage clause created an independent and new contract with the mortgagee and did not merely appoint it as the party authorized to receive the proceeds of the policy. In the *Boardman* Case a similar clause was attached, which also contained a provision that it should take precedence over the provisions of the policy. The ruling very naturally followed that with such a clause a provision in the policy that commencement of foreclosure should avoid it could not defeat the mortgagee. It was said, at page 343 of 58 Kan., page 93 of 49 Pac.: "The commencement by the mortgagee of proceedings to foreclose a mortgage is not prohibited by the express terms of the mortgage clause, nor by any fair implication therein contained. If prohibited at all, it must be by reason of the provisions of the policy quoted. Construing both the original policy and the mortgage clause together, in the light of the plain purpose to insure the interest of the mortgagee, the commencement of the foreclosure proceedings cannot be held to be a violation of any stipulation forbidding the mortgagee. The insurer must have known when attaching the mortgage clause that it might become necessary for the mortgagee, in order to protect his interest under the mortgage, to commence foreclosure proceedings; that this would not have a tendency to diminish the interest of the mortgagee in the property, but rather to increase it."

The case of *Dodge v. Insurance Co.*, 4 Kan. App. 415, 46 Pac. 25, is referred to with apparent approval, wherein it was held that a

clause making the loss, if any, payable to the mortgagee or his assigns, as his interest may appear, insures the owner of the mortgage to the extent of his interest, and that a change of title which increases his interest, even to absolute ownership, will not release the insurer from liability. Further that no notice need be given of such increase. There the mortgage clause was very long and provided that notice should be given by the mortgagee of any change of ownership or increase of hazard which should come to his knowledge, and all of its many provisions were expressly made to take precedence over any conflicting provision or condition contained in the policy, and it was held that it must be construed as if it read "loss, if any, payable to the mortgagee." Also, that a company insuring a mortgage lien must anticipate foreclosure; that the mortgagee is protected until a foreclosure, confirmation of a sale, and payment of the money ordered made to him. It seems that the mortgagee purchased at his own foreclosure, and the company defended on the ground that he had failed to notify it of this change of ownership; but the court said this was not such change as was contemplated by the subrogation contract, and that it in no manner increased the risk, and the title had not vested in some one not insured, and *Continental Ins. Co. v. Ward*, 50 Kan. 346, 31 Pac. 1079 was followed, holding that a change of title which increases the interest of the insured, whether by judicial sale or voluntary conveyance, will not defeat the insurance.

It appears that the mortgagee foreclosed and caused the property to be sold and was holding a certificate of purchase, the period of redemption having expired since the fire. But under the rule announced in the cases already referred to, this would not of itself avoid the insurance.

No such clause as the one now under consideration was found in any of the foregoing cases nor in any cited by either party. So that the real question is whether the words "subject, however, to all the terms and conditions of this policy," mean what they say, or mean anything. There is a seeming inconsistency in insuring a mortgage lien and at the same time contracting that a foreclosure shall destroy or avoid the insurance, but to the writer it seems clear that, when those competent to contract have settled upon the terms by which they are to be bound, neither can call upon the courts to make different terms. Such appears to him to be the unmistakable force of the rule announced in *Insurance Co. v. Thorp*, 48 Kan. 239, Syl. 1, 28 Pac. 991; *Insurance Co. v. Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234; *Insurance Co. v. Knerr*, 72 Kan. 385, 83 Pac. 611; *Bank v. McIntosh*, 72 Kan. 603, page 611, 84 Pac. 535.

But the court is of the opinion that the clause in question does not differ essentially from the ones considered in the previous

¹ Reported in full in the *Pacific Reporter*; reported as a memorandum decision without opinion in the *Kansas Reports*.

decisions referred to, and that no different rule of construction should apply. This holding is in accord with the practical doctrine that the province of insurance companies is to insure, and is consonant with the theory that by a contrary ruling an unsuspecting mortgagee might lose an indemnity for which he had paid in good faith believing he was secure.

The judgment is affirmed. All the Justices concurring.

HINCHEY v. STARRETT et al.

(Supreme Court of Kansas. Dec. 6, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 155*)—TIME FOR GRANTING—DEMURRER TO EVIDENCE.

The pleading, while open to criticism for confusion of theories, stated a cause of action. The evidence, if undisputed, showed a right to recover in some amount. The court sustained a demurrer to the evidence and rendered judgment for costs. Within three days a motion for a new trial was filed, which was taken under advisement until the next term and then granted. *Held*, that the latter order was proper.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315; Dec. Dig. § 155.*]

2. FRAUD (§ 12*)—WHAT CONSTITUTES—DAMAGES—FALSE REPRESENTATIONS CONCERNING EXISTING CONDITION—EXCHANGE OF PROPERTY.

It was alleged that by falsely and fraudulently pretending that one of the defendants was ready and anxious and financially able to take a certain tract of land at \$1,600 cash, although worth more, the plaintiff was defrauded into trading to the other for such land an automobile worth that sum. *Held*, that such pretense concerned an existing condition and was not a mere promise or opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.*]

3. FRAUD (§ 59*)—MEASURE OF DAMAGES.

In such situation the measure of damages is the difference between the value of the automobile and the value of the land taken in exchange therefor.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

4. PLEADING (§ 369*)—ELECTION—WHAT CONSTITUTES—RECITALS ON MOTION.

After extended pleadings had been filed and amended, a motion to strike a certain allegation from the answer recited that the petition showed that the action was one to recover damages for misrepresentation of the character and value of the land, which motion was overruled. *Held*, that such expression thus used cannot rightfully be regarded as an election to proceed upon the basis of the represented value of the land instead of the sum agreed to be paid therefor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199-1209; Dec. Dig. § 369.*]

5. FRAUDULENT REPRESENTATIONS—CONSTRUCTION.

The plaintiff testified to the reiteration by both defendants of certain fraudulent representations, but on cross-examination stated that the last repetition by one of them was what in-

duced him to make the trade. *Held*, that this might well be construed to mean that such last repetition was the climax of the fraudulent inducements rather than the sole operating influence.

Appeal from District Court, Shawnee County.

Action by Dennis P. Hinchey against William Starrett and another. From judgment and order granting a new trial, defendants appeal. Affirmed.

C. W. Burch and B. I. Litowich, both of Salina, for appellants. Lee Monroe and W. S. Roark, both of Topeka, for appellee.

WEST, J. Action for damages. The second amended petition alleged in substance: That the plaintiff received a letter from the defendant Starrett inquiring whether he would trade an automobile which he then owned for land in Oklahoma, and requested a conference with him, and later Starrett orally offered to exchange a quarter section near Monroe; said that he owned a quarter near that town and that the defendant Wharton stood ready to purchase it for \$1,000 cash. That upon the plaintiff's refusal to trade Starrett requested him to write Wharton, which was done. Shortly thereafter Starrett telephoned the plaintiff from Salina repeating the offer and request, and again repeated both in a conversation held at Junction City within a few days. That, thus induced, the plaintiff wrote Wharton and promptly received a reply that he had offered Starrett \$1,600 for the land but would prefer another quarter ten miles from Stringtown as it was covered by an oil lease which included other land adjoining which he was buying, and if the plaintiff could get this quarter he (Wharton) would take it. Replying to a written inquiry as to what he would give for the quarter last mentioned, he wired "\$1,600." That about this time Starrett represented to plaintiff that the quarter near Stringtown was good, level, fertile farm land, with a large amount of valuable timber growing thereon, and was located in an oil-producing territory, and reasonably worth between \$1,800 and \$2,000. That he was the owner thereof, and that Wharton was well acquainted therewith, was willing, able and anxious to purchase it for \$1,600 cash, and was a thoroughly reputable, reliable, and financially responsible business man. That on account of some former trouble Starrett's wife would not join in a deed to Wharton. That by these statements the plaintiff was induced to meet the defendants at McCracken, Rush county, where Starrett verbally reiterated his statements and Wharton corroborated them; the latter stating that he owned several other tracts adjoining the Stringtown quarter and had considered oil drilling in the neighborhood, and that if plaintiff would exchange

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.-6

his automobile for the land he (Wharton) would pay him therefor \$1,600, and he entered into writing to that effect and gave a check for \$25 as earnest money. That thereafter Starrett reiterated his statements and the plaintiff entered into a written agreement to exchange his automobile for the land and delivered the former to Starrett, who later turned over the deed from one Ringland for the land. After this was done plaintiff executed and tendered to Wharton a deed and abstract showing proper title and demanded payment of the purchase price without avail; Wharton being financially worthless. That all of these statements and representations were false and known to both of the defendants to be false at the time they were made. That the land was rough, sterile, and unfit for farming, the timber thereon worthless. That it was not underlaid with oil or in any oil-producing territory and was not worth to exceed 50 cents an acre. That the car was worth \$1,600. A demurrer to this pleading was overruled, and Starrett answered by a general denial, expressly disclaiming any authority for any acts or statements made by Wharton, and alleging that the plaintiff had expressed satisfaction with the exchange of property which was made after an independent investigation of the facts by him and upon advice of counsel. Wharton made default. The motion to strike out certain portions of this answer was overruled, and a reply by way of general denial was filed. A trial was had, a demurrer to the evidence overruled, likewise a motion to instruct a verdict for the defendant Starrett, and, after the latter had introduced a part of the testimony of one witness, the court reconsidered and sustained the demurrer to the plaintiff's evidence. Within three days thereafter the plaintiff moved for a new trial and to set aside the order sustaining a demurrer, which motion was taken under advisement until the next term and then sustained. From this order the defendant Starrett appeals.

In plaintiff's motion attacking the answer he asked that the allegation that he had not tendered a conveyance to the defendant be stricken out for the reason that it was not a matter of defense or responsive to any issue in the case; "this being an action in which plaintiff's amended petition shows that he has elected to affirm the exchange for the land in question and sues for damages for fraudulent misrepresentation of the character and value of said land." It is contended that the plaintiff's pleadings were so indefinite that his theory of the case could not be determined therefrom; that they contained no allegation of the value of the land, if it had been as represented, and therefore no basis for proof of the proper measure of damages; that no such proof was offered; that, if the claim be against Starrett for Wharton's failure to pay, the record does not disclose Wharton's insolvency or Starrett's knowledge thereof;

and that, the demurrer to the evidence having been sustained and the action dismissed at the January term, the court could not at the April term grant a new trial and restate the action. Whatever confusion or uncertainty may be shown in the second amended petition, we have no difficulty in holding that it stated a cause of action, for, if the plaintiff's allegations be taken as true, certainly the defendants were liable to him in some amount.

[3] Counsel argue that it was essential to state what the land would have been worth if as represented, while the plaintiff contends that as both defendants represented that it was worth and Wharton stood ready to pay at once \$1,600 cash, which was the sum asked for the machine, and which both defendants pretended the plaintiff would receive therefor by the operation of buying this land from Starrett and at once conveying it to Wharton, all he need to do is to show how much less than \$1,600 it was in fact worth. We agree with the latter contention. The evidence disclosed that the land was not worth much above \$1.50 an acre; that it was not even owned by Starrett or desired by Wharton who had no intention of taking it. From so much of the evidence as appears in the record presented, one would have to be blind not to see that the defendants co-operated in a fraudulent scheme whereby they procured the plaintiff's car, and it would serve no purpose for the latter to show what the land would have been worth had the representations of either borne the remotest semblance of truth. Hence the rule in *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, relied on by the defendant, that the measure of damages is the difference between the actual and represented value of the land does not so directly apply as to be controlling.

[2] Here the fraud consisted largely, if not entirely, in making the plaintiff believe that, by using the land as an instrument of the transfer, he would really be selling his car for \$1,600 cash. The important thing stated and believed was not that the land was worth \$1,600 but that Wharton actually stood ready, able, and anxious to pay that sum for it; and the land passing from Starrett through Hinchey to Wharton was a mere medium of exchange used to accomplish the supposed bona fide plan of buying Starrett's car for \$1,600 but the real mala fide purpose of getting it for practically nothing. The assurance made by both defendants of the ability and intention of Wharton to take the land at once at the cash sum named was a statement touching an existing condition and not a mere promise or opinion. *State v. Cowdin*, 28 Kan. 269; *State v. Briggs*, 74 Kan. 377, 86 Pac. 447, 7 L. R. A. (N. S.) 278, 10 Ann. Cas. 904; *Smith v. State*, 116 Ga. 587, 42 S. E. 766; *Commonwealth v. Drew*, 153 Mass. 538, 27 N. E. 593; *People v. Hugins*, 110 App. Div. 613, 97 N. Y. Supp. 187;

note to *State v. Briggs*, 7 L. R. A. (N. S.) 278.

[4] While the quoted words used in the motion of plaintiff to strike out a certain allegation of the answer, taken alone, might bear the literal interpretation contended for by opposing counsel, still, when considered together with the allegations and prayer of the second amended petition, we think it was not intended as an election to proceed for the recovery of the difference between the real and the represented value of the land but as an assertion that the action was not for rescission. A motion, not an election, was the matter at hand, and the former should not be construed into the latter by reason of the mere use of some inapt language.

The point is pressed that Wharton's insolvency was not proved. The record is illuminated, however, with his own explanation of his financial condition, which is quite sufficient to convince one that a judgment against him would not add materially to the assets of its holder. Aside from this his present desire, intention, and ability to take the land for the price of the car were assiduously pressed upon the plaintiff by Starrett, who knew full well that at least no such desire or intention existed, and the mere matter of financial ability was only one element of the false pretense deliberately and successfully made.

It is insisted that the plaintiff swore on cross-examination that but for Starrett's assurance when returning from McCracken that Wharton was good and would pay, he would not have made the trade, and hence that he could not have relied on the statements as to the value and character of the land. We do not think that this meant or was intended to mean that he was uninfluenced by the former representations, only that this last assurance, like the pleadings of the importunate widow, removed all further hesitation.

[1] That a motion for a new trial filed at one term may be taken under advisement and granted at the succeeding term was decided in *Life Ins. Co. v. Twining*, 19 Kan. 349; *Springfield Fire & Marine Ins. Co. v. Gish, Brook & Co.*, 23 Okl. 824, 102 Pac. 712. The trial court upon reconsideration concluded that the plaintiff's claim was supported by some evidence, and that the demurrer thereto had been improperly sustained, in which conclusion we find no error.

The defendant is justified in complaining that the plaintiff's pleadings were more fertile in prolixity than in perspicuity, but we hardly think the remarkable ability shown in the numerous attacks and attempts to require clearness of theory and fixity of position demands the entire defeat of the plaintiff.

The order granting a new trial is affirmed. All the Justices concurring.

Ex parte KUHN'S. (No. 2,101.)

(Supreme Court of Nevada. Dec. 15, 1913.)

1. EXTRADITION (§ 32*)—INTERSTATE—GROUNDS—REVIEW OF PROCEEDINGS.

Where an alleged fugitive from the justice of a sister state seeks his discharge from arrest under a warrant issued by the Governor on extradition from the sister state, and the indictment accompanying the papers charged an offense committed in the sister state within the period of limitations, he could not avail himself of the fact that the copy of the indictment under which he was first arrested contained a clerical error so as to charge a crime barred by limitations.

[Ed. Note.—For other cases, see *Extradition*, Cent. Dig. §§ 36-38; Dec. Dig. § 32.*]

2. EXTRADITION (§ 30*)—INTERSTATE—PERSONS SUBJECT TO EXTRADITION—FUGITIVE FROM JUSTICE.

Where a husband and wife residing in Pennsylvania agreed to separate and he agreed to make monthly payments for her support and that of a child of the marriage, and he made the monthly payments for a time and prior to any default left the state, and while residing in a sister state failed to make the payments, he was not guilty of abandoning his wife in Pennsylvania, he was not a fugitive from justice from Pennsylvania, based on his failure to maintain his wife and child, and he could not be extradited at the request of the authorities of Pennsylvania.

[Ed. Note.—For other cases, see *Extradition*, Cent. Dig. § 32; Dec. Dig. § 30.*]

Application for writ of habeas corpus by F. H. Kuhns for his discharge from arrest under an extradition warrant. Petitioner discharged.

Alfred Chartz, of Carson City, for petitioner.

TALBOT, C. J. Petitioner seeks to be discharged from arrest under a warrant issued by the Governor of the state of Nevada on extradition papers from the state of Pennsylvania.

Under copies duly authenticated by the signature of the president judge and clerk and seal of the court, and accompanying the requisition papers, it appears that in the court of quarter sessions of the peace for the county of Allegheny, state of Pennsylvania, on November 12, 1913, an indictment was returned charging that on the 1st day of April, 1913, the petitioner, at the county of Allegheny, did separate himself from and neglect to maintain his wife and minor child. Acting upon what is shown upon the face of these papers, and without taking testimony, the Governor of this state issued his warrant for the arrest and extradition of petitioner, and it is from this arrest and extradition warrant that he seeks to be released.

Prior to the arrival of the extradition papers, the sheriff of Ormsby county arrested the petitioner after receiving a copy of the indictment, which charged the desertion and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nonsupport of the wife and child to have been in the year 1900. Application was made to the district court for a writ of habeas corpus. It was contended that the offense, as shown by the copy of the indictment, was barred by the statute of limitations, and last Friday the district court ordered the discharge of the petitioner.

[1] As the date given for the alleged offense in that copy of the indictment was evidently a clerical error, which does not appear in the copy of the indictment accompanying the extradition papers, this objection does not avail the petitioner in this proceeding, for he now seeks his discharge from the warrant of the Governor, issued upon the papers containing a duly certified copy of the indictment alleging the offense to have been committed on the 1st day of April, 1913.

[2] From the evidence presented for our consideration, it appears without contradiction that on the 27th day of May, 1910, the petitioner and his wife entered into a written agreement to live separate and apart from each other, and for the payment by the petitioner of \$50 per month in advance for the support of his wife and minor son, to the wife, who in addition received the rental of \$20 per month or \$15 per month from a dwelling house; that petitioner made the monthly payments under the agreement to and including the month of April, 1913, and that the last of these payments was made in advance for that month by check drawn by petitioner and dated April 1, 1913; that he has since failed to make the payments but has contributed a small amount toward the support of the minor son; and that prior to any delinquency in payments or failure to support, he left the state of Pennsylvania on the 29th day of March, 1913, and has not since returned there, and has resided in the state of Nevada since his arrival here on the 3d day of April, 1913.

The indictment was found upon the testimony of the wife of the petitioner. In her detailed sworn "statement of circumstances of aggravation," accompanying the requisition papers, she states, among other things, that petitioner separated himself from her and his children on the 1st day of April, 1910, without reasonable cause, and has since that day refused to live with or make his home with her; that on or about the 30th day of March, 1913, the petitioner closed his office in the city of Pittsburgh, where he was practicing as a specialist on the treatment of the eye, ear, nose, and throat for a number of years, and gave his accounts into the hands of a collection agency, and absolutely discontinued his business in the city of Pittsburgh; and that ever since March 30, 1913, petitioner has willfully neglected to maintain her and their son, and that they are wholly dependent on their earnings for adequate support, aside from the income of about \$15 monthly rental from a piece of property belonging to her.

In this proceeding disputed facts are not regarded as in any way controlling, and if these statements made in her affidavit may be considered as contradicting the direct evidence of the petitioner that he drew his check on the 27th day of March, 1913, dated the 1st day of April, 1913, for the payment in advance for April, according to the agreement for supporting her and the boy, which has been introduced in evidence, nevertheless the "statement of circumstances of aggravation" accompanying the papers does not show that there was any failure on his part to keep the agreement or to support her and the son until after he left the state of Pennsylvania, while according to his testimony and under the written agreement there was no default on his part for more than a month after his departure from that state.

As the agreement of separation was in force, there was no abandonment of the wife. Any failure to support her or the son did not occur while petitioner was in the state of Pennsylvania.

If, as contended, we are not to consider the undisputed evidence that the petitioner was not delinquent in performing the conditions of his contract and did not fail to support his wife and child until more than a month after he left the state of Pennsylvania, and that under the admitted facts no conviction could be obtained under the indictment, and that the holding and taking of the petitioner for trial would result in fruitless expense to the state of Pennsylvania and unnecessary hardship to petitioner, the question remains whether he is a fugitive from justice, subject to extradition, when it appears beyond dispute that he was not in the state of Pennsylvania at the time he is alleged by the indictment to have committed the misdemeanor there. A person while in one state may be guilty of the commission of a crime in another state, when he is operating with an agent or accessory there, as in *Re Cook* (C. C.) 49 Fed. 833, in which the accused was convicted of receiving deposits in an insolvent bank mostly owned by him in the state of Wisconsin while he was in Chicago, and the case of *State v. Chapman*, 6 Nev. 320, in which it was held that one of the accused persons who went to the state of California, and from there telegraphed his accomplices in the robbery when the treasure would be shipped, was properly convicted as an accessory before the fact in this state. There is no principle of the law relating to agency or accessory by which the petitioner can be held. He did not, with the assistance of any other person in Pennsylvania, commit the offense charged after he came to Nevada. His acts in selling his furniture and placing his accounts with a collection agency before he left the state of Pennsylvania did not constitute or result in any crime.

It has been held often that the court may hear testimony and discharge a person held under a warrant for extradition if the un-

disputed facts justify his release or show that he is not a fugitive from justice. *Ex parte Smith*, 35 Nev. 90, 126 Pac. 655.

In habeas corpus proceedings before the Circuit Court of the United States for the District of Maryland, in *Bruce v. Raynor*, 124 Fed. 481, 62 C. C. A. 501, under an indictment for bigamy alleged to have been committed more than two years before the finding of the indictment in a state in which that offense is barred within two years unless the accused flees from justice, the petitioner was allowed to prove that he remained in that state without being concealed for more than two years after the date of the alleged offense, and it was held that such evidence would not go to any matter of defense but tended to prove that the petitioner was not a fugitive from justice.

In *Ex parte Raggel*, 114 U. S. 651, 5 Sup. Ct. 1153, 29 L. Ed. 250, the court said: "The only question remaining to be considered relates to the alleged want of competent evidence before the Governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly the act of Congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the territory was not required, by the act of Congress, to cause the arrest of appellant and his delivery to the agent appointed by the Governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of an indictment or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or the territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestable proof, that the accused had in fact never been in the demanding state, and therefore could not be said to have fled from its justice. Upon the executive of the state in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. He does not fail in duty if he makes

it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is in fact a fugitive from the justice of the demanding state."

In *Ex parte Spencer*, 34 Nev. 240, 117 Pac. 1, we heard testimony and discharged the petitioner because it appeared that he was not in the state of Illinois at the time he was alleged to have committed the offense there.

In *Ex parte Hose*, 84 Nev. 91, 116 Pac. 417, we ordered petitioner surrendered to the authorities of the state of Pennsylvania under an information charging him with the crime of desertion by separating himself from his wife and minor child. We held that the warrant for the arrest and return of the petitioner in that case to answer for the crime of desertion was not objectionable as failing to set out an offense known to the laws of that state.

We have held that by lack of jurisdiction a resident of one of the counties of this state may not be taken for trial to another county in which he is charged with crime when the undisputed evidence shows that he was not in and did not commit any offense in the county in which he is accused.

We have the highest regard for our great sister state of Pennsylvania, and we do not wish to obstruct the enforcement of her laws or the administration of justice in any commonwealth. We desire to show every consideration for warrants and process issued on her behalf which we would give or desire to have given to our own. We doubt whether the petitioner would have been indicted for desertion if controlling facts, omitted from the "statement of circumstances of aggravation," such as that the petitioner and his wife were living apart by written agreement and that he did not fail to keep that contract while in the state of Pennsylvania, had been made known to her authorities, and we do not assume that it will longer be desired to extradite or prosecute the petitioner when they become aware of the facts presented to this court, indicating that he was not guilty of the crime of desertion nor of any offense at the time alleged in the indictment nor while residing in that state. We feel assured that the state of Pennsylvania does not wish to proceed against any person when it becomes apparent that he is not guilty of the offense with which he has been charged.

In view of the undisputed facts indicated, we do not feel that it would be consistent with justice or the liberty guaranteed to the citizen by the Constitution to allow the petitioner to be taken to Pennsylvania for trial, and we do not believe that the rights of that state will be violated or her best interests be otherwise than subserved by the release of the petitioner.

It appearing to the court that the petitioner is not a fugitive from justice, it is ordered that he be discharged.

NORCROSS and McCARRAN, JJ., concur.

PUEBLO OF ISLETA v. TONDRE et al.

SAME v. PICARD et al.

(Supreme Court of New Mexico. Sept. 1, 1913.
On Motion for Rehearing, Dec. 17, 1913.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES (§ 128*) —
COMMUNITY ACEQUIAS—DIVERSION OF WATER.

Chapter 49, Laws of 1907, does not regulate community acequias constructed prior to the passage of the act as to the right to change the point of diversion from the stream into such acequias.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 143; Dec. Dig. § 128.*]

2. EMINENT DOMAIN (§ 47*)—PROPERTY SUBJECT—COMMUNITY ACEQUIAS.

Said chapter authorizes the enlarging of an old community acequia by condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

Roberts, C. J., dissenting.

Error to District Court, Bernalillo County; before Justice Ira A. Abbott.

Appeal from District Court, Valencia County; before Justice Mechem.

Proceedings by Frederick Tondre and others against the Pueblo of Isleta to establish a ditch, and suit by the Pueblo of Isleta against J. A. Picard and others. Judgment for plaintiffs, in the first action, and defendant brings error. Decree for defendants in the second action, and plaintiff appeals. Affirmed.

Francis C. Wilson, of Santa Fé, for plaintiff in error and appellant. Frank W. Clancy, of Santa Fé, for defendants in error and appellees.

PARKER, J. Both of the above cases involve the same questions, and will be considered together, as was done by counsel for the respective parties in their briefs. The first of the above cases involves the validity of a proceeding for the condemnation of a right of way for an irrigation ditch through the lands of the plaintiff in error. The condemnation proceedings were instituted by the defendants in error for the purpose of securing a right of way and a headgate, taking the water from the Rio Grande river at a point of diversion different from that which had formerly been employed for that purpose. The proceedings resulted in the condemnation of the land and the payment into court of the amount awarded in that

proceeding. The second of the above cases was an equity proceeding for an injunction to restrain alleged trespass by reason of the operation of the new ditch constructed over the right of way awarded in the condemnation proceedings above referred to.

The claims of the plaintiff in error in the first action and the appellant in the second action are based in each instance upon a single proposition, which may be stated as follows: That by reason of the provisions of chapter 49 of the Laws of 1907 it became necessary to apply for and obtain a permit from the then territorial (now state) engineer to change the point of diversion of water from any natural stream in the state into any irrigating ditch, and the defendants in error and appellees, having obtained no such permit, were not authorized to maintain condemnation proceedings, or change the point of diversion of water from the Rio Grande, and were consequently trespassers in all of their acts. It appears that both the plaintiff in error and appellant and the defendants in error and appellees are, and have been for many years past, appropriators of water for the purpose of irrigation from the Rio Grande river. The headgate of the ditch of defendants in error had been washed away by a change in the banks of the Rio Grande, and it became necessary for them to seek a new headgate, together with a considerable length of ditch from the new point of diversion, in order to be able to use the water for the purposes required.

It is contended by counsel for plaintiff in error that the Legislature had not only the power to regulate the right to the use of the waters of the state by persons who had acquired water rights long prior to the passage of the act above mentioned, but that it did not in said act in terms provide for such regulation. It is argued by counsel for appellee that a fair construction of the terms of the act shows that it speaks prospectively from the date of its passage, and was never intended to and does not apply to water rights acquired prior to the passage of the act, or to the means of enjoying the same. It becomes necessary, therefore, to examine the act as a whole, and to determine the legislative intent therefrom, there being some little obscurity in the same.

The title of the act is as follows: "An act to conserve and regulate the use and distribution of the waters of New Mexico, to create the office of territorial engineer, to create a board of water commissioners, and for other purposes." Section 12 of the act provides that the territorial engineer shall have the supervision of the apportionment of water in this territory according to the licenses issued by him and his predecessors and the adjudications of the courts. This section would seem to limit the jurisdiction of the territorial engineer to such water rights as

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had been acquired under licenses issued by him or his predecessors. Section 13 provides for the division of the state into water districts, and section 14 provides that after such division, upon the application of a majority of the water users of any district, the state engineer may appoint a water master for such district, who shall have charge of apportionment of waters in his district. These two sections would seem in no way to refer to old established water rights or community acequias, but to speak to the future and to provide for a condition of affairs to be brought about by the districting of the state under the supervision of the territorial engineer. Until the same had been done it would seem to confer no power and require no duty of the state engineer in regard to the use of any water right. Section 19 provides for a hydrographic survey of each stream system in the state, and section 20 provides for the filing with the Attorney General of the data so accumulated and, at the request of the state engineer, to require the Attorney General to bring suit on behalf of the state for the determination of all rights to the use of water in such system. These two sections also speak to the future, and have no application to water rights acquired prior to the passage of the act and the means of enjoying the same. Section 24 of the act requires every applicant intending to acquire the right to the beneficial use of any of the public waters of the state to make application to the state engineer for a permit to appropriate the same, and the works to be employed for such purpose are to be subject to the approval of the state engineer. This section requires the applicant or proposed appropriator of water to furnish the state engineer with plans and specifications of the proposed works. Section 25 further deals with the detail of the data required to be furnished to the state engineer by the proposed appropriator, and provides that the plans of construction may be amended with the approval of the state engineer, and contains the following proviso: "Provided, further, that a change in the proposed point of diversion of water from a stream shall be subject to the approval of the territorial engineer, under the provisions of section 45 hereof, and shall not be allowed to the detriment of the rights of others having valid claims to the use of water from said stream."

[1] Counsel for plaintiffs in error rely much on this proviso, and argue that it was intended to apply to all ditches, regardless of when the same were constructed, or the right to appropriate the water was acquired. We do not so understand the provisions of sections 24 and 25. They speak entirely of water rights to be acquired by means of filing a petition with the state engineer, and do not in terms, nor do we think in intent, attempt to deal with any ditches or water rights acquired before the passage of the act. Section 45, referred to in the proviso, does

not purport to modify the terms of section 25 of the act. The only direct application of the chapter to prior existing rights occurs in section 59, which is as follows: "Nothing contained in this act shall be construed to impair existing vested rights, or the rights and priorities of any person, firm, corporation or association, who may have commenced the construction of reservoirs, canals, pipe lines or other works, or who have filed affidavits, applications or notices thereof for the purpose of appropriating for beneficial use, any waters as defined in section 1 of this act, in accordance with the laws of the territory of New Mexico, prior to the passage of this act: Provided, however, that all such reservoirs, canals, pipe lines or other works and the rights of the owners thereof shall be subject to regulation, adjudication and forfeiture for abandonment, as provided in this act."

At first glance it might seem that this section expressly subjects all prior rights to regulation in accordance with the terms of the chapter; but a more careful examination of the section leads, we think, to the opposite conclusion. It is seen that two classes of rights are mentioned in the section, viz., "existing vested rights," or "the rights and priorities of any person, firm, corporation or association, who may have commenced the construction of reservoirs, canals, pipe lines or other works, or who have filed affidavits, applications or notices thereof." Then follows the proviso which applies the feature of regulation to those "reservoirs, canals, pipe lines, or other works and the rights of the owners thereof" only, and omits to mention the first class of rights above pointed out. In determining the meaning of this section, and the scope of the application of the regulation feature, resort should be had to the then existing legislation. We had, at the date of the passage of the act in question, chapter 102, Laws of 1905. Section 19 of that act required notice or application to be made to the territorial engineer, which office was first created by that act, by "all persons, associations, or corporations who shall desire to construct any dam or dyke, for the purpose of storing, appropriating or diverting any public waters," and required them to submit plans and specifications of the proposed works. The section contains two provisions. The first is to the effect that if the proposed works are, in the opinion of the territorial engineer, not of sufficient importance to have the provisions of the section applied to them, he might suspend the operation of the section, and in case of works of great importance, where life or property would be in danger by the failure of such works, the territorial engineer might require certain precautions therein mentioned to be taken by the persons proposing to construct the works. The second proviso excludes from the operation of the section all works requiring the expendi-

ture of less than \$2,000. It thus appears that the class or kind of works referred to in section 59 of chapter 49, under discussion, must refer to the class of works concerning which, under the act of 1905, application was required to be made to the territorial engineer, and not to small community ditches or acequias, which involve no danger to life or property, and which are of comparatively insignificant cost.

[2] Counsel for appellants argue that sections 3 and 61 of the act provide the only means whereby an acequia already constructed can be enlarged by condemnation proceedings, as was done in these cases, and that therefore the defendants in error and the appellees must necessarily have been acting under the said chapter 49 in the proceedings which were taken; that therefore their rights are controlled by the terms of that chapter. We think the conclusion is faulty in the foregoing argument. Assuming that no other provision of law exists authorizing the condemnation proceedings taken in these cases than sections 3 and 61 of chapter 49, still it does not follow that the proceeding cannot be maintained. The question is whether old, prior existing rights of the kind presented by plaintiff are subject to regulations by the state engineer. If they are not, as we conclude, it does not follow that the owner of such a right cannot pursue condemnation proceedings under sections 3 and 61 of the chapter. The terms of the sections are broad, and include every person having a water right, and there is nothing in the terms of either section restricting the class of persons entitled to enjoy the right of condemnation to those persons who are seeking either to initiate a right or whose rights are regulated by the terms of the act. It therefore follows that the proceedings in condemnation were regular and properly maintainable.

Further contention is made by counsel for plaintiff in error and appellant to the effect that there was a defect of parties; but this error, if error it was, was cured by the bringing in of the absent party, who adopted the pleadings of the plaintiff in each case, and the judgment was in each case rendered in its favor. In this connection it may be stated that the question involved in these cases is no longer of any importance except to the immediate parties, in so far as it relates to public community acequias established and in operation prior to March 19, 1907, for by chapter 26 of the Session Laws of 1912 it is provided that no application to or permit from the state engineer is necessary to change the point of diversion of such an acequia.

For the reasons stated, the judgment of the lower court in each of the cases will be affirmed; and it is so ordered.

LEAHY, District Judge, concurs.

ROBERTS, C. J. (dissenting). The facts are stated in the majority opinion, and need not be here repeated. The sole question presented by these cases is as to whether or not it was necessary for the appellees and defendants in error to allege and prove that they had applied to the territorial engineer for permission to change the point of diversion of their intake ditch, and had secured a permit from such official so to do, prior to the institution of their proceedings in condemnation. If such application and permit were required by reason of existing statutes, then it is conceded that the lower court committed error, and a reversal is necessary. A consideration of the question involves two propositions, which may be stated as follows: First, did the Legislature have the power to regulate the manner and method of changing the point of diversion of a pre-existing water right? And, second, do the provisions of the act of 1907 apply in this regard to an appropriator of water who had perfected and completed his appropriation prior to the passage of the act?

Discussing the two propositions in the order stated, it is but fair to counsel for appellees and defendants in error to state that but seeming little reliance is placed upon the first proposition, although the question is stated in his brief. I do not regard the question as an open one, and believe it has been answered in the affirmative as often as presented. Water in the natural stream, in all those states where the common law with respect to the use of water and the right thereto is altogether ignored, is held to be the property of the public or the state as the representative of the public. *Wiley v. Decker*, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939. Water in the natural stream thus being the property of the public, or state, and its economical use, beneficial application, and full duty contributing so materially to the prosperity of the people, as a whole, and to the general welfare of the state, the state has the right to provide reasonable regulations for its distribution and application, in order to advance such objects and protect the rights of all persons enjoying or participating in the right. The waters of the state being thus impressed with a public interest, the state, under its police power, clearly has the right to regulate the distribution and use thereof. Under the power of regulation, which, of course, must be reasonably exercised, no one would contend that the Legislature would be authorized to impose regulations which would be confiscatory. In this case the regulations are not claimed to be confiscatory, or unreasonable; but the statement is made, unsupported by argument, however, that the Legislature could not provide for the regulation of a pre-existing right to the use of water.

A review of a few of the authorities will, I think, clearly and unmistakably demon-

strate the right to regulate old as well as new rights to the use of water. In the case of *C. B. & Q. Ry. Co., v. Illinois ex rel. Grimwood*, 200 U. S. 561, 28 Sup. Ct. 341, 50 L. Ed. 593, 4 Ann. Cas. 1175, Mr. Justice Harlan, speaking for the court, says: "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote public health, the public morals, or the public safety."

It must be recognized by every one, familiar to any extent with conditions in the arid region, that the general prosperity of a state situated therein is dependent upon the economical distribution and use of water, and regulations designed to secure and promote such economical use and distribution, and secure the full duty of water, come clearly within the police power of the state. Again, the Legislature of New Mexico, as I view the effect of the sections of the act of 1907, hereinafter set out, determined that it was necessary, in order to protect the rights of other water users, that an appropriator, desiring to change the point of diversion of his water, should by an orderly procedure, upon notice to all other water users who might be affected by such change, have his right to make such change determined in advance, thereby preventing injury to others and long and protracted litigation. The right of an appropriator of water to change the point of diversion thereof has always been recognized by the courts in the arid states; but such right is universally denied where such change will be detrimental to the rights of other appropriators, whether subsequent or prior to the right of the party desiring the change.

If it be admitted that the Legislature has the right to regulate the use and distribution of water under its police power, such right to regulate must be held to extend to rights in existence at the time of the attempted regulation. As said by Mr. Justice Waite in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77: "It matters not in this case that these plaintiffs in error had built their warehouse and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good."

The power exercised by the Legislature in this case, as I construe the statute, comes clearly within the police power of the state, as defined by Judge Cooley, and quoted with approval by a number of courts of last resort: "Police power, in a comprehensive sense, embraces the whole system of internal regulation by which the state seeks, not only to preserve the public order and to prevent offenses against the state, but to establish for the intercourse of citizens with cit-

izens those rules of good manners and good neighborhood which are inculcated to prevent a conflict of rights and insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of rights by others. State ex rel. *Star Pub. Co. v. Associated Press*, 159 Mo. 410, 60 S. W. 91 [51 L. R. A. 151, 81 Am. St. Rep. 368]; *Commonwealth v. Bearse*, 132 Mass. 542 [42 Am. Rep. 450]." A proceeding for an orderly determination in advance of the right of an appropriator of water to change the point of diversion thereof certainly is calculated to "prevent a conflict of rights" between citizens, and to insure to each the "uninterrupted enjoyment of his own, so far as it is reasonably consistent with the like enjoyment of the rights of others," and the interests of the state are involved, and its rights should be protected. *Irrigation Co. v. Water Supply Co.*, 29 Colo. 469, 68 Pac. 781.

Statutory proceedings, similar to the provisions now under consideration, have been upheld in many of the states, and have likewise been held to apply to rights existing at the date of the passage of the act. See *Well on Water Rights in the Western States* (3d Ed.) § 506; *New Cache La Poudre Co. v. Water Supply Co.*, 29 Colo. 469, 68 Pac. 781; *Farmers', etc., Co. v. Gothenburg, etc., Co.*, 73 Neb. 223, 102 N. W. 487. *Well* says (3d Ed. § 507): "Under the recent water codes, the appropriator is usually required by statute to apply to the state engineer for a permit before changing the point of diversion."

To deny to the state the power to regulate the exercise of a right to use water, where such right was acquired and perfected antecedent to the attempted regulation, would in my opinion be inimical to water users and detrimental to the prosperity of the state. If the Legislature could not make provisions for the manner of changing the point of diversion, the existence of power in the Legislature to make any regulations whatever applicable to such old rights must likewise be denied. It could not provide for the maintenance, as to such rights, of suitable headgates, diversion weirs, dams, measuring devices, or other appliances for the economical use and distribution of water. In fact, it would provide no regulations whatever, be they ever so essential for the protection of the rights of others or the public generally. I do not believe further argument is necessary; in fact, it appears to me so concededly within the police power of the state as to require no argument whatever to establish the affirmative of the proposition.

The principal contention of appellee, however, is that a fair construction of the terms of the act shows that it speaks prospectively from the date of its passage, and was never intended to and does not apply to water rights acquired prior to the passage of the act, or to the means of enjoying the same.

The act in question is remedial, and should therefore be liberally construed, so as to make it effectual against the evil which it was intended to abate, if such construction will not deprive any individual of his just rights. See *Irrigation Co. v. Water Supply Co.*, supra, holding such a statute to be remedial, and section 686 (2d Ed.) Lewis' Sutherland, *Statutory Construction*, as to the construction of remedial statutes. And the intention of a remedial statute will always prevail over the literal sense of its terms, and therefore, when the expression is special or particular, but the reason is general, the expression should be deemed general. Lewis' Sutherland, *Statutory Construction*, § 687. And likewise, in construing a statute, consideration must also be given to the result which will follow such a construction, and if it be evident that such proposed construction will lead to an absurdity, or will render the statute impotent, it is not to be presumed that the Legislature intended it to have such meaning. The same author on *Statutory Construction*, quoted above, says: "A result which will follow from one construction or another of a statute is always a potent factor, and is sometimes in and of itself conclusive as to the correct solution of the question of its meaning." Section 487. And "statutes will be construed in the most beneficent way which their language will permit to prevent absurdity, hardship, or injustice, to favor public convenience, and to oppose all prejudice to public interests." Section 490, Lewis' Sutherland, *Stat. Const.* And again in the same section the author says: "In construing an act of the General Assembly, such a construction will be placed upon it as will tend to advance the beneficial purpose manifestly within the contemplation of the General Assembly at the time of its passage; and courts will hesitate to place such a construction upon its terms as will lead to manifest absurd consequence, and impute to the General Assembly total ignorance of the subject with which it undertook to deal."

In view of these general rules for the construction of statutes, let us consider the act of 1907, in so far as it is involved in this proceeding, and determine from the act the intent of the Legislature and the meaning properly attributable to the language used. The act in question is comprised of 73 sections, and was intended, I believe, to constitute a complete code of the law of irrigation. By this act the Legislature of the territory attempted to place New Mexico in the forefront of the arid states, in securing proper state control and regulation of irrigation enterprises. It is a matter of history, which I apprehend cannot be controverted, that those states which have provided for a complete system of state control of irrigation have developed and prospered most amazingly. Colorado and Wyoming may be

cited among the states early to adopt such a system, and the result has been that millions of dollars have been expended in the construction of irrigation works, which has resulted in unbounded prosperity to the states. New Mexico, prior to 1905, did not attempt to provide for such control, and the result was that no outside capital came into the territory for investment in such enterprises. True, under the old system there was more or less development done, but almost exclusively by local capital. In 1905 the territorial Legislature enacted chapter 102, "An act creating the office of territorial irrigation engineer, to promote irrigation development and conserve the waters of New Mexico for the irrigation of lands and other purposes," by which it attempted in a way to provide for state control; but experience demonstrated that the act was not sufficiently comprehensive and modern to place New Mexico abreast of her sister states, and in 1907 the act was repealed, and the present comprehensive, modern, and efficient code was enacted. Under the latter act millions of dollars have been expended in irrigation enterprises in New Mexico, and the resources of the state have amazingly increased. Therefore I do not believe the court should, unless the language of the act expressly requires, so interpret it as to undermine its foundation or impair its efficacy.

It appears to me that the construction contended for by appellees, that "the act speaks prospectively from the date of its passage," if adopted, would place New Mexico in the anomalous situation of having a complete modern irrigation code, with state supervision and control, applicable to all rights acquired thereunder, but such rights impaired and hampered by the lack of any supervision or control of rights theretofore acquired. Why, I would ask, is there any more reason for state regulation of a water right perfected in 1907 than there is of a right acquired by appropriation in 1906? In many instances, some of which will be enumerated later, the state has provided for the control and supervision of water rights, and the instrumentalities through which such rights are made available; but to illustrate the absurdity of the suggested construction we need only consider those sections of the act which provide for the change of the point of diversion. Granted that the claimed construction is sound, we then have a class of water users who may change their point of diversion so far as the statute is concerned, at their own pleasure, regardless of the injury other appropriators may suffer, without let or hindrance. I say, in so far as the statute is concerned, and do not desire to be understood as asserting that they may exercise the right to the injury of others, because such would not be correct; for it has always, so far as I know, been uniformly held by the courts that an appropriator, of

water may not change his point of diversion to the injury of other appropriators. Now, this being true, A., an appropriator of water under rights perfected in 1906 from a stream system, might move his point of diversion up or down the stream, without regard to the act in question, while B., an appropriator, under rights initiated and perfected under the act of 1907, taking his water from a stream directly opposite A.'s point of diversion, would be required to follow the statutory procedure. What reason or argument can be advanced in support of the reason for such a distinction by the Legislature? I believe none, and the court should not make the distinction, unless compelled to do so by clear and explicit language in the act.

As I read the act, however, its language is plain and the meaning clear. Section 45 reads as follows: "An appropriator of water may use the same for other than the purposes for which it was appropriated, or may change the place of diversion, storage, or use, in the manner and under the conditions prescribed in sections 25 and 44 of this act." It will be noted that this language is as plain and explicit as it could well be expressed. It says that an appropriator of water may change the place of diversion in the manner and under the conditions prescribed in the sections referred to. The maxim, "*Expressio unius est exclusio alterius*," applies, and it follows that an appropriator of water has no right to change the point of diversion in any other way or manner. "Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded." *Lewis' Sutherland*, Stat. Const. § 492.

The section does not say, "an appropriator under this act," but says "an appropriator"; clearly, I think, referring to any appropriator, however or whenever his right might have been acquired. "Appropriators are diveters of the waters of a stream" (*Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674), and the article "an" is equivalent to "any" (*Kaufman v. Superior Court*, 115 Cal. 152, 46 Pac. 904), so that the section may fairly be held to mean "any appropriator." This being true, it must be held to apply to any appropriator, whether his rights were perfected precedent or subsequent to the act of 1907, unless the meaning is changed by the sections 25 or 44 of the act.

Section 25 makes provision for the correction of an original application for the appropriation of water and the amendment of the plans of construction, and concludes with the following proviso: "Provided, further, that a change in the proposed point of diversion of water from a stream shall be subject to the approval of the territorial engineer, under the provisions of section 45 hereof, and shall not be allowed to the detriment of the rights of others having valid claims to the use of

water from said stream." Now, the mere fact that this proviso is in connection with an original application under the act of 1907 can have no bearing upon the construction of section 45, because the later section only refers to section 25 for the conditions under which the change may be made, viz.: Such right shall be subject to the approval of the territorial engineer, and shall not be allowed to the detriment of the rights of others having valid claims to the use of water from said stream.

Section 44 is as follows: "All water used in this territory for irrigation purposes, except as otherwise provided in this act, shall be considered appurtenant to the land upon which it is used, and the right to use the same upon said land shall never be severed from the land without the consent of the owner of the land; but by and with the consent of the owner of the land, all or any part of said right may be severed from said land, and simultaneously transferred, and become appurtenant to other land, or may be transferred for other purposes, without losing priority of right theretofore established, if such changes can be made without detriment to existing rights, on the approval of an application of the owner to the territorial engineer. Before the approval of such application, the applicant must give notice thereof by publication, in the form required by the territorial engineer, once a week for four consecutive weeks in a newspaper of general circulation in the stream system in which the tract or tracts of land may be situated." It will be seen that this section, in so far as applicable, simply prescribed the procedure to be followed.

If the language of the sections quoted was so indefinite and uncertain as to require judicial construction, which it does not, recourse to the title of the act would remove the ambiguity or supply the omission. It is well settled that, where the meaning of the body of the act is doubtful, reference may be had to the title to remove the ambiguity or to supply an omission. 36 Cyc. 1133, and authorities cited. The title of the act in question reads as follows: "An act to conserve and regulate the use and distribution of the waters of New Mexico, to create the office of territorial engineer, to create a board of water commissioners, and for other purposes." If the claimed construction be sound, it will be seen that the title of the act does not correctly express the real intention of the lawmaking body; for by such title the Legislature declared that it was enacting a law "to conserve and regulate the use and distribution of the waters of New Mexico," whereas, in fact, it was only intending to conserve and regulate the unappropriated waters of the territory. It is too elementary to require the citation of authorities that water flowing in a natural stream is the property of the public or the state, and does not become the property of the appropriator

until he has diverted it into his ditch or canal. While the appropriator, under the law prevailing in this state, has the right to divert and use such water, nevertheless so long as it is in the natural channel, he has no claim to any specific water. Certainly the Legislature recognized that all the waters of the state, flowing in the natural channels, were the property of the state, and declared that it would regulate and conserve such waters—not a portion of such waters, but all.

Counsel for appellees cites certain sections of the act, which he claims shows that the Legislature was speaking prospectively. True it is, many sections may be found which do speak prospectively; for it would have been impossible for the Legislature to provide a complete code, applicable to both old and new rights, without making some provisions for the acquiring, in the first instance, of a new right to appropriate and use water, or the determination of the rights of old appropriators. Section 12 of the act may be cited as an example. It provides that the territorial engineer shall have the supervision of the apportionment of water in this territory according to licenses issued by him and his predecessors and the adjudication of the courts. No one will contend, I apprehend, that this section undertakes to prescribe and limit the powers of the engineer under the act. It simply defines his power in that particular regard. It necessarily speaks prospectively, for the Legislature well knew that under the former laws in force in the territory many water users had old rights to the use of water, with no evidence thereof in any public office. Certainly the engineer could not supervise the apportionment of water to such rights, without an adjudication by some tribunal, and necessarily a judicial tribunal, of the rights of the old appropriators. The act therefore provided for the determination of such question by the courts, and thereafter gave the engineer supervision of the apportionment of water to all water users of a stream system. But said section 12 did not attempt to curtail any of the other powers or duties conferred upon such official by other sections of the act. The same reasoning applies to sections 13 and 14.

While these sections and many others might be cited which do speak prospectively, still a number of other sections might be quoted which show clearly that it was the intention of the Legislature to provide regulations and make provisions for the enjoyment and protection of old rights as well as new. I will refer to a few: Section 4, after providing for the appointment of a territorial engineer, says: "He shall have general supervision of the waters of the territory, and of the measurement, appropriation, and distribution thereof, *and such other duties as are required by this act.*" Section 32

in part is as follows: "If the territorial engineer shall, in the course of his duties, find that *any* works used for the storage, diversion or carriage of water are unsafe and a menace to life or property, he shall at once notify the owner or agent, specifying the changes necessary and allowing a reasonable time for putting the works in safe condition." Section 33 makes it a misdemeanor to use works for the storage, diversion, or carriage of water contrary to the instructions of the engineer, after inspection by him and notice that the same are unsafe; and such works may not be used until the engineer gives notice that the same are safe.

Now, can it be claimed that these sections only apply to works constructed under the act? Section 32 says "any works," and the evident purpose is to protect life and property. Is there any more reason for protecting life and property from unsafe dams and canals constructed under the act of 1907 than those constructed under any previous act. If the act was intended only to apply to future appropriators, then an old appropriator might continue to use a dam that was a menace to life and property without authority to any official to compel the owner to make such works safe. Clearly such was not the intention, but the engineer was given jurisdiction over old as well as new works in this regard.

Section 37 is as follows: "In any suit concerning water rights, or in any suit or appeal provided for in this act, the court may in its discretion submit any question of fact arising therein to a jury, or may appoint a referee or referees to take testimony and report upon the rights of the parties." If the act speaks only of new rights, then the court would have no power, under the act, to submit a question of fact to a jury, if old rights were involved in the litigation.

Section 42 provides that, where a party entitled to use water falls for the period of four years to apply the same to beneficial use, such unused water shall revert to the public. If the act only applies to new rights, then an old appropriator might fail to beneficially use water for any number of years, and still would not forfeit his right thereto.

Section 44 makes all water appurtenant to the land where used for irrigation, and provides for the transfer of a water right separate and apart from the land, by following a prescribed procedure. Following out the argument contended for, an old appropriator could not sever his water right from the land and transfer it. And likewise, under section 45, *supra*, an old appropriator would have no authority to use the water for any other purpose than that for which it was appropriated.

The next section provides that every ditch owner shall, when requested by the territorial engineer, construct and maintain a substantial headgate at the point where the water is diverted, and construct a measuring

device. Now, there is as much reason to require an old appropriator to maintain a substantial headgate as a new appropriator. Such requirement was evidently intended to protect the public against damage by reason of a ditch taking too much water and breaking through banks, and also to conserve the waters.

Section 47 makes it a misdemeanor for any person to interfere with, injure, or destroy any dam, headgate, weir, bench mark, or other appliance for the diversion, carriage, storage, apportionment, or measurement of water. If this section only applies to new rights, then an old appropriator would have no protection under the statute in this respect. Section 48 makes the unauthorized use of water, to which another person is entitled, a misdemeanor. Does it mean a person only entitled to the use of water under the act?

Section 50 reads as follows: "Whenever any appropriator of water has the right of way for the storage, diversion, or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violations of this section shall be a misdemeanor." Section 57 provides for the adoption of rules and regulations by water users, and clearly applies to old as well as new works; and likewise I think sections 63, 71, and 72 clearly were intended to apply to all water users.

It is contended, however, that by the peculiar wording of section 59 it is evident the act in question was only intended to apply to certain water rights and irrigation works. The section is as follows: "Nothing contained in this act shall be construed to impair existing vested rights or the rights and priorities of any person, firm, corporation or association, who may have commenced the construction of reservoirs, canals, pipe lines or other works, or who have filed affidavits, applications or notices thereof for the purpose of appropriating for beneficial use, any waters as defined in section 1 of this act, in accordance with the laws of the territory of New Mexico, prior to the passage of this act: Provided, however, that all such reservoirs, canals, pipe lines or other works and the rights of the owners thereof shall be subject to regulation, adjudication and forfeiture for abandonment, as provided in this act." As I read the section, it does not justify such a construction. It specifically says that the act in question shall not impair existing vested rights. Without this declaration, the act could not have done so; but this was inserted, in my judgment, by the Legislature because of the fact that it had provided for the regulation of such rights, and disclaimed any intention, in so doing, of impairing any existing vested rights.

But it is argued that the proviso shows that it was not the intention to regulate such

old rights. An examination of the proviso will show that this argument is faulty, because, if it be admitted to be sound, then we have only regulation for such reservoirs, canals, pipe lines, or other works of those owners "who may have commenced the construction of reservoirs, canals, pipe lines or other works, or who have filed affidavits, applications or notices thereof for the purpose of appropriating for beneficial use, any waters as defined in section 1 of this act, in accordance with the laws of the territory of New Mexico, prior to the passage of this act," and have no regulations whatever for rights perfected at that time, or those acquired under the act of 1907. Such, of course, was never the intention of the lawmakers; for there is no reason whatever for the regulation of such rights to the exclusion of all others. The Legislature, in my judgment, by the terms of the act in question had provided clearly for the regulation of all rights; but in section 59, it had said that the act should not impair existing vested rights, or the rights of any person who had commenced the construction of their works, etc., and not desiring to remove such unperfected rights from the regulations provided for all other rights, as a matter of precaution inserted the proviso, so as to remove all doubts, and to bring such rights again within the operation of the statute, if perchance they had been taken out by the wording of the first part of the section.

It is also suggested that the works referred to in the section 59 are those which, under the act of 1905, application must be made to the territorial engineer for a permit to construct, and that it does not refer to small community acequias. I would ask what evidence there is in the record in this case to show that the ditch in question, and the works connected with it, cost less than \$2,000. As I read it, I have not been able to find a word or syllable tending to make any such showing. Nor is there any proof showing the character of the proposed ditch, or the fact that it will involve no danger to life or property. Such claimed construction must be erroneous, for section 59 refers to applications, initiated by affidavit, thus clearly bringing rights initiated under both chapters of the Session Laws of 1905 within the purview of the section.

It is further suggested that the question involved in this case is no longer of practical importance, except to the immediate parties, in so far as it relates to community acequias established and in operation prior to March 19, 1907, because by chapter 26 of the Session Laws of 1912 it is provided that no application to or permit from the state engineer is necessary to change the point of diversion of such an acequia. The act of 1912 reads as follows:

"Section 1. That it shall not be necessary for the officers of public community acequias

established and in operation prior to March, 19, 1907, to make any application to, or obtain any permit from, the territorial engineer or the board of water commissioners in order to change the place of diversion: Provided that by such change no increase in the amount of water appropriated shall be made beyond the amount to which the acequia was formerly entitled.

"Sec. 2. That it is necessary for the preservation of the public peace and safety of the inhabitants of the state of New Mexico that the provisions of this act shall become effective at the earliest possible time, and therefore an emergency is hereby declared to exist, and this act shall take effect and be in full force and effect from and after its passage."

To the casual observer it would appear that the act of 1912 was passed because of the issues involved in this very case, for such act is applicable only to community ditches, and that the authors of the act realized that under the act of 1907 all appropriators of water were placed upon an equal footing in the matter of regulations therein provided for. If the act has any effect or influence on the present case, it must be only to clearly demonstrate that the construction for which I contend is sound, and was so recognized by the legislative branch of the government, else why the necessity for the act. Under well-established rules of construction, the act of 1912 amounts to a legislative construction of the former act, and such legislative declaration of the meaning of the former act should govern the construction thereof. "If it can be gathered from a subsequent statute in pari materia what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Morris v. Mellin*, 6 Barn. & Cress. 454, 7 Barn. & Cress. 99; *United States v. Freeman*, 3 How. 556 [11 L. Ed. 724]." And 36 Cyc. p. 1142, lays down the rule thus: "A construction of a statute by the Legislature, as indicated by the language of subsequent enactments, is entitled to great weight."

In this case, in addition to the plain language of the act of 1907, we have as a further guide the construction of the act by a subsequent Legislature, in full accord with the views herein announced, and it seems to me there is no escape from the conclusion that sections 44, 45, and 25 of the act of 1907 apply to old as well as new rights, and include community acequias, as well as all others, and that these causes should be reversed.

For the reasons stated, I am compelled to dissent.

On Motion for Rehearing.

PARKER, J. The motion for rehearing is founded upon the proposition that the con-

struction placed upon the irrigation act by this court makes it class legislation, and renders it obnoxious to section 18 of article 2 of the Constitution, which has the usual guaranty of "equal protection of the laws." It would seem to require neither argument nor citation of authority for the proposition that, given a reasonable classification of subjects, "equal protection of the laws" is had, if all within any given class are treated alike. That all such classification must be based upon some reasonable distinction is to be conceded. Counsel for appellant argues, in support of this motion for rehearing, that the classification which results from the construction of the irrigation act by the court is arbitrary and capricious, and has no reasonable basis upon which to rest. We cannot agree to the contention.

In the first place, regulation of any given business, occupation, or right should be provided for only when there is some reason or necessity for the same. Any given right of the citizen ought to be enjoyable without any supervision or restraint, unless the nature of the right, or of its exercise, is of such a character as to require the same in justice to the rest of the public. Applied to the old public community acequias, as is the case here, there seems to us to be no reason or necessity for any such regulation or restraint as is contended for by plaintiff in error. While perhaps without the field of judicial notice, it is nevertheless a matter of common knowledge that these acequias were constructed by the joint efforts of the settlers, whose lands were to be irrigated, without the aid of engineers, or without headgates of anything like a permanent character. There is no storage system in connection with them. They simply are ditches running out into a stream from which the water is taken. The bank of the stream, except at specially favored locations, is constantly subject to erosion in times of high water, and the headgates, such as they are, must each year be renewed or replaced at points either above or below the original point of diversion as the exigencies of the situation arise. The same situation often arises several times during the irrigation season. It therefore becomes a necessity to warn out the people and to reconstruct the headgates at once, or the crops for that season will perish. The situation of such public community acequias appears, therefore, to be unsuited to the regulation contended for, which involves advertisement and delay for at least four weeks. The Legislature is to be presumed, when it passed the act of 1907, to have examined the whole field, and to have determined that there was, by reason of the character of the appropriations and diversions of water for irrigation theretofore made, no reason for regulations or supervision of the means of diverting and carrying of such water. A singular fact in this connection appears. An examination of the

records of the state engineer's office discloses the fact that not a single permit has been granted by him to a public community acequia to appropriate water since the passage of the act of 1907, from which we infer that the Legislature correctly determined, when it passed the act, that the whole field suitable to the assertion of such rights as those in this case had been covered, and that in the future waters for irrigation were to be stored in large volumes, conducted over large areas, under one system, and, therefore, that supervision and control of such operations was desirable and necessary in behalf of the public welfare, health, and safety. There was reason, therefore, for the classification made.

The act in terms applies only to such rights as have been initiated, but not perfected, and to the rights which might be initiated and perfected thereunder. It does not apply in terms to perfected rights. Assuming that, under section 24 of the act, public community acequias, as well as all other appropriators, must now apply to the state engineer for a permit to make an appropriation of water, and must submit to the regulation imposed by the act, if, at some future time, a public community acequia shall have applied to the state engineer for a permit to appropriate water, and shall have obtained the same, and shall thereupon object to the regulation feature of the act, the question then may arise as to whether the classification, by the act, of prior appropriators into one class and subsequent appropriators into the other class is capricious and discriminatory. Until such a contingency, the question is not before us for determination. The denial of equal rights or the imposition of unequal burdens can be pleaded only by those who show that they belonged to the class discriminated against. 8 Cyc. 791; Cooley's Const. Lim. (7th Ed.) 232; *Kansas City v. Union Pac. R. Co.*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321; *State v. Currens*, 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252; *Brown v. Ohio Valley R. Co.* (O. C.) 79 Fed. 176. To this class, if the act is indeed discriminatory, the plaintiffs in error in this case do not belong.

Whether a new appropriator, who initiates a right under the act, could ever question its constitutionality as construed, is not before us for decision, and we do not decide the same; but it would seem to be doubtful if a person who accepts the benefit of a state could, under any circumstances, be heard to complain of its unconstitutionality. See Cooley's Const. Lim. (7th Ed.) 554; *Ferguson v. Landram*, 5 Bush (Ky.) 230, 96 Am. Dec. 350; *Moore v. Napier*, 64 S. C. 564, 42 S. E. 997; *Motz v. Detroit*, 18 Mich. 495; *Dewhurst v. Alleghany*, 95 Pa. 437; *Andrus v. Board of Police*, 41 La. Ann. 697, 6 South. 603, 5 L. R. A. 681, 17 Am. St. Rep. 411; *Dodd v. Thomas*, 69 Mo. 364; *Ralston v. Oursler*, 12 Ohio St. 105; *State v. Mitchell*, 31 Ohio St. 592, 610. It is to be said, in this connection, that coun-

sel do not present the alleged unconstitutionality of the act, as construed by us, as directly available to plaintiffs in error, but it is presented more by way of argument against the construction adopted by us.

We fully appreciate the force of the argument, and fully realize the duty of the court to so construe an act as to make it constitutional, rather than otherwise. But even assuming, but not admitting, that our construction does render the act open to objection of this kind, the terms of the act, as we read them, preclude us from departing from the construction heretofore adopted.

Strength is added to the argument in support of our construction of the act by reference to some other section not alluded to in the opinion. Section 57 provides that all rules and customs of water users from a "common canal, lateral or irrigation system" shall remain undisturbed by the act, "but nothing in this section shall be taken to impair the authority of the territorial engineer and water master to regulate the distribution of water from various stream systems of the territory to the ditches and irrigation systems entitled to water therefrom under the provisions of this act." Section 58 provides that no water master shall be appointed under this act until the prior rights to the use of water have been determined in one or more stream systems in this territory, under the provisions of the act. Section 12 of the act gives supervisory control over the apportionment of water "according to the licenses issued by him or his predecessor and the adjudications of the courts."

These three sections would seem to provide that when adjudication has been had, under the provisions of the act, of priorities of water rights, and when a water master has been duly appointed for any given water district, then, and not before, does the state engineer acquire jurisdiction to regulate the distribution of water to the various ditches and irrigation systems, both old and new, in said water district. After adjudication, old rights would seem to be subjected to the regulation and control by the state engineer, and the power to regulate the distribution of water to any given irrigation system would seem to include the power to regulate the point and means of diversion. After adjudication, old rights would seem, by the terms of the act, to come into the same general class with new rights initiated and perfected under the terms of the act, at least so far as the regulation feature is concerned.

The wisdom of postponing the jurisdiction of the state engineer until after adjudication of the priorities is at once apparent. Without adjudication there is no evidence before the state engineer, except such as he may gather ex parte in his investigations of the various stream systems, upon which to base his action as to the rights and priorities of water right owners who acquired their rights

prior to the passage of the act. As to all rights initiated under the provisions of the act, he has in his office evidence, complete and satisfactory, as to the relative rights of all of the water right owners in that class. And, after all, the only reason for supervision of the point of diversion, except when large storage, or diversion, or both, might endanger life or property, is to prevent the encroachment of one right upon another. If these rights have not been determined, there is no basis for the exercise of the supervisory power.

The only other section of the act which might be construed to militate against the conclusion reached by the court is section 46, which provides that every ditch owner is required, when requested so to do by the state engineer, to construct and maintain a substantial headgate at a point where the water is diverted, and a measuring device, of a design approved by the state engineer, at some practicable point for measuring and apportioning the water, as determined by the state engineer. At first glance, this section might seem to authorize the state engineer to require headgates and measuring devices for the distribution of waters in all cases. But, as we have heretofore seen, the power to apportion and distribute waters as between old and new water right owner arises only after adjudication of their respective priorities, and hence has no application to old water rights, at least so far as the distribution of water is concerned, until such adjudication is had. It may be that under this section the state engineer has the power to compel the installation of headgates and measuring devices in all ditches in the state, for the purpose of determining the amount of water flowing in such ditches, and thus gather valuable data for future use in his office, or in the courts. But for the purpose of apportionment of water, as before seen, he has no jurisdiction over any old ditch system, until the rights and priorities of the owners of such system have been adjudicated in accordance with the terms of the act.

For the reasons stated, the motion for rehearing will be denied.

LEAHY, District Judge, concurs. ROBERTS, C. J., dissents.

ROLATER v. STRAIN.

(Supreme Court of Oklahoma. Nov. 11, 1913.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY (§ 3*)—CIVIL ASSAULT—PROOF REQUIRED—SURGICAL OPERATION.

In a civil action by a patient against a surgeon for assault and battery, it is not necessary to show that the surgeon intended, by the act complained of, to injure the patient. It is

sufficient if it appears that the act was wrongful and unlawful.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 2; Dec. Dig. § 3.*]

2. PHYSICIANS AND SURGEONS (§ 15*)—RIGHT TO OPERATE—CONSENT.

Consent of the patient, either expressed or implied, is necessary to authorize a physician to perform a surgical operation upon the body of the patient. An operation without such consent is wrongful and unlawful, and renders the surgeon liable in damages. Consent may be implied from circumstances.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 32; Dec. Dig. § 15.*]

3. ASSAULT AND BATTERY (§ 6*)—PHYSICIANS AND SURGEONS (§§ 15, 18*)—OPERATION—LIABILITY FOR DAMAGES—QUESTION FOR JURY.

The plaintiff in error advised an operation upon the great toe of the defendant in error's right foot. She consented to the operation upon the express agreement that no bones should be removed. She was placed under an anesthetic, and the operation performed, and in performing the operation a sesamoid bone was removed. Contending that she did not consent to the removal of this sesamoid bone, and that its removal was wrongful and unlawful, and that her foot was permanently injured by reason of the removal of this bone, she brought this action for assault and battery. It is held:

(a) That the plaintiff in error had no authority to remove a sesamoid bone from the defendant in error's foot without her consent, either expressed or implied.

(b) That she did not expressly consent, and whether or not her consent was implied from the circumstances was a question for the jury to determine under all the evidence.

(c) That, if the defendant in error did not consent, the removal of this sesamoid bone from her foot was wrongful and unlawful, and constitutes in law a trespass upon her person, and a technical assault and battery.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 3; Dec. Dig. § 6;* Physicians and Surgeons, Cent. Dig. §§ 32, 34-41, 43-46, 48; Dec. Dig. §§ 15, 18.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Mattie Inez Strain against J. B. Rolater. Judgment for plaintiff, and defendant brings error. Affirmed.

Flynn, Chambers, Lowe & Richardson, of Oklahoma City, for plaintiff in error. E. G. McAdams and A. F. Moss, both of Tulsa, for defendant in error.

GALBRAITH, C. This is an appeal from a judgment of the district court of Oklahoma county, rendered upon the verdict of a jury in favor of the defendant in error and against the plaintiff in error, for \$1,000, in an action for trespass to the person.

The plaintiff in error is a physician and surgeon in Oklahoma City, and, at the time of the wrong charged, owned and was conducting a sanitarium at Fourth and Stiles streets. The defendant in error, a young lady, was in the employ of the Pioneer Telephone & Telegraph Company, and on February 7, 1908, when passing from the building of the company where she was employed,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stepped upon a nail which penetrated the great toe of her right foot. Inflammation set in, and the wound not having healed, some 60 days after the injury, the Pioneer Telephone & Telegraph Company caused the plaintiff in error to make an examination of the injured foot. He advised that an operation was necessary to effect a cure, and that the operation should be made by making an incision in the foot or toe so as to drain the joint and remove any foreign matter that might be found therein. It was agreed that the operation might be made, and the defendant in error was removed to the hospital of the plaintiff in error, an anæsthetic administered, and the operation performed. In performing the operation a sesamoid bone was removed. The cause of action is based on the removal of this sesamoid bone. It is not claimed that the operation was unskillfully performed, but that the plaintiff in error had agreed before the operation that he would not remove any bones from the foot, and that the removal of this sesamoid bone was without the authority or consent of the patient, and constituted a trespass to her person, and a technical assault and battery.

The petition, so far as material, averred that the defendant in error consented to the operation upon the express condition that no bone should be removed from her foot, and that the removal of this sesamoid bone was without her consent, or the consent of any one authorized to act for her, and was wrongful, and that the foot had been permanently injured, and that she had suffered great pain and distress of both body and mind by reason thereof. The defendant in error interposed a general denial, and during the course of the trial, by consent of the court, amended his answer setting out "that he was employed as her physician to drain the first joint of the large toe on the right foot; that at the time the said joint was infected, and it was necessary that the same be drained; that, in compliance with said employment, he made an incision into said toe; that, before reaching the joint so as to drain the same, he found it covered with a sesamoid bone which rendered it impossible to drain the joint without the removal of said sesamoid bone; that the said sesamoid bone was in an unusual place and its presence could not be ascertained by an examination; that, had said sesamoid bone not been removed and the joint properly drained, serious results would have followed; that the removal was necessary to effect a cure; that said sesamoid bone is not considered one of the bones of the human anatomy, and was not within the contemplation of the parties at the time said defendant consented to the operation." To this amended answer a general denial was filed.

[1-3] It is not denied that this bone was removed, and it is not contended that the defendant in error consented to its removal. The plaintiff in error denies that he under-

took the operation with the understanding that no bones were to be removed, but the defendant in error testifies that such was the agreement, and in this she is supported by the testimony of her mother and a sister. This evidence was sufficient to take this question to the jury. It is argued by the plaintiff in error that even if the contract was made as contended, that the sesamoid bone was not within the contemplation of the parties, and that its removal, under the circumstances disclosed by the evidence, was not a violation of the terms of the agreement, and that the jury should have been instructed to bring in a verdict for the plaintiff in error.

This case presents questions that are new, if not novel, not only in this jurisdiction, but there are few cases to be found anywhere on the questions presented here.

In discussing the case of *Pratt v. Davis*, from the Court of Appeals of Illinois, 118 Ill. App. 166, it was said in 87 Chicago Legal News, p. 218: "Under a free government at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person, in other words, his right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise and prescribe (which are at least necessary first steps in treatment and care), to violate without permission the bodily integrity of his patient by a major or capital operation, placing him under an anæsthetic for that purpose, and operating on him without his consent or knowledge."

In *Mohr v. Williams*, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N. S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303, involving the same principle as the case at bar, concerning the right to make this kind of contract, the court, after quoting from 1 Kinkead, Torts, § 375: "The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right. Consent, therefore, of an individual must be either expressly or impliedly given before a surgeon may have the right to operate"—said: "There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between the physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and he finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further."

An attempt is made in the brief to dis-

tinguish *Mohr v. Williams* from the case at bar, inasmuch as in that case the patient consented to an operation on the left ear, and it was performed on the right ear, while in this, the consent was to an operation upon the right foot, where it was performed. However, the operation was not performed in the manner agreed upon and in the manner consented to by the patient, and, as a matter of fact, the actual operation performed was without her consent. There can be no real distinction between the cases in principle. The same rule of law is applicable to each. It follows from this authority and upon reason and principle that if the contract was made between the patient and surgeon, that the patient had the right to insist upon a strict performance of it, that the removal of the sesamoid bone by the surgeon was without the consent of the patient, and was therefore unlawful and wrongful, and constituted a trespass upon her person.

It is argued with earnestness that the sesamoid bone is not one of the bones of the human anatomy, inasmuch as the recognized authorities on anatomy, in naming and numbering the bones of the human body, do not include the sesamoid bone, and therefore the sesamoid bone was not within the contemplation of the parties at the time of making the agreement, and that its removal would not be a violation of the terms of the agreement, in any event. This argument overlooks the pertinent facts that it does not appear from the record that the defendant in error was conversant with anatomy or knew the names of the bones in her foot, and that it does appear that she knew there were bones there, and that she wanted to retain all of them, and was not willing that any of them, whatever its name, should be removed, and that she consented to the operation upon the express condition that no bones should be removed. The expert witnesses all agreed that the sesamoid bone was a bone and was found in the human foot, but that its exact location varied in different persons. We cannot say, as a matter of law, that the sesamoid bone was not within the contemplation of the parties at the time consent was given to the operation. This question was properly submitted to the jury for determination.

Again, it is contended by the plaintiff in error, even if the contract was made, that the removal of the bone, under the circumstances, was not a violation of it, since the facts show this to be an emergency case, as this bone was found in an unusual place, and was unexpected, and when it was discovered, the patient being under the influence of the anæsthetic, it was unsafe to stop the operation at that time and allow her to come out from under the influence of the anæsthetic so as to have obtained her consent to its removal, and that he was justified under the circumstances in removing the

bone. In answer to this argument, the Supreme Court of Minnesota, in *Mohr v. Williams*, supra, said: "The medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering. The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them."

It does not appear from the record that the operation in this case was of such a character as to bring it within the rule last above named by the Supreme Court of Minnesota. The operation itself was not designated by any of the expert witnesses as a major operation. It was represented by the plaintiff in error that it was of slight consequence, and that it would not be necessary for the patient to remain in his hospital over 24 or 48 hours at the outside, and he testified, as to the time taken to perform the operation, that "I suppose the time I occupied in doing that was possibly 15 or 20 minutes, the actual work that completed the operation." We would not hold under this evidence, as a matter of law, that there was such an emergency existing as authorized the surgeon to proceed in this operation, after the discovery of this bone in an unusual and unexpected place, as to authorize him to remove it without the consent of the patient. As to whether or not such an emergency existed was a question of fact under

the evidence for the jury. If the jury found that the necessity which authorized the surgeon to proceed to remove this bone without the consent did not exist, then his doing so was wrongful and unlawful, and he is liable for whatever injury resulted to the patient from such unauthorized act. See, also, *Pratt v. Davis*, 224 Ill. 300, 309, 310, 79 N. E. 562, 7 L. R. A. (N. S.) 609, 8 Ann. Cas. 197.

The Civil Court of Appeals of Texas, in an opinion handed down May 28, 1913, said, relative to the rule of law under consideration: "The law, as enunciated by the few courts which have passed thereon, is not as clear and satisfactory as it should be in cases of this character, but it seems to be reasonably established that a physician is liable for operating upon a patient unless he obtains the consent of the patient, if competent, and if not, of some one, who, under the circumstances, would be legally authorized to give the requisite consent. Of course, consent may be presumed from circumstances, without direct proof, but there must be consent in every case, except in an emergency when to delay to obtain consent would endanger the life or health of the patient." *Rishworth v. Moss*, 159 S. W. 122, at 124.

Again, it is contended that the judgment cannot be sustained for any more than nominal damages, since there is no testimony that any actual injury resulted to the defendant in error from the removal of this bone. The plaintiff in error testified that this sesamoid bone was wedged in the joint, and that when he made the incision and discovered the bone that he knew it would be impossible to drain the joint without its removal, and it was necessary to drain the joint in order to effect a cure, and "after my incision down to the bone, I merely took a pair of scissors and cut closely around the bone and removed it in that way." All the other expert witnesses testified that in all their experience they had never found a sesamoid bone in the position that the plaintiff in error testified it was in this patient. However, they were unanimous in their opinion that this sesamoid bone did not serve any useful purpose in the foot, and its removal would not cause injury. As we understand, the value of expert testimony and the weight of it depends upon the experience and ability and the extent of the witness' opportunity for observing the result of similar cases under like conditions. Where the evidence shows, as in this case, that the expert never observed a similar condition, it seems that his opinion as to the effect of removing the bone, in the case at bar, might have had little probative force with the jury. In any event, the jury were not compelled to believe this testimony. Being composed of men of ordinary intelligence, they may have consulted their common experience, and reached the conclusion that every bone in the human

body serves some useful purpose, and that the sesamoid bone in the defendant's foot served a purpose, and its removal might have resulted in injury, the testimony of the experts to the contrary notwithstanding. There was testimony that the foot was more or less deformed since the operation, that the joint was stiff, and that the patient could not wear a shoe for a long time thereafter, and that she had suffered almost constant pain in the injured foot since the operation. From the evidence, the jury might have found that the removal of this sesamoid bone was in a measure responsible for these unfavorable conditions (since the operation). The following excerpt from the decision of the Supreme Court of Alabama, in *Alabama, etc., B. Co. v. Hill*, 93 Ala. 514, 515, 9 South. 722, 724 (30 Am. St. Rep. 65), is pertinent to this question: "It is to be assumed that every physical endowment, function, and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to the extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages? We can, in other words, conceive of no physical injury, wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages." Also quoted with approval in 4th Sutherland on Damages, § 1241.

The record shows that the foot which had been operated upon was exhibited to the jury at the trial in the court below. The plaintiff in error testified that he only made one incision in the foot. But the evidence produced in rebuttal shows that there were three scars on the foot, as exhibited to the jury; one made by the nail and two made by incisions; one scar on the side of the foot and two on the bottom. And on cross-examination of the defendant in error, it was asked when she first discovered these scars, and she said three days after the operation, and that she asked Dr. Rolater what he made that cut on the bottom of her foot for, and he replied, "for drainage." This testimony was not denied, and these scars were physical facts which were exhibited to the jury, and they might have raised a question in the minds of the jury as to whether the sesamoid bone was taken from the side of the foot, as testified to by plaintiff in error, or from the bottom of the foot, where the experts testified this bone was usually found. The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which, the nature of the malady to be healed, and the beneficial nature of the operation should be taken into consideration, as well as the good

faith of the defendant. *Mohr v. Williams*, supra.

The question as to the amount of the recovery, as well as the other disputed questions of fact involved under the issues in the case, were submitted to the jury, under instructions as to the law that have not been questioned. The amount of the verdict was reviewed by the trial court in passing upon the motion for a new trial. The amount of the judgment does not impress us as being in any sense excessive, and we find no good reason for disturbing the judgment appealed from, and conclude that the same should be affirmed.

PER CURIAM. Adopted in whole.

RACKLEY v. CITY OF PURCELL.

(Supreme Court of Oklahoma. Dec. 9, 1913.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 162*) — OFFICERS—RIGHT TO COMPENSATION.

A person acting in the capacity of a public officer of a municipality cannot recover compensation as such officer from such municipality on the ground of an implied contract to pay what his service is reasonably worth.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. § 162.*]

2. MUNICIPAL CORPORATIONS (§ 162*) — OFFICERS—RIGHT TO POSSESSION.

A person acting in the capacity of a public officer of a municipality is entitled to only such compensation as may be given by some provision of law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. § 162.*]

Error from County Court, McClain County; W. H. Woods, Judge.

Action by B. H. Rackley against the City of Purcell. Judgment for defendant, and plaintiff brings error. Affirmed.

Wadlington & Wadlington, of Purcell, for plaintiff in error. J. W. Hocker, of Los Angeles, Cal., for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court wherein the plaintiff in error, as plaintiff, on March 30, 1909, sued the defendant in error, as defendant, to recover the sum of \$250 as fees accruing to him as mayor of the said defendant. Prior to the erection of the state the plaintiff was elected to the office of mayor of the defendant and qualified and acted as such. The petition in part declares as follows: "That prior to the adoption of the Constitution plaintiff's fees as mayor of said city were \$50 per month, or about that sum; that after the adoption of the Constitution the city of Purcell appointed or elected a police judge, or police magistrate, who acted in that capacity, and plaintiff for the space of five months and nine

days acted as the qualified acting mayor of said city without remuneration of any sort, and that said city of Purcell continued to exist as a de jure municipal corporation under the provision of the Constitution aforesaid, and for the space of five months and nine days plaintiff continued to act as mayor of said city, and that said de jure corporation after statehood succeeded to all the rights and its offices thereof as before statehood and the adoption of the Constitution of the state of Oklahoma." Plaintiff further avers: " * * * That the public exigencies made it necessary for him to act as mayor as aforesaid, and that the public demanded his services as such, and that his said services were necessary for common preservation of the peace and welfare of said city, and it was a public necessity for plaintiff to perform said duties as mayor of said city. Though plaintiff has often requested the payment for said services as aforesaid, the said defendant refuses to pay plaintiff; that plaintiff's services aforesaid was and is reasonably worth the sum of \$250, the same being approximately what plaintiff was receiving before the adoption of the Constitution."

Our attention has neither been called to any statute in force in the Indian Territory prior to the erection of the state or in this state since its erection that authorized such compensation, nor is it contended that any ordinance was in force at the time of the erection of the state that entitled him to recover said compensation.

[1] A party seeking to fasten a claim on a municipality or any political subdivision for services as its officer must point out some provision of law authorizing the same. Unless such provision exists, the party is presumed as a matter of law to have performed such services from a sense of public or patriotic duty without any expectation of compensation. Whilst this rule may seem to work a hardship at times, yet it is salutary. If this safeguard did not exist, too many times raids would be made upon the public treasury and unjust burdens placed upon the taxpayers. It is better that an occasional hardship may fall upon an individual than that a precedent may be established under which the treasury may be filched and unjust burdens imposed upon the taxpayers.

[2] A person acting in the capacity of a public officer is entitled to only such compensation as may be given him by some provision of law. This rule is founded upon a sound public policy and should be rigidly adhered to. *Coggeshall v. Connor*, 31 Okl. 113, 120 Pac. 559, 39 L. R. A. (N. S.) 81, Ann. Cas. 1913D, 577; *Board of County Commissioners of Washita County v. Brett*, 32 Okl. 853, 124 Pac. 57; *State v. Hooker*, 26 Okl. 467, 109 Pac. 527; *Board of County Commissioners v. Twyford*, 134 Pac. 968.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It follows that the plaintiff's petition did not state a cause of action against the defendant, and that the demurrer thereto was properly sustained. The judgment of the lower court is affirmed. All the Justices concur.

SAVILLE et al. v. TOLBERT, Judge of the District Court, et al.
(Supreme Court of Oklahoma. Oct. 21, 1913.)

(Syllabus by the Court.)

QUO WARRANTO (§ 28*)—VENUE—COUNTIES.

In an action in the nature of quo warranto to test the validity of the organization of a new county, the proper respondents are the persons who assume to act in a corporate capacity, and such a suit may be brought in the county in which the respondents or some one of them reside or may be summoned, or in any court of general jurisdiction to which they voluntarily submit themselves.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 30; Dec. Dig. § 28.*]

Original action for writ of prohibition by Joseph Saville and others against Hon. James R. Tolbert, Judge of the District Court of Kiowa County, and another. Writ denied.

Joseph Beasley, of Snyder, and McAdams & Haskell, of Oklahoma City, for petitioners. J. F. Griffith, Co. Atty., and L. M. Keys, both of Hobart, and J. A. Fain, of Lawton, for respondents.

KANE, J. This is an original application for a writ of prohibition. The proceeding itself is somewhat in the nature of a sequel to *Armstrong et al. v. State ex rel.*, 29 Okl. 161, 116 Pac. 770, Ann. Cas. 1913A, 565, and the facts stated in that case necessary to an understanding of this will not be restated here.

It seems that some considerable time after the decision in the *Armstrong* Case was handed down some of the usurping county officers who were parties defendant therein, together with a number of others who were not parties to that proceeding, sufficient to make up a full corps of county officers, attempted to reorganize the disbanded county of Swanson; whereupon the county attorney of Kiowa county filed a proceeding in the district court of that county, of which the respondent, James R. Tolbert, is judge, wherein he prayed that said pretended county officers be enjoined from acting or pretending to act as county officers of Swanson county. Thereupon this proceeding was instituted by said pretended county officers upon the theory that the judgment rendered in the former case was void for want of jurisdiction in the court that rendered the same. It is contended that, whilst the former proceeding was nominally against the persons who asserted the right to perform the duties and exercise the functions of the various county offices of the pretended coun-

ty of Swanson, it was in effect a suit against the de facto county, and that such a proceeding being a local action could be brought only in the district court of such Swanson county; that at the time of the quo warranto proceeding in the district court of Comanche county Swanson county was a county de facto, and was therefore as completely removed from the territorial jurisdiction of the district courts of Comanche and Kiowa counties, and from the judicial districts in which those counties were located, as it would be as a de jure county.

We are unable to agree with counsel. In *Armstrong et al. v. State ex rel.*, supra, it was contended that an order to dissolve Swanson county could not be entered in that cause, because the county was not made a party defendant; but the court, following a long line of decisions, held that the suit was properly brought against the persons who assumed to act in a corporate capacity, and that Swanson county was not a necessary nor a proper party.

Article 5, c. 87, Comp. Laws Okl. 1909, prescribes the county in which actions may be brought. The various sections of that article provide where real actions—actions for the recovery of a fine, forfeiture, or penalty imposed by statute, actions against public officers for acts done by them by virtue or under color of their office, actions on official bonds or undertakings of public officers, actions against foreign corporations, carriers, turnpike companies, domestic corporations, nonresidents, divorce actions—shall be brought, and the last section of the article (section 5589) provides that "every other action must be brought in the county in which the defendant, or some one of the defendants, reside or may be summoned."

As the quo warranto proceeding of *Armstrong et al. v. State ex rel.*, supra, does not fall within any of the designated causes of action, it must be covered by section 5589, supra. It follows that the respondents in that suit could be properly sued in the district court of any county wherein jurisdiction of their persons by service of process upon them or their voluntary appearance could be obtained. All the defendants appeared in person and by attorneys, and waived all objections which they might have had to the jurisdiction of the court, and later, after having invoked the jurisdiction of the lower court in vain, they sought to reverse its judgment by a proceeding in error in the Supreme Court.

If the doctrine is accepted—that when, in a quo warranto proceeding, or one in the nature of quo warranto, the existence of a county is denied the proper respondents are the usurping officials who wield municipal powers, and to make the county a party is illogical, because thereby its existence would be implied, which is the very fact

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

denied—it seems to us that, by virtue of the foregoing statute, the action against the usurping officials may be brought in the district court of any county where any of the defendants reside, or where they may be served with summons, or in any court of general jurisdiction to which they voluntarily submit themselves.

It therefore follows that the writ of prohibition must be denied. All the Justices concur, except TURNER, J., absent.

BILBY v. BROWN et al.†
(Supreme Court of Oklahoma. July 22, 1913.)

(Syllabus by the Court.)

FORCIBLE ENTRY AND DETAINER (§ 5*)—RIGHT OF ACTION—PROCUREMENT OF POSSESSION.

Plaintiff was in possession of the land in controversy by his tenants. At the expiration of the term of his tenants, but before they had left the premises, the defendants, claiming to have rented the land from another claiming the land by title superior to plaintiff, moved upon the land without objection from plaintiff's tenants, and took entire possession as soon as plaintiff's tenants moved away, and refused to surrender possession on demand. *Held*, that plaintiff could maintain an action of forcible entry and detainer for the land.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 23-28; Dec. Dig. § 5.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Hughes County; P. W. Gardner, Judge.

Action by Nicholas V. Bilby against William Brown and another. Judgment for defendants, and plaintiff brings error. Reversed and rendered.

Lawson & Samples, of Holdenville, for plaintiff in error. Warren & Miller, of Holdenville, for defendants in error.

ROSSER, C. The plaintiff, Nicholas V. Bilby, was in possession of the land described in the petition in this case, occupying it by his tenants, Robert and Rube Pollock. One Gilliland claimed the land under a deed from the heirs of Little Peter, a Creek Indian. In the month of November, 1910, about the time the Pollocks had moved from the land, Gilliland had the defendants, Brown and Bean, move upon the land and take possession as his tenants. The evidence shows that the two defendants moved their effects to the place before the Pollocks moved away, but the Pollocks made no objections to their entering and moved out immediately. The plaintiff brought this action in forcible entry and detainer to recover the possession of the land. There was a verdict and judgment for the defendants, and the plaintiff appeals.

The first and second grounds assigned as reasons for a new trial are the misconduct of counsel for the defendant in error in stating to the jury in their opening statement that the land belonged to John W. Gilliland,

and that he had been adjudged to be the owner of said land at the March, 1911, term of the district court, and that the plaintiff had no right in the land, and in making the same statement in their argument after the evidence was in. The record shows that these statements were made either in the opening statement of counsel or in the argument to the jury. It is true that the motion for new trial alleges the fact that they were made as ground for a new trial, but if they were made they were not preserved in any manner so as to bring them to this court. Therefore, so far as this court is concerned, they were not made, and the question cannot be considered.

The next ground for reversal urged is that the verdict is not supported by the evidence. As stated above, the evidence shows that the plaintiff was in possession by his tenants. The defendants entered surreptitiously and without his consent. There is a very strong indication in the testimony that they entered by collusion with his tenants; still there is no direct evidence to that effect. Our statutes of forcible entry and unlawful detainer are very similar to the statutes of Nebraska upon the same subject. See *Brennan v. Shanks*, 24 Okl. 563, 103 Pac. 705. In the case of *Brown v. Feagins*, 37 Neb. 256, 55 N. W. 1048, it was held that "a person who claims the paramount title to real property in the undisputed possession of another cannot, by surreptitiously obtaining possession thereof, place such former possessor at any disadvantage as to the assertion of his rights or the enforcement of his remedies in respect thereto." And it was held in that case that, where a person drove in through a gap in an inclosure around the premises and took possession, the person previously in possession could maintain action in forcible entry and detainer, through he was not actually on the premises when the defendant entered. A case very similar to the one now before the court is *Estabrook v. Hateroth*, 22 Neb. 281, 34 N. W. 634. In that case the defendant obtained possession immediately after plaintiff's tenant had vacated the premises. It was held that the plaintiff could recover. The case of *Childress v. Black*, 9 Yerg. (Tenn.) 317, is also somewhat similar to the case at bar. In *Oklahoma City v. Hill*, 4 Okl. 521, 46 Pac. 568, the sheriff went upon the premises occupied by the plaintiffs and arrested plaintiffs and took their furniture out of the building. The city was claiming the property, and, as soon as the sheriff had removed the plaintiffs from the premises, the policemen and city officers moved in. It was held that plaintiffs could recover possession in an action of forcible entry and detainer. Some of the language of the court indicates that it was considered that the city ratified the force which the sheriff used, but it is manifest that the city was in no way a party to the conduct of the sheriff. The true

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

ground of the decision was that the city had taken possession under circumstances that amounted to fraud, just as if its officers had slipped in and taken possession while the partners were gone to the post office, and that it could not retain possession thus fraudulently and surreptitiously obtained. See, also, *Chisholm v. Weise*, 5 Okl. 217, 47 Pac. 1086; *Campbell v. Coonradt*, 22 Kan. 704; *Emsley v. Bennett*, 37 Iowa, 15.

In the present case it was the duty of the tenants to turn back the property to their landlord, the plaintiff in this action. The defendants, either by conniving with them or otherwise, prevented them from discharging this duty. They cannot retain a possession obtained in this manner. Such scrambles for the possession of real property are not to be encouraged by the law, as they tend to encourage breaches of the peace and cause people to resort to their own methods of obtaining their remedy instead of resorting to the law.

The judgment is reversed and here rendered in favor of the plaintiff.

PER CURIAM. Adopted in whole.

FENDER et al. v. SEGRO et al.

(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 231*)—OBJECTIONS BELOW—SUFFICIENCY—ADMISSION OF EVIDENCE.

Simply objecting to the admissibility of evidence, without assigning the statutory grounds named in section 5070, Rev. Laws 1910, or any other ground of objection, is not such an objection as will cause this court to review the action of the trial court in overruling the purported objections.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

2. MARRIAGE (§ 51*)—EXISTENCE—QUESTION FOR JURY.

The existence of facts essential to a valid marriage is to be determined by the jury trying the case.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 90; Dec. Dig. § 51.*]

3. MARRIAGE (§ 51*)—EXISTENCE—QUESTION FOR JURY.

It was within the province of the jury to say whether a marriage was to be inferred from cohabitation and reputation.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 90; Dec. Dig. § 51.*]

4. MARRIAGE (§ 40*)—COHABITATION AND REPUTATION—INDIANS.

Cohabitation and reputation do not constitute marriage but only evidence tending to raise a presumption of marriage from circumstances. In any case the cohabitation must not be meretricious but matrimonial to raise the presumption.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.*]

5. MARRIAGE (§ 40*)—COHABITATION AND REPUTATION—PRESUMPTION—INDIANS.

Such presumption of marriage does not arise where it is not shown that there was a

recognition of the marriage relation by the parties and a holding out of each other as husband and wife respectively.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.*]

Commissioners' Opinion, Division No. 1. Error from District Court, McIntosh County; Preslie B. Cole, Judge.

Action by Bettie Segro against Eli Segro and others. From a judgment for plaintiff, certain defendants bring error. Affirmed.

Charles Whitaker, of Eufaula, and W. C. Franklin and P. J. Carey, both of Muskogee, for plaintiffs in error. Charles A. Cook and Fred P. Branson, both of Muskogee, for defendants in error.

SHARP, C. On the 12th day of September, 1910, plaintiff brought suit against the above-named defendants to recover the possession of 360 acres of land in McIntosh county. It was alleged in plaintiff's petition that she was a duly enrolled full-blood member of the Creek Tribe of Indians, and that of the lands in question 120 acres was allotted to her father, Tom Segro, 120 acres to her brother, Chepahnoche Segro, and 120 acres to her sister, Susan Segro; that each of said allottees were dead; and that plaintiff was the sole surviving heir at law of the said decedents, each of whom died intestate. On the part of the defendants, Eli and Willie Segro, it was contended that they were the children of Tom Segro, and his sole surviving heirs at law, as well as the sole surviving heirs at law of Chepahnoche Segro and Susan Segro, deceased.

No objection is made to the court's instructions to the jury; the only errors assigned being the admission of evidence on the part of the plaintiff and the claim that the verdict of the jury is not supported by the evidence.

[1] While the witness Louisa Gray was on the stand, she was asked the following, among other, questions: "What relation did Tom Segro have to Sarah Segro?" "Did Tom and Sarah hold themselves out to the community as man and wife?" These questions were each objected to by counsel for defendants, but no grounds of objection were assigned. Our statute controlling the examination of witnesses provides that where any party desires to object to any question put to a witness, either before a court or tribunal or upon the taking of depositions upon notice, the ordinary objections of incompetency, irrelevancy, or immateriality shall be deemed to cover all matters ordinarily embraced within such objections, and it shall not be necessary to specify further the grounds of such objections or to state the specific reasons whereby the question is so objectionable; but the court or opposing counsel may inquire of the objector wherein the question is so objectionable, and the objector shall thereupon state specifically his

reasons or grounds for such objection. Rev. Laws 1910, § 5070. This statute became effective March 16, 1905. Sess. Laws 1905, p. 327. Prior to its adoption, it had been held that this court would not as a general rule consider objections to the introduction of evidence, unless such objections were made to the trial court at the time the testimony was offered, and that the objections made must be sufficiently certain and definite to advise the court of the specific grounds of objection.

In *Long Bell Lumber Co. v. Martin*, 11 Okl. 192, 66 Pac. 328, the objection made to the introduction of a deed was upon the grounds of incompetency, irrelevancy, and immateriality, and it was held that the objection thus made in general terms was not sufficient to call the attention of the trial court to the objection urged on appeal, that it did not appear that the grantor had authority to execute the deed as an attorney in fact. In *Enid & Anadarko Ry. Co. v. Wiley et al.*, 14 Okl. 310, 78 Pac. 90, it was said that an objection that the evidence was "incompetent," without specifically stating the grounds upon which the objection was based, was too indefinite to present any question to the trial court. In *Conklin v. Yates et al.*, 16 Okl. 266, 83 Pac. 910, it was held that an objection to the introduction of testimony should state the precise grounds of objection.

Such was the law at the time of the enactment of the foregoing statute. It would be doing violence to the language of the act and would be a grave injustice to trial courts and opposing counsel to permit an attorney to simply object and afterwards on appeal elaborate upon the grounds of his objection. If there be reason for an objection, it should be stated at the time the objection is made; at least the very liberal requirement of the statute must be observed, before error in the admission of testimony can be urged on appeal. The exact question does not appear to have been before this court under the present statute, though attention was called to the statute in *Midland Valley Ry. Co. v. Ezell*, 129 Pac. 734, but was before the Criminal Court of Appeals in *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447, where it was said by Justice Furman, in a case where a like objection was made: "Whatever this court may think upon this subject, we are bound by the statute above quoted. It will be seen that the counsel for defendant simply said, 'Objected to.' This does not comply with the statute, and therefore does not amount to any objection. The better and the safer practice is to point out the specific objection relied upon. But the objection must at least go as far as the statute provides; otherwise it cannot be considered by this court. We are not willing to relax the rules relating to objections to evidence any further than the statutes require us to do. So we will not consider this matter, holding that no legal objection was made."

The rule is one of general application and is announced in 38 Cyc. 1378, as follows: "The general rule is that an objection to evidence must state the specific grounds on which it is based; that an objection which states no grounds therefor will not suffice. This rule is so well settled, and has been applied with such frequency, that the citation of authorities is almost useless. Its operation is the same whether the evidence is oral or documentary, or whether the objection is to the form or substance of a hypothetical question asked an expert." While the rule is there stated perhaps somewhat broader than authorized by our statute, in the present case, where no objection whatever was given, it announces a rule in full harmony with our view of the law.

[2, 3] We think there was sufficient evidence to warrant the verdict returned by the jury. The witness Louisa Gray, on behalf of the plaintiff, testified that Tom Segro had four children by his first wife, Anna; that of his marriage to Sarah one child, Bettie, was born; that these were the only children that Tom had at the time of his death; and that she had known him for a long time, ever since he was a boy, during the greater part of which time they lived near each other. The testimony of Vacey Sevier, though a half-sister of Eli and Willie, was of little, if any, value as an aid to the jury in determining the character of the relationship that existed between Tom Segro and Julia Beavers. Kate Vann, being asked whether Tom and Julia lived together as husband and wife, stated that she did not know they were ever married, and being further asked, "Q. Did they ever live together as husband and wife?" answered, "A. I suppose so; that's what they claim." She testified further that Tom would go to Julia's house and sleep there and get wood for her pretty near every night, and that this was about two or three years before Eli, the oldest child, was born; that she (the witness) raised Eli, and that Tom Segro was his father and treated him as his child; that Tom and Julia lived together. On cross-examination she testified that, at the time Tom chopped wood for Julia, he had a home across Gray's creek, but that he would go there and sleep with Julia and chop wood for her, and then go back; that Tom kept this up until he died. She testified further that Julia Beavers was a Creek freedwoman. Vacey McNac, an enrolled freedwoman, and half-sister of Eli and Willie, testified that she was a daughter of Julia Beavers and lived with her aunt, and that, before moving, her mother and Tom Segro lived together as husband and wife; that of nights Tom would stay with her mother, and had been doing so for a long time, beginning before Eli and Willie were born. This witness was an enrolled freedwoman and did not know her own age. She testified that Eli and Willie were enrolled as freedmen, and that her mother was enrolled

under the name of Julia Beavers; that the farm where Tom Segro lived was about two miles from where her mother lived; that, during the time Tom was visiting her mother, the latter had a child by one Thomas Adkins; that she did not know whether her mother had a child named Smith.

The Creek law of marriage and divorce was neither pleaded nor proved; nor was there testimony offered as to any tribal customs, pertaining to marriage or divorce among the Creeks, save that Willie McComb, a former member of the Supreme Court of the Creek Nation, testified that, according to the Creek customs, the wife at marriage did not change her former name, and the children were given but one name.

[4, 5] The jury's verdict could only have been reached through a belief that Julia Beavers and Tom Segro were not shown to have been married under either the Creek laws or customs at the time controlling and in force in the Creek Nation. The mere fact that Tom, who at or about the time had a living wife, was maintaining relations with Julia Beavers was far from conclusive evidence of the fact that he and Julia were ever married; and the testimony offered to prove marriage to Julia is not of that character that is calculated to satisfy either court or jury. An irregular, limited, or partial cohabitation is not sufficient to create a presumption in favor of marriage. It must be continuing and complete and such as is usual between persons lawfully married. There are a number of circumstances, shown by the testimony of these witnesses, that cast a serious doubt upon the all-important facts of a marriage between the putative father and Julia. Tom Segro was a full-blooded Creek Indian; Julia Beavers was a Creek freedwoman, and Eli and Willie enrolled Creek freedmen. The evidence mainly tends to show that Tom would go to Julia's house at night and sleep with her, although there is evidence that he made some provision for her and her children, Eli and Willie. At the same time, Julia had another child by one Thomas Adkins, who took his father's name. In one place Vicey McNac testified that the Adkins child was older than Eli and Willie, and in another she states that he was younger. The nature of the relationship existing between Tom and Julia was a question of fact for the jury. If that relationship was meretricious, and if under the tribal laws Julia and Tom were not husband and wife, plaintiff's right to recover must stand, for there can be no reasonable question, from the testimony, but that Tom Segro and Sarah were husband and wife, and that the plaintiff Bettie was the legitimate offspring of their union. The issue whether Tom and Julia were ever married was submitted to the jury, and the effect of its verdict was to find that the relationship that existed between Tom and Julia was adulterous, and

that no rights to the property in controversy could be acquired by their progeny.

The position of counsel that the jury capriciously disregarded the evidence is therefore, we think, not well taken. It is difficult to establish a rule which will regulate and limit the discretion of a court or jury, in the degree of credit to be given to the testimony of witnesses. Much must depend on the particular circumstances of each case. While juries may not arbitrarily disregard the uncontradicted testimony of disinterested witnesses of fair fame, where it contains no inherent improbability, yet where it is incumbent upon a litigant to affirmatively prove a given state of facts, and the evidence introduced for that purpose is lacking in probative value and of the character we have seen, it is within the province of the jury to consider it as insufficient and to find against the one asserting the claim.

Marriage, it is true, may be proved by circumstantial evidence; and, since the presumption is in favor of marriage and against concubinage, the fact that a man and woman have openly cohabited as husband and wife for a considerable length of time, holding each other out and recognizing and treating each other as such by declarations, admissions, or conduct, and are accordingly generally reputed to be such among their relatives and acquaintances and those who come in contact with them, may give rise to a presumption that they have previously entered into an actual marriage, although there may be no direct testimony to that effect. The existence in fact of a marriage, and the existence of facts essential to a valid marriage, are questions for the jury, and it is within the province of the jury to say whether a marriage is to be inferred from cohabitation and reputation. *Doe v. Roe et al.*, 2 *Houst. (Del.)* 49; *Mickle v. State (Ala.)* 21 *South.* 66; *Apong v. Marks et al.*, 1 *Hawaii*, 83; *Jackson et al. v. Jackson*, 80 *Md.* 176, 30 *Atl.* 752; *Turner v. Williams*, 202 *Mass.* 500, 89 *N. E.* 110, 24 *L. R. A. (N. S.)* 1199, 132 *Am. St. Rep.* 511; *Lorimer v. Lorimer*, 124 *Mich.* 631, 83 *N. W.* 609; *Adair v. Mette*, 156 *Mo.* 496, 57 *S. W.* 551; *Richard v. Brehm*, 73 *Pa.* (22 *B. F. Smith*) 140, 13 *Am. Rep.* 733; 26 *Cyc.* 898.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

Ex parte WAUGH.

(Supreme Court of Oklahoma. Dec. 9, 1913.)

(Syllabus by the Court.)

HABEAS CORPUS (§ 29*)—COMMITMENT OF WITNESS—SUFFICIENCY OF ORDER.

Every order of commitment to prison of a witness by a court or officer must specify particularly the cause of arrest or commitment,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and, when the commitment is for the refusal to answer a question, such question must be stated in the order.

(a) When such mandatory provision under the statute is not complied with, the prisoner will be discharged.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. § 29.*]

Original action in habeas corpus by Leroy E. Waugh. Petitioner discharged.

Joseph Wisby and O. G. Horner, both of Guthrie, for petitioner. Dale & Bierer and Devereux & Hildreth, all of Guthrie, for respondent.

WILLIAMS, J. The petitioner as plaintiff brought an action for damages against the Guthrie Gas, Light, Fuel & Improvement Company for injuries alleged to have been received on account of an explosion, which occurred during the year 1907. The action for damages was commenced 3 years and 3 months after the injury. The defendant served the usual notice on plaintiff to take depositions of witnesses before the county judge of Logan county, and thereafter subpoenaed plaintiff, and the plaintiff, refusing to testify, was adjudged guilty of contempt, and committed to the county jail until he purged himself of contempt. The petitioner seeks to be enlarged from said imprisonment.

The commitment under which the petitioner was imprisoned is as follows: "Now, on this 13th day of October, 1913, comes on for consideration the judgment of the judge of the county court of Logan county, state of Oklahoma, in the matter of the contempt proceedings against Leroy E. Waugh, and thereupon the court adjudged said defendant guilty of contempt in refusing to answer proper questions submitted to said Leroy E. Waugh while a witness before said judge in the taking of deposition in the case of Leroy E. Waugh v. Guthrie Gas, Light, Fuel & Improvement Company pending in the district court of Logan county, Oklahoma, and, the said Leroy E. Waugh refusing and failing to answer questions propounded to him as a witness as aforesaid, it is by the court adjudged that the said Leroy E. Waugh is in contempt of said court, and that the said Leroy E. Waugh pay a fine in the sum of twenty ——— (\$25.00) dollars, and stand committed to the county jail of Logan county, Oklahoma, until such time as he shall show to the judge of the county court of Logan county, Oklahoma, that he will answer all questions propounded to him in said matter which the court shall direct him to answer, and the sheriff of said Logan county, Oklahoma, is hereby directed to take charge of the said Leroy E. Waugh and place him in the county jail of Logan county, there to remain until the fine of twenty-five (\$25.00) dollars herein imposed be paid, and the said Leroy E. Waugh purges himself of

said contempt as in the manner herein imposed."

Section 5061, Revised Laws of Oklahoma 1910, provides: "Every attachment for the arrest, or order of commitment to prison of a witness by a court or officer, pursuant to this article, must be under the seal of the court or officer, if he have an official seal, and must specify, particularly, the cause of arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order. Such order of commitment may be directed to the sheriff, coroner or any constable of the county where such witness resides, or may be at the time, and shall be executed by committing him to the jail of such county, and delivering a copy of the order to the jailor."

This language is mandatory in its terms.

Section 5256, vol. 2, 6th Ed. Bates Annotated Ohio Statutes, is identical with said section 5061. In *re Turner*, 8 Nisi Prius & Gen. T. Rep. 241, 11 Ohio S. & C. P. Dec. 251, the court inclined to the view that it should consider alone the order of commitment in determining whether the petitioner should be discharged when the commitment did not comply with said section.

In *Ex parte Woodworth*, 6 Ohio S. & C. P. Dec. 19, it is said: "The order of commitment sets out the question which the petitioner refused to answer. But in the order there is nothing showing whether or not the questions were competent—were, in other words, such questions as the petitioner might lawfully be ordered to answer. Section 5256 requires that the order of commitment must specify particularly the cause of commitment, and, if the commitment is for a refusal to answer a question, such question must be stated in the order. The order in this case sets out the questions; but does it 'specify particularly the cause of the commitment?' When a witness refuses to answer, the cause of the commitment is a refusal to answer when lawfully ordered. He cannot be lawfully ordered * * * unless the question put to him is pertinent and relevant to the issue in the case. To specify particularly the cause of the commitment in such case, the order must show that the witness refused to answer a pertinent and relevant question, and to do that it should set out facts enough to make it appear on the face of the order that the question asked was pertinent and relevant. In [*Ex parte Zeelandelaar*] 71 Cal. 238 [12 Pac. 259], it was held that a commitment for contempt in refusing to answer a question must state facts sufficient to show the pertinency and relevancy of the question. In [*In re Sims*] 4 Ohio Dec. 473, it was held that, to commit a witness for contempt in refusing to bring books and papers under a subpoena duces tecum, it should appear from the mittimus that the book or paper contains evidence pertinent to the issue." The petitioner in that case

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was discharged on account of the defects in the order of commitment.

Counsel for respondent insist that the petitioner should be remanded in order that a commitment containing the questions propounded might be issued. If this were a case where the petitioner stood convicted by a verdict of a jury, and the court had made a sentence that was voidable, this might be the proper practice. In cases of contempt where a mandatory statute requires the question propounded to be set out in the order of commitment, and such is not done, the commitment being void, the prisoner must be discharged. All the Justices concur.

MULLIN v. BROWN et al.

(Supreme Court of Oklahoma. Nov. 18, 1918.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1010*)—JUDGMENT—EVIDENCE.

Where the evidence reasonably tends to support the findings of the trial court, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Error from District Court, Stephens County; Frank M. Bailey, Judge.

Action by J. S. Mullin against Eli Brown and others. Judgment for defendants and plaintiff brings error. Affirmed.

H. A. Ledbetter, of Ardmore, for plaintiff in error. J. B. Wilkinson and C. Riley, both of Duncan, for defendants in error.

TURNER, J. On August 12, 1910, plaintiff in error, J. S. Mullin, sued defendant in error Eli Brown in the district court of Stephens county in ejectment for the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ of S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ and N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of section 34, township 1 S., range 7 W., and for \$90 damages for its unlawful detainer. After issue joined there was trial to the court and judgment for defendant, and plaintiff brings the case here. The court held that plaintiff was not entitled to recover on the strength of his own title. The court was right. Both plaintiff and defendant claimed the right to possession of the land under leases from the same lessor, both executed and delivered by him on September 25, 1909; the lease of defendant being prior in point of time to that of plaintiff. Both were filed for record at 2:30 p. m. on September 27, 1909. Plaintiff conceded that his right to recover turned upon the question of whether defendant was in possession of the demised premises at the time the lease under which plaintiff claims was executed and delivered to him.

On this issue the court found for defendant, and, there being evidence reasonably tending to support the finding, the judgment

of the trial court is affirmed. All the Justices concur, except WILLIAMS, J., absent and not participating.

CITY OF SHAWNEE v. SEARS.

(Supreme Court of Oklahoma. Nov. 25, 1918.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS (§ 789*) — STREETS—DEFECTIVE ELECTRIC WIRING—LIABILITY FOR PERSONAL INJURIES.

A municipal corporation is liable for an injury caused by a dangerous obstruction in the street which results from a disarranged or defective system of electrical wiring, maintained lawfully in the streets by others than the municipal corporation itself, only where it had, or by the exercise of reasonable care would have obtained, notice of the particular defective and dangerous condition which produced the injury, with reasonable opportunity to remedy the dangerous condition before the injury occurred.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1644; Dec. Dig. § 789.*]

2. MUNICIPAL CORPORATIONS (§§ 762, 763*)—DEFECTIVE WIRING IN STREETS—DUTY TO INSPECT—PERSONAL INJURIES—LIABILITY OF A MUNICIPAL CORPORATION.

A municipal corporation is not required to inspect the wiring, insulation, apparatus, and appliances of an electric light plant, operating in the city under a franchise, to discover defects therein. If, however, a municipality permits a third party to maintain in the streets a system of electrical wiring, a portion of which extends into a sidewalk, constituting an obstruction thereof, and which creates a condition so inherently dangerous as to amount to a nuisance—one that constitutes a peril and menace to persons using the streets—and it has knowledge of such condition, and of the danger, or the circumstances are such that knowledge will be implied, then it may be liable to a person injured because of such dangerous obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1606-1611, 1612-1615; Dec. Dig. §§ 762, 763.*]

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"DEAD WIRE."

As applied to electricity or the construction of electrical conducting apparatus, a "dead" wire is one which never carries "electricity."

Commissioners' Opinion, Division No. 2. Error from District Court, Pottawatomie County; W. N. Maben, Judge.

Action by May Sears against the City of Shawnee, a municipal corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

P. O. Cassidy and W. M. Engart, both of Shawnee, for plaintiff in error. Stanard, Wahl & Ennis and J. H. Woods, all of Shawnee, for defendant in error.

BREWER, C. May Sears, about 6 a. m. May 1, 1904, who was at the time about 12 years of age, slipped and fell against a guy rod erected and maintained by the Shawnee Light & Power Company, a corporation, and was severely burned by reason of the rod

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

having become charged the night preceding with electricity. She sued and recovered a judgment against the light company, which on appeal was sustained by this court. 21 Okl. 13, 95 Pac. 449. The light company became insolvent, and the judgment could not be collected, and this present suit was brought against the city of Shawnee, and the Shawnee Telephone Company, which appears to have been also using the poles of the light company for some of its wires. At the trial the plaintiff abandoned her claim against the telephone company, and proceeded to recover a judgment against the city of Shawnee, which brings error, and alleges that the evidence is insufficient to support the verdict and judgment against it.

The suit of plaintiff is shown by the pleading to have proceeded upon two theories, upon either of which it was contended that the city was liable. The first was, briefly stated, that the city, because of its having granted the franchise under which the light company erected and was operating its plant, and because of its general power of supervision over same, etc., under the law, was charged with the duty of seeing that the light company constructed and maintained its plant, wires, appliances, and instrumentalities at all times in a safe condition; that its obligation, in other words, to the public, of vigilant care and constant inspection of these instrumentalities, was the same as those of the light company owning and operating the plant. The second theory was that the city had constructive notice of the deranged condition of the electrical appliances; that is, that the dangerous condition existed sufficiently long that the city, in the proper discharge of its duty to keep the public ways reasonably safe, ought to have discovered and remedied same in time to have prevented the accident. At the trial the court eliminated the first theory upon which plaintiff sought to charge the city, in the instructions to the jury, by holding that the city was not charged with the duty of inspection of the appliances of the light company, and that before a recovery could be justified it must be shown by the evidence that the city had actual notice of the deranged and dangerous condition of the wires, in time to have prevented the injury, or that the defect existed sufficiently long and under such circumstances that it ought to have discovered the same in time to prevent the injury, and therefore it might be liable, under the doctrine of implied or constructive notice. The rule in this, and perhaps a majority of the states, and in the Supreme Court of the United States, relative to the liability of a municipality for defects in the streets, sidewalks, etc., which it constructs and is under the primary duty to maintain, is not involved here, except in a general way; nor is the rule announced here applicable where the municipality owns, constructs, and maintains a lighting plant.

[1, 2] The precise questions presented here have not arisen as often as one would suppose; and upon an examination of the cases cited, and others we have been able to find, we have concluded that the view of the trial court as to the liability of a municipal corporation under the circumstances of this case is substantially correct. We do not believe that the city which authorizes a public utility such as an electric light plant, street car, or telephone system, to make use of the streets in a lawful way, is held to the same degree of care, and the duty of inspection, in regard to the construction and maintenance of the equipment and appliances of such a utility, as is the company itself. We think the correct rule is that the municipality is liable for an injury caused by a dangerous obstruction in the street which results from a disarranged or defective system of electrical wiring, maintained in the streets by others than the municipality itself, only where it had, or by the exercise of reasonable care might have had, notice of the particular defective condition which produced the injury. In Joyce on Electrical Law, vol. 1, § 243, it is said: "Although a city has merely authorized the erection and operation of an electric light plant in its streets, and does not own it, said city is not bound to inspect, from time to time, all poles, wires, lamps, and cables, for defects therein, and to repair such defects in order to prevent their obstructing the safe use of the streets. Nor is it liable, except upon actual or constructive notice of the existence of danger, to the public in the use of the street, by reason of some defect in said poles, wires, etc., and its failure to use diligence in obviating the danger."

It is true that the courts are not in harmony on these questions. Pennsylvania seems to hold the city liable under whatever circumstances would render the electrical company liable, thus holding the city to the duty of inspection. *Mooney v. Luzerue*, 186 Pa. 161, 40 Atl. 311, 40 L. R. A. 811; *McKeesport v. McKeesport & R. P. R. Co.*, 2 Pa. Super. Ct. 242. On the contrary, New York, some of the federal courts, and other states have held that the municipality is not charged with the duty of inspection. *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116, 2 L. R. A. (N. S.) 474, is a leading case. In that case it is said in the head notes: "A municipality is not responsible for injuries to travelers arising from fallen or hanging telephone or electric light wires obstructing the street and likely to strike or come in contact with them, unless it has notice of such obstruction or the condition is apparent and the danger obvious." And in the body of the opinion, it is said: "It is contended that the fact that persons had received shocks from the telephone wire at this point should have apprised the trustees that the telephone wire and the light wires must at some point to the south have been in contact, and therefore dangerous, and that the trustees should thereupon

have inspected the two lines and either had the telephone line removed or the position of the wires changed. This view was substantially accepted by the trial court, which charged, over the exception of the defendant village, that the law imposed on the officials of the municipality the duty of making an inspection from time to time to see whether the wires, if dangerous, had been remedied or removed. We are of a different opinion. Nobody had received substantial injury by the hanging wire at the bakery. The children had played with it and thus received the shocks. It is true one man is said to have been knocked down, but it appears that he was intoxicated at the time. The trustees discharged their duty when they cut off and removed the pendent wire. There was nothing so alarming in the fact that children playing with the wire had received shocks from it, in no case with serious results, that rendered it necessary or the duty of the trustees to inspect the whole length of the wires to examine their insulation and see that at all points they were in proper condition. Though the law authorizes the construction of electric light lines, power lines, telephone lines, and similar structures along the streets and highways, that does not relieve the municipality from its duty to see that the streets and highways are kept reasonably safe and secure for the public using them. But this doctrine is not to be carried to the extent of holding that the obligation of the municipality is coextensive with that of the company which maintains the line. Principally the duty of a municipality is to see that its streets and highways are kept safe and secure for passage over the surface, for the primary object of highways is to enable the public to travel thereon. Therefore it must always be alert to prevent or guard obstructions in the highways. Where, however, the danger to the traveler is not in the nature of an obstruction, but proceeds from the negligence of a third party in the use of the highway in a manner authorized by law, the municipality should not be held liable for that negligence unless it has notice thereof, or the condition is apparent and the danger obvious. The municipality may well be held to the same degree of responsibility with regard to electric light poles, telegraph poles, and the like that is imposed upon it with reference to awnings, gratings, and similar incumbrances on the street, and so also as to fallen or hanging wires obstructing the street and likely to strike or come in contact with the traveler. To go further, however, and impose upon a municipality the duty of inspecting the insulation of the wires, the position in which they are strung, and similar matters involving technical knowledge, unless in the case of an obvious danger or exceptional occurrence, would place upon it a very onerous and unfair burden. The company maintaining the line of wire is primarily lia-

ble for its negligent or defective condition in these respects and should be solely so unless in the cases suggested of obvious danger or exceptional circumstance."

And in the course of the opinion in *City of Denver v. Sherret*, decided by the Eighth Circuit Court of Appeals, 88 Fed. 226, 31 C. O. A. 490, it is said:

"The court instructed the jury that, as the city was charged with the duty of keeping the streets in a safe condition, it was charged with the duty of inspecting the poles from time to time, in order to ascertain their condition; and, in effect, the court laid down the rule that the city was bound to do all that would have been required of it had the city itself been the owner of the electric plant, including the poles used in connection therewith. If this liability exists with respect to the poles erected in the streets, it must also exist with respect to the wires and lamps attached thereto, for it will be remembered that it is not claimed that the mere erection of the pole which fell created an unlawful obstruction of the streets; but the theory of the trial court was that, as the city permitted the electric company to erect the pole as part of its lighting system, the city was charged with the duty of inspection, by reason of the duty of the city to keep the streets in a safe condition, and therefore, as the city permitted the electric company to string its wires along the streets, and hang its lamps over the same, the same duty of inspection must exist with respect to the wires and lamps as exists with respect to the poles. It is well known that, in the development of urban life, city streets are now used, under legislative sanction, for many purposes other than for the passage of persons, animals, and vehicles along the same. Underneath the streets may be placed conduits for the conveyance of water and gas, while above ground are found telegraph and telephone wires, electric light and power wires, and electric street car wires, all suspended along and over the streets, and experience has demonstrated that the presence of these wires creates a new danger in the use of the public highways. If what is called 'a live wire' becomes broken and falls into the street, it may cause the death of all persons or animals coming in to contact therewith. So, also, it has been demonstrated that, in the running of cable cars through the streets of a city, a danger is created to the public, in that occasionally the machinery forming the grip does not properly act, and the car cannot be stopped, but may be dashed into other vehicles, causing injury to persons and property, or the cable itself may become defective, and thus cause an obstruction to the free use of the street. If the ruling of the trial court in this case is sustained, to the effect that, because the city permitted the electric company to erect the pole in the street as part of its electric system, the city became charged with

the duty of inspecting the pole, the same as though it was owned and operated by the city, then it must follow that, because a city permits the use of its streets for telegraph, telephone, electric light, and power systems, as well as for the use of cable and electric street car systems, the city is charged with the duty of inspecting all the poles, wires, lamps, cables, and cars used in connection with these systems in the public streets, in order to prevent obstructions being caused to the safe use of the street, through defects in the appliances used for these several purposes.

"The trial court charged the jury that, if the city was liable in this case, it was by reason of its omission in the matter of inspection. But it is apparent that inspection is merely a means to an end, and, if the city was under obligation to inspect, it is because the city was under obligation to maintain the pole in a safe condition; and that this was the meaning of the court in its charge is clear from the statement (to the jury). Thus, the jury were instructed that they must view the case just as they would be required to do if it appeared that the city had itself erected the pole as part of a lighting system erected, owned, and operated by the city. Any corporation, municipal or otherwise, or any person that may be the owner of an electric light and power plant, is under obligation to use ordinary care in the maintenance and operation thereof, in order to prevent injury to third parties; but it cannot be true that, simply because a municipal corporation permits another to erect and operate such a plant in the city streets, it becomes charged with the duty of maintaining the poles, wires, and lamps connected therewith in a safe condition. The charge given to the jury was to the effect that the obligation resting upon the city was just the same as though the city had erected and owned the pole; that therefore it was under obligation to inspect the pole from time to time, to the end that it should be kept in a safe condition; and that if, through the failure to properly inspect the same, it was allowed to become rotten and fall, the city would be liable for the results thereof. If this is a correct statement of the law, it follows that with respect to all the appliances in the shape of poles, wires, lamps, cables, and the like placed in the city streets by telegraph, telephone, electric light, electric power, electric and cable street car companies there rests a primary duty and obligation upon the city to keep them in safe condition, and to make the inspections necessary to detect defects in order that the same may be promptly repaired. If this duty rests upon the city, then it will be compelled to keep in its employ men who possess the knowledge and skill needed to detect defects, and, when detected, to repair and keep in proper condition the electric wires and the cables and other appliances used in the streets; and it is apparent that

this would, of necessity, lead to a conflict, in many instances, between the city and the companies owning and operating the electric and cable plants. In support of the charge of the court upon this point, counsel for the defendants in error cite a number of cases decided by the Supreme Court of the United States and the Supreme Court of Colorado, in which the duty of inspecting the streets is recognized; but they are all cases based upon defects in bridges, sidewalks, or carriage-ways, wherein the primary duty of erecting and maintaining the same, as part of the highway, was upon the city, and wherein the duty of inspection exists, because the duty of keeping in repair rests primarily upon the city, but none of these cases involved the point now under consideration."

That to hold the municipality liable it must have had notice actual or implied is held in the case of *Decatur v. Hamilton*, 89 Ill. App. 561. See note 2 L. R. A. (N. S.) 476, in which it is said: "While we are not prepared to hold, as has been held in some of the states, that a city is liable for injuries resulting from a defect in the construction of an electric car line or for an improper adjustment of electric wire suspended over the street, we do hold, as a matter of law, that where a private corporation, to whom has been granted the right to operate by electricity a street railway, uses an appliance that is a constant menace to the public in the use of the street, and the city has notice of the same, but neglects to abate it, the city is liable," etc. See, also, *West Kentucky Telephone Co. v. Pharis*, 78 S. W. 917, 25 Ky. Law Rep. 1838; *Colbourn v. Willington*, 4 Pennewill (Del.) 443, 56 Atl. 605; *Hayes v. Hyde Park*, 153 Mass. 514, 27 N. E. 522, 12 L. R. A. 249; *District of Columbia v. Dempsey*, 13 App. D. C. 533; *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350.

As said in *Fox v. Manchester*, supra, the municipality is not relieved of the duty to see that the streets and highways are kept reasonably safe and secure for the public using them. This duty, however, falls far short of that imposed on the company which maintains the lines. And where the danger to the traveler is from an obstruction on the street, primarily caused by the negligence of a third party, the municipality will not be held liable for that negligence unless it had notice thereof, or the condition was apparent, and the danger clearly obvious.

[3] The evidence shows that at the time of this injury the various guy wires used in the construction were without any kind of insulation. Where the injury occurred at Tenth street and Oklahoma avenue, an arc light was suspended over the center of the street intersection. This lamp was hung on an iron wire extending diagonally from the top of the pole at the southeast corner to the top of the pole at the northwest corner; each end being fastened to the pole by metallic bolts. This wire is called a suspension guy. An-

other wire attached to the lamp was used to raise and lower the lamp, and, when not in use, was fastened to one of the poles. This wire is called a supporting guy. At the northwest corner, there was an iron wire fastened near the top of the pole, about 12 inches below the end of the suspension wire, which ran into the ground and was fastened to a heavy buried timber. This wire was called a guy and was to support the pole in an upright position. Each of these guy wires, the suspension guy, the supporting guy, and the pole guy wire, were supposed to be at all times "dead" wires, that is, wires that never carried electricity, but none of them had any insulation, or devices for breaking the current in case it should get into them from the other wires carrying the current. This was the manner of the original construction of this system several years before the injury, and in which the city was permitting it to be maintained at the time of the injury. The night preceding the injury was very stormy and a heavy rain fell. During the night the top of these poles at this street intersection were seen to be afire. Next morning early the plaintiff below, a little girl probably 12 year old, started down the pathway along the parking of the street; there being no sidewalks. She was discovered in a few minutes lying on the ground where this pole guy entered it, horribly and frightfully burned by having come into contact with the guy. So much electricity was escaping through this guy wire that blue blazes were coming up out of the wet ground where the child lay. A witness who was on the scene next day, and who was familiar with electrical construction, testified that the primary wire, the one carrying the electric current used for residences, was lying against the supporting guy; that it charged and followed this guy to the suspension guy, and followed it to the pole on the northwest corner into and through the 12 inches of wet wood to the pole guy and down it into the ground.

It is clearly inferable: That this uninsulated construction was general all over the city. There was proof, tending to show that a device known as the "strain insulator," had been in general use for a number of years. This is a round piece of nonconducting material which is set into these "dead" guy wires, and, when through any cause a current gets into one of these "dead" wires, it follows to this insulator, which, being a non-conductor, stops or breaks the current so it cannot escape to where persons can come into contact with it. That there were also other methods of protecting against coming into contact with this current. That insulation or protection was, and had been for years prior to the injury, recognized generally as necessary, and was being provided generally for the protection of the people. Considerable

time was devoted to evidence along this line, and much of it is conflicting.

The evidence shows that all of these guy wires ought to have had an insulator, and it is most probable that if either one of them had been so equipped the injury would not have happened. If the condition detailed above was so inherently dangerous as to amount to a nuisance—constituting an ever present peril and menace to persons using the street—and the city had knowledge of the same, or if the dangers inhering in the condition were so apparent and obvious, and of such long standing, as to impute notice to the city, then it neglected its duty to the public in permitting the dangerous condition to be maintained.

From an examination of the evidence we have concluded that there was some evidence tending to show a negligent failure of the city to perform its duty and that the court fairly submitted this question to the jury. In fact, the instructions of the court limited the grounds of recovery further than was warranted by the views herein expressed; but this, of course, cannot be said to militate against the defendant.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

ROBERTS v. WILKINS et al.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. REPLEVIN (§§ 89, 103*)—DISMISSAL BY PLAINTIFF—RIGHTS OF DEFENDANT.

Under Rev. Laws 1910, §§ 4806, 4807, where a plaintiff in replevin took the property under the writ, sold the same, and dismissed his suit, defendant is entitled to have his right of property and the right of possession inquired into and determined by the court, notwithstanding such dismissal and, in such proceeding, should the right of property and of possession be found in his favor, he is entitled to judgment for its value together with his damages for the wrongful detention of the property.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 349-351, 398-411; Dec. Dig. §§ 89, 103.*]

2. APPEAL AND ERROR (§ 204*)—ADMISSION OF EVIDENCE—OBJECTIONS BELOW.

Where, in such a case, the usable value of the property was the defendant's measure of damages for its wrongful detention, which she failed to prove, but, without objection, proved that by reason of the wrongful detention she was damaged by being prevented from making a crop, in a sum certain, held, that a verdict in her favor will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.*]

3. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

Where it appears that, although an instruction is erroneous, the jury was not misled thereby, the judgment will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Error from County Court, Jefferson County; G. M. Bond, Judge.

Action by Isaac Roberts against Mrs. W. J. Wilkins and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Bridges & Vertrees, of Waurika, for plaintiff in error. Jones & Green, of Waurika, for defendants in error.

TURNER, J. On May 24, 1909, plaintiff in error sued defendants in error, "Mrs. W. J. Wilkins" and S. J. Wilkins, a minor, in replevin, and there was turned over to him under the writ three head of horses and a wagon of the alleged total value of \$225, which he afterwards sold. Thereafter both defendants filed separate answers, but later S. J. (who appeared for himself and not by guardian or next friend) withdrew his answer and demurred. After his demurrer was overruled, plaintiff dismissed the cause as to both defendants, whereupon Mrs. Wilkins asked for a trial on her "counterclaim," and S. J. passed out of the case. At the same time plaintiff asked that the cause be continued, but the court proceeded to trial to a jury over his objection and exception. There was a verdict and judgment for Mrs. Wilkins for \$150, and plaintiff brings the case here. It seems that the property in controversy was included in two certain chattel mortgages theretofore executed and delivered by W. J. Wilkins and S. J. Wilkins to the plaintiff; that, after condition broken, plaintiff by this action sought possession of the mortgaged property, but, before suit, W. J. Wilkins died, leaving "Mrs. W. J. Wilkins," his widow, and S. J., his minor son, who was the owner of one of the mortgaged horses and which was taken under the writ.

There is no merit in the contention that the court erred in excluding testimony that after the death of the father, S. J. turned the property over to plaintiff but thereafter regained possession and refused to surrender it to plaintiff on demand.

[1, 2] Neither is there merit in the contention that the cause was not at issue and hence did not stand for trial. For whether at issue or not, or whether her pleading was an answer or a "cross-bill," the court was right, plaintiff having failed to prosecute his action to final judgment, in proceeding to trial as indicated by the section of the statute hereinafter set forth. Her answer, among other things, contained an allegation that by reason of the wrongful seizure of the property under the writ she had been prevented from making a crop, to her damage \$300. While it seems that she was only entitled to recover the usable value of the property

wrongfully taken from her under the writ (Thomas v. First Nat. Bank, 82 Okl. 115, 121 Pac. 272), and that the alleged damage was too remote to be recovered, if objected to, and, on that ground, either by answer or "cross-bill," the court proceeded to trial and to inquire into the right of property and her right to the possession and, without objection, to hear evidence in support of her allegation of damage only; no evidence being offered as to usable value. Rev. Laws 1910 reads:

"Sec. 4806. If the property has been delivered to the plaintiff, and judgment rendered against him, on demurrer, or if he otherwise fails to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, proceed to inquire into the right of property, and right of possession of the defendant to the property taken.

"Sec. 4807. * * * If the property has been delivered to the plaintiff, and defendant claims a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same."

But plaintiff cannot complain of this for the reason that the evidence in support of this allegation was introduced without objection, and hence no error can be predicated upon it.

[3] Whether the court erred in leaving it to the jury to say whether or not the writ was wrongfully sued out, we need not say, for the reason that the jury found that it was, and correctly we think. Neither was there material error in that part of the charge which told the jury that if they believed that plaintiff had no ground upon which to base his action, and that the property was and should have remained the property of the defendants S. J. and Mrs. W. J. Wilkins, then it was their duty to find for the defendants "for the amount that you may find that they had been damaged by the taking of the property, under the evidence in this case and the instructions of the court herein." This for the reason that the jury knew that Mrs. Wilkins only was seeking relief in damages and that S. J. and the horse he claimed had passed out of the case. With this knowledge it is clear the jury disregarded that part of the charge concerning any damage that might have accrued to S. J., for in their verdict they find for her alone and assess her damage at \$150.

As substantial justice has been done, the judgment is affirmed. All the Justices concur, except WILLIAMS, J., absent and not participating.

SCOTT et al. v. BROWN et al.
(Supreme Court of Oklahoma. Dec. 9, 1913.)

(Syllabus by the Court.)

INFANTS (§ 115*)—APPEAL—SUMMONS IN ERROR—MINORS.

Where summons in error is issued and served upon their guardian and not upon the minors, who by their guardian were plaintiffs in the court below, or their attorneys, held, that such service fails to comply with sections 5238 and 4721, Rev. Laws (1910); that the same is insufficient to give the court jurisdiction over the minors, and that the motion to dismiss the proceeding in error be sustained for want of necessary parties.

[Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 305, 326-332; Dec. Dig. § 115.*]

Error from County Court, Johnston County; Nick Wolfe, Judge.

Action by Mildred Brown and others against W. M. Scott and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

Harry K. Allen, of Kansas City, Mo., for plaintiffs in error. Sigler & Howard, of Ardmore, for defendants in error.

TURNER, J. On February 20, 1911, judgment was rendered and entered herein in the county court. After motion for a new trial was filed and overruled, plaintiffs in error, defendants below, commenced proceedings in error, and caused summons in error to be issued and served on A. P. Brown, guardian of Mildred Brown, Alice Brown, Wm. G. Brown, and Martin Brown, minors, who, by their said guardian, were plaintiffs below. Come the minors and move the court to dismiss the proceeding, "because no summons in error was ever served upon the defendants in error or their attorneys." Section 5238, Rev. Laws (1910), provides that after the petition in error has been filed in this court "a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record in the original case shall be sufficient." Section 4721, Rev. Laws (1910), provides, if the defendant is a minor and under the age of 14 years, that the summons in the commencement of an action shall be served on the minor and his guardian, and if over 14 years, then on the minor. In either case it is necessary to serve the minor. This statute must be strictly followed.

The court having acquired no jurisdiction of the minors by proper service, the motion to dismiss is sustained. *Boiling et al. v. Campbell*, 36 Okl. 671, 128 Pac. 1091; *Fanning v. Foley*, 99 Cal. 336, 33 Pac. 1098; *Keys v. McDonald et al.*, 1 Handy (Ohio) 287; *Helms v. Chadbourne*, 45 Wis. 60; *Ingersoll v. Ingersoll*, 42 Miss. 155; *Melcher v. Schluter*, 5 Neb. (Unof.) 445, 98 N. W. 1083; *Campbell v. Laclede Gas Co.*, 84 Mo. 352; *Jones v. Mathews (Miss.)* 4 South. 547. All the Justices concur.

GILES et al. v. LATIMER et al.
(Supreme Court of Oklahoma. Nov. 18, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 56*)—LEASE—PRESUMPTION AGAINST INFANCY.

Where nothing appears to the contrary, a lessor is presumed to be an adult at the time he makes the lease, and one who relies upon his infancy to defeat his act has the burden of proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 76; Dec. Dig. § 56.*]

2. REFORMATION OF INSTRUMENTS (§ 46*)—PROCEDURE—SUBMISSION TO JURY.

Where such issue arises in a suit in equity to reform a lease, the court may submit the issue to a jury, pursuant to Comp. Laws 1909, § 5785.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 194; Dec. Dig. § 46.*]

3. APPEAL AND ERROR (§ 260*)—EXCEPTION—NECESSITY.

Whether the court erred in the admission of testimony over objection will not be considered, where no exception is saved to the ruling of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

4. APPEAL AND ERROR (§ 263*)—EXCEPTION—NECESSITY.

Where no exception was saved to that part of the charge which told the jury to "take this case, the pleadings, the blank verdicts, and this charge, and, after consideration of your verdict, return with same into open court," and nothing appears in the record to disclose that the jury did so over defendant's objection and exception, this court will not consider whether there was error in permitting the jury to do so.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1523, 1525-1532; Dec. Dig. § 263.*]

Error from District Court, McClain County; R. McMillan, Judge.

Action by A. D. Latimer and another against G. W. Giles and others. Judgment for plaintiffs, and certain defendants bring error. Affirmed.

Rennie, Hocker & Moore, of Purcell, for plaintiffs in error. J. F. Sharp, of Oklahoma City, and J. B. Dudley, of Norman, for defendants in error.

TURNER, J. This is an action to reform a lease brought by Latimer, the lessee, one of the defendants in error. The petition substantially states that on February 2, 1907, one of the defendants, Foster, who was conceded to be a citizen of the Choctaw Nation of less than one-half blood, leased his allotment of 160 acres for a term of five years from that day, in consideration of \$300, which was paid; that by mutual mistake of the parties 80 acres thereof was not included in the lease; that the lessee had entered into possession of the land intended to be conveyed by the lease, and had been in possession thereof ever since, and had erected thereon valuable improvements; that later the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—8

lessor leased the 80 acres intended to be included in the lease to the defendant L. C. Giles, and had later conveyed the same to defendant G. W. Giles, who thereafter conveyed some interest therein to defendant W. D. Lamar. "Plaintiff further states that defendants G. W. Giles, L. C. Giles, and W. D. Lamar all well knew, long prior to the time that either of said defendants may have acquired any right in and to any portion of the lands described in plaintiff's original lease, February 2, 1907, that said plaintiff was holding the said lands, including the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 15 (being the 80 acres above referred to), and that said defendants, and each of them, knew that this plaintiff was in the actual and notorious possession of said lands, including said 80-acre tract, and had been since the date of the execution of the lease, as aforesaid." The prayer is that the lease be reformed so as to include the land intended to be conveyed, which was the whole of the lessor's allotment, and that, pending this suit, defendant G. W. Giles be restrained from prosecuting his action in ejectment, already commenced against plaintiff, to recover the 80 acres omitted from the lease. After demurrer thereto filed and overruled, defendants answered, admitting the allegations of the petition, and interposing the sole defense that at the time of the execution of the lease Foster was a minor, and for that reason the lease was void. After issue joined by reply, in effect of a general denial, there was trial to a jury, and verdict and judgment for the plaintiff. All the defendants save Foster, who is made a defendant in error, bring the case here.

[1, 2] There is no merit in the contention, as the petition fails to state that Foster was an adult at the time he executed the lease, that the demurrer thereto should have been sustained. 2 Cyc. p. 690, says: " * * * Where nothing appears to the contrary, persons entering into an agreement are presumed to be adults, and competent to contract, and hence one who relies upon his infancy to defeat his act, contract, etc., has the burden of proving such infancy." While it is conceded that Foster had a right to make this lease if an adult, it is contended that such he was not at the time, but a minor, and that by reason of his minority the lease was void under the statute. As the issue of minority was one of fact arising in this, a suit of equity, the court did not err in submitting the issue to the jury. Comp. Laws 1909, § 5785; Catron v. Deep Fork, etc., 35 Okl. 450, 130 Pac. 263; McCoy v. McCoy, 30 Okl. 393, 121 Pac. 176, Ann. Cas. 1913C, 146.

[3] To maintain the issue on his part Latimer introduced as a witness the brother of Foster, whose uncontroverted evidence was that Foster was 21 years old on June

4, 1906, and by the family Bible, introduced in evidence, proved that he was born June 4, 1885. After that Latimer was permitted to testify, over objection, that Foster told the witness that he was of age at the time of the execution of the lease, and that Foster's mother, at the same time and in his presence, said he was of age, and that witness believed it, and, relying thereupon, parted with the consideration expressed in the lease. Whether the court erred in so doing we will not say, for the reason that no exception was saved to the ruling of the court in admitting the evidence. Dunham v. Holloway, 3 Okl. 244, 41 Pac. 140; Capital Fire Ins. Co. v. Carroll, 26 Okl. 286, 109 Pac. 535, and cases cited.

[4] As there is no exception to that part of the charge which tells the jury to "take this case, the pleadings, the blank verdicts, this charge, and after the consideration of your verdict return with the same into open court," and nothing appears in the record to disclose that the jury did so over defendants' objection and exception, we will not consider whether there was error in permitting the jury so to do.

There is no merit in the remaining assignments.

Affirmed. All the Justices concur.

DAVIS et al. v. BOARD OF COM'RS OF LINCOLN COUNTY et al.

(Supreme Court of Oklahoma. March 11, 1913.
On Rehearing, Dec. 9, 1913.)

(Syllabus by the Court.)

1. DRAINS (§ 91*)—ASSESSMENT—INJUNCTION—ADEQUATE REMEDY BY APPEAL.

Where the commissioners of a drainage district have, by pursuing the provisions of the Drainage Act (chapter 32, §§ 3043-3077, Comp. Laws 1909), acquired jurisdiction to make assessments against property in the district for benefits, and the property owners have been given notice of a hearing on said assessments, as provided by statute, and have had an opportunity to be heard upon their objections thereto, such property owners cannot be heard to say in a proceeding for injunction that the assessments levied by the commissioners are greater than the benefits received, or are not in proportion to those levied upon other property receiving corresponding benefits, because such property owners have, by reason of section 3050, Comp. Laws 1909, an adequate remedy by appeal.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 53, 82, 102, 103; Dec. Dig. § 91.*]

2. DRAINS (§ 76*)—REPORT OF VIEWERS—NOTICE OF HEARING—NECESSITY.

The provision of section 3052, Comp. Laws 1909, which requires that the county clerk shall, upon the filing of the report of the viewers of a drainage district, issue a notice directed by name to the property owners of the district, informing them of the date of the hearing on the report of the viewers as to assessments of benefits and damages, and that the same shall be published for four weeks in some newspaper printed and of general circulation in the county, is mandatory; and, where such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

notice is not given as provided by said statute, the assessment of benefits and damages is void as to all property owners who do not appear at said hearing, or otherwise waive the issuance and publication of such notice.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

3. DRAINS (§ 76*)—OATH OF VIEWERS—NECESSITY.

The provisions of section 3047, Comp. Laws 1906, require that the viewers of any drainage district shall, before entering upon the discharge of their duties, take and subscribe to an oath to faithfully and impartially discharge their duties as such viewers, and to fairly and correctly make and return the report required by statute, is mandatory to the extent at least that, where the property owners for whose benefit the requirement of the statute is primarily made do nothing to waive such irregularity, failure of the viewers to take the oath renders their proceedings void.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

4. DRAINS (§ 91*)—CONTRACTS—INJUNCTION.

Although the assessments for an improvement in a drainage district have been made and a cloud thereby created upon the title to the lands against which such assessments are made, the owners of such lands may maintain an action to enjoin the commissioners of the district from issuing bonds and contracting for the improvement and paying therefor, where the assessments made are void, and said further acts of the commissioners will further complicate the cloud upon the title to plaintiffs' property and result in the unlawful expenditure of public funds.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 53, 82, 102, 103; Dec. Dig. § 91.*]

(Additional Syllabus by Editorial Staff.)

On Rehearing.

5. DRAINS (§ 76*)—REPORT OF VIEWERS—NOTICE OF HEARING—SUFFICIENCY.

The notice of a hearing on the report of viewers in drainage district assessment proceedings was void, where it did not contain in appropriate columns a tabulated description of every lot or parcel of land to be affected by the proposed improvement, as required by Comp. Laws 1906, § 3052.

[Ed. Note.—For other cases, see *Drains*, Cent. Dig. §§ 76-81; Dec. Dig. § 76.*]

Error from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by George Davis and others against the Board of County Commissioners of Lincoln county and others. Judgment for defendants, and plaintiffs bring error. Reversed and remanded.

Plaintiffs in error were plaintiffs in the court below, and defendants in error, defendants. Plaintiffs allege in their petition that each of them is the owner of land in Deep Fork drainage district No. 1, in Lincoln county; and that the land of each of them has been assessed to pay for the construction and maintenance of a drainage ditch in Deep Fork Valley; that defendants, as commissioners of said district, have caused a survey to be made for the purpose of digging said ditch, and for the purpose of paying therefor have levied assessments upon the lands in said district, including, among others,

the lands of plaintiffs. Plaintiffs charge that the assessment levied upon their lands is much in excess of any benefits which can possibly accrue thereto by the digging of the ditch; and that the amounts charged as benefits against their lands by defendants is much more than the value of their lands at the present time, and more than the value of their lands will be when said ditch is completed and in operation. By reason of these facts, it is charged that their lands are about to be confiscated and taken from them, without due process of law and in contravention of the fourteenth amendment to the federal Constitution. They further allege that in the drainage district are located certain school lands belonging to the state, against which defendants have made assessments for benefits; but that defendants, knowing that there is no provision of law by which such assessments could be collected, have assessed against the lands of plaintiffs and others in like condition increased charges sufficient to cover the amount of benefits charged against the school lands, which cannot be collected. They also allege that a large number of Indian allotments are situated in said district; and that defendants are without power or authority to levy any assessments against any of these Indian allotments or to collect anything from them for the benefits such lands will receive by the construction of the ditch; and that defendants have raised the amounts assessed against the lands of plaintiffs to cover the deficiency that will be caused because of their inability to collect from said Indian lands any charges for benefits. By reason of these facts, they allege that their lands are charged with more than their proportionate share of the benefits that will be received from a construction of the ditch, all in violation of the fourteenth amendment to the federal Constitution. Defendants are now undertaking to issue bonds and let a contract for the construction of the ditch, which plaintiffs allege will create a lien upon their property and create a cloud on the title to their lands; and that the acts of the defendants are not only void, because of the foregoing facts, but also because defendants have proceeded to act without notice to the plaintiffs of their intention to construct the ditch having been issued as required by law, and because no notice has ever been served upon the plaintiffs; and that the notice issued did not contain matters required by the statute to be contained therein, and has not been published for four weeks as required by law—by reason of which fact, they contend the burden of the benefits has been assessed against their lands without notice and opportunity to be heard on objections thereto. They also allege that the viewers appointed to assess said benefits proceeded to do so without taking and subscribing to the oath required by law of them

before entering upon the discharge of their duties. Other irregularities in the procedure taken by the defendants are alleged, but a consideration of those already mentioned will be sufficient to dispose of the others.

This appeal is prosecuted from an order of the court sustaining a demurrer to plaintiffs' petition, and the sole questions presented for our consideration arise on the petition of plaintiffs and the demurrer of defendants.

Devereux & Hildreth, of Guthrie, for plaintiffs in error. Grant Stanley, of Oklahoma City, for defendants in error.

HAYES, C. J. (after stating the facts as above). The statutes controlling the questions this proceeding presents are to be found in chapter 32, Comp. Laws 1909. The board of county commissioners are invested with power at any regular meeting, when the same shall be conducive to public health, or where it will be a public utility or benefit to agricultural interests or to the soil of the lands affected, to cause to be constructed, straightened, or widened any underground or tile ditch or drain, or natural stream of water within the county. Said commissioners are invested with exclusive jurisdiction to hear and determine all contests and objections to the creation of such district. Before any district shall be established, however, there must be filed with the clerk of the county a petition signed either by 15 per centum of the owners or by the resident owners of 15 per centum of the aggregate acres of land to be benefited or affected by the improvement and to be assessed for the construction thereof. Upon the filing of such a petition, the county commissioners are required to appoint three resident freeholders of the county, possessing certain qualifications named in the statute, who, assisted by the surveyor, shall proceed at once, under the direction and order of the commissioners, to view the line of the proposed drain or improvement and to report whether the proposed improvement is practical and necessary, and whether it is a private or public utility and benefit. After the report of the viewers is filed, the county clerk is required to fix by order of record the time for hearing the petition and report of the viewers, and cause notice to be given by publication for two weeks in some newspaper printed and of general circulation in the county of the pendency of the petition and of the date fixed for the hearing thereon. If upon its hearing the commissioners shall find that the proposed improvement is necessary or will be a public utility, they shall cause to be entered upon the record a finding to that effect, together with an order directing the viewers previously appointed to go upon the line described in the order, and to establish the precise location of the improvement, and to make a schedule of all lots and parcels of land, together with the names and residences of the owners that will be benefited, damaged, or condemn-

ed by or for the improvements, and to make a schedule of damages or benefits to each tract of 40 acres or less, and to make separate estimates of the cost of location and construction, and to apportion same to each tract and to apportion the benefits or damages that may result to each.

When this report is filed in the office of the county clerk, it is the duty of the county clerk immediately to set a hearing of same for some day during the next regular meeting of the board of county commissioners, and thereupon to issue in the name of the state a notice directed by name to every person returned by the viewers as the owner of any lot or parcel of land affected by the improvements or of any interest therein, and also by name to all others who in any manner may be ascertained to own such land or any part thereof; and also, generally, to all other persons without mentioning their names who may be interested therein, notifying them of the petition and report and of the date on which the petition and report will be heard, and requiring all such persons notified to appear on that date to show cause, if any they have, why the report shall not be confirmed as made or as the same may be amended by the commissioners, and the assessments therein described or reported shall not be made as reported or as amended. If the commissioners find that due notice has been given, they shall examine the report of the viewers and surveyor, and if they find that the assessments of the cost of location and construction and of damages and benefits to each tract are correct, and that the apportionment of cost is in proportion to the benefits, and that the assessed damages of each tract are fair and just, they shall approve and confirm the report. But if they find it is unjust or erroneous, they may amend the report upon evidence so as to make the apportionment fair and just in proportion to the benefits or damages. All lands benefited by the drain or improvement are required to be assessed in proportion to the benefits for the construction thereof. From the order of the commissioners approving the schedule of the assessments, an appeal may be prosecuted to the district court by any person aggrieved; and upon such appeal there may be determined either or any of the following questions: First, whether just compensation has been allowed for property appropriated. Second, whether proper damages have been allowed for property prejudicially affected by the improvement. Third, whether the property for which an appeal is prayed has been assessed more than it will be benefited, or more than its proportionate share of the cost of the improvements.

[1] As to those alleged irregularities which resulted in assessing the property of plaintiffs a greater amount than the property will be benefited, or more than the proportionate share of the cost of the improvement than

should be assessed against the properties of the respective plaintiffs, an adequate remedy by appeal is afforded by the statute to plaintiffs, if the commissioners acquired jurisdiction to make the order confirming the report of the viewers. Where a commission or the public officials, authorized by law to levy assessments against property for special benefits resulting from local improvements, obtain jurisdiction to levy the assessment, and an opportunity is given by appeal to the property owner to protect him against any irregularities in the proceedings, the rule which seems to us to be supported by the sounder reason, and which, in so far as we have been able to investigate the authorities, is supported by the weight of authority, is that, whether the property owner has taken advantage of the appeal or not, the opportunity of a remedy by appeal will prevent him from obtaining an injunction as to any defect which might have been remedied by appeal. *Gardiner et al. v. City of Bluffton*, 173 Ind. 454, 89 N. E. 853, 90 N. E. 898, 22 Ann. Cas. 713; *Cauldwell et al. v. Curry et al.*, 93 Ind. 363; *Caskey v. City of Greensburgh*, 78 Ind. 233; *Jones v. Gable*, 150 Mich. 30, 113 N. W. 577; *Minn. & St. L. Ry. Co. v. Linquist*, 119 Iowa, 144, 93 N. W. 103; *Lyman v. City of Chicago*, 211 Ill. 209, 71 N. E. 832; *President & Fellows of Yale College v. City of New Haven*, 57 Conn. 1, 17 Atl. 139.

If the commissioners in the instant case acquired jurisdiction to make the assessments against the property of plaintiffs, and plaintiffs had an opportunity to be heard upon the objections thereto, they cannot now be heard to say in this proceeding that the assessments levied are greater than the benefits received, or are not in proportion to those levied upon other property receiving corresponding benefits. On the other hand, if the commissioners did not acquire jurisdiction—to which question we shall next advert—the assessment is void, and further consideration of these alleged irregularities need not be made.

[2] Where local or special assessments are made against property to pay for local improvements and the cost of the improvements is by such assessments apportioned to the property owners in proportion to the benefits received, it is clear, by the great weight of authority, that at some stage in the proceedings some form of notice of the assessments to the property owners and an opportunity to be heard upon exceptions or objections to the assessments must be given; and statutes that fail to provide or to authorize such notice are declared void, because in violation of the federal constitutional provision which forbids the taking of property without due process of law. The statute in the case at bar provides for service of notice by publication, but does not provide for personal service of such notice; and it is alleged in the petition that no personal notice was served. But the absence of provision

for personal notice in the statute and the failure to give personal notice does not render the statute invalid and does not result in the proceeding denying to the property owners due process of law, if some other form of notice is provided and given which fairly and reasonably apprises the property owners of the proceeding to assess their property and gives them an opportunity to be heard upon the merits of their objections to the assessment. Where the statute provides for notice by publication, that accomplishes the purpose, and it is not void as being in violation of the constitutional provision which prohibits the taking of property without due process of law. *Bellingham Bay & British Columbia Ry. Co. v. New Whatcom*, 172 U. S. 314, 19 Sup. Ct. 205, 43 L. Ed. 480; *Wight v. Davidson*, 181 U. S. 371, 21 Sup. Ct. 616, 45 L. Ed. 900; *Ballard v. Hunter*, 204 U. S. 241, 27 Sup. Ct. 261, 51 L. Ed. 461; *Ritter v. Drainage Dist. No. 1*, 78 Ark. 580, 94 S. W. 711; section 121, *Page & Jones on Taxation by Assessment*.

This statute prescribes that notice shall be given by publication for four weeks in some newspaper printed and of general circulation in the county, the last insertion to be before the day set for the hearing on the report of the assessment of benefits and damages by the viewers; but the publication of this notice was not made. There is no allegation in the petition whether the notice of the hearing on the petition and upon the report of the viewers as to whether the proposed improvement is practicable and necessary, or will be of benefit, or of public utility, was given. Since the presumption in this proceeding is that the officers discharged their duty and that the proceedings are regular, except as they are shown to be otherwise, the question might be suggested, although it has not been by counsel, whether plaintiffs, having received notice and had an opportunity to be heard at the hearing on the petition for the formation of the district and construction of the ditch and upon the report of the viewers as to its practicability and necessity, will not be held bound to take notice of subsequent proceedings; and failure to publish the notice of the hearing upon the assessment, although an irregularity, does not render the assessments void for want of jurisdiction of the commissioners.

In *People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872, the court considered a statute that provided that after the commissioners shall classify the lands within the drainage district, and that when they have established or properly tabulated, or shown by a map such classification, the same shall be filed in the office of the town clerk for inspection and shall remain as a basis for levy of such taxes as may be needed for the purpose of the drainage district. The statute also provided that notice should be personally served upon all persons owning lands

to be affected by the proposed work, notifying them of the time and of the place where the drainage commissioners would meet to hear any and all objections that might be made to the classification of lands. This notice was given, but the property owners complained that no notice was given or hearing had before resolution or order of the commissioners making the special assessments, or of the making and filing of the assessment rolls, and that they did not learn of such facts until after the time allowed by statute for an appeal therefrom had expired. It was held that, since the statute did not require a notice of the subsequent proceedings to be given, the property owners were required to take notice thereof; and that the proceedings might be likened to a suit in a court, and, the commissioners having acquired jurisdiction over the person of the property owners, they are required to take notice of the different steps taken in the cause, without further notice.

Provision for notice of every step in assessment proceedings is not necessary in order to render a statute not subject to attack for denying due process of law; but the question here presented is not whether the statute is void because it takes property without due process of law, but whether the statute, having provided that two notices shall be given, the second notice must be given before the commissioners acquire jurisdiction to make the assessment and proceed to issue bonds and contract for the construction of the ditch. Statutes which authorize the taking of private property for public use are to be strictly construed. It is clear that it was not the intention of the Legislature to impose upon the property owners the burden and duty, after they had been given notice of the hearing upon the petition for the improvement and the report of the viewers thereon as to its practicability and necessity, to inform themselves thereafter at their own risk of the time and place where hearing would be had upon the report of the viewers as to the assessment of benefits and damages; for, if such had been the intention of the Legislature, the second notice provided for by the statute would not have been required. At the second proceeding and at the second hearing a judicial power is exercised, and the property owners are vitally interested in it; for it is upon this hearing damages for property taken are awarded, and the cost for the benefits received are proportioned and assessed. To hold that the commissioners may dispense with the second notice required by the statute, and that an assessment without giving such notice is valid, would be to render the statute a snare; for by it the property owners would be lulled into depending upon such notice to inform them of the place and time of the hearing at which their property would be taken, and the burden of improve-

ment assessed against their property and be deprived of a hearing, whereas without the requirement of this notice they would exercise diligence to inform themselves of the time and place of such hearing. The rule of strict construction applicable to this character of statute requires that it shall be held that the provision for the second notice is mandatory; and that it was intended by the Legislature that the hearing upon the petition for the formation of the district and upon the advisability of the improvement, and upon whether the proposed improvement is practicable and necessary, and that the hearing upon the report of the viewers reporting the assessment of damages and benefits shall be treated as separate proceeding, and that the notice prescribed to be given for the original proceeding confers upon the commissioners jurisdiction only for that proceeding, and without the second notice, the commissioners are without jurisdiction and authority to confirm the report of the viewers upon the assessment of damages and benefits, and to make the assessment for the cost thereof against the property of the owners.

[3] The statute requires that the viewers, before entering upon the discharge of their duties, shall take and subscribe an oath faithfully and impartially to discharge their duties as such viewers and truly and correctly make and return the report required by the statute. It is alleged that this oath was not taken. The text-writers generally declare that the failure to take the oath in substantially the form prescribed by the statute renders all the proceedings of the viewers invalid. Section 281, Page & Jones on Taxation by Assessment; section 629, Lewis on Em. Domain (3d Ed.). In support of this declaration, however, the text-writers above referred to cite cases in which the irregularity of the viewers or appraisers was attacked both in proceedings in the nature of a review and in proceedings in the nature of collateral attacks. We have examined the decided cases with considerable thoroughness. In the following cases, wherein the proceeding was in the nature of a review of the action of the viewers, it was held, without discussion of what would be the effect of such irregularity upon collateral attack, that the failure to take the oath was such an irregularity as required the report to be set aside: *Cambria Street*, 75 Pa. 357; *Latah County v. Hasfurthur*, 12 Idaho, 797, 88 Pac. 433; *Frith v. Justices of Inferior Court*, 30 Ga. 723; *State et al. v. Mayor and Alderman of City of Paterson*, 37 N. J. Law. 409; *State et al. v. Perth Amboy*, 38 N. J. Law, 425; *Hendrickson v. Point Pleasant*, 65 N. J. Law, 535, 47 Atl. 465.

In the following cases the validity of the proceeding was attacked collaterally, and the rule announced by the court sometimes without discussing the character of the pro-

ceeding, was that the failure to take the oath as prescribed by the statute renders the proceeding void: *Merritt et al. v. Village of Portchester et al.*, 71 N. Y. 309, 27 Am. Rep. 47; *Brevoort v. City of Brooklyn*, 89 N. Y. 128; *Shattuck et al. v. Bascom*, 105 N. Y. 39, 12 N. E. 283; *Wheeler et al. v. City of Chicago*, 57 Ill. 415; *Crossett v. Owens et al.*, 110 Ill. 378; *Hentig v. Gilmore*, 33 Kan. 234, 6 Pac. 304.

On the other hand, some of the cases have held that failure to take the oath is not such an irregularity as to render the assessment void on collateral attack. *Trinity College v. City of Hartford*, 82 Conn. 452; *Caskey v. City of Greensburgh et al.*, 78 Ind. 233; *Walker et al. v. People ex rel. Kochersperger*, 169 Ill. 473, 48 N. E. 694; In the Matter of the Petition of Kendall, 85 N. Y. 302. The decision in the last-mentioned case was reached without criticism or referring to *Merritt et al. v. Village of Portchester*, et al., supra, decided by the same court in which a contrary doctrine was announced. Such is also true of *Walker et al. v. People ex rel. Kochersperger*, supra, in which no reference is made to either *Wheeler et al. v. City of Chicago*, supra, or *Crossett v. Owens et al.*, supra, from the same state. In *Caskey v. City of Greensburgh*, supra, In the Matter of the Petition of Kendall, supra, and in *Trinity College v. City of Hartford*, supra, the action of the viewers was sustained upon the ground that they are de facto officers; and that the validity of their acts cannot be called into question in a suit to which the viewers are not parties.

In the following cases from a decision of the viewers it was held on appeal without deciding whether the question could be raised in a collateral attack, that their acts would not be set aside, where the complaining parties had notice of the time and place of the hearing on the viewers' report and proceeded to such hearing without objection or exception to their action upon the ground that the oath had not been taken: *Patton v. Clark*, 9 Yerg. (Tenn.) 268; *Petition of Gifford*, 25 N. H. 124; *Inhabitants of Raymond v. County Commissioners of Cumberland County*, 63 Me. 110.

Observing the rule of strict construction, always applicable to a statute that takes private property for public use, or that imposes taxes upon property, we think that this requirement of the statute should be held mandatory to the extent, at least, that, where the property owner for whose benefit the requirement of the statute is primarily made does nothing to waive such irregularity, failure to take the oath renders the proceeding void.

The appeal provided by the statute affords a remedy for errors of the viewers in making the assessment of damages for property taken or injured and in the apportionment of benefits for which the tax is assessed against the property. But the viewers are

charged with other duties, the performance of which is not subject to review by appeal, and for which any irregularity or misconduct of the viewers cannot be corrected by resort to the appeal the statute allows. They are charged with the duty and are authorized to locate the proposed improvement; they may vary its location from that described in the petition; they determine its dimensions and form; what disposition shall be made of the excavated earth; they determine the manner and time in which the improvements shall be made and completed, and let the contracts therefor. In the discharge of all these duties, it was intended by the statute that the viewers should act under the influence of a solemn oath laid upon their consciences to discharge such duties, including the assessment of damages and apportionment of benefits, faithfully and impartially. To disregard the requirements of the statute would be to encourage a laxity in the discharge of official duties and endanger the rights of parties whose property the statute authorizes to be taken against their will for public purposes. We do not here undertake to decide whether, if the property owners, with knowledge of the failure of the viewers to take such oath, with notice of the hearing and opportunity to be heard, or after appearing at the hearing without notice, made no objections to such irregularity, they would not thereby waive the requirements of the statute designed for their benefit; but, under the facts alleged in this petition, we hold that the failure to take the oath renders the proceeding invalid.

[4] Counsel for defendants urge that the remedy for injunction will not lie, because the assessment of benefits has already been made and the same taxed against the land of the property owners of the district. This contention requires no lengthy discussion. Under the rule announced in *Marlow et al. v. School District No. 4, Murray County*, et al., 29 Okl. 304, 116 Pac. 797, and supported by the authorities from this jurisdiction therein cited, this contention cannot be sustained. In that case it was said: "Equity has jurisdiction to prevent public officers and boards from letting or carrying out unauthorized and illegal contracts for public buildings, bridges, and other improvements, when such actions may cause the levy of illegal taxes, the expenditure of public funds in an improper manner, or a complication of the public business that will bring about many actions at law."

It is true that, by the assessment of the benefits against the land of plaintiffs, a cloud upon their title has already been created; but these assessments are made for the purpose of paying bonds yet to be issued to pay for the construction of the ditch, the construction of which is yet to be contracted for. The bonds, when issued as provided by the statute, are to be recorded. The

assessments made against the property of plaintiffs and now constituting a cloud upon their titles are for the sole purpose of paying the bonds about to be issued. If the bonds are never issued, the construction of the ditch never contracted for, it would follow that these assessments could not be collected; and, while acts have already been taken that cloud the title of plaintiffs, they are but the initiatory steps; and the issuance of the bonds and the construction of the ditch under a contract made by defendants in error would but further complicate the cloud upon their title, and give to the assessments made stronger appearances of validity.

For the foregoing reasons, we are of the opinion that the petition states a cause of action; and the judgment of the trial court is accordingly reversed, and the cause remanded. All the Justices concur.

On Rehearing.

PER CURIAM. [5] On rehearing our attention is called to the fact that we assumed in the foregoing opinion that the notice mentioned in the second section of the syllabus was not given, or, to speak precisely, that there was an entire absence of such notice, whereas, it is contended some notice was given, as disclosed by the allegations of the petition; that at most such notice was irregular only and not void; that the commissioners in acting upon it passed upon its validity and declared it valid as affording due process of law; and, as no appeal is allowed by statute from their adjudication of its validity, that their judgment was final. Pertaining to this notice, the petition states: " * * * That the proceedings under which the said defendants are proceeding to act in the premises is illegal and void because the notice issued by the defendants of its intention to construct said ditch was not issued in compliance with the law and is void, and because the said notice was never served upon these plaintiffs as required by the laws of the state of Oklahoma, and because such notice does not contain in proper columns a tabulated description of every lot or parcel of land that would be affected by the purported improvement, and because said notice was not published for four weeks, as required by law." Whether the allegations that the proceedings are void because the notice in question "was not issued in compliance with the law and is void, and because the notice was never served upon these plaintiffs as required by the laws of the state," are mere conclusions of law not admitted by the demurrer, we need not say; but true it is that, construed with a view to substantial justice, the pleading, on closer inspection, does fairly imply that a notice was given, and the only question for us to decide is whether that notice, which does not contain, as charged in the petition and admitted on demurrer, "in

proper columns a tabulated description of every lot or parcel of land that would be affected by the purported improvement," omits such material matters required by statute as to render the notice void, and hence fails to afford due process of law. For the reason that the same fails to comply with the statute, the notice is not merely irregular, but void. Referring to this notice, Comp. Laws 1909, § 3052, requires: "Such notice shall contain in appropriate columns a tabulated description * * * of every lot or parcel of land that will be affected by the proposed improvements. * * *"

In *Merritt et al. v. Village of Portchester et al.*, 71 N. Y. 309, 27 Am. Rep. 47, the general rule was announced that: "A statute delegating power to charge the property of individuals with the expense of local improvements must be strictly pursued, and any departure in substance from the formula prescribed by statute vitiates proceedings under it."

In *Hopkins v. Mason*, 42 How. Prac. (N. Y.) 115, the act required the commissioners to publish a notice addressed to the owners of land within the assessment district. The notice actually published was not addressed to anybody. This was held to be a noncompliance with a jurisdictional requirement.

In *Bank of British Columbia v. City of Portland*, 41 Or. 1, 67 Pac. 1112, the fourth section of the syllabus reads: "Under Portland City Charter, § 128 (Laws 1898, p. 150), providing that the city engineer shall post notices, headed, 'Notice of Street Work,' in letters of not less than an inch in length, of the fact of the council's passage of a resolution of an intention to make street improvements, together with the character of the proposed improvement, and the time within which objections thereto may be made, a notice headed, 'Notice of Street Work,' in three-quarter inch type, is insufficient to confer upon the council jurisdiction to make the proposed improvement." Concerning which the court said: " * * * Now, it is prescribed how the notice shall be headed; that is to say, it shall be in letters not less than one inch in length. The direction is absolutely inhibitive of the use of letters of less dimension, and there is no room for saying that the use of a three-quarter inch type is a substantial compliance, because the Legislature, by express terms, requires a literal compliance. Such a rendition and execution of the requirement of the charter may seem technical, but it is not for the courts to declare that a nonessential which the Legislature has prescribed, and in language that cannot be misinterpreted or misunderstood, to be an essential. In this connection a further reference to authorities will not be amiss. Mr. Elliott, in his work on Roads and Streets (2d Ed.) § 824, says: 'The form of the notice is not important unless the statute expressly prescribes a particular form, but the substance of the notice must, in all essential

features, be such as the statute requires.' So in *Wilson v. Inhabitants of City of Trenton*, 53 N. J. Law, 645, 647, 23 Atl. 278, 279, 16 L. R. A. 200, the court says: 'The Legislature may prescribe how much notice may be given. The mode prescribed must be strictly followed, and the proceedings must show the prescribed notice.' And again, in *Harbeck v. City of Toledo*, 11 Ohio St. 219, 224: 'The court has no discretion as to the form of the notice. It must contain, or be accompanied by, a copy of the application, and it is idle to speculate as to the object of the enactment, and what would be sufficient compliance with its spirit, rather than its letter. The language of the act is clear, distinct, and unambiguous—a copy of the application must be published with the notice of the time and place—and we are not at liberty to disregard its express requirement, or to fritter it away by mere rules of construction. If a municipal corporation avails itself of the statute to take private property without the owner's consent, it must, as we have seen, strictly follow its provisions.' See, also, *State v. Shreeve*, 15 N. J. Law, 57; *White v. Bayonne*, 49 N. J. Law, 311, 8 Atl. 295; *Austin v. Allen*, 6 Wis. 134. What notice shall be given, and the manner in which it shall be given, are matters within legislative discretion; and the courts cannot inquire as to the reasons which prompted its action, or do less than to require an observance of its mandates, unless contrary to the fundamental law."

In *State v. Mayor, etc., of Bayonne*, 51 N. J. Law, 428, 17 Atl. 971, the certiorari brought up the proceedings taken by the city of Bayonne for the opening of a certain street. The court said: " * * * The next objections are against the notices given of the filing of the preliminary map and report of the commissioners. These notices clearly failed to comply either with the charter (section 58, *ubi supra*) or with the general law (Revision, p. 711). They did not contain a general description of the land taken, or the land assessed, or of the streets or sections thereof, included in the assessment; they merely referred to the map on file as showing each lot or parcel of land bounded by the improvement. It is true that, in response to these notices, the prosecutor appeared; but that appearance was for the purpose of objecting to the proceedings on this ground, among others. Such an appearance is no waiver of the objections. *State v. Jersey City*, 26 N. J. Law, 444; *State v. Perth Amboy*, 29 N. J. Law, 259; *State v. Commissioners*, 41 N. J. Law, 83. For this reason the notice and all subsequent proceedings are illegal, and must be set aside."

See, also, *Wilson v. City of Trenton*, 53 N. J. Law, 645, 23 Atl. 278, 16 L. R. A. 200; *Barber Asphalt Pav. Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 496; *In re Palmer*, 138 Mich.

36, 102 N. W. 996; *Page & Jones, Taxation by Assessment*, §§ 750, 755; *Core v. Smith*, 23 Okl. 909, 102 Pac. 114.

We are therefore of opinion that the notice fails to comply with the statutory requirements in a material particular, and for that reason is void, and, being void, fails to afford due process of law.

We therefore adhere to the opinion as handed down except as modified hereby. All the Justices concur, except LOOFBOURROW, J., absent and not participating.

JONES v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 20, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 1144, 1186*)—APPEAL—HARMLESS ERROR—"TECHNICALITY"—RECORD—PRESUMPTION OF REGULARITY.

(a) It amounts to a miscarriage of justice for an appellate court to reverse a conviction upon purely technical objections.

(b) A technicality within the meaning of section "a" of this syllabus is a proposition of law which in the abstract is correct but which does not involve the jurisdiction of the court or the substantial rights of the defendant.

(c) If a principle of law has been violated during a trial, which involves the jurisdiction of the court, or which affects the substantial rights of the defendant, it will not constitute a technicality under section "a" of this syllabus but will be reversible error.

(d) The burden is on an appellant to show that the law was violated upon his trial in such a manner as to involve the jurisdiction of the court or to deprive him of a substantial right; unless this affirmatively appears from the record, where the evidence shows that a defendant is guilty, the appellate court has not the legal right or power to reverse a conviction.

(e) There must be an end to litigation; every presumption must be indulged in favor of the regularity of proceedings in courts of record and in support of the verdicts of juries; and they will not be disturbed unless it affirmatively appears from the record that they are erroneous and that the defendant was injured thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037, 3215-3219, 3221, 3230; Dec. Dig. §§ 1144, 1186.*]

2. CRIMINAL LAW (§ 1133*)—APPEAL—PETITION FOR REHEARING—ESSENTIALS.

In a petition for rehearing the grounds upon which it is sought must be distinctly and particularly set forth.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2984; Dec. Dig. § 1133.*]

3. CRIMINAL LAW (§ 361*)—EVIDENCE—REBUTTAL.

Where a defendant places a witness upon the stand who testified in his behalf that a certain man was at a given place upon a given day, and the presence of said man at said place is material, the state on cross-examination or by direct evidence may show why said man was there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 802, 803; Dec. Dig. § 361.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. CRIMINAL LAW (§§ 423, 1169*)—LARCENY (§ 50*)—HARMLESS ERROR—EVIDENCE—OWNERSHIP OF PREMISES—STATEMENTS OF CO-CONSPIRATORS.

(a) Where a defendant is charged with larceny, and the ownership or control of a certain pasture, in which the stolen property was found, is in question, it is competent for the state to show that a year before the larceny was committed the defendant had used the said pasture or exercised control over it. The length of time which had elapsed would go to the weight of the evidence and would not affect its admissibility.

(b) Where the evidence tends to establish a conspiracy to steal cattle and horses, conversations with, or statements to or by, persons who are connected with this conspiracy, and during its continuance, are admissible in evidence against any of the co-conspirators upon trial for larceny.

(c) If upon a trial for larceny a witness is erroneously permitted to testify to a statement made by him to a third party and further testifies that such statement was true, and it appears from the record that this statement was material to the issue of guilt or innocence, such positive and direct testimony given in court would cause the error, in allowing the witness to tell what he had said to the third party, to become harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 989-1001, 3088, 3130, 3137-3143; Dec. Dig. §§ 423, 1169;* Larceny, Cent. Dig. § 142; Dec. Dig. § 50.*]

5. CRIMINAL LAW (§ 413*)—WITNESSES (§ 268*)—DEFENSE—EVIDENCE—SELF-SERVING DECLARATION—CROSS-EXAMINATION—WIFE OF ACCUSED.

(a) Where the wife of a defendant takes the stand for the purpose of proving an alibi in his behalf and testifies that he was at home with his family at the time of the commission of the crime but left home early on the following morning, it is competent for the state on cross-examination to ask said witness how long it was after the commission of said crime before defendant returned home.

(b) Where a defendant is charged with the commission of a crime and leaves the country and is gone for seven months, or any length of time, it is not competent for him to prove when he returned home or use in evidence any statements which he may have made as to where he had been, and what he had been doing in such absence, as such statements would clearly be self-serving declarations.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413;* Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. § 268.*]

6. CRIMINAL LAW (§§ 511, 800*)—EVIDENCE OF ACCUSED—CORROBORATION—INSTRUCTIONS.

For a correct instruction as to the testimony of an accomplice, see opinion.

(b) The law does not require the jury to find, beyond a reasonable doubt, that the testimony of an accomplice has been corroborated. All that is necessary is that there must be some other evidence tending to connect the defendant with the commission of the crime charged against him.

(c) Jurors are presumed to be men of ordinary intelligence and to understand the English language. It is therefore not necessary for the court in its instructions to define the meaning of the words, "connect the defendant with the crime charged against him."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128-1137, 1808-1810, 1812. Dec. Dig. §§ 511, 800.*]

7. CRIMINAL LAW (§§ 1183, 1208*)—APPEAL—REDUCTION OF SENTENCE—SUFFICIENCY OF EVIDENCE.

(a) While this court has the power to modify a judgment and reduce a sentence inflicted by the jury or trial court, this power cannot be arbitrarily used but can only be exercised where it appears from the record that an injustice has been done in assessing the punishment upon him.

(b) For circumstances which justified and required the infliction of the maximum punishment in a case of larceny, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3195-3198, 3281-3287, 3289-3295; Dec. Dig. §§ 1183, 1208.*]

On rehearing. Affirmed.

For former opinion, see 136 Pac. 182.

FURMAN, J. [1] First. Owing to sickness, the writer did not participate in the consideration and decision of this cause when it was first submitted. As counsel for appellant are attorneys of the highest ability and integrity, and as they earnestly insist that the court in its original opinion overlooked material questions presented in their original brief, and as the punishment assessed against the appellant is the maximum of the law, the writer has carefully read and considered the entire record and the brief filed by counsel for appellant and will treat the questions presented as though the case was originally submitted for decision. Before discussing the matters relied upon, it may be well to state some general principles which control the action of the court in the determination of all cases submitted to it. In the case of *George v. U. S.*, 1 Okl. Cr. 307, 97 Pac. 1052, 100 Pac. 48, this court said: "We desire to reaffirm the announcement, heretofore made, that, when a defendant is clearly guilty, this court will not reverse a conviction upon a technicality or exception which does not affect the substantial rights of the defendant. This is the settled policy of this court." This doctrine we have uniformly adhered to in all cases. We have at all times announced that every presumption must be indulged in favor of the regularity of the proceedings in courts of record and in support of the verdicts of juries; and that error and injury must affirmatively appear from the record before a conviction will be reversed. These views have been stated in so many cases that it would be a useless consumption of time for us to cite the cases in which they were announced. We know that these positions of the court have been vigorously assailed by attorneys representing defendants ever since; but if we have ever varied from them we do not know it. Whatever may have been thought as to the right and power of the court to act upon these views at the time they were announced, there can be no question on that subject now.

Section 6005, Revised Laws, is as follows: "No judgment shall be set aside or new trial granted by any appellate court of this state

in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

Here is a legislative recognition and indorsement of all that we have ever said upon this subject; in fact, it is simply a restatement of the position assumed and maintained by this court from the day of its organization. In our opinion it would be a miscarriage of justice to reverse convictions upon any purely technical objections. We have been frequently asked, "What is a technicality?" Many different answers can be given to this question, which would not be applicable to the matter now before us; but, that the bar may more fully understand what our position is, we will say that a technicality, as applicable to the statute above quoted, is an abstract proposition of law, which is correct, but which does not involve the jurisdiction of the court or the substantial rights of the parties in the case under consideration. If a principle of law has been violated during a trial which involves the jurisdiction of the court or which affects the substantial rights of a defendant, it would not constitute a technicality, but, under the statute above quoted, such violation would amount to reversible error; but the burden is on the party who seeks a reversal to show that the law was violated in such a manner as to involve the jurisdiction of the court or to deprive the defendant of a substantial right; unless this is done, where the evidence shows that the defendant is guilty, this court has neither the legal right nor power to set aside a conviction. From this it appears that, although the trial court may have violated some abstract principle of law, yet, if such principle did not go to the jurisdiction of the court or affect the substantial rights of the defendant, an objection based upon such violation would be a mere technicality and not a ground for reversal. In this connection we deem it proper to restate our position as to whether or not an error committed should be ground for reversal.

We are frequently asked the question, "How do you know that a given error did not deprive a defendant of a substantial right?" Our answer is that it is not necessary for us to know anything of the kind. For a full discussion of this question, see *Coleman v. State*, 6 Okl. Cr. 252, 118 Pac. 594; *Brown v. State*, 9 Okl. Cr. —, 132 Pac. 359. If only those cases were to be affirmed which this court knew to be right, all convictions would be reversed, for it is always possible in any given case that the conviction may be wrong. Brutes act upon knowledge and in-

stinct. Human beings act upon knowledge and belief. The sacred things of life are matters of belief. The common things of life are matters of knowledge. The dog knows his master, whom he has seen. The human being believes in and worships God, whom he has not seen. In all ages men have died for matters of belief. Such a thing as mathematical certainty cannot exist in the enforcement of law. All that courts and juries can act upon is belief to a moral certainty. A moral certainty always admits the possibility of error. Our statute was substantially taken from the decisions of this court and indorses them, for it says that no conviction shall be reversed "unless in the opinion of the court to which application is made, after an examination of the entire record, that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right." This is not only our opinion, but it is the statute law of Oklahoma. This is the yard stick of the law by which the rights of a convicted defendant must be measured. It will be well for counsel, who appeal cases to this court, to bear the decisions of this court and this statute in mind.

It is impossible for human wisdom to foresee and anticipate every contingency which may arise in the affairs of men; therefore the law cannot provide fixed rules applicable alike to all cases. The best that can be done is to provide general rules, which may or may not be applicable to a given case, according to its individual facts and circumstances. Of course this system is not perfect, and there is a possibility of mistakes; but it is the best that poor, weak, erring mortals can do. It would take perfect men to make perfect laws and to perfectly enforce them. It is admitted that the wisest and best men sometimes make mistakes; therefore the best that we can do is to approximate justice as near as possible. It must always be remembered that the law is not and cannot be an exact science.

[2] Second. The first proposition contained in the motion for rehearing is as follows: "The plaintiff in error had 14 assignments of error to which he had directed the attention of the court in his brief, and which were properly preserved on the trial, and in the opinion there is but one assignment of error discussed." This proposition is entirely too general to receive consideration in that it does not point out any specific error complained of and relied upon.

[3] Third. The second proposition contained in the motion for rehearing is as follows: "Because the court overlooked the principal assignment of error, where witnesses were asked about other horses which it was alleged the defendant, Oce Jones, had stolen, for which he had never been tried or convicted and was altogether a different transaction, which assignment is known as No. 8." In their brief touching this matter counsel say:

"Eighth. The county attorney asked the witness Priest: 'Now you say Oce (meaning defendant) had some horses there in a stalk field about that time? Yes, sir. Did you know who owned the stalk field? Indians by the name of Sams own the land. Isn't it a fact that Mr. Meadows and others went up there and out of the stalk field, where Oce Jones had his horses there, that they got some other horses that had been stolen? (Objected to. The Court: It is admissible only as to why Meadows was up there. Exception.) Not that I know of. Don't you know that Meadows went up there looking for the Cook horses and Gibson horses that had been stolen, and that they got them out of the stalk field where Oce Jones' horses were there? (Objected to, and court said: Admitted for the purpose of showing why Meadows was up there. Exception.) Meadows was up there looking for the horses? Yes, sir. And he got the horses, didn't he? Yes, sir. (Objected to. The court let him answer. Exception.)'"

In this connection it should be stated that the evidence above objected to was brought out by the county attorney on the cross-examination of the witness Priest when he had been placed upon the stand by appellant, and when his testimony was evidently intended to throw suspicion upon Meadows as the real thief. He testified that he had seen Meadows near the place where the stolen horses were found. Under these conditions it was proper for the state to show why Meadows was there. The ruling of the trial court is therefore approved.

[4] Fourth. The next ground contended in the motion for rehearing is as follows: "Because the court overlooked the fifth and sixth assignments of error, where the trial court permitted witnesses to be asked about what other witnesses had told them, and that the witness had assisted the defendant in driving stock to a pasture a year previous, as a circumstance to show that the defendant was then in possession of the pasture which he had abandoned long prior to the offense charged against him."

In their brief counsel for appellant say:

"Fifth. Because the court permitted the witness Meadows, in testifying for the state, to testify that he had assisted the plaintiff in error in driving stock a year before to the pasture where the alleged stolen horses were found.

"Sixth. The court erred in permitting the witness Holden to testify he told a man named Simmons that the brand on a mare ridden by plaintiff in error looked like an acid brand."

The record shows that the stolen property was found in a certain pasture on the top of Arbuckle Mountains, in Carter county, which was known as No Man's Pasture. It was proven by one witness residing near this pasture, and who was evidently a friend of

appellant, that he had heard appellant claiming the pasture in which the stock was found. No one else was shown to have ever made any claim to it. The testimony of the witness Meadows that about a year before the larceny he had assisted appellant in driving stock into this pasture tended to prove that appellant was asserting an interest in it. The length of time that had elapsed merely went to the weight of the testimony and did not in any manner affect its admissibility. The admission of the testimony of the witness Holden as to what he had said to Simmons cannot be regarded as reversible error. Simmons came to the home of Holden with appellant, and the circumstances strongly indicate that Simmons was connected with appellant in a general conspiracy to steal stock. In fact, the evidence in the case is strongly suggestive of the idea that a general conspiracy existed between appellant and many of those with whom he was associated to steal horses and cattle, and that No Man's Pasture was the common place for concealing said stock; but even if Simmons was not acting in the common conspiracy with appellant, and such evidence was not admissible upon this ground, its admission was harmless error, because Holden, while on the witness stand, testified positively that the brand on the mare ridden by appellant looked like an acid brand. This was material to the case, because it was proven that, on the evening before the larceny was committed, appellant had purchased carbolic acid from Dr. Heflin in the town of Lone Grove, and that the stolen horses when found in No Man's Pasture had had their brands altered by an application of carbolic acid. All of these circumstances tended to prove the guilt of appellant, and the trial court did not err in the admission of the testimony complained of.

[5] Fifth. The next ground set up in the motion for rehearing is as follows: "Because the court overlooked the fifth, sixth, eighth, ninth, and tenth assignments of error, because according to a previous decision rendered by this court the evidence was inadmissible and was sufficient to reverse the cause for a new trial." We have already disposed of the fifth, sixth, and eighth assignments of error. We will now consider the ninth and tenth assignments.

When Mrs. Jones, the wife of appellant, was on the stand, she was asked by the county attorney: "You say Mr. Jones left home on the morning of the 19th (January)? Yes, sir. How long after that until Mr. Jones was back? (Objected to. Overruled. Exception reserved.) I reckon it was in August. You know when he surrendered to Buck Garrett down here." Mrs. Jones had taken the witness stand to testify to an alibi in behalf of her husband. She swore that he was at home on the night of the 18th of January, the night on which the horses were

stolen, and that he left early on the morning of the 19th. It was competent for the county attorney to show when appellant left home and how long he remained away. This went to prove, in connection with other evidence, that immediately after the larceny of the horses in question appellant became a fugitive from justice and was gone from home about seven months. This evidence was competent and admissible. Counsel for appellant then asked Mrs. Jones the following question: "I will ask you whether or not Mr. Jones, when he came back, told you where he had been? If he didn't tell you that he had been in Arizona?" To this question the county attorney objected, and the objection was sustained by the court, to which counsel for appellant excepted. There was no error in the ruling of the court. Any statements which appellant may have made to his wife, under the circumstances, would have been self-serving declarations. Defendants cannot commit crimes, flee the country, and take seven months to think about the matter in, and then come home and manufacture evidence in their own behalf. We therefore find that the rulings of the trial court were in all respects correct.

[6] Sixth. The next ground set up in the motion for rehearing is as follows: "Because the court overlooked exception No. 14 to the instructions of the trial court, the same being in paragraph No. 5, an instruction on the weight of the evidence, which this court has frequently held was reversible error."

The instruction of the court complained of is as follows: "You are instructed that two of the state's witnesses, Warren Yell and Bryant Ballew, have admitted to the jury that they were principals in the crime alleged in the information; hence you are told that they, being parties to the larceny in this case (that is, parties principal to said crime, if the crime was committed), have been introduced as witnesses in behalf of the state and by their admissions are what is known as principals or accomplices to whatever crime was committed, and you are instructed that it is the law that no person can be convicted upon the testimony of an accomplice or accomplices, unless there is other evidence in the case tending to connect the defendant with the commission of the offense, and you are told that if the corroboration by other evidence, if there be such, is insufficient if it merely shows the commission of the crime and the circumstances thereof, but such other evidence, to be sufficient to corroborate an accomplice or accomplices, must tend to connect the defendant with the commission of the crime charged against him." In their brief counsel for appellant complain of this instruction in the following language: "Paragraph No. 5, where it uses the language, 'But such evidence, to be sufficient to corroborate an accomplice or accomplices, must tend to connect the defendant with a crime charged against him,'

without stating that, if they have reasonable doubt as to the fact, they would acquit the defendant, and without defining what was meant by the words 'connect the defendant with the crime charged against him.'"

If this court has ever rendered an opinion sustaining the above contention of counsel for appellant, we are not aware of it, and, if such opinion is in existence, it is hereby expressly overruled. There is no law requiring a jury to find beyond a reasonable doubt that an accomplice's testimony has been corroborated by other evidence tending to connect the defendant with the commission of the crime charged against him. Under the common law a conviction could be sustained upon the uncorroborated testimony of an accomplice, but our statute has mitigated this hardship of the common law and now requires that there must be some evidence other than that of an accomplice tending to connect a defendant with the commission of the crime charged. See *Alderman v. Territory*, 1 Okl. Cr. 562, 98 Pac. 1026. This is all the law requires. Neither is it necessary for the court to define the meaning of the words "connect the defendant with the crime charged against him." These are words used in the common everyday affairs of life, and have no technical meaning and are well understood by all persons of ordinary intelligence. This court presumes that jurors are men of common intelligence, and understand the English language. If this be not true, it was the duty of counsel for appellant to object to their serving on the jury. We think that the law was clearly and admirably stated by the trial judge, and the instruction is in all things approved and indorsed; but even if there was error in the instruction given, in the light of the overwhelming and conclusive evidence as to the guilt of appellant, this court would hesitate long before granting him a rehearing.

[7] Seventh. The last ground relied upon in the motion for rehearing is as follows: "Because the court overlooked that portion of the brief directing the attention of the court to the excessive punishment inflicted in this case, and if, upon a hearing, it is concluded that the cause should be affirmed, we respectfully suggest that the punishment should be reduced to be in harmony with the gravity of the offense."

It is true that this court has the power to modify a judgment and reduce a sentence, when from the record it appears that an injustice has been done by inflicting an excessive punishment, but this power cannot be arbitrarily used. See *Newton Henry v. State*, 136 Pac. 982, decided the present term.

In the light of the testimony in this case, we think the jury were fully justified in assessing the penalty of ten years' confinement in the penitentiary. We believe that the appellant is not only guilty of the crime of which he was convicted but that the evi-

dence justified the jury in believing that he was an old and experienced criminal and was a corruptor of the youth of the country. In fact, from the evidence in the record, he might be called an instructor in the art of larceny. He induced two young boys, about 19 years of age, to join with him in the commission of this crime, and after it was committed he fled the country and was gone for seven months, during which time he was evidently manufacturing an alibi. Two of the witnesses who testified in his behalf were directly impeached by the state's evidence. The others testified to the most improbable stories, and the jury doubtless came to the conclusion that their testimony was manufactured from beginning to end. Without disrespect to the counsel for appellant, we cannot see how any impartial, fair-minded, or intelligent man can read the record and come to any other conclusion. Upon the trial appellant did not take the stand in his own behalf and deny or explain a single word of testimony against him. It is true that this could not be considered by the jury in determining his guilt; but after his guilt has been established and he comes to this court and seeks to have the verdict of the jury set aside, or the judgment modified, this court cannot overlook the fact that appellant did not dare to go upon the witness stand in his own behalf. Men who steal the property of others in the dead hours of night, and who induce boys to do so, and then come into court with evidently manufactured evidence, should receive the extreme penalty of the law; in fact, the longer such men are locked up in the penitentiary the better it is for society. Honest people must have protection against such characters, or the courts are a farce, and law is a mockery, a snare, and a delusion.

We find no error in the trial in the lower court. We do not see how the jury could have come to any other conclusion than that appellant was guilty, and we think that his punishment was less than he deserves. The judgment of the lower court is in all things affirmed. The mandate will issue at once. Justice has too long been delayed in this case.

ARMSTRONG, P. J., and DOYLE, J., concur.

JOHNSON v. MUENZ.

(Supreme Court of Washington. Dec. 5, 1913.)

1. ATTACHMENT (§ 119*) — SUFFICIENCY OF COMPLAINT.

Under Rem. & Bal. Code, § 649, providing that an action may be commenced and the property of a debtor attached before the debt becomes due, when nothing but time is wanting to fix an absolute indebtedness, and when the affidavit in addition to that fact states that the defendant is about to dispose of his property with intent to defraud creditors or to remove

from the state, and refuses to make arrangements for securing payment of the debt, etc., the complaint in such an action does not state facts sufficient to constitute a cause of action unless it shows on its face the reasons for its premature filing.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 214; Dec. Dig. § 119.*]

2. APPEAL AND ERROR (§ 71*)—DECISIONS REVIEWABLE—"INTERLOCUTORY ORDER."

An order dissolving or refusing to dissolve an attachment is an "interlocutory order" and appealable only by virtue of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 386-401; Dec. Dig. § 71.*]

For other definitions, see Words and Phrases, vol. 4, p. 3715.]

3. APPEAL AND ERROR (§ 874*)—SCOPE OF REVIEW — APPEALS FROM INTERLOCUTORY ORDERS.

An order refusing to dissolve an attachment will not be reversed for insufficiency of the complaint if it is capable of amendment so as to state a cause of action, since the time to determine whether the court erred in overruling a demurrer to the complaint is on an appeal from the final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530-3540; Dec. Dig. § 874.*]

Department 1. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Action by Magna N. Johnson against Fred Muenz. From orders overruling a demurrer to the complaint and denying a motion to dissolve an attachment, defendant appeals. Affirmed.

F. B. Carpenter, of Seattle, for appellant. Daniel Landon, of Seattle, for respondent.

CHADWICK, J. Plaintiff brought this action against defendant to recover upon an immature debt and sued out a writ of attachment.

[1] The complaint does not state any of the facts necessary to be shown under section 649, Rem. & Bal. Code. The affidavit for the attachment was in proper form, alleging that the defendant was about to remove from the state; that he refused to make any arrangement for securing the payment of the debt when it falls due; and that such contemplated removal was not known to the plaintiff at the time the debt was contracted. Defendant demurred to the complaint upon the grounds that the complaint does not state facts sufficient to constitute a cause of action, and moved for a dissolution of the attachment. The demurrer to the complaint was overruled, and, after a hearing upon affidavits submitted by both parties, an order refusing to dissolve the attachment was entered. Notice of an appeal from the order overruling the demurrer and from the order refusing to dissolve the attachment was given in open court.

This court has held as often as the question has been submitted to it that a complaint filed under our attachment law, which does not show upon its face the reasons for its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

premature filing, is obnoxious to a demurrer for the want of facts. *Cox v. Dawson*, 2 Wash. 381, 26 Pac. 973; *Augir v. Foreman*, 23 Wash. 595, 63 Pac. 201; *Carstens v. Millo*, 40 Wash. 335, 82 Pac. 410. Tested by these cases the complaint before us does not state facts sufficient to constitute a cause of action.

[2, 3] It does not follow, however, that the order refusing to dissolve the attachment must be reversed. An appeal from an order dissolving or refusing to dissolve an attachment is an appeal from an interlocutory order and is permissible only in virtue of the statute, and an appellate court will not in such cases ordinarily review any alleged error that does not go to the merit of the particular question or issue raised on the appeal.

The governing principle is well stated in *Belding v. Washington Cornice Co.*, 36 Wash. 549, 79 Pac. 37. In that case an appeal was prosecuted from an order overruling a demurrer to the complaint and from an order appointing a temporary receiver. The court said: "That a complaint does not state facts sufficient to constitute a cause of action can, of course, be urged as a ground for reversing an order appointing a temporary receiver; but, to be effective, it must be shown that the complaint not only fails to state a cause of action but that it is so far incapable of amendment that no action at all can be maintained for the cause stated. That it is merely defective and subject to demurrer on such ground is not sufficient; it must appear that the complainant has no cause of action whatsoever, and that the only order that can be entered is a dismissal of the action, before it will have that effect. The complaint here does not present such a case. An action will lie for the causes stated in the complaint, and, if the complaint is defective in any particular, it can only be reviewed on appeal from a final judgment. It will thus be seen that the time to test an order of the court overruling a demurrer to the complaint would be when the case is before us upon an appeal from a final judgment. The logic of the decision just cited and quoted from is that, upon appeal from an interlocutory order when the insufficiency of the complaint is urged, we will not look to the complaint further than to ascertain whether the complaint is capable of amendment. If it is, it will be passed until properly before us. If it is not, we will order the action dismissed.

Passing to the merits of the appeal, we have read the record and are unable to say that the trial judge erred in refusing to dissolve the attachment. The evidence is decidedly conflicting, with a possible preponderance in favor of the plaintiff.

Affirmed.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

SIMPSON LOGGING CO. v. NORTHWEST BRIDGE CO. et al.

(Supreme Court of Washington. Dec. 5, 1913.)

1. PRINCIPAL AND SURETY (§ 112*)—RIGHTS OF SURETY.

Under a contract for the construction of a bridge for a logging company, which provided for the retention of a part of the contract price until the completion and acceptance of the work, a surety company which executed a bond conditioned for the faithful performance of the contract by the contractor, and which provided that the logging company should notify the surety in writing before the last payment, or any reserve due the principal under the contract should be paid, was entitled to have the logging company hold the whole of the reserve payment until notice to it, since a surety is entitled to have such a reserve held as indemnity until his rights and liabilities are determined.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 226-234; Dec. Dig. § 112.*]

2. GUARANTY (§ 27*)—PRINCIPAL AND SURETY (§ 59*)—SCOPE AND EXTENT OF SURETY'S LIABILITY.

Sureties and guarantors are not to be held liable beyond the express terms of their engagement.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 28; Dec. Dig. § 27;* *Principal and Surety*, Cent. Dig. §§ 103, 103½; Dec. Dig. § 59.*]

3. PRINCIPAL AND SURETY (§ 114*)—LIABILITY OF SURETY.

Under a contract for the construction of a bridge for a logging company, which provided for the retention of the last payment on the contract price until the completion and acceptance of the work, and the performance of which was secured by a bond which provided that the owner should notify the surety in writing before the last payment or any reserve due the principal should be paid, the logging company before the completion of the work made certain payments on behalf of the contractor from the amount specified as the last payment. Thereafter it wired the surety that there were outstanding claims and bills to the amount of approximately \$10,000, with a credit still due the contractor of \$7,000, which was the amount of the stipulated last payment, to which the surety replied, consenting to the application of the balance of the contract price in settlement of such lienable claims as might be approved by the contractor. Some of the amounts paid by the logging company from the \$7,000 were not lienable items, and it could not be determined which items were lienable and which nonlienable. *Held*, that the payments on nonlienable items constituted as to the surety a misapplication pro tanto of the funds due the contractor, and, it not being possible to determine which items were lienable, the whole demand was nonlienable, and hence the surety was not liable for the amounts paid by the logging company in excess of such \$7,000.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 240-243; Dec. Dig. § 114.*]

4. PRINCIPAL AND SURETY (§ 82*)—BUILDING CONTRACT—EXTENT OF OBLIGATION.

A contract for the construction of a bridge provided that the contractor would furnish all materials and labor necessary to construct the bridge ready for the rails, and further provided that, if he did not make a profit of 10 per cent. on the cost of the bridge, the owner would make the 10 per cent. good up to a specified maximum amount, and that cost covered all costs of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

labor, materials, plant items bought expressly for the work and consumed thereon, liability insurance on pay roll, general supervision, traveling expenses, and all other expenses such as miscellaneous items chargeable against the job direct. *Held*, that the contractor did not agree to pay each and every item of expense that the owner might be put to had it built the bridge itself, and its surety was liable only to pay for what actually went into the bridge; the definition of "costs," being merely intended as basis upon which to ascertain if the contractor had made a profit.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 127; Dec. Dig. § 82.*]

Department 1. Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by the Simpson Logging Company against the Northwest Bridge Company and the American Bonding Company of Baltimore. From a judgment in favor of the bonding company, plaintiff appeals. Affirmed.

T. P. Flisk and Gordon & Easterday, all of Tacoma, for appellant. Chapman & Bailey and Frank H. Kelley, all of Tacoma, for respondents.

CHADWICK, J. This action was begun by plaintiff against the defendant to recover the sum of \$2,606.44. Judgment was entered against the Northwest Bridge Company and in favor of the American Bonding Company. On January 23, 1911, the bridge company entered into a contract with the plaintiff to furnish all material and labor necessary to construct a bridge over the Satsop river, in Chehalis county, for the sum of \$31,000. Payments were to be made as follows: \$7,000 on March 10, 1911; \$7,000 on April 10, 1911; \$10,000 on May 10, 1911, and the balance of \$7,000 as soon as the work was completed and accepted. The bridge was to be completed on or before June 15, 1911. The contract provided, among other things, that in the event that the bridge company did not make a profit of 10 per cent. on the cost of the bridge, the plaintiff would make the 10 per cent. good up to a maximum sum of \$32,500. The engagement of the bonding company was as follows: "If the said principal shall faithfully perform said contract on its part, according to the terms, specifications, covenants, and conditions thereof (except as hereinafter provided), then this obligation shall be null and void, otherwise to remain in full force and effect." It was further provided: "The said owner shall notify the surety in writing before the last payment, or any reserve due the principal under said contract shall be paid." The bridge company began the construction of the bridge and completed it about August 1, 1911. The contract was completed according to the specifications and no liens have been filed against it. The bridge covered by the contract is referred to in the evidence as "bridge No. 2." It also appears that at the time the contract was made, the bridge company was under con-

tract to furnish the labor and material to construct another bridge, which is referred to as "bridge No. 1." Bridge No. 1 was about three-fourths completed at the time work was begun on bridge No. 2, and was entirely completed in March, 1911. The testimony does not show that the bridge company failed to make a profit of 10 per cent. on bridge No. 2. It shows a substantial loss on bridge No. 1, and probably shows that no loss was incurred by the bridge company on bridge No. 2. At the time the first bridge was finished, the bridge company was indebted to the Lumberman's Mercantile Company in a large sum of money, approximately \$6,000. Payments on bridge No. 2 were made as follows: \$7,000 on March 9, 1911; \$7,000 on April 8, 1911; \$7,000 on May 8, 1911, and \$3,000 on June 13, 1911. The logging company furnished to the bridge company tools, appliances, provisions, and board for its workmen. It also paid to one H. E. Ford, on the bridge company's order, the sum of \$1,500 for lumber. All of these sums were charged against the bridge company. On June 30, 1911, the account shows that the plaintiff had paid the bridge company \$28,538.90, or \$4,538.90 more than was then due under the contract. On July 14th the bridge company notified plaintiff that it would not have enough money to meet its obligations, whereupon plaintiff wired the bonding company as follows: "The contractor informs us that the bridge will be ready for acceptance within a few days and that there are outstanding claims and bills to the amount of approximately ten thousand dollars, with a credit still due him as a final payment on the contract of seven thousand dollars, leaving approximately three thousand deficiency which he is unable to meet at this time and which we look to you to protect. Shall we apply the final payment of seven thousand dollars in liquidation of pressing claims and await final settlement of the remaining claims through your office." The bonding company replied as follows: "We consent to your applying balance of contract price in settlement of such lienable claims as may be approved for payment by the Northwest Bridge Company. This wire will not be construed as an admission of liability or waiver of any defenses under bond." At the time the bonding company was notified, there was an actual balance due the bridge company of \$4,461.10. Upon receipt of the last telegram quoted, plaintiff paid the following claims:

1911.	
July 28th W. S. Lumber Co.....	\$1,137 48
August 10th J. E. Connolly.....	439 38
August 21st H. E. Ford.....	1,981 48
July 20th Jos. Lazerous.....	33 35
November 14th Pen. Ry. Co.....	101 95
November 14th Lumberman's Merch. Co.	3,748 49

The difference between the amount owing and the amount paid is the sum sued for in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this action. From a judgment dismissing the complaint the plaintiff has appealed. We will refer to the bonding company as the defendant.

We agree with the conclusions of the trial judge that the evidence and the bill of exceptions rendered by plaintiff are so confusing that a court cannot determine with any degree of certainty which items are lienable and which are not. Many legal propositions are advanced by the respondent to sustain the judgment. We will not discuss all of them, but content ourselves with inquiring whether plaintiff made overpayments in violation of its contract, and whether there were any misapplications of payments.

[1] It will be remembered that at the time plaintiff notified defendant that the bridge company had defaulted, it told it that there was due the final award of \$7,000. If this had been so, no liability would have come to the defendant. In this, however, the plaintiff was mistaken. The notification, nevertheless, must have indicated to the defendant that there had been no overpayment. It accordingly directed that that sum be applied in payment of lienable items. By the terms of the contract, defendant was entitled to have two things concur—notice of the last payment, and that the whole of the reserved payment be at hand at the time notice was given to it. It was the duty of the plaintiff to keep available the remedy that defendant had reserved unto itself. *Peters v. MacKay*, 20 Wash. 172, 54 Pac. 1122; *Lelendecker v. Aetna*, etc., 52 Wash. 609, 101 Pac. 219; *Black v. Natl. Surety Co.*, 61 Wash. 471, 112 Pac. 517. And this is in accord with the great weight of authority. 32 Cyc. 223; *National Bank of Montgomery v. Fidelity & Deposit Co.*, 145 Ala. 335, 40 South. 415, 5 L. R. A. (N. S.) 418, 117 Am. St. Rep. 45, 8 Ann. Cas. 241.

The theory upon which the right of a surety to insist upon the retention of the reserve is based is that he is entitled to have the sum agreed upon held as indemnity, and until his rights and liabilities are determined, and this, says the Supreme Court of the United States, is a "superior equity." *Prairie State National Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412.

In *U. S. v. Am. Bonding Co.* (C. C.) 89 Fed. 930, the case of *Rees v. Berrington*, 2 Ves. Jr. 540, is quoted with approval. It says: "It is the clearest and most evident equity not to carry out any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much as your own) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

[2] This court in the cases cited has held that sureties and guarantors are not to be held liable beyond the express terms of their

engagement. This doctrine is well established, and has the sanction of the Supreme Court of the United States. *Union Mut. Life Ins. Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437, 36 L. Ed. 118. It is suggested in the brief of respondent that the cases *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833, and *Monro v. National Surety Co.*, 47 Wash. 483, 92 Pac. 408, may be out of harmony with the *Peters*, *Lelendecker*, and *Black Masonry Cases*, and that they are contrary to the current of authority. A re-examination of those cases is unnecessary. In so far as this case goes, they are sufficiently distinguished by what we have said of them in the *Black Masonry Case*.

[3] We are unable to say just how much of the several amounts paid is made up of lienable items. To a certain extent they are not lienable under the authority of *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106, and *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766, and payments made thereon are pro tanto misapplied under the rule announced in *Crane Co. v. Pacific Heating & Power Co.*, 36 Wash. 95, 78 Pac. 460, and the whole demand would therefore fall within the rule of confused accounts and be nonlienable under the doctrine announced in *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B, 225.

[4] Appellant insists, however, that the defendant is bound by the following items in the contract:

"It is also further agreed, that if the parties of the second part are unable to show a profit of ten per cent. (10%) on cost of said bridge, piers and approaches, for the sum of \$31,000.00, the parties of the first part will make the ten per cent. (10%) good up to a maximum sum of \$32,500.00."

"By cost it is understood that the same covers all cost of labor, materials, plant items bought expressly for this work and consumed on the same, liability insurance on pay roll, general supervision, traveling expenses and all other expenses, such as miscellaneous items which are chargeable against this job, direct."

It is said that defendant was to do for plaintiff what plaintiff did not care to do for itself—to build the bridge and pay for each and every item of expense that plaintiff might be put to had it built the bridge itself. We agree with counsel for respondent that this clause of the contract will not bear such construction, but that the words employed, when read in connection with the condition that the bridge company would furnish all "materials and labor necessary to construct ready for the rails," etc., means that the defendant did not engage itself to pay more than actually went into the bridge, and was chargeable "against the job, direct," under the contract and under the statute, and that the word "cost" should be read in connection with the previous stipulation that if the bridge com-

pany was unable to show a profit of 10 per cent. on the "cost" of the bridge, plaintiff would pay a profit of 10 per cent. up to \$32,500. We think the clause relied on was intended as a basis upon which to ascertain if the bridge company had made a profit, and to limit the amount which appellant agreed to pay over and above the contract price in case a profit was not made.

The judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

MURRAY et al. v. WISHKAH BOOM CO.
(Supreme Court of Washington. Dec. 12, 1913.)

1. LOGS AND LOGGING (§ 13*)—PUBLIC SERVICE CORPORATION—LIABILITY.

A corporation organized under Rem. & Bal. Code, § 7119, to improve a river and to drive, hold, and deliver logs thereon, which improves a river by splash dams and otherwise, in pursuance of section 7122, must, as required by sections 7123, 7124, render service as a public service corporation and is liable for damages from its unreasonable delay to move the logs of another by water stored in its dams.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 31-35; Dec. Dig. § 13.*]

2. TRIAL (§ 280*)—INSTRUCTIONS—REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested instruction embodied in substance in the instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 280.*]

3. LOGS AND LOGGING (§ 13*)—PUBLIC SERVICE CORPORATION—LIABILITY.

A public service corporation engaged in driving, holding, and delivering logs in a stream which it has improved cannot refuse to release water to float logs for one applying therefor and entitled thereto because of a threatened injunction against its release of water by land-owners further down stream, where it has engaged in the service for 15 years or more, and the one applying for the service had cut its logs and placed them in the river, believing that the corporation was able to render the proper service.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 31-35; Dec. Dig. § 13.*]

4. LIMITATION OF ACTIONS (§ 28*)—ACTION ON CONTRACT.

An action against a corporation engaged in the business of driving, holding, and delivering logs for its failure to move logs by releasing water from its dams and thereby prevent the destruction of the logs by forest fires is an action on contract within the three years' statute of limitations (Rem. & Bal. Code, § 159).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 135, 142; Dec. Dig. § 28.*]

Department 2. Appeal from Superior Court, Chehalis County; Mason Irwin, Judge.

Action by Arch Murray and another, co-partners, against the Wishkah Boom Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Bridges & Bruener, of Aberdeen, for appellant. W. H. Abel, of Montesano, and T. H. McKay, of Aberdeen, for respondents.

PARKER, J. This is an action to recover damages which the plaintiffs allege resulted to them from the failure of the defendant to cause artificial freshets or "splashes" from its splash dam maintained in the Wishkah river, in Chehalis county, so that their logs could be moved while in the river bed and escape being burned by neighboring forest fires by which they were destroyed. Verdict and judgment were rendered in favor of the plaintiffs, from which the defendant has appealed.

Appellant is a driving and boom company, organized as such under the statute of this state, having control of the Wishkah river, in Chehalis county, and has been engaged in driving and booming logs upon that river for something over 15 years. It maintains splash dams in the river and its tributaries by which it creates artificial freshets or "splashes," as termed in logging parlance, in the river from time to time, especially in the summer months when the natural flow of the water is low, for the purpose of driving logs placed therein by those engaged in logging along its banks. For many years prior to May 1, 1910, appellant has created splashes from its dams in the summer months, at intervals of four weeks or oftener, by which logs in the bed of the river could be driven out. During those months logs could not be moved in the river without such splashing because of the natural flow of the water therein being insufficient. The larger portion of the territory along the banks of the river for a distance of 10 or 15 miles had been logged off prior to the year 1910. This rendered such territory subject to frequent forest fires during the dry summer months. During the dry summer months of 1910, forest fires were burning in such territory and were more or less of a menace to logs in the neighborhood, including logs which had been placed in the bed of the river for driving. Prior to May, 1910, respondents had been logging near the river below one of appellant's splash dams and had a considerable quantity of logs cut and ready for transportation down the river. They commenced placing these logs in the river bed about May 10th and finished about June 8th. This was done in the usual manner by rolling the logs over a high bank into the river bed, which caused them to pile up some 30 feet high. Respondents then flattened the pile down considerably by the use of a donkey engine with a line, and thereafter kept their donkey engine in position so as to aid in starting the logs when the next splash came from appellant's dam. The last splash made by appellant was on May 1, 1910, until the fall of that year after respondents' logs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had been burned. Soon after respondents had commenced to place their logs in the river, about May 14th, they asked appellant for a splash. This appellant neglected to furnish until after the burning of respondents' logs. On August 24th, and during the few days following, being over two months after respondents' logs were put into the river bed, they were destroyed by fire which was communicated to them by one of the forest fires then burning along the river. The existence of the forest fires at that time, and their more or less probable menace to respondents' logs, was known to appellant's officers. There was plenty of water stored in appellant's dam to create a splash sufficient to move respondents' logs during all of this period, especially with the help of respondents' donkey engine and line in starting them. We think the evidence fully warranted the jury in believing these facts. Respondents' claim for damages is rested upon appellant's neglect to splash so as to render the driving of the logs possible and thus remove them from the danger of destruction by forest fires. Counsel upon both sides proceeded upon the theory that this is an action for damages resulting from the breach of an implied contract to drive the logs with reasonable dispatch.

[1] A considerable portion of the brief of counsel for appellant is devoted to an effort to demonstrate that the degree of care required of a boom company relative to logs placed in a river controlled by such a company is not of that high degree required of a common carrier possessing wholly artificial means of transportation, and that the trial court's rulings in effect erroneously submitted the cause to the jury upon the theory that such high degree of care was required of the appellant. The court instructed the jury touching the service and care required by law of appellant as follows: "You are instructed the laws of this state require boom and driving companies to boom and drive logs delivered to them for that purpose with reasonable care and diligence, and, if loss of logs occurs on account of unreasonable delay on their part, they are liable for the loss. In this case it is for you to say under all the circumstances whether there was unreasonable delay on the part of this defendant company."

We do not find in the record before us any ruling of the court suggesting to the jury any higher degree of care than that stated in this instruction. It is plain that appellant was, at the time of the burning of respondents' logs, and for many years prior thereto, a corporation organized under the statutes of this state with all the objects and purposes as stated in section 7119, Rem. & Bal. Code, as follows: "Any corporation having for its object, in whole or in part, the clearing out and improvement of rivers and streams in this state, and for the purpose of driving, sorting, holding, and delivering logs and

other timber products thereon, may be organized under the laws of this state."

It is also plain that appellant had improved the Wishkah river by constructing splash dams and otherwise in pursuance of the statutory powers of such corporations (Rem. & Bal. Code, § 7122), and that it was bound to render service as a public service corporation, of the nature stated in the above-quoted instructions (Rem. & Bal. Code, § 7123). By section 7124, Rem. & Bal. Code, such corporations are rendered liable in damages for failure to properly perform such service by express provision thereof, reading as follows: "Any corporation acting under and in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resulting from neglect, carelessness, or unnecessary delay on the part of such corporation or its agents."

It seems plain to us that the instruction above quoted, which we find to be in keeping with other rulings of the court, did not impose upon appellant any higher degree of care than that required by the express terms of the statute relating to such corporations. We deem it unnecessary to follow learned counsel's argument touching the comparative degree of care ordinarily required by driving and boom companies and other carriers possessing wholly artificial means of transportation.

[2] Counsel for appellant contend that, so far as its liability is concerned, its delay in splashing and driving the logs down the river was not the efficient proximate cause of the destruction of the logs, because it did not have reasonable cause to anticipate the burning of the logs, and complain of the refusal of the court to give the jury the following requested instruction and others of similar import: "If you believe from the evidence that the defendant did not have reasonable cause to expect that a forest fire would be communicated to these logs, then the plaintiff cannot recover."

We do not understand counsel to contend that the court should decide the question of efficient proximate cause in appellant's favor as a matter of law. In any event, it seems clear that such question could not have been so decided by the court in the light of the evidence. The substance of this contention of counsel is stated in their brief as follows: "We were entitled to have the jury decide under proper instructions whether or not the defendant should, under all the circumstances, have known that there was probability of the logs being destroyed by fire."

A reading of the other instructions given by the court convinces us that they conveyed to the jury the same thought as that suggested by the above-quoted requested instruction, and that the jury were thereby given to understand that appellant was not to be held liable for the destruction of respondents' logs by fire unless it had reasonable

cause to apprehend such danger, even though it may have been somewhat negligent in its delay. We are of the opinion that the refusal to give the instruction in the language requested was not prejudicial error.

[3] Appellant sought to excuse its delay in splashing by showing that certain landowners during the month of April, 1910, commenced proceedings in the superior court for Chehalis county, seeking to enjoin it from creating splashes in the river, upon the ground that their land would be injured thereby, and that appellant was justified in acceding to such demands of such owners and refraining from splashing until condemnation proceedings could be commenced and prosecuted to acquire such right as against such owners. No injunction was issued, however, in such proceedings. In view of the fact that appellant had been continuing for 15 years or more rendering service as the law required, of such corporations, including regular splashing, it seems clear to us that the learned trial court correctly excluded this defense from the cause; such exclusion being the alleged error complained of by appellant. Manifestly a public service corporation, having been continuously engaged in the service required by law of it, covering a period of 15 years or more, cannot refuse to render such service to one applying therefor and entitled thereto because of a threatened injunction against its continuing business as a public service corporation. It is plain that respondents conducted their logging operations and placed their logs in the river with a view to having them transported to market by appellant as a public service corporation upon the faith of such corporation being able to fulfill its duties as such a corporation. Manifestly respondents were justified in this faith in view of the long-continued operations of appellant and its holding itself out to the public as being able to render such service.

[4] It is finally contended on behalf of appellant that this action is barred by the statute of limitations. If the two-year statute were applicable, there would be some ground for appellant's contention in this regard, at least as to a portion of respondents' claim of damage. If the three-year statute is applicable, clearly no part of respondents' cause of action is barred. In section 159, Rem. & Bal. Code, among the causes of action there enumerated as being barred in three years, is the following: "An action upon a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument." While this is an action seeking the recovery of damages for breach of an implied contract, we think it clear, in the light of the authorities, that it is an action upon contract, within the meaning of the statute of limitations. *Alabama Great Southern R. R. Co. v. Elchofer*, 100

Ala. 224, 14 South. 56; *Railway Co. v. Neal*, 11 Lea. (79 Tenn.) 270; *Patterson v. Railway Co.*, 94 Ga. 140, 21 S. E. 283. The rule is stated in the text of 25 Cyc. 1033, as follows: "Viewed with reference to the statute of limitations, an action against a carrier for injury resulting from a breach of contract for safe carriage is one on contract and not on tort."

We are of the opinion that the action is not barred by our statute of limitations. Other claimed errors suggested by counsel for appellant, we think, do not call for discussion.

The judgment is affirmed.

CROW, C. J., and MOUNT and MORRIS, JJ., concur.

STATE ex rel. GREAT NORTHERN RY. CO.
v. PUBLIC SERVICE COMMISSION
OF WASHINGTON et al.

STATE ex rel. CHICAGO, M. & P. S. RY. CO.
v. SAME.

(Supreme Court of Washington. Dec. 13, 1913.)

1. CORPORATIONS (§ 394*)—REGULATIONS—ORDERS OF PUBLIC SERVICE COMMISSION—APPEAL.

Public Service Commission Act (Laws 1911, c. 117, § 86), authorizing any complainant or any public service company affected by any order of the commission to apply to the superior court within 30 days after service of the order to have its reasonableness and lawfulness determined, does not limit the right of review to final orders, but confers the right of review within the time limited of any order of the commission for the purpose of having its reasonableness and lawfulness determined.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1576; Dec. Dig. § 394.*]

2. CARRIERS (§ 18*)—REGULATIONS—ORDERS OF PUBLIC SERVICE COMMISSION—APPEAL.

An order of the Public Service Commission which directs railroads to establish joint rates, and which gives the railroads a specified time after service of the order to comply and agree on the joint rates, and, in the event of their failure so to do, the commission will by supplemental order establish the rates and fix the division between the railroads, is a final order and an application for its review must be made within 30 days after service thereof, if Public Service Commission Act (Laws 1911, c. 117, § 86), authorizing review of orders of the commission, be construed to limit the review of final orders only.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

3. CARRIERS (§ 10*)—ESTABLISHMENT OF JOINT RATES—AUTHORITY OF PUBLIC SERVICE COMMISSION.

Public Service Commission Act (Laws 1911, c. 117, § 83), providing that when any order of the commission shall require joint action by two or more public service companies the order shall specify that the same shall be made at their joint cost, relates to the cost of coupling, and refers to some physical connection between the companies, and does not authorize the Public Service Commission to establish joint rates, which authority is conferred by section 57, au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thorizing the commission to provide for joint rates and through routes on railroads.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14–20; Dec. Dig. § 10.*]

4. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—EMINENT DOMAIN (§ 2*)—TAKING OF PROPERTY WITHOUT COMPENSATION—REGULATION OF RATES.

Since railroads voluntarily devote their property to public use, they are public corporations subject to special limitations by law as to rates and the manner of the performance of their public duties, and the regulation of rates by the state is not a taking of property without due process of law, or a taking or damaging of property without compensation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.* Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

5. CARRIERS (§ 10*)—CONSTITUTIONAL LAW (§ 297*)—EMINENT DOMAIN (§ 2*)—DUE PROCESS OF LAW—TAKING OF PROPERTY WITHOUT COMPENSATION—REGULATION OF RATES.

Public Service Commission Act (Laws 1911, c. 117, § 57), authorizing the commission to order railroads to establish through routes, and empowering the commission to establish joint rates and to order that car load freight shall be carried by the different railroads without being transferred from the originating cars, empowers the commission to order an interchange of cars between connecting carriers when the rates in force between given points are excessive, and when there is no satisfactory through route and joint rate, and when the public necessities demand the establishment of a joint rate and through route; but before the making of the order the commission must make rules for the expeditions and safe return and proper compensation for the cars so employed, and the provision so construed does not take property without due process of law, in violation of the fourteenth amendment of the federal Constitution, and does not take or damage private property without compensation, in violation of Const. art. 1, § 16; and an order of the commission establishing a joint rate for a given service and apportioning the rate between connecting carriers, leaving to them the practicable way of complying with the order, either by sending the loaded cars through to their destination or transferring the load from the cars of one carrier to those of the other at the connecting point, is not invalid as beyond the power of the commission to make.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14–20; Dec. Dig. § 10.* Constitutional Law, Cent. Dig. §§ 832–834; Dec. Dig. § 297.* Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

6. CARRIERS (§ 18*)—ESTABLISHMENT OF RATES—FINDINGS OF PUBLIC SERVICE COMMISSION—CONCLUSIVENESS.

The findings of the Public Service Commission created by Public Service Commission Act (Laws 1911, c. 117), so far as they establish rates for railroads, will not be disturbed by the courts unless they are made arbitrarily and in disregard of the material rights of the parties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. § 13.*]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Actions by the state of Washington on the relation of the Great Northern Railway Company, and on the relation of the Chicago, Milwaukee & Puget Sound Railway Company, against the Public Service Commission and

others, to review orders of the commission. From a decree sustaining the orders, the relators appeal. Affirmed.

F. M. Dudley and F. V. Brown, both of Seattle, for appellants. W. V. Tanner and Stephen V. Carey, both of Olympia, for respondents.

MORRIS, J. It is sought by this appeal covering consolidated cases to reverse the decree of the lower court sustaining an order of the Public Service Commission establishing joint rates between South Tacoma and points on appellants' lines, and a second order dividing revenues arising from the joint rates thus established between the participating carriers, made after the appellants' failure to comply with the first order and adjust their tariffs in conformity with the conclusions first reached by the commission.

South Tacoma is the name of a station located at the south end, but within the corporate limits of the city of Tacoma, and within its contributing territory are a number of manufacturing establishments requiring the shipment of their products in car load lots to points on appellants' lines. The only railway line reaching this territory is the Northern Pacific. The Great Northern, under a contract with the Northern Pacific, has acquired the privilege of running its trains between Tacoma and Portland over the line of the Northern Pacific, passing through South Tacoma, but, under this arrangement with the Northern Pacific, has acquired no rights for the transaction of business at South Tacoma, so that freight from and destined to points on the Great Northern would be hauled between Tacoma and South Tacoma by the Northern Pacific and charged for as local freight. The Chicago, Milwaukee & Puget Sound Railway Company has no arrangement with the Northern Pacific for the use of tracks at South Tacoma, but has a physical connection with the tracks of the Northern Pacific at Tacoma, and shipments to and from points on its line were compelled to pay the local traffic between Tacoma and South Tacoma. It was found by the commission that the terminals of these several lines entering Tacoma were centrally located, and that the territory served by the South Tacoma station was no further distant from the Tacoma terminals than other portions of the city of Tacoma included within the switching district of Tacoma, and the freight rate to and from Tacoma. The first order complained of was made November 18, 1911, and directed that joint rates should be put in force between the Northern Pacific and appellants, under which car load lots would be carried to and from South Tacoma and points on the lines of appellants at the same rates charged for like commodities under the Tacoma tariff, in cases where, under their tariff, appellants absorbed the switch-

ing charges to and from industries on Northern Pacific tracks at Tacoma; and, in cases where such switching charges were not absorbed, a charge of not to exceed \$5 per car was to be added to the joint rate; providing, however, that none of the joint rates ordered should apply between South Tacoma and Northern Pacific and Great Northern and Northern Pacific and Milwaukee competitive points. Under this order the railway companies were given ten days after service of the order upon them to comply with its terms and agree upon the joint rates, it being further provided that, in case of their failure so to agree, the Public Service Commission would itself by a supplemental order establish such rates, and fix the division between the respective carriers. On December 20, 1911, the carriers having failed to agree upon a division of the joint rates, the commission notified them that a further hearing would be had on January 3, 1912, to hear evidence touching the proper division of the joint rates. This hearing was had on January 8th, and on the same day the commission made its order dividing the joint rates by giving to the Northern Pacific two cents per hundred pounds with a minimum of \$6 per car, and a maximum of \$10 per car, and the balance of the rate was to be apportioned to the Great Northern and Milwaukee. These are the orders attacked by the appeal. They apply, of course, only to traffic wholly within the state.

Section 86 of the Public Service Commission Act (page 596, Laws 1911) provides: "Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined."

[1] The writs of review in these cases were sued out in the lower court within 30 days after the service of the order of January 8, 1913, but not within 30 days after the service of the order of November 18, 1911. The state thereupon moved the lower court to quash the writs in so far as they sought to review the order of November 18, 1911, upon the ground that they had not been sued out within 30 days after the service of the order, which motions were granted.

This ruling is sustained. Appellants argue that the words "any order," as used in section 86, should be interpreted to mean only final orders. This contention is disposed of in *State ex rel. Railroad Commission v. O. R. & N. Co.*, 68 Wash. 160, 123 Pac. 3, where it was held that the provisions of this section are so plain as to admit of no argument as to their meaning. The Legislature has not limited the right of review to final orders, but has conferred that right, and fixed a limit

within which it may be exercised, upon any order of the commission which is deemed contrary to law, "for the purpose of having its reasonableness and lawfulness inquired into and determined." That the Legislature has a right to provide for the review of any order must be admitted, and when it has in express terms done so, it is not for the courts to say that such review should be, not from any order as in the language of the act, but only from any final order. This would mean a judicial amendment of the act which, doubting our power, we are not disposed to make.

[2] At all events, the order of November 18th was a final order to all intents and purposes. It fully covered and disposed of the matter before the commission. It required nothing to make it effectual, and had it been complied with by appellants would have ended the matter. That it did not end the matter was not because of its lack of finality, but because, appellants having failed to observe its mandate, subsequent action to enforce it became necessary on the part of the commission. Suppose a court of equity should in its decree order the execution and delivery of a deed providing that, if the order was not complied with in ten days, a supplemental decree would be issued, directing such execution by a commissioner then to be appointed, could it be contended that the decree did not become final until the supplemental decree was entered? Or that the time for appeal began to run from the entry of the supplemental decree and not from the entry of the original decree?

[3] It is next urged that the commission has no power to apportion the joint rates between the carriers. As the only power vested in the commission in this regard appellants cite section 83 of the act, providing that when any order of the commission shall require joint action by two or more public service companies, the order shall specify that it shall be done at their joint cost, and if within a given time the companies fail to apportion such costs between themselves, the commission shall have authority after hearing to enter an order fixing the proportion of such cost to be borne by each company. Counsel for appellants argue that the only authority conferred upon the commission by this section is to apportion costs. That may be granted. This section does not touch the question at issue, since it manifestly relates to the cost or expense of complying with an order of the commission requiring joint action on the part of two or more public service corporations. This section plainly refers to some physical connection between the respective companies. It speaks of operation, maintenance, and joint service, thus clearly indicating that something other than the fixing of rates was in the legislative mind.

[4, 5] There was no necessity of again taking up the question of railway rates and the power sought to be conferred upon the com-

mission in this regard, for the legislative will in this particular had been fully written in section 57, providing: "Whenever the commission shall be of opinion, after hearing had upon its own motion or upon complaint, that the rates and charges in force over two or more railroads, between any two points in the state, are unjust, unreasonable or excessive, or that no satisfactory through route or joint rate exists between such points, and that the public necessities and convenience demand the establishment of a through route and a joint rate between such points, the commission may order such railroads to establish such through route, and may establish and fix a joint rate which will be fair, just, reasonable and sufficient, to be followed, charged, enforced, demanded and collected in the future, and the commission may order that car load freight moving between such points shall be carried by the different companies, parties to such through route and joint rate, without being transferred from the originating cars. In case no agreement exists between such railroads for the interchange of cars, then the commission, before making such order, shall be empowered to, and it shall be its duty to, make rules for the expeditious and safe return and proper compensation for the cars so loaded by the company or companies receiving the same."

Appellants contend that this section is violative of the fourteenth amendment of the federal Constitution in that it is a taking of property without due process of law, and likewise infringes upon section 16, art. 1, of the state Constitution, prohibiting the taking or damaging of private property for public or private use without compensation first being made. We cannot follow appellants' argument in support of this contention, as we fail to see how this section in any sense provides for a taking or damaging of private property for public use, or appropriates property without due process of law. Appellants, by virtue of their public character, and in order to carry out the purpose of their organization, have voluntarily devoted all their property to public use, and for this reason it has always been regarded that public service corporations of this character are subject to special limitations by law, as to their rates and charges and as to the manner of the discharge of their public duties. The regulation of rates by the state has never been regarded as a taking of property without due process of law, nor as a taking or damaging without compensation.

The constitutionality of statutes delegating power to public service companies to establish and regulate joint rates of independent and connecting common carriers is expressly established in *Minneapolis & St. Louis R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151. Nor is there anything indicative of a contrary view expressed in *L. & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, relied

upon by appellants as sustaining their contention that rolling stock is property within the meaning and protection of the federal and state Constitutions, and that any requirement by the state that one carrier turn over such property for the use of another is a taking. We cannot find that this last question is involved in this case, as the orders appealed from make no reference to any interchange of cars; nor is there any requirement that one of these carriers shall turn over any portion of its rolling stock for the use and benefit of the other. The orders establish a joint rate for a given service, and apportion that rate between the connecting carriers, leaving to the carriers the convenient and practicable way of complying with the order, either by sending the loaded cars through to their destination or transferring the load from the cars of one carrier to those of the other at the connecting point. The order applies to rates only, and makes no reference to service in the sense spoken of. So far, however, as section 57 confers power upon the commission to order an interchange of cars between connecting carriers in case no agreement for such interchange exists between the carriers, it will be noted that this power is to be exercised (1) when the rates in force between the given points are unjust and excessive, (2) when there is no satisfactory through route and joint rate, (3) when the public necessities and convenience demand the establishment of a joint rate and through route, and (4) when, before the making of such order, the commission shall have made rules and regulations for the expeditious and safe return and proper compensation for the cars so employed.

Referring now to the facts of the Stock Yards Case, we find that there were two stock yards located in the city of Louisville. The Central Stock Yards were the stock terminals of the Southern Railway; the Bourbon Stock Yards were the stock terminals of the Louisville & Nashville railroad. An effort was made to require the Louisville & Nashville railroad to make delivery of cars at the Central Stock Yards instead of at its own terminals, the Bourbon Stock Yards. In holding that the Louisville & Nashville road could not be required to do this, the court, at page 143 of 212 U. S., page 248 of 29 Sup. Ct. (53 L. Ed. 441), says: "It was argued however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the fourteenth amendment as an unlawful taking of its property. In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or breaking bulk, in case of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon that question. It is enough to observe that such a law perhaps ought to be so limit-

ed as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for its protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal indiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. * * * It follows that the requirement of the state Constitution cannot stand alone under the fourteenth amendment, and that the judgment in this respect also, being based upon it, must fall. We do not mean, however, that the silence of the Constitution might not be remedied by an act of Legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state Constitution by the state court."

Now, referring again to section 57, it will be noted that it provides for the very thing the opinion in the Stock Yards Case indicates would destroy the objectionable feature of the order sought, in providing for the expeditious return and proper compensation for the cars used in the interchange. It will also be seen, by referring to the last sentence of the quoted opinion, that the court does not hold that the silence of the Constitution might not be remedied by appropriate legislative act or by regulation of a duly authorized subordinate body, when such legislation is consistent with the state Constitution. It seems to us we have this remedial provision in the establishment of the Public Service Commission, with the power conferred and regulation fixed for its exercise in section 57, and that no showing can be made that such power so conferred and so to be exercised is inconsistent with any constitutional provision.

[8] Appellants attack the sufficiency of the evidence, the joint rate, and its division between the connecting carriers. We find no merit in these contentions. Inquiries of this nature depend altogether upon expert evidence and we might add expert findings, and the state has conferred the power upon the commission to determine the merits of the controversy, and its findings should not be disturbed unless they show evidence of arbitrariness and disregard of the material rights of the parties to the controversy. Such decisions are peculiarly within the province of the commission to make, and "its findings are fortified by presumptions of truth due to the judgments of a tribunal appointed by law and informed by experience." *Interstate Commerce Commission v. C. R. I. Pac. Ry. Co.*, 218 U. S. 88, 80 Sup. Ct. 651, 54 L. Ed. 946.

We repeat what we said in *Puget Sound Electric Ry. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 789, Ann. Cas. 1913B, 763: "The inquiry was of such a nature as to call largely for expert testimony, and the findings made are necessarily of the same nature. In such a case great consideration should be given the findings of that body to whom the state has primarily given the right and authority to determine questions of this character. Such findings should not be disturbed unless they bear evidence of having been arbitrarily reached and without a full and due consideration of all the controlling facts. Their determination calls for the exercise of economic as well as legal principles. Courts may well review the questions submitted, in so far as they suggest the application of legal principles. In so far as they suggest the enunciation of proper economic rules, they must defer largely to those who, by study, experience, and calling, are in a better situation to determine what is and what is not a proper method of determination."

Appellants submit a late decision of the Interstate Commerce Commission, made June 13th, last, in the case of *Manufacturers' Ry. Co. v. St. Louis, Iron Mountain & So. Ry. Co.*, as supporting their contention of lack of power in the commission to establish joint rates. We cannot find anything in that case that is decisive of any point here involved contrary to any conclusion we have reached. That the decision was not so intended is manifest from the fact that the Interstate Commerce Commission has on two occasions reviewed the joint rate order here involved in so far as it applies to interstate traffic, and in each instance has sustained it, not because the state commission had reached the same conclusion respecting state traffic, but because the Interstate Commerce Commission held the through charges resulting from the exclusion of South Tacoma from the Tacoma switching district were excessive, and that any joint rate on interstate traffic to and from South Tacoma, in excess of the differential over the Tacoma rates proposed by the state commission on such traffic, would be unreasonable, and with that view required the Northern Pacific Railway Company and appellants to establish joint through rates. *Public Service Commission v. N. P. Ry. Co.*, 23 Interst. Com. Com'n Rep. 256; *s. c.*, 26 Interst. Com. Com'n Rep. 272. We refrain from further discussion, believing that the orders of the commission were in all things proper, and within the power conferred upon the commission.

The judgment is affirmed.

CROW, C. J., and PARKER and MOUNT, JJ., concur.

FULLERTON, J. I concur in the result.

PECK v. PECK et al.

(Supreme Court of Washington. Dec. 5, 1913.)

1. WILLS (§ 440*)—CONSTRUCTION.

In construing a will, the dominant intention of the testator, as manifested by his will, must, if lawful, be given effect.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 956; Dec. Dig. § 440.*]

2. WILLS (§ 488*)—CONSTRUCTION—AMBIGUITIES.

It is only where the terms of a will are ambiguous and the testator's intention is doubtful that resort may be had to adventitious circumstances to determine that intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1024, 1025, 1033-1036; Dec. Dig. § 488.]

3. WILLS (§ 455*)—CONSTRUCTION.

Courts will not slavishly adhere to mere technical rules of construction in interpreting wills.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 972, 973, 976; Dec. Dig. § 455.*]

4. WILLS (§ 523*)—CONSTRUCTION—ESTATES DEVEISED.

A gift to a class being a gift to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in some definite proportions, a devise of an undivided two-thirds interest in a building to the testator's son and the son's three children, by name, to take share and share alike, is not a gift to a class, and hence the predecease of one of the children results in a lapsed devise which will pass under the residuary clause of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

5. WILLS (§ 523*)—CONSTRUCTION.

A testator devised to his wife a one-third interest in a parcel of land occupied by a building and remaining two-thirds to his son and his three grandsons, naming them. Before the death of the testator, one of the grandsons died without issue. *Held* that, even though the testator knew that there was no cordiality between his son and his wife, who was not the son's mother, yet, as he did not make the gift one to a class, there was no survivorship between the son and the testator's grandchildren, and the lapsed legacy of the deceased grandchild will pass to the wife under a devise of the residue to her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.*]

6. WILLS (§ 740*)—DISTRIBUTION—WHAT CONSTITUTES.

Where a testator devised undivided interest in a building to his wife and to his son and grandchildren, the fact that the wife, who was the executrix, allowed the son to collect part of the rent before the period fixed by the will, which was noninterventional, for distribution, and also joined with the son in mortgaging property, will not establish a distribution which would preclude the wife from claiming a lapsed devise to one of the grandchildren under the residuary clause of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888-1895; Dec. Dig. § 740.*]

7. WILLS (§ 740*)—LAPSED DEVISE—ESTOPPEL TO CLAIM.

Where a testator devised an undivided two-thirds interest in a building to his son and three grandsons, one of whom died before the testator, the fact that the wife, who was made executrix of the will, allowed the son to collect the rent for two-thirds of the building, and joined in a mortgage by the son of an undivided two-thirds of the building, will not raise an

estoppel preventing her from claiming the share of the deceased grandson by virtue of the residuary clause of the will; there being no change of position on the part of the son and the grandchildren.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1888-1895; Dec. Dig. § 740.*]

8. WILLS (§ 698*)—SCOPE OF REMEDY.

Where plaintiff's title depends upon a will, she need not bring an independent action for the construction of the will, but may sue to quiet title and in that proceeding have the will construed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1676; Dec. Dig. § 698.*]

9. APPEAL AND ERROR (§ 425*)—NOTICE OF APPEAL—TIME FOR SERVING.

Under Rem. & Bal. Code, § 1720, providing that all persons whose interests are similarly affected by any judgment may join in the notice of appeal, and any party who is not joined may, at any time within ten days after notice is given, serve an independent notice or join in the appeal already given by filing a statement with the clerk of the superior court to that effect, an attempt by the grantees of the principal defendants, who urged the same defense, to perfect an appeal by serving notice 30 days after the service of notice of the appeal by the principal defendants, comes too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2155-2161; Dec. Dig. § 425.*]

Department 2. Appeal from Superior Court, Spokane County.

Action by Frances E. Peck against Heman Everett Peck and others and Isabella McLaren Howard and another. From a judgment for plaintiff, defendants appeal. Affirmed on the appeal of the first-named defendants; that of the last being dismissed.

Tolman & King, of Spokane, for appellants. John M. Gleeson, A. G. Gray, and A. E. Gallagher, all of Spokane, for respondents.

ELLIS, J. This action was brought by Frances E. Peck to remove a cloud from the title to a one-half interest in certain real estate in the city of Spokane which she claims under the will of her deceased husband and of which one-third, or one-sixth of the entire property, is claimed by the defendants Heman Everett Peck, Roy Peck, and Margaret Peck by virtue of the same will. The following facts are not in dispute: The plaintiff was the wife of one O. O. Peck at the time of his death and for many years prior thereto. She was his second wife. By his first wife, O. O. Peck had one son, the defendant Heman Everett Peck. This son had three sons, Frank Peck, Roy Peck, and Ora Peck. The property here in question was the separate property of O. O. Peck, acquired by him between the time of the death of his first wife and his marriage with the plaintiff. In 1902, O. O. Peck made a nonintervention will of which the following clauses are pertinent to the issues here involved:

"Second. I give, bequeath and devise to my wife, Frances E. Peck, one undivided one-

third (⅓) interest in and to all that certain piece or parcel of land situate on Howard street, in said city and county, and occupied by the building commonly known as 'Peck Building,' and more particularly described as follows, to wit: * * * (No question being presented as to the particular description, we omit it.)

"Third. I give, devise and bequeath to my son, Heman Everett Peck, and to his sons, Frank Peck, Roy Peck and Ora Peck, the remaining undivided two-thirds (⅔) interest in and to the above-described real estate to be divided equally between them share and share alike; provided, however, this clause of my will shall not take effect and be operative until the expiration of five (5) years from the date of my death, and provided further, and I hereby direct, that my said wife, Frances E. Peck, shall take possession of the whole of said above-described real estate, and collect all the rents, issues and profits thereof until the end of said five (5) years, and out of the said rents, issues and profits, to pay all the taxes and other necessary expenses of preserving and protecting said property and after paying said taxes and expenses to pay my son, Heman E. Peck, the sum of twenty-five dollars (\$25.00) per month during said period of five years, and the balance of said rents, issues and profits to herself as, and in lieu of any and all other compensation for managing said real estate and collecting the rents, issues and profits thereof and paying said taxes and expenses and commissions as executrix of this, my last will and testament. * * *

"Fifth. I give, bequeath and devise to my wife, Frances E. Peck, all the rest and residue of my estate, real, personal and mixed.

"Lastly. I do hereby nominate and appoint my wife, Frances E. Peck, executrix of this, my last will and testament, and I do hereby revoke all former wills made by me, and I hereby direct that my said executrix shall not be required to enter any bond, and that my estate shall be settled in the manner herein provided, by my executrix, and that letters testamentary or of administration shall not be required."

After this will was made, and some time prior to the death of the testator, Ora Peck died, a minor, unmarried, intestate, and without issue. The testator died on June 28, 1906, and Frances E. Peck, the plaintiff, qualified as executrix, filed an inventory, caused an appraisal of the estate to be made, and procured an order of the superior court in probate, declaring the estate solvent, and authorizing her to administer and settle the estate in accordance with the terms of the will and without the intervention of the court. Some time after the death of the testator, Frank Peck died, leaving as his sole heir his widow, the defendant Margaret Peck. After the testator's death and prior to August, 1910, the defendants Peck had made mortgages upon their interest in

the property in question, apparently without designating the extent of that interest, to the plaintiff and also to certain other persons. On August 19, 1910, a loan was made to the defendants Peck for the purpose of taking up these mortgages, by the defendants Howard, which loan was secured by a mortgage on the undivided two-thirds interest in the property now claimed by the defendants Peck. On February 17, 1911, the plaintiff and defendants Peck joined in a five-year lease of the entire premises in question to the Combination Club Café, which lease contained the following provision: "One-third of each and every month's rent to be paid to Frances E. Peck; the remaining two-thirds of each and every month's rent to be paid to Everett H. Peck, the lessors." Other facts upon which there was a conflict in the evidence will be noticed in the course of the discussion.

At the conclusion of the evidence, the court declined to make any findings of fact or conclusions of law, but entered a decree adjudging the plaintiff to be the owner in fee simple of an undivided one-half interest in the property, free from any interest or lien of any of the defendants, and quieting her title thereto and awarding her costs. The defendants appeal.

We find it unnecessary to set out or review the voluminous pleadings further than to say that they are sufficient to raise the following questions, the answers to which must be determinative of the case: (1) Was the devise of the two-thirds interest, to be divided equally, share and share alike, between Heman Everett Peck and his sons, Frank, Roy, and Ora, a gift to individuals as tenants in common, which lapsed as to the share of Ora upon his death before the testator's demise, or was it a gift to a class composed of the persons named which survived unimpaired to the others of that class on the death of Ora Peck prior to the death of the testator? (2) Was there such a distribution of the estate prior to the commencement of this suit in accordance with either of these views as to be binding upon the parties to this action? (3) Has the respondent estopped herself to assert any claim to more than the one-third of the real estate in question? (4) Has the respondent mistaken her remedy?

1. The appellants earnestly insist that the devise to the testator's son, Heman E. Peck, and to his sons, Frank Peck, Roy Peck, and Ora Peck, of the undivided two-thirds interest in the real estate in question, to be divided equally between them, share and share alike, was a gift to these persons collectively as a class, and that those of the class who survived the testator took the share which would have gone to the testator's grandson Ora, had he outlived the testator. The respondent is equally insistent that the devise was of a specific interest to each of the persons named, as an individual, and that, on the death of Ora Peck, the de-

vise to him lapsed, and the interest intended for him fell into the residuum and passed to the respondent under the fifth clause of the will.

[1] It is, of course, a rule to which there can be no dissent that, in construing a will, the dominant intention of the testator, as manifested in his will, must, if lawful, be given effect; but the intention which controls is that which is positive and direct, not that which is merely negative or inferential. *Bill v. Payne*, 62 Conn. 140, 25 Atl. 354.

[2] It is only where the terms of the will are ambiguous, and the intention left in doubt, that a resort may be had to adventitious circumstances to determine that intention. Such circumstances can never be invoked to create an ambiguity not apparent in the will itself, nor necessarily arising when it is sought to apply the terms of the will to the subject-matter or to the beneficiaries. The duty of the court is ended when it has determined by the well-settled rules of interpretation what the testator actually intended by the language which he has used. If that intention is valid, it must be carried out. *Herzog v. Title Guaranty & Trust Co.*, 177 N. Y. 86, 69 N. E. 283, 284, 67 L. R. A. 146.

[3, 4] Whether a devise is intended as a gift to a class collectively or to individuals distributively as tenants in common must, of course, primarily be determined by the language employed in the particular devise. If there is any doubt as to the intention there expressed, resort must be had to the other provisions of the will, and, if there is still a doubt, aid may sometimes be found in the situation and relation of the persons interested and in the circumstances of the estate. Owing to the almost infinite variety of language which may be used in wills, it is obviously impossible to lay down any invariable rule for determining the intention. Courts will not permit themselves to be enslaved by mere technical rules of construction, but there are certain broad canons of interpretation which have become so thoroughly established by judicial announcement that they may be said to have passed into the body of substantive, or at least definitive, law upon the subject, which the courts will not capriciously disregard.

As defining a gift to a class, no rule has been more frequently announced, nor more universally adhered to, than the following: "In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number." In *re Kimberly's Estate*, 150 N. Y. 90, 93, 44 N. E. 945, 946. "A number of persons are popularly said to form a class when they can be designated by some general name as 'children,' 'grandchildren,' 'nephews';

but in legal language the question whether a gift is one to a class depends, not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions; the share of each being dependent for its amount upon the ultimate number of persons." 1 *Jarman on Wills* (6th Ed. Bigelow) p. 262. This rule is announced in *hæc verba* as a determinative principle in each of the following decisions, in which the exact question here involved was presented and decided adversely to the contention of the appellants here: In *re Murphy's Estate*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110; In *re Russell*, 168 N. Y. 169, 61 N. E. 166, 167; *Herzog v. Title Guaranty & Trust Co.*, 177 N. Y. 86, 69 N. E. 283, 286, 67 L. R. A. 146; *Dulany v. Middleton*, 72 Md. 67, 19 Atl. 146, 149. See, also, 80 Am. & Eng. Encyc. Law (2d Ed.) p. 718; 40 Cyc. p. 1473.

Applying this rule to the third clause of the will above quoted, it is evident that, standing alone, that clause was not a gift to a class collectively, but a distributive gift to the individuals named. The number of persons was certain at the time of the gift, and the share which each was to take was definite and in no way dependent for its amount upon the number who might survive. The devise was "to my son, Heman Everett Peck, and to his sons, Frank Peck, Roy Peck and Ora Peck, the remaining undivided two-thirds (⅔) interest in and to the above-described real estate to be divided equally between them share and share alike." This clause evinces no intention that the extent of the interest given to any of the persons named should be determined by the ultimate number of persons. The four persons named do not meet Jarman's popular definition of a class. They could not be designated by any general name, as "children" or "grandchildren." One was a son, the others grandsons. This fact, though not controlling, is at least significant in view of the fact that the testator used no other words indicating an intention to treat them as a class or that the survivors should take the entire two-thirds interest mentioned.

There is another general rule of construction which, under different forms of expression, has met an almost universal approval by the courts. "Where there is a gift to a number of persons who are indicated by name, and also further described by reference to the class to which they belong, the gift is held *prima facie* to be a distributive gift and not a gift to a class." Page on *Wills*, § 543; In *re Hittell's Estate*, 141 Cal. 432, 75 Pac. 53, 54; *Kent v. Kent*, 106 Va. 199, 55 S. E. 564, 567; *Moffett v. Elmendorf*, 152 N. Y. 475, 46 N. E. 845, 57 Am. St. Rep. 529; *Frost v. Courtis*, 167 Mass. 251, 45 N.

E. 687; *Dildine v. Dildine*, 32 N. J. Eq. 78, 80; *In re Russell*, supra; *In re Murphy's Estate*, supra. See, also, Rood on Wills, § 479, p. 317; Remsen, Wills, p. 93; 30 Am. & Eng. Encyc. Law (2d Ed.) 718. Applying this rule to the clause of the will under discussion, it is plain that, even had the four persons named stood in the same relation to the testator so as to be capable of one general class description, and had they been so described, the further particular designation by name must have been held to constitute the devise to them in equal parts a distributive gift and not a gift to a class. So far as this clause and the one preceding it are concerned, the testator simply indicated his wife, his son, and his three grandsons by name as his devisees of definite interest in the property in question, indicating in a general way their relation to himself. As stated in *Bill v. Payne*, supra: "It is suggested that the nephews and neeces, excluding the sister, may well enough take as a class. But that destroys the unity of the gift and makes a division of the devisees. We fail to discover that the testatrix had any such intention. She simply named the legatees, indicating in a general way the relation which each sustained to herself, and provided that her property should be equally divided among them. Thus each one took individually and not as a member of a class, as a tenant in common and not as a joint tenant."

The Supreme Court of California, in *re Murphy's Estate*, supra, was confronted with a situation substantially the same as that now before us, save that there the general heirs claimed the property covered by the lapsed legacy, while here the claim is made by the widow as residuary devisee. The mooted clause of the will there involved was as follows: "Fourth. It is my will and desire that all the rest of my property both real estate and personal property shall go to, and be equally divided among the four children of my late sister Catherine F. Flynn, deceased; that is to say: I give, devise and bequeath all the rest of my personal property and all my real estate of whatsoever kind and wheresoever situate, share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan, and Kate I. Prendergast." William D. Flynn died without issue prior to the death of the testator. The court, after announcing the general principles of construction to which we have referred, and citing many sustaining authorities, uses the following language: "But assuming, however, that the language used in the clause in question is capable of two different legal meanings resulting from the testator devising his estate to the four children of his late sister, followed by other words of express devise to each of the children by name and in equal proportions, still this mention of them by name and a devise to them in equal shares will control the description

of them as children of his deceased sister. If words which, standing alone, would be effectual to create a class, are followed by equally operative words of devise to devisees by name and in definite proportions, the law infers from the designation by name and mention of the share each is to take that the devisees are to take individually, and as tenants in common, and that the descriptive portion of the clause (children of a deceased sister) is intended merely as matter of identification." In addition to the foregoing authorities, the following may be cited as sustaining our construction of the clause of the will here in question: *Rockwell v. Bradshaw*, 87 Conn. 8, 34 Atl. 758; *Ritch v. Talbot*, 74 Conn. 137, 50 Atl. 42; *Church v. Church*, 15 R. I. 138, 23 Atl. 302; *Dresel v. King*, 198 Mass. 546, 85 N. E. 77, 126 Am. St. Rep. 459; *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831; *Langley v. Westchester Trust Co.*, 180 N. Y. 328, 73 N. E. 44; *Auger v. Tatham*, 191 Ill. 296, 61 N. E. 77; *In re Sharpless' Estate*, 214 Pa. 335, 63 Atl. 884. As we have intimated, these rules of construction are not absolute. They must give way to the dominant intention of the testator when that intention has been clearly ascertained. The appellants insist that the whole will shows a dominant intention on the testator's part that Heman E. Peck and his sons should take as a class. We have quoted every provision of the will which can have any possible bearing upon this question. It fails to disclose any such intention.

[8] It is argued, in effect, that the intention is explicit to give only an undivided one-third of the property in question to the widow, but that intention is no more explicit than the intention to give of the other undivided two-thirds one-fourth only to each of the four persons named, since the other undivided two-thirds is given specifically "to be divided equally between them, share and share alike." It is insisted that, by the division of the Peck building into two parts of one-third and two-thirds, there is an implied intention that in no event shall the widow take more than an undivided one-third of the property in question; but, in view of the fact that there is no direct provision for survivorship among the four named devisees of the other two-thirds, and that under the fifth clause of the will there is a direct provision that the widow take the residuum of the estate, no implication that she can in no event take more than an undivided one-third of the real estate here in question can reasonably arise. It is also argued that the testator's knowledge that his son and grandsons, on the one hand, and his second wife, the respondent, on the other, were not altogether friendly, was a circumstance from which to infer an apparent intention on his part to give the two-thirds of the property in question to his son and grandsons as a class, with the incident of survivorship in

case of the death of any of them prior to his own demise. Had this been his dominant intention, it is difficult to conceive a reason for the omission from his will of any reference to the intended survivorship while specifying with particularity the son and the three grandsons by name, and providing that they take in equal parts, "share and share alike." To override the plain terms of the will on the mere suggestion of a possible contrary motive would be to rewrite the will, not to construe it. Again, as said in *Bill v. Payne*, supra: "Conceding then that the testatrix intended to disinherit her sister, it must be remembered that she could only do that by effectively giving her property to others. That she attempted to do. That she failed was owing to events which occurred after making her will—events for which she made no provision as she might have done. It frequently happens that legatees die during the lifetime of the testator. The testatrix could have provided for such a contingency by giving it to the survivors, or to other parties. She did neither. There is therefore some presumption that she intended that the law should settle the matter. That presumption is strengthened by the fact that she had an opportunity to change her will after one or more of the legatees had died, and failed to do so."

In the case before us, the presumption that the widow take is even stronger than that in favor of the sister in the case above quoted. There was no intention to disinherit the widow, or to withhold from her everything except a definite bequest. On the contrary, she was expressly made the beneficiary of the residuary clause of the will. The supposed controlling motive was as well known to the testator after the death of Ora Peck as it was before. Still, even after the death of Ora Peck, the testator made no provision for the survivorship of the devise to him in favor of the other three. If that had been his dominant intention at any time or for any reason, he would surely then have so changed his will as to express it, since a contingency which the will did not recognize or provide for other than by the residuary clause had then clearly arisen. In *re Hittell's Estate*, 141 Cal. 432, 75 Pac. 53; *Starling's Executor v. Price*, 16 Ohio St. 29. The third paragraph of the will, on its face, must be construed as a gift to the individuals named as tenants in common, and not a gift to a class, and we fail to find anything in other parts of the will or in the attendant circumstances evidencing any other intention on the testator's part.

The authorities relied upon by the appellant are: *Springer v. Congleton*, 30 Ga. 976; *Warner's Appeal*, 39 Conn. 253; *Talcott v. Talcott*, 39 Conn. 186; *Bolles v. Smith*, 39 Conn. 217; *Stedman v. Priest*, 103 Mass. 293; *Jackson v. Roberts*, 14 Gray (Mass.) 546; *Schaffer v. Kettell*, 14 Allen (Mass.) 528; *Swallow v. Swallow*, 166 Mass. 241, 44 N.

E. 132. Nearly all of these cases are noticed by the Supreme Court of California in the opinion in *Re Murphy's Estate*, supra. As there pointed out, in none of them was any different rule of construction announced from those which we have here invoked. In *Church v. Church*, supra, nearly all of these cases are discussed and distinguished. In each of them there was found either in the will itself or in the surrounding circumstances clear and convincing evidence of an intention on the testator's part to make a gift to the legatees or devisees named as a class and not as individuals. Here, however, we cannot find anything either in the will itself or in the surrounding circumstances to overcome the presumption that, by naming the devisees and the portions each should take the testator intended a distributive gift.

[§] 2. The will being noninterventional, there has been no decree of court distributing the estate, but it is contended by the appellants that the respondent has, by agreement with the other devisees, distributed the entire property in question, one-third to herself, and two-thirds to the appellants Peck. The authorities cited by the appellants in this connection go no further than to sustain the view that where there has been an actual distribution of the estate, accepted as such by the devisees or legatees, it is valid and binding without any order of court making the distribution or affirming the distribution made, and that after such distribution the executor or administrator loses control over the res distributed. This may be conceded, but the question here presented is: Has there been any distribution of the property in question? There is no evidence of, nor is it claimed that there was, in fact, any specific or direct agreement to that effect. The evidence of distribution relied upon is found in the fact that the respondent joined in the lease of February 17, 1911, to the Combination Club Café, which provided that she should receive one-third of the rent and that the other two-thirds should be paid to Herman Everett Peck. The latter testified that the defendant then said that she wanted her share of the rent paid to her, and that, as to the other shares, it made no difference to her, as it was none of her business. The respondent emphatically denied making any such statement, and testified that she agreed to this division because Herman E. Peck requested it, complaining that he was in great need of money, and that she then, and at all times, had insisted that she owned an undivided one-half of the property. Another circumstance relied upon is the claim that, when the Howard mortgage was given by the appellants Peck, the respondent read it and knew that it covered an undivided two-thirds of the property and that, in order to facilitate the making of the loan secured by the mortgage, she made an affidavit that all the debts of the estate had been paid and that she

accepted part of the proceeds of that mortgage in payment of a prior mortgage held by herself. The respondent denied having read the mortgage and denied any knowledge that it covered an undivided two-thirds of the property. It is manifest that this, and other evidence of the same character, could only be effective as proof of distribution by estoppel respondent to dispute distribution.

[7] 3. Giving to this evidence all the probative force of which it is capable, it seems to us to fall far short of establishing an estoppel in pais against the respondent in favor of appellants Peck. These transactions in no way redounded to the benefit of respondent or to the injury of appellants Peck. One or the other of these results would be essential to an estoppel. Neither of these matters had any tendency to place the respondent in any better position than she was before, and certainly placed the appellants Peck in no worse position. In fact, they alone were the gainers by both transactions. No element of misrepresentation to the detriment of appellants Peck enters into either transaction. The appellants were as fully cognizant of all the facts and of the provisions of the will as was the respondent. We have been cited to no decisions of any court sustaining an equitable estoppel on facts such as these. On the contrary, our own courts recognize the necessity of a direct benefit, on the one hand, or an injury, on the other, to create or effect an estoppel. *Hughes v. N. Y. Life Ins. Co.*, 32 Wash. 1, 5, 72 Pac. 452; *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765; *Daniel v. Gold Hill Mining Co.*, 28 Wash. 411, 68 Pac. 884; *Butler v. Supreme Court Independent Order of Foresters*, 53 Wash. 118, 101 Pac. 481, 26 L. R. A. (N. S.) 293. See, also, *Mutual Life Insurance Co. v. Phinney*, 178 U. S. 327, 343, 20 Sup. Ct. 906, 44 L. Ed. 1088; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221, 230.

[8] 4. Finally, it is contended that the respondent has mistaken her remedy. This claim is apparently based upon the assumption that there has been a distribution of the estate and that this action is equivalent to a collateral attack upon the title conferred by such distribution. We find no merit in this contention. This is not an action to contest the will, nor, primarily, to construe the will. It is an action to quiet title, in which the will is invoked as a muniment of title. We can conceive of no reason why an independent action to quiet title may not be maintained where that title depends upon the construction of a will, which would not apply where title depended upon the effect of a deed or any other instrument.

[9] The respondent has interposed a motion to dismiss the appeal of the defendants Howard on the ground that their notice of

appeal was belated. The defendants Peck, on January 3, 1913, appealed from the decree and served their notice of appeal on the attorneys for the defendants Howard on the same day. The defendants Howard did not join in that notice, nor did they join in that appeal by filing a statement to that effect with the clerk, nor have they taken any independent appeal within ten days from that appeal. They served their notice of appeal on February 3, 1913, one month after the original appeal was taken. The statute, Rem. & Bal. Code, § 1720, so far as material, reads as follows: "All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an independent notice of like appeal, or join in the appeal already taken by filing with the clerk of the superior court a statement that he joins therein or in some part thereof, specifying in what part. Any such party who does not so join shall not derive any benefit from the appeal unless from the necessity of the case; nor can he independently appeal from any judgment or order already appealed from, more than ten days after service upon him of written notice of the former appeal, unless such former appeal be afterwards dismissed." The terms of the statute are imperative and leave no room for construction. *Griffith v. Seattle Nat. Bank Bldg. Co.*, 16 Wash. 329, 47 Pac. 749. It is manifest that the interests of the defendants Peck and the defendants Howard are similarly affected by the decree. While those interests are not identical, they are all traceable to the title claimed by the Pecks under the will. The defenses set up by the defendants Howard were identical with those set up by the Pecks. The answers were, in all material particulars, the same. The interests of the Howards and the Pecks, so far as attacked by the plaintiff's complaint, and so far as affected by the issues raised by the answers, were exactly the same. The evidence adduced in support of both answers was identical. The decree founded thereon necessarily affected the interests of all of the defendants similarly. We are loath to dismiss an appeal in any case; but, in view of the express terms of the statute, we have no discretion in the matter. The motion is granted.

The judgment is affirmed.

CROW, C. J., and MAIN, MORRIS, and FULLERTON, JJ., concur.

STATE v. HAZZARD.

(Supreme Court of Washington. Dec. 8, 1913.)

APPEAL AND ERROR (§ 835*)—APPEAL—REVIEW—MOTION FOR REHEARING—CONSTITUTIONAL QUESTIONS.

The Supreme Court will not consider and review an alleged constitutional question, not reasonably predicated on the assignments of error theretofore made, first raised by accused on motion for rehearing in order to lay a foundation for a writ of error from the Supreme Court of the United States.

[Ed. Note.—For other cases, see Appeal and Error, Cent.Dig. §§ 3241-3243; Dec.Dig. § 835.*]

Department 1. On motion for an additional order to amend the record so that it will appear that the court considered and overruled a constitutional question raised by accused so as to sustain an application for a writ of error from the Supreme Court of the United States. Denied.

Karr & Gregory and J. H. Buchanan, all of Seattle, for appellant. Thomas Stevenson, of Bremerton, for respondent.

CROW, C. J. Appellant, being charged with murder in the first degree, was convicted of manslaughter, and the judgment of the superior court of Kitsap county was affirmed by this court. *State v. Hazzard*, 184 Pac. 514. Thereafter a petition for rehearing was filed, in which appellant for the first time contended that the method of prosecution adopted by the state, and permitted by the trial court, and the instructions of the trial judge, constituted an infringement of appellant's rights and privileges, guaranteed by the fifth and fourteenth amendments to the Constitution of the United States, and that sections 2167, 2168, and 2263 of Rem. & Bal. Code, if given the construction which the rulings and instructions of the trial court by necessary implication placed upon them, are obnoxious to, and an infringement of, such constitutional guaranties. This petition was denied without an opinion, and appellant, desiring to obtain a writ of error from the Supreme Court of the United States, now presents to this court a motion reading as follows: "Comes now the above-named appellant and defendant and moves the court for an order or other proper action or direction to make the record in this cause and court show the fact that this court considered and passed upon adversely the contention made by this appellant and defendant in her petition for rehearing (page 59 of the printed petition); that the method of prosecution adopted by the state and permitted by the trial court, and the charge to the jury given by the trial court, constituted an infringement of the rights and privileges guaranteed to this defendant by the fifth and fourteenth amendments of the Constitution of the United

States; and that sections 2167, 2168, and 2263 of Rem. & Bal. Code of the laws of the state of Washington are obnoxious to said constitutional guaranty. This motion is made upon the assumption that this court did consider and pass adversely upon said contention. If this court did not consider or pass upon said contention, then defendant respectfully moves for an order making the record show that fact."

The record shows that the contention set forth in the petition for rehearing, and mentioned in the motion, was neither made in the trial court nor in the briefs in this court. It was first presented in the petition for rehearing, substantially as above stated. Citing *Sullivan v. Texas*, 207 U. S. 416, 28 Sup. Ct. 215, 52 L. Ed. 274, *Illinois R. R. Co. v. Kentucky*, 218 U. S. 551, 31 Sup. Ct. 95, 54 L. Ed. 1147, and *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 31 Sup. Ct. 171, 55 L. Ed. 137, appellant contends that, where a federal question is raised for the first time in a petition for rehearing in the state court, it will be examined by the United States Supreme Court if the record shows that the state court considered the federal question thus presented and passed thereon adversely to the petitioner's contentions. Citing other cases from the Supreme Court of the United States, appellant concedes that the United States Supreme Court will not review such matters unless the record affirmatively shows that the state court did consider and pass upon them. Denying a petition for rehearing in *State ex rel. Milwaukee Terminal R. Co. v. Superior Court of King County*, 54 Wash. 365, at page 377, 104 Pac. 175, this court said: "The respondent has filed a petition for a rehearing en banc, wherein it seeks to raise the question that the condemnation sought is for a private and not a public use. This question was not raised, either in the original briefs or in the oral argument, and was not considered by the court. * * * We cannot sanction the practice of permitting new questions to be raised in a petition for rehearing."

The practice of this court not to consider points raised for the first time in petitions for rehearing, unless they can be predicated reasonably upon assignments of error theretofore made, is well established and was clearly announced in the excerpt above quoted. For these reasons, conceding without deciding that a federal question has been raised in appellant's petition for rehearing, this court properly refused to consider the same.

The motion for an additional order is denied.

CHADWICK, GOSE, ELLIS, and MAIN, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**FISHER FLOURING MILLS CO. v.
SWANSON.**

(Supreme Court of Washington. Dec. 13, 1918.)

1. CONTRACTS (§ 116*)—LEGALITY—SALE OF GOODS.

A manufacturer who has imparted a reputation to his goods may lawfully employ any means to secure the legitimate benefits of that reputation, not inhibited by statutory enactment or inimical to sound public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

2. CONTRACTS (§ 116*)—VALIDITY—"RESTRAINT OF TRADE"—"RESTRAINT OF COMPETITION."

The term "contracts in restraint of trade" applies to undertakings not to pursue a particular profession, trade, or business. Such contracts are valid only when restricted as to time and place, and when reasonably necessary to the protection of the party in whose interest they are made, while contracts in "restraint of competition" are those which by any other means tend unreasonably to restrict competition in trade; these being of a more recent development and prohibited on the ground of public policy.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

3. CONTRACTS (§ 116*)—LEGALITY—FIXING PRICES.

Where a manufacturer has a monopoly of a manufactured product, a contract of sale binding the purchaser to maintain a retail price on resale of the article is essentially restrictive of competition, unreasonable, and void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

4. CONTRACTS (§ 116*)—ILLEGALITY—FIXING PRICES.

Where a contract between buyer and seller, fixing the price at which the article may be resold, is not ancillary to some main lawful contract, but its sole object is to restrain competition and enhance prices, and its only tendency is to control the market, it is invalid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

5. CONTRACTS (§ 116*)—RESTRAINING COMPETITION—FIXING PRICES.

Whether a contract between a manufacturer and a seller, fixing the price at which an article may be resold, is invalid as restraining competition, depends on whether, considering all the circumstances including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of the commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all the dealers, operating as a substantial control of the market by one or a few, and tending to create a monopoly, in which case the contract is void, otherwise not.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

6. CONTRACTS (§ 116*)—PRICES OF COMMODITIES—VALIDITY.

Contracts fixing prices of commodities for resale as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from nor tending to create or maintain a monopoly, will be sustained when the restriction, under the circumstances of the particular

case, is reasonable in reference to the interests of the parties and the interests of the public, to wit, when the price fixed is fairly necessary to the protection of the covenant and fair to the public, in that it furnishes only a reasonable profit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

7. CONTRACTS (§ 116*)—SALES—PRICE OF RE-SALE—VALIDITY.

Complainant, a large manufacturer of a special brand of patent flour, had widely advertised the same and sold it to retailers under an agreement to maintain a specified retail price, which was not unreasonable and did not afford more than a reasonable profit. Complainant had no monopoly of the patent flour business, and the contract was necessary to enable it to maintain the good will of retailers who purchased the same, and also the demand for the flour. Held, that the fixing of the retail price was merely ancillary to the contract of sale, and was not void as tending to restrict competition.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 542-552; Dec. Dig. § 116.*]

En Banc. Appeal from Superior Court, King County; King Dykeman, Judge.

Suit by the Fisher Flouring Mills Company against O. A. Swanson. Judgment for defendant, and plaintiff appeals. Reversed.

Hastings & Stedman, Higgins, Hall & Halverstadt, and Hyman Zettler, all of Seattle, for appellant. John E. Humphries and Charles E. Remsberg, both of Seattle, and Wm. A. Johnson, of Everett, for respondent.

ELLIS, J. In this action, the plaintiff seeks to enjoin the defendant from selling flour manufactured by the plaintiff at less than the retail price fixed by the plaintiff in a contract of sale made with the defendant, and to recover damages in the sum of \$1,000. The complaint alleges, in substance: That the plaintiff is a Washington corporation with its principal place of business at Seattle, where it has erected a large manufacturing plant and installed special machinery for manufacturing a special brand of flour known as "Fisher's Blend of Patent Flour." That the cost of manufacturing this flour is greater than that of ordinary flour. That the plaintiff has widely, and at great expense, advertised this flour as a blended flour, pure, wholesome, and of unusual excellence, and has used certain copyrighted designs and the above trade-name to acquaint the public with the flour, so that it has become widely known as of unusual excellence and as of higher price than the ordinary patent flour, and large quantities of it are sold in Seattle and King county. That it is necessary to operate the mill to its full capacity in order to continue the business at a profit. That the flour is sold in all of its markets in constant and keen competition with many other brands of patent flour of all qualities, and the quantity of plaintiff's flour so sold is only a very small part of the pure blended flour and of the quantity of ordinary patent flour sold in each of such markets.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

That it is necessary to sell the flour through all retail dealers in each community rather than through one or two, as may be profitably done with ordinary patent flours, so that the good will of the retail dealers is necessary to the success of the company. That in order to keep this good will it is necessary to maintain a minimum retail price offering a reasonable profit to the retailer. That, if the uniform minimum price is not maintained, the reputation of the flour will be injured, the good will of the dealers lost, and the plaintiff will be prevented from operating its mill at a profit. That the defendant conducts a retail grocery store in Seattle, and on or about October 3, 1911, entered into an oral contract with the plaintiff, agreeing to purchase from the plaintiff a car load of this flour at the uniform wholesale price, and further agreeing not to sell the flour at less than a certain minimum retail price. That these prices were the same as the wholesale and retail prices maintained by the plaintiff and its other customers, and permit no more than a reasonable profit. That, according to the contract, the plaintiff delivered an installment of the flour on this purchase; the defendant accepting therewith a written invoice containing the following stipulation: "Retail prices. Our flour is sold on condition, which is made a part of the consideration of the sale of said goods, that the purchaser, if he retails the same, will maintain our fixed minimum retail selling prices, and if he wholesales them, they are sold subject to the same conditions. Nothing in the above conditions shall prevent the purchaser from fixing the selling price in excess of the above lists when cost of transportation or other local conditions necessitate the same." That, since the delivery of the flour to the defendant, he has violated the agreement by selling the flour at less than the agreed price, and has widely advertised such sales, which price is less than the general retail price of all the other patent flours so sold in Seattle and the state of Washington. That his purpose in so doing is to attract customers to his store, and that he has threatened to continue this practice. That the defendant's action in this respect is causing damage to the plaintiff by injuring the reputation of the flour with the public and destroying its sale to retailers in Seattle and throughout the state. That, by reason of defendant's action, other retailers are threatening to follow his example, which will curtail the sales of the flour and cause irreparable damage to the plaintiff. That it has already decreased the sales of the flour, by rendering it unpopular with the retailers, to the plaintiff's damage in the sum of \$1,000. That the plaintiff has no adequate remedy at law. The defendant demurred to the complaint upon the ground that it does not state a cause of action, and that the court has no jurisdiction of the subject-matter. The demurrer was sustained, and, the plaintiff electing to stand upon its complaint,

the action was dismissed. The plaintiff appeals.

A single question is presented: Has a manufacturer, who has given a reputation to particular goods which he creates, the right to fix in his contract of sale to retailers a reasonable minimum price at which those goods shall be sold to consumers?

[1] It may be premised as a postulate that a manufacturer who has imparted a reputation to his goods may lawfully employ any means to secure the legitimate benefits of that reputation not inhibited by statutory enactment or inimical to a sound public policy.

It is not claimed, on the one hand, that the contract in question is inhibited by any statute of this state. No question of interstate commerce is involved. We are therefore not here concerned with the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Nor is it claimed, on the other hand, that the fact that the article sold was under a trade-name or in a trade dress, or the fact that it was manufactured by a patented process, affords the contract any immunity from invalidity which it would not otherwise possess. These things must be regarded as immaterial to this discussion. No question of public service corporations is involved. What we shall say has no application to contracts of corporations charged with public functions or duties as such.

[2] The question is thus reduced to the inquiry whether at common law the contract here involved is violative of any canon of public policy. In considering this question, much confusion may be avoided by marking the distinction not always observed in the adjudicated cases between those contracts which, since the earliest history of the law on the subject, have been designated as "contracts in restraint of trade," and those more correctly designated as "contracts in restraint of competition." The term "contracts in restraint of trade" has so long been applied to undertakings not to pursue a particular profession, trade, or business, and has so thoroughly acquired that conventional significance, as to render its use in any other connection confusing. The rules relating to such contracts are of long standing and thoroughly established. Such contracts are valid only when restricted as to time and to place, and when reasonably necessary to the protection of the party in whose interest they are made. Conversely stated, such contracts, when without limit as to time or place, are invalid. *Long v. Towl*, 42 Mo. 545, 97 Am. Dec. 355. The broader doctrine inhibiting, as contrary to public policy, all contracts which, by any other means, tend unreasonably to restrict competition, is of much more recent development, and is much less thoroughly settled. This doctrine has to do with the rules of public policy relating to control of markets. See note to *Harding v.*

American Glucose Co., 182 Ill. 551, 55 N. E. 577, 84 L. R. A. 738, 74 Am. St. Rep. 238, 239; Noyes, Intercorporate Relations, § 336; 2 Eddy, Combinations, §§ 719, 722; Cooke, Combinations, Monopolies & Labor Unions (2d Ed.) § 160.

[3] This broader doctrine is primarily directed against monopoly in any form, and seeks to protect the public interest by holding invalid all contracts by which monopoly of a given market may be either created or sustained, or, as such, made profitable to its beneficiaries, where the right to make them is not incidental to a legal monopoly such as is accorded by the patent laws. With these last we are not here concerned. It is manifest that in case of such contracts the public interest is not conserved by mere limitations either as to time or space. The public interest can only be secured by a prohibition of all contracts having a tendency to create or foster monopoly by a control of any given market. Noyes, Intercorporate Relations (2d Ed.) § 357. Since limitations of time and space do not serve as the test of the validity of contracts in restraint of competition, the test must be sought in the reason which underlies the rule of public policy. It must be found in the tendency of the given contract to control the given market. If the contract has that tendency, it is against public policy. If it does not have that tendency, it is not. In applying this test, the public interest is always the first and controlling consideration. A contract or combination creating a general—that is to say, complete—restraint or restriction, however slight, within a given market, is essentially invalid because it must either result from, or tend to produce, a monopoly. Its inevitable tendency is to destroy competition. Under an economic system founded upon competition, every general restriction—that is, every restriction covering all or a controlling fraction of a given commodity—is essentially unreasonable. It is not fairly necessary to the protection of the manufacturer. Having a monopoly, he needs no protection. It is not in any sense beneficial to the public, because it does not tend to create an incentive to increased excellence of product in order to maintain the better price, but, because of the monopoly, has a contrary effect.

[4] And again, when the contract fixing the price is not ancillary to some main lawful contract, the sole object of the contract is to restrain competition and enhance prices, and its only tendency is to control the market. It is therefore invalid because of this tendency, without reference to its reasonableness in other particulars. In such a case, there is no main lawful purpose to subserve which partial restraint is permissible; hence nothing by which to measure the reasonableness of the restraint. Its only measurable tendency would be to create a monopoly. Such a contract is therefore invalid. *United States v.*

Addyston Pipe & Steel Co., 85 Fed. 271, 29 O. C. A. 141, 46 L. R. A. 122; *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 23 L. R. A. (N. S.) 1260.

But it does not follow that every contract restraining competition as to an insignificant part of the total of a given commodity in a given market in any degree is obnoxious to public policy. At common law, contracts containing limited restrictions on competition as incidental to some main contract and not entered into for the sole purpose of suppressing competition or controlling the market are not always and necessarily invalid. 2 Eddy, Combinations, § 723. "A monopoly created by the crown seems to have been necessarily illegal, and, subject to the limitations hereafter considered, the same seems true of what is strictly a monopoly; that is, a complete restriction upon competition, resulting from the acts of individuals. But, however it may have been as to restrictions upon competition created by the crown, it seems clear enough that not all restrictions upon competition resulting from the acts of individuals are illegal. This results from the view that seems to be generally accepted, that the economic effects of a restriction upon competition are not necessarily evil; in other words, that unrestricted competition results in economic evils, capable of prevention or removal by some degree at least of restriction upon such competition. A different view of such economic effects has, however, led to judicial declaration in sweeping condemnation of any restriction upon competition, though, as may readily be inferred, there is no decision to that effect." Cooke, Combinations, Monopolies & Labor Unions, § 118. *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 410, 23 L. R. A. (N. S.) 1260. See, also, Noyes, Intercorporate Relations (2d Ed.) § 336; 1 Eddy, Combinations, §§ 307-324, incl.; *Herriman v. Menzies*, 115 Cal. 16, 44 Pac. 660, 46 Pac. 730, 85 L. R. A. 318, 58 Am. St. Rep. 81; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784; *State v. Eastern Coal Co.* (R. I.) 70 Atl. 1; *Lanyon v. Garden City Sand Co.*, 223 Ill. 616, 79 N. E. 313, 9 L. R. A. (N. S.) 446.

Partial restrictions have been held valid where the restraint was in different particulars. For example: The contract may limit the vendee's right of sale to a certain territory—a restriction as to place. *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593. It may provide that the vendee deal exclusively with the vendor and only in articles of the vendor's manufacture—a restriction as to person. *Brown v. Rounsavell*, 78 Ill. 589; *Wood Mowing & Reaping Co. v. Greenwood Hardware Co.*, 75 S. C. 378, 55 S. E. 973, 9 L. R. A. (N. S.) 501, 9 Ann. Cas. 902; *Ferris v. American Brewing Co.*, 155 Ind. 539, 58 N. E. 701, 52 L. R. A. 305; *Butterick Publishing Co. v. Fisher*, 203 Mass. 122, 89 N. E. 189,

133 Am. St. Rep. 283. Again, the restriction may be as to the price which the retailer must charge for goods purchased from the manufacturer—the case here involved. *Elliman, Sons & Co. v. Carrington & Son*, 2 Ch. Div. 275; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *Grogan v. Chaffee*, 156 Cal. 611, 105 Pac. 745, 27 L. R. A. (N. S.) 395; *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427, 56 L. R. A. 709.

[5] The foregoing authorities make it clear that the courts now generally recognize as the basis of the rule of public policy against restraints on competition the tendency to create a monopoly. It is manifest that a restriction of competition between the owners of an insignificant part of the entire supply of a given commodity in a given community could not create a monopoly nor injuriously affect the public. It is equally clear that the restriction need not be a complete restriction covering the entire supply of a given commodity in order to injuriously affect the public; but, unless it be held that every restriction is per se illegal, where are we to draw the line? Obviously, the answer must be found in the facts of each particular case. If, considering all of the circumstances, including the character of the business, the necessities of the parties, the existence of other contracts, if any, of the same character, the restriction results or tends to result in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, or by what amounts to a combination of all of the dealers, the contract is invalid. Substantial control of a market by one or a few is, of course, as injurious to the public as an absolute control. Wherever, therefore, there exists a monopoly or combination, or the contract creates or tends to create a monopoly or such approximation to monopoly as to practically bar others from entering the field by the chance of failure, a contract fixing retail prices is void as essentially injurious to the public. "It is not essential, however, to the control of the market, within the rule, that it should be complete. Practical control is sufficient; and this does not imply an absolute elimination of competition. On the other hand, a mere restriction of competition does not give control of the market and is not unlawful. The commercial maxim, 'competition is the life of trade,' while not adopted as a maxim of jurisprudence, finds a place in many decisions, and the language of the courts is often broad enough to include, as opposed to public policy, every combination in restraint of competition, regardless of degree. But the weight of authority—as well as sound principle—supports the view that every combination restricting competition is not invalid; that restriction, to be unlawful, while not necessarily amounting to total suppression, must give substantially the control of the market. Just where the line is

to be drawn between a lawful and unlawful restriction of competition, just what restriction is practical suppression, must depend largely upon the facts and circumstances of each case. As said in *Hoffman v. Brooks*, a case not officially reported: "Those engaged in any trade or business may, to such limited extent as may be fairly necessary to protect their interests, enter into agreements which will result in diminishing competition and increasing prices. Just the extent to which this may be done the courts have been careful not to define, just as they have refused to set monuments along the line between fairness and fraud." *Noyes, Intercorporate Relations*, § 356. *Cooke, Combinations, Monopolies & Labor Unions*, § 120. As exemplifying that the facts in each case must determine the effect of the contract, and that practical control of the market or any approximation to monopoly marks the line between valid and invalid restrictions, see the following decisions: *Herriman v. Menzies*, supra; *Walsh v. Dwight*, supra; *Oakdale Mfg. Co. v. Garst*, supra; *Phillips v. Iola Portland Cement Co.*, supra; *Marsh v. Russell*, 66 N. Y. 288; *Export Lumber Co. v. South Brooklyn Sawmill Co.*, 54 App. Div. 518, 67 N. Y. Supp. 626; *U. S. v. Nelson* (D. C.) 52 Fed. 646; *State v. Duluth Board of Trade*, supra; *Meredith v. New Jersey Zink & Iron Co.*, 55 N. J. Eq. 211, 37 Atl. 539.

[6] The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare, must be considered, and that, of all circumstances, the dominant consideration is the welfare of the public, makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain, a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantee, and fair to the public in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy. As said by Lord Macnaghten in *Nordenfelt v. Maxim-Nordenfelt Company*, 1894 App. Cas. p. 565: "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there

is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: Restraint of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public." And again, as said by Mr. Justice Hughes in *Dr. Miles Medical Co. v. Parke & Sons Co.*, 220 U. S. 373, 406, 31 Sup. Ct. 376, 384 (55 L. Ed. 502): "To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy."

Measured by our definition, which, as it seems to us, is as stringent as any fair construction of the authorities will sustain, the facts and circumstances as alleged in the complaint disclose no sinister purpose in the contract pleaded, nor any tendency inimical to the public interest. It may be objected that, since protection against general restriction is the basis of the rule of public policy, then if a general restriction is brought about by all, or nearly all, of the dealers in a given commodity in a given area making contracts of the same character with all retailers, the public interest is injuriously affected just as if there were an actual combination or contract creating or approximating a monopoly. The possibility of such a result as a mere coincidence, however, is too remote to furnish a reason for declaring the contracts of a single manufacturer who has no monopoly or approximation thereto void. If a controlling number of manufacturers or wholesale dealers in a given commodity should make identical contracts with the retailers of that locality, it would doubtless be the result of an agreement, secret or otherwise, between them, and all such contracts would be invalid as in aid of a combination in restraint of competition. The coincidence would be almost conclusive evidence of the illegal combination, and sufficient basis for declaring all of the contracts void. No such condition, however, is presented by the record before us.

Such a contract as that here in question is of interest to the public only where the whole of a given commodity, or a measurable approximation to the whole of that commodity, is in the control of one of the contracting parties, or of some combination of which he is a member or which dictates his policy. It is monopoly, either actual or approximate,

hence potential, against which the public interest is arrayed, not a fair reward to individual effort and initiative, which is as essential to competition as a competitive price. In the absence of a monopoly, either actual or potential, as above defined, a contract fixing retail prices to the consumer cannot have an effect appreciably inimical to the public interest because it cannot fix prices at an unreasonably high figure without defeating its own purpose by either signally failing to maintain the fixed price, or putting the individual manufacturer out of business. In either case, it fails to restrict competition. Either the consumers will not buy the product at the price fixed, or, if they do, the high price will stimulate competition in production and the price will inevitably fall. The given manufacturer will thus be compelled to accept one or the other alternative. He must either fix the price to cover only a reasonable profit, or he must retire from business, and this for the simple reason that, in the absence of a monopoly either actual or potential, of the entire supply, the natural conditions of trade will defeat any attempted restriction of competition. Under our present competitive system, the public is as vitally interested in the maintenance of competition in the excellence of the product as it is in competition in prices. The one is as essential to value received at any price as the other is to a reasonable price for any value. Lacking either, the public will eventually be the loser, either in quality of product or in enhancement of price, which comes to the same thing. No sound public policy will insist upon the complete sacrifice of competition in one of these elements to competition in the other. A monopoly, however, either complete or approximate, tends to the destruction of both, hence is on all scores, against public policy. But where a given product is not in the hands of one man or a combination of men, there is no monopoly, either actual or proximate, and the public has no interest hostile to a contract by a single manufacturer among many, intended and reasonably calculated to enable him to maintain an unusual standard of excellence in that part of the aggregate of the given product which he puts out. On the contrary, the public interest, so far as it is touched by the contract, is in sympathy with it, because served by it.

[7] Applying the principles which we have developed from the cases, it seems clear that this contract is valid. The facts alleged negative the idea of any existing monopoly in the appellant, and the contract has no tendency to create one. The retail selling price was fixed merely as ancillary to the contract of sale to the respondent. The fixing of the price was reasonably necessary to protect the appellant, and reasonable as applied to the public, in that it provides only for a fair profit. Fairly considered, the contract, while slightly restricting competition,

is primarily intended to promote competition by enabling the appellant to compete with other high grade flours while maintaining the excellence of its product. As said by the Supreme Court of California in a case closely parallel to that before us (*Grogan v. Chaffee*, supra): "Under these circumstances, we see no reason why the contract alleged by the plaintiff should not, as between the parties to it, be held to be valid. It violates no canon of public policy. By its terms the buyer is not precluded from engaging in any lawful trade. He may sell other olive oil at any price and on any conditions satisfactory to him. The producer was, in the first instance, under no obligation to sell his oil, and when he did sell it had the right to exact, as part of the consideration for the sale, a promise by the purchaser that he would not sell it at less than a stipulated price. There is nothing either unreasonable or unlawful in the effort by a manufacturer to maintain a standard price for his goods. It is simply a means of securing the legitimate benefits of the reputation which his product may have attained. Contracts similar to the one under discussion have been considered in a number of cases, and have generally been upheld where, as here, they had no tendency to create a monopoly." After citing and reviewing many authorities, the opinion continues: "The necessary result of what we have said is that the complaint must be held sufficient. It is alleged that the defendant bought oil under an express agreement that he would not sell it at less than given prices and that he had sold and threatened to sell it at less than such prices. This is a violation of plaintiff's rights under his contract. Whether this contract could be enforced against persons who might come into possession of plaintiff's oil, with notice of the restriction imposed by him on its sale, but without having made any direct agreement to respect such restriction, is a question not here presented. See *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631."

In *Walsh v. Dwight*, supra, the New York Supreme Court, touching a contract closely analogous to that here involved, said: "It is difficult to see upon what ground it can be claimed that such a contract is illegal. That the defendants would have the right to establish agencies for the sale of their goods, or to employ others to sell them, at such prices as the defendants should designate, cannot be disputed. Nor can it be that a manufacturer of merchandise cannot agree to sell to others upon condition that the vendees, in selling at retail, should charge a specified price for the goods sold, or should sell only the manufactured product of the manufacturer. If a dealer in articles of this kind, for his own advantage, agrees to confine his business to a particular line of goods, or agrees with the manufacturer to charge a particular price for the articles which he sells in his business, such an agree-

ment is not illegal, as in restraint of trade or as tending to create a monopoly, as there is nothing in the agreement to prevent others from engaging in the business, or the manufacturers of other articles from selling their products to any one who is willing to buy."

In *Commonwealth v. Grinstead*, 111 Ky. 203, 63 S. W. 427, 56 L. R. A. 709, notwithstanding the existence of a statute expressly prohibiting any person, firm, or corporation doing business in Kentucky from entering into any pool, trust, combine, agreement, confederation, or understanding with any other person, firm, or corporation for the purpose of regulating, controlling, or fixing prices, the court upheld the plan of fixing minimum retail prices of certain brands of goods of established reputation by contracts between the manufacturer and retailer, on the ground that there was no concerted action among the manufacturers, since the price was fixed by each manufacturer on his own product only.

The English courts maintain the same doctrine. *Elliman v. Carrington*, supra; *National Phonograph Co. v. Edison-Bell Consol. Phonograph Co.*, 1908, 1 Ch. Div. 335.

That the tendency to monopoly, complete or substantial, is the real test in all cases involving the restraint of competition, is demonstrated by cases involving labor unions. Independent of statute, the test of legality as to contracts or combinations in restraint of competition is the same for sellers of merchandise as for sellers of labor. This, so far as we are advised, has never been judicially challenged. "On principle, it is not apparent why the legality of combinations among employes as such should be subjected to any different test from that applied to combinations among employers as such, or among tradesmen as such." *Cooke, Combinations, Monopolies & Labor Unions*, § 52; 27 Cyc. 904; *Herriman v. Menzies*, supra; *Milwaukee Masons' & Builders' Association v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127, 60 Am. St. Rep. 97; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475, 80 Am. St. Rep. 1; *Froelich v. Musicians' Mutual Benefit Ass'n*, 93 Mo. App. 383; *O'Brien v. Musical Union*, 64 N. J. Eq. 525, 54 Atl. 150; *Folsom v. Lewis*, 208 Mass. 336, 94 N. E. 336, 35 L. R. A. (N. S.) 787; *More v. Bennett*, 140 Ill. 69, 29 N. E. 888, 891, 892, 15 L. R. A. 361, 33 Am. St. Rep. 216.

It would seem that the doctrine which would hold the contract there involved a contract or combination in illegal restraint of competition, carried to its logical extent, would render illegal practically every trades union or labor union in the country. The courts should be slow to adopt a rule of such far-reaching results. Such unions or associations for the purpose of maintaining wages are now universally recognized as legal. 24 Cyc. 819 C.

The respondent relies solely upon the following decisions: *Park & Sons Co. v. Hartman*, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135, *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086, and *Dr. Miles Medical Co. v. Parke & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, affirming the decision of the Circuit Court of Appeals in 164 Fed. 803, 90 C. C. A. 579. The decision in *Park & Sons Co. v. Hartman* is not necessarily in antagonism to the views here expressed. That case involved a monopoly. It holds that there is no such analogy between the statutory monopoly accorded by the patent laws and the monopoly resulting from the sole possession of a trade secret as to make it lawful to protect the latter by contracts or notices fixing the retail price, as is permitted in the case of patented articles. The opinion is devoted largely to a demonstration of the proposition, which we deem unquestionably sound, that the owner of a secret formula for the manufacture of a proprietary medicine, though he may protect the secret by contract against its disclosure, cannot protect the profits resulting from his monopoly in the manufactured article (in that case, *Peruna*) by contracts or notices fixing a minimum price at which the jobbers and retailers shall sell it. That the effect of the contracts there involved was an absolute prevention of any competition in prices, a complete or general restriction as to *Peruna*, because of their application to the whole supply of that article on the market, is shown by the opinion, where it is said: "Thus all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus a combination between the manufacturer, the wholesalers and the retailers to maintain prices and stifle competition, has been brought about." * * * It is true that the complainant is not in a combination with other makers of '*Peruna*.' There are no others. If there were, there would not be a complete or general restraint; for it might then happen that these others, not being bound by any covenants, could supply the public. If the supply to come from them was adequate for the public demand, the public might be in no wise affected." That the learned judge who wrote the opinion recognized the validity of such contracts as between the actual contracting parties, where no monopoly is involved, and when merely ancillary to some main contract, and reasonably necessary to the protection of the retained business of the covenantee, is also evident from the following language which further distinguishes that case from the one before us: "Looking to the averments of the bill as a whole and to the scheme of business as disclosed by

the contracts themselves, we cannot escape the conclusion that the covenants restricting sales and resales have as their prime object the suppression of competition between those who buy to sell again. Any benefit to the retained business to result from them is manifestly but an incident of the main purpose, which is to benefit his vendees and sub-vendees by breaking down their competition with each other. Restraints which might be upheld if ancillary to some principal contract cannot be enforced if, when unmasked, they appear to be the main purpose of the contract and not subordinate. The covenants in the contracts signed by the retailers are not even collateral to any sales by the complainant, but to sales made by the wholesalers. Although they run to the complaint, their prime purpose is neither the protection of the retained business of the complainant nor of the wholesaler, but only to prevent competition between retailers. Covenants protecting the seller of property against the competition of the buyer, by its use against the business retained by the seller, which are upheld if not wider than necessary for that purpose, have been covenants where the main purpose has been to protect the seller himself against competition directed against his retained business." The opinion, when fully considered, fairly recognizes every principle hereinbefore developed from the authorities as sustaining the contract here involved.

In *Bobbs-Merrill Co. v. Straus*, it was held that the sole right to vend a copyrighted book secured by the United States statute to the owner of the copyright does not include the right to impose, by a mere notice printed on the same page with the notice of copyright, a limitation as to the price at which the book shall be sold at retail by future purchasers with whom there is no privity of contract. The distinction from the case in hand is too plain to require further comment.

Nor do we deem the decision of the United States Supreme Court in *Dr. Miles Medical Co. v. Parke & Sons Co.* controlling on the facts here presented. In that case, the bill alleged the manufacture of certain proprietary medicines under secret formulæ and processes, and the sale thereof under trade-marks and trade dress; that, to prevent injury to its business by the sale of its medicines at cut prices, complainant had adopted a dual system of contracts controlling the sale and resale of its product; that the system contemplated consignments to wholesale dealers, permitting them to sell only to other contracting wholesale dealers and retail dealers who had also contracted with the complainant to sell its goods at fixed prices; that the defendant, refusing to enter into a consignment contract, had induced complainant's wholesale and retail agents, by means of fraudulent representations, to violate their

contracts and sell goods of complainant's manufacture to the defendant, with the intention of selling such goods at cut rates to attract customers for other merchandise. An injunction against this practice was sought. It appeared that consignment contracts had been made with over 400 jobbers and wholesalers, and retail agency contracts with 25,000 retail dealers in the United States. The court refused relief on the ground that, by its system of interlocking restrictions, complainant sought to control not only the prices at which its agents might sell its product, but the prices for all sales by all dealers at wholesale or retail, whether purchasers or sub-purchasers, and thus fix the amount which the consumer shall pay, eliminating all competition. The court held that such a system amounts to a restraint of trade, and is invalid both at common law and under the Sherman Anti-Trust Act. It will be noted that the system there involved had no purpose save to create and perpetuate a monopoly which, under any view of the authorities, is invalid. While certain expressions in the opinion might appear contrary to the views we have expressed, the opinion expressly states that the mere fact that some restraint results does not necessarily render the contract invalid, and clearly recognizes the principles upon which the contract here involved must be held valid. Mr. Justice Hughes, speaking for the court, uses the following language: "With respect to contracts in restraint of trade, the earlier doctrine of the common law has been substantially modified in the adaptation to modern conditions. But the public interest is still the first consideration. To sustain the restraint, it must be found to be reasonable both with respect to the public and to the parties and that it is limited to what is fairly necessary, in the circumstances of the particular case, for the protection of the covenantee. Otherwise restraints of trade are void as against public policy. As was said by this court in *Gibbs v. Baltimore Gas Co.*, 130 U. S. 409: 'The decision in *Mitchell v. Reynolds*, 1 P. Wms. 181, a. c., *Smith's Leading Cases*, 407, 7th Eng. Ed., 8th Am. Ed. 756, is the foundation of the rule in relation to the invalidity of contracts in restraint of trade; but as it was made under a condition of things, and a state of society, different from those which now prevail, the rule laid down is not regarded as inflexible, and has been considerably modified. Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable. *Rousillon v. Rousillon*, 14 Ch. D. 351; *Leather Cloth Co. v. Lonsont*, L. R. 9 Eq. 345.'"

¹ 9 Sup. Ct. 553, 22 L. Ed. 973.

The cases upon which the respondent relies are all reviewed and distinguished from a case such as that here presented, in *Ghirardelli v. Hunsicker*, 164 Cal. 355, 128 Pac. 1041.

We do not hold that a mere notice printed on the packages or bill of lading in the absence of express contract to be bound by such notice would be sufficient to create a valid restriction of the sale price, however unobjectionable. We do not hold that a manufacturer would have the right by any such notice to pursue his product into the hands of third parties and fix their selling price. The right, where it can be exercised at all, rests in contract, and it would seem that the contract should only be held binding upon the parties to it, except where the breaking of the contract is induced by the fraud of the third party. As observed in *Dr. Miles Medical Co. v. Parke & Sons Co.*, supra: "Whatever right the manufacturer may have to project his control beyond his own sales must depend, not upon an inherent power incident to production and original ownership, but upon agreement." See, also, *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, and *Bobbs-Merrill Co. v. Straus*, supra.

Finally, it seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles, a competition in excellence, which can never be maintained if, through the perfidy of the retailer who cuts prices for his own ulterior purposes, the manufacturer is forced to compete in prices with goods of his own production, while the retailer recoups his losses on the cut price by the sale of other articles at, or above, their reasonable price. It is a fallacy to assume that the price cutter pockets the loss. The public makes it up on other purchases. The manufacturer alone is injured, except as the public is also injured through the manufacturer's inability, in the face of cut prices, to maintain the excellence of his product. Fixing the price on all brands of high grade flour is a very different thing from fixing the price on one brand of high grade flour. The one means destruction of all competition and of all incentive to increased excellence. The other means heightened competition and intensified incentive to increased excellence. It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement. *Mazetti v. Armour & Co.*, 135 Pac. 633. His reputation as a manufacturer, one of his chief assets, is bound up in them. The attitude of the respondent, who has willfully violated his contract, presents no equities in his favor. The allegations of the complaint show that the

were carried back to the east shore, where they intended to put the boat in the required position to be carried back to the west shore, to permit Nielson to land to go with C. On reaching the east shore the boat was snubbed to the post by two men on the bank, one of them the deceased's son.

Up to this point the evidence is without substantial conflict. But from here there is some conflict in the evidence. As testified to by some of the plaintiff's witnesses, it was more dangerous to operate the boat in high water than in low water, and that because of the high water Nielson and others, several days before the accident expressed apprehensions of danger in operating the boat until the high waters of the stream had subsided. But the only inference deducible on the record is that the deceased as fully comprehended and realized that danger as did Nielson. The evidence further on behalf of the plaintiff shows that Nielson, in preparing to leave the east shore to return to the west shore, before the forward end of the boat (the west end) was drawn to the proper position and the rope fastened to the railing, looking in the direction of the men at the snubbing post, called out, "Boys, let her go," or, "Let it go." The men on the bank, seeing that the front end of the boat was not in proper position, hesitated. Nielson again said, rather sharply or impatiently, as expressed by some of the witnesses, "Let it go," or "Boys, let her go." Thereupon the snubbing rope was released, the deceased and two other men having hold of the forward rope or tackle endeavoring to draw the forward end to the cable and in position. The boat moved forward. One of the witnesses testified it "shot out"; others, of plaintiff's witnesses, that it "moved as usual." The deceased and the men at the forward rope were unable to draw the forward end of the boat to the proper position. Nielson took hold of the rope and assisted. Some of the witnesses on the bank testified that as the boat was moving out they saw the slack of the forward rope over the south rail; one of them that Nielson put it around the rail; another, that it appeared tied to that rail. The men at the rope, with Nielson's assistance, were unable to draw the forward end of the boat in position. The boat drifted out in the stream about 100 or 125 feet, the current driving the forward end downstream farther from the cable, causing the deceased and the other men holding the rope to be drawn up and against the north railing. As some of the witnesses expressed it, the boat swerved, the front end suddenly cast downstream the length of the rope, and the deceased, who still had hold of the rope, was thrown or pulled overboard and drowned. After the front or west end of the boat had been driven downstream the full length of the rope and there securely held by it and the east end held nearer the cable, the move-

ment of the boat was reversed, which by the force of the current against it was then safely carried back to the east shore.

According to the defendants' evidence, as the boat was about to leave the east shore to return to the opposite side, two men were on the bank at the snubbing post, one man on the boat at the east end, hold of the rope at the backward or east tackle, the deceased and two other men at the west end of the boat, hold of the rope at the forward tackle, and Nielson near them at the west end of the boat. Nielson, addressing and looking at the man at the east or rear tackle, said to him, "Let that rope go," or, perhaps, "Let her go," meaning to let the rope out at that tackle so that the east end of the boat would move downstream to enable the men at the forward tackle to pull the west or forward end of the boat to the required position. The men on the bank, mistaking the order, and taking it as addressed to them, released the snubbing rope, causing the boat to move out before the front end was in position and the rope tied to the railing. Nielson, observing that the deceased and the two men pulling on the rope at the forward tackle were unable to draw the front end of the boat in position, immediately went to their assistance and helped pull on the rope. He testified that he did not put the rope around the south railing, and that it was not attached or tied to that rail. The deceased, as the boat started to move out, several times called out to the man at the rear tackle, "Let that rope go," meaning to loosen or let it out to permit that end of the boat to move downstream and thus enable the men to pull the forward end of the boat up. The rope at the rear tackle was not released, or not sufficiently let out, to enable the men at the forward rope to draw the front end of the boat up, which was gradually by the current driven downstream, and the men at the forward rope gradually drawn up towards the north railing. When the boat had moved out about 100 feet from the shore, and the front end had been driven downstream about the full length of the rope, and the men drawn up against the railing, some of them let loose. The deceased, still holding to the rope, was pulled up and thrown into the stream. The boat then safely returned to the east shore, as heretofore stated.

The alleged acts of negligence are: (1) That Nielson negligently ordered the boat released at the snubbing post before the boat was in proper position, and before the rope at the front end had been tied to the railing; (2) that Nielson negligently tied the slack of the rope at the front tackle to the south railing of the boat, causing that side at the front end to be raised and the north side lowered, the boat to tilt or dip; (3) that Nielson, without notice or warning, untied and released the rope on the south railing, causing the boat to be suddenly jerked and

the deceased thrown overboard; (4) that Nielson negligently required and commanded the deceased to stand near the front end of the boat and near the north railing, and there, in a perilous position, to take hold of and pull on the rope.

At the conclusion of the plaintiff's evidence the defendants severally moved for a nonsuit, on the grounds of insufficiency of the evidence to show negligence, and that upon the evidence it was shown that the death was caused by mere accident, or by the deceased's negligence. The motion was granted as to two defendants, and denied as to two, Nielson and the Little Valley Irrigation Company. Upon the same grounds the last-named defendants, at the conclusion of all the evidence, severally moved the court to direct a verdict in their favor. This motion was also denied, and the case submitted to the jury, who rendered a verdict against the defendant Nielson alone. He complains of these rulings, of portions of the charge, and of the refusal to charge as requested by him. He also urges that the verdict is in disobedience of the charge, and hence is against law.

[1, 2] I think there is sufficient evidence to support the first allegation of negligence, but not the second, third, or fourth. As to the second and third, there is evidence—the testimony of some of the witnesses on the bank, plaintiff's witnesses—that the slack of the forward rope on which the men at the front end of the boat were pulling was over the south rail of the boat, one of them testifying that after the boat had moved out Nielson put the rope “over the south rail,” but did not see him pull on it nor take it off. Another testified that Nielson had hold of the rope, that the other three men were pulling on it, and that he “tried to put the rope around the lower rail,” but that it was not at any time fastened to that rail. Another was asked by plaintiff's counsel: “Now, what is the fact as to whether or not, when the boat was out in the water, the rope was attached to the lower rail?” The witness answered: “I don't know whether it was fastened or not. Q. Well, how did it look to you? Describe its appearance, if you took any particular notice. A. Well, it appeared to me as though it was tied.” But he further testified that he thereafter saw the rope “lying on the deck (not attached) as the front end of the boat started downstream,” and saw the four men pulling on the rope as the current drove the front end of the boat downstream, drawing the men up to the north railing, when three of them let go of the rope, but could not say whether the deceased held on or let go at the time he went overboard. It was shown that to attach the rope to the south rail, with the current moving against the boat on the north side and driving the front end downstream, tended to tip or tilt the boat. But this witness

was asked by plaintiff's counsel: “State whether or not the boat was tipped in any way.” He answered: “I cannot tell you that. Q. How did it appear to you? Did it appear to be tipped in any way? You said it looked as though it was tied on the south rail. Describe how it was. A. I couldn't see. Q. Well, I say, it appeared to be tied? In what kind of a knot? A. I couldn't say whether it was wrapped around the rail or whether it was tied.” Other witnesses on the bank testified that before the deceased went overboard the boat swerved, as described by them, the front end driven downstream by the current, and by others that the front end or north side dipped, causing water to run on the boat either at the front end or over the north side. Now, this is some evidence tending to show that Nielson put the rope around the south rail, and that the boat dipped or tilted. But it does not show that he fastened the rope to that rail, or that putting the rope around that rail was the cause of the boat's dipping or tilting; nor does it show or support the allegation that he, without notice or warning, suddenly released the rope, thereby causing the boat to be jerked or tilted and the deceased thrown overboard. That is, the evidence does not sufficiently, but only vaguely, show that the deceased, from any such cause, was thrown overboard. And a vague or uncertain cause is not a reasonable or probable cause. This is especially so when, by the testimony of all the witnesses testifying upon the subject, it is shown that just before the deceased went overboard the four men were all pulling on the rope the end of which then was lying on the deck, and, notwithstanding their combined efforts, the current drove the front end of the boat farther downstream the full length of the rope, drawing the men up against the north rail, and as some of them let loose, the deceased, still clinging to the rope, went overboard. I do not find evidence to justify any other conclusion, and find no sufficient evidence to justify the conclusion that Nielson, by attaching the rope to the south rail and suddenly releasing it, jerked or tilted the boat, and that the deceased, from such a cause, was thrown overboard.

[3] Now, as to the fourth allegation. There is no evidence whatever that Nielson, on the occasion in question, at any time or in any particular, directed or commanded the deceased, or said anything to him, or that the deceased, because of anything that Nielson said or did, took hold of the rope, or pulled on it, or did anything. He was at the forward rope and had hold of it, and was pulling on it before the snubbing rope was released, and before the boat moved out, and there he remained, without anything whatever being said to him by Nielson, until he went overboard.

[4, 5] I think there is sufficient evidence to

support the first allegation of negligence that Nielson directed and ordered the rope at the snubbing post released before the front end of the boat was in position and the rope at the forward tackle tied to the rail. Of course the defendants' evidence shows that the order or direction was given to the man at the rear tackle, to let out that rope. But there is evidence on behalf of the plaintiff to show that the order was given to the men at the snubbing post to release that rope, which, in obedience to the order, was released, and that it was dangerous and unsafe to do that before the forward end of the boat had been drawn to the proper position and the forward rope tied to the rail. There is, however, the further question—that of proximate cause. It is contended by the defendant that the deceased's going overboard was not caused by the premature releasing of the snubbing rope; but that the direct cause, the probable, the proximate cause (if his going overboard was not accidental nor due to contributory negligence), was the failure of the man at the rear tackle to release that rope which did not permit that end of the boat to move downstream and prevented the front end from being drawn up. The current moving more rapidly towards the middle of the stream than at the shore, it is urged that had the rope at the rear tackle been released the front end of the boat would have been drawn in position, and the forward rope tied to the rail, before the boat had moved far and encountered the current where it was moving rapidly. There is evidence to show that the rope at the rear tackle was not released or let out, or at least not sufficiently let out, to permit that end of the boat to move downstream, though the deceased twice commanded the man at that rope to let it out. What testimony there is to dispute it comes from witnesses who but say they did not notice or see any one at the rear tackle. Still that does not tend to disprove the fact that the rope at the rear tackle was not sufficiently let out to permit that end of the boat to move downstream. It is not alleged or claimed that the defendant was responsible for that. The case is argued and submitted on the theory that he was not. Nevertheless, that the front end of the boat could or would have been drawn in proper position, and the boat safely carried across the stream had the rope at the rear tackle been sufficiently let out, is matter of argument and inference. And though such inference be reasonable and probable, still the deduction was a question more properly falling within the province of the jury. Then there is the further question of sole cause, or concurring causes. If Nielson's act, prematurely directing the snubbing rope to be released, was a contributing cause of the deceased's going overboard, then, in the absence of contributory negligence, must he be held responsible, though his act was not the sole, but a concurring and combined, cause with

the failure of the man to release the rope at the rear tackle. Of course, it is argued that the failure to release the rope at the rear tackle was an intervening and the sole cause, with which the premature direction to release the snubbing rope did not concur or combine. But again, that is matter of argument and inference. I, therefore, think the question of proximate cause was one of fact.

[8, 7] I do not see anything in the evidence to justify a holding that the deceased, as matter of law, was guilty of contributory negligence. The claim is made that he, being familiar with the operation of the boat, realizing the inability of all of the men to draw the front end up, seeing the rope slip through their hands as the front end of the boat was farther and farther driven downstream by the current, and, seeing the men releasing their hold as they with him were drawn up against the railing, negligently clung to the rope and was pulled overboard. I think that, too, was for the jury. I, therefore, am of the opinion that the plaintiff was entitled to go to the jury on the first allegation of negligence, and hence the court properly overruled the motions for nonsuit and direction of the verdict. But the court erred in submitting the case on the other allegations of negligence. The defendant, however, is not in position to complain of such submission, except as to the issue presented by the last allegation. He cannot complain of the rulings refusing the motions referred to if there was sufficient evidence to support any of the allegations of negligence. As to the last, the fourth, he specifically requested the court not to submit to the jury that issue, on the ground that there was no evidence to support that allegation. The court refused the request and submitted such issue. And, as has been seen, there being no evidence whatever to support that allegation, the ruling clearly was erroneous. As to the second and third allegations of negligence, no such request was made, except as was embraced in the motions for nonsuit and direction of the verdict—to take the whole case from the jury upon all the issues presented by the complaint.

Complaint is also made of the court's refusal to charge on contributory negligence as requested by defendant. The court gave the jury, in substance, every principle embodied in the defendant's request, and sufficiently and properly charged them on that subject.

The defendant requested a submission of the case on the theory that he was not responsible for the premature releasing of the snubbing rope, if the order given by him was directed to the man at the rear tackle but was misunderstood by the men at the snubbing rope, and that rope prematurely released because of such misunderstanding or mistake, as did the plaintiff on the theory that the defendant was responsible if the order given by him was directed and given to the men at the snubbing post. The court sub-

mitted the case on both such theories. The defendant, in addition, also requested the court to submit the case on the theory that the failure of the man to release the rope at the rear tackle, and who had been commanded to release it, was the cause of the accident. The court refused that request, and did not submit the case upon such theory. The court erred in that. The defendant was just as much entitled to go to the jury upon that theory as was the plaintiff upon her theory that the proximate cause of the accident was the premature releasing of the snubbing rope at the direction of the defendant. The charge shows a submission of the case upon all the theories of the plaintiff, some of which are not even supported by evidence, but the want of a submission on theories of the defendant, though supported by evidence.

For these reasons I think the judgment should be reversed, and the case remanded. In that my Associates concur, but not in the conclusion that there is sufficient evidence of negligence to carry the case to the jury. The judgment of the court below is therefore reversed, and the case remanded for a new trial. Costs to the appellant.

MCCARTY, C. J. [8] I fully concur with Mr. Justice STRAUP except his conclusion that the motions for a nonsuit and a directed verdict were properly overruled. I think the evidence, considered in the light most favorable to plaintiff, wholly fails to show any negligence on the part of Nielson in his supervision of the management of the boat on the occasion in question. The evidence shows that the current—flow of the water—is much stronger on the west side of the river than it is on the east. Frank Tucker, a witness for plaintiff, testified regarding what occurred on the boat at the time of and immediately prior to the accident, in part, as follows: "I think Madsen must have stood closest to the rail. * * * After the others let go, as I saw it, Madsen was drawn up until his feet got in contact with the railing. I saw his foot hit the top of the rail. He had hold of the rope as he went up, the rope pulling him up. I saw his hat go off, and almost immediately he went over."

Byron Mower, another of plaintiff's witnesses, testified regarding the position and movement of the boat, and as to what occurred thereon on that occasion, as follows: "The boat was in position so that the pressure of the water forced it forward in the usual way, with the hind end down the river lower than the front end. The boys on the rope were struggling to get it up, but had not quite got it tied to the rail. Madsen was holding onto the rope, which drew him up onto the rail with his hand still onto the rope, and I saw his feet, or one foot, on the rail in this (indicating) position, and then both feet on the rail, and then I saw him go over. At this time the rope at the east end was

not slackened. I don't think it was. If it had been it would not have gone down the stream and there would have been no trouble in pulling up that forward tackle. *One or two men could have pulled it up.*" While this witness testified that he did not think the tackle nearest the east end of the boat was released or slackened before the boat left the shore on the occasion in question, on being further interrogated by plaintiff's counsel he testified as follows: "Q. Do you mean to state that when the boat came into this shore [referring to the east shore] they didn't release, in order to land, the tackle, which would be the east tackle? A. I don't know whether they did or not. Q. Well, could they land without releasing it? A. Not square up against the bank. Q. And you stated that they did land square against the bank? A. I think they did. Q. Was it released? A. It must have been. Q. Did you ever see them land without releasing it? A. No, sir. * * * Q. If the tackle were released as it came in, the front tackle as it came up, which would be the rear tackle as it went out, would there be any necessity of releasing it before the snubbing post was released, and until the boat had gotten out some distance into the water? A. I don't think so. Q. Was there anything to release until the boat had been drawn up to the cable and the rope tied there and the snubbing rope released? A. No, there was nothing to release after you released the snubbing rope. Q. Now, was there anything to be released before that? A. No, sir."

The foregoing, as well as much other evidence introduced by plaintiff, shows that as the boat is brought to a landing the rope of the forward tackle is loosened and the forward end of the boat permitted to move downstream until the boat is at a right angle with the shore or landing, the rope of the tackle is then fastened to the railing of the upper side of the boat. The boat is then held against the landing by means of a rope attached to the snubbing post. Preparatory to taking the boat to the opposite side of the river, the end extending into the river is drawn upstream toward the cable until the position of the boat is reversed from what it was when it came from the landing on the opposite side of the river; that when the boat was thus reversed it was the usual and customary practice in the management of this particular boat to fasten the rope by which the end of the boat had been moved upstream to the upper railing, and then release the rope from the snubbing post, permitting the boat to be propelled into and across the river by the force of the current. On the occasion in question this method of handling the boat was followed, except that the rope was released from the snubbing post before the rope of the forward tackle was fastened to the railing. In other words, at the time the rope was released from the snubbing post, the boat was in position for crossing the river, and

the only thing remaining to be done to make the preparations complete was the fastening of the forward tackle rope to the railing. This, I think, is made plain by the testimony of all of the witnesses who were present and saw the accident. Each of these witnesses, excepting one, testified that when the rope was untied from the snubbing post the boat moved forward in the "usual way." Two witnesses testified that it "moved at the usual rate of speed." In order for the boat to move in the usual way and at the usual rate of speed it necessarily would have to be in the "usual" position. The only evidence in the record that can be said to be in conflict with the foregoing was elicited from one of plaintiff's witnesses by her counsel as follows: "Q. Were they [referring to Madsen and his assistants, who were trying to swing the west end of the boat upstream] still pulling when the boat shot out into the stream? A. Yes, sir. They were holding the rope." The conflict between this and the testimony of the witnesses mentioned is more apparent than real, because if the boat on being released "shot out into the stream," it would indicate that the east end of the boat was down the stream a sufficient distance to cause the current to force the boat forward at an unusual rate of speed, and that there was no necessity for loosening the rope of the east, or what at this time was the rear, tackle. This evidence, therefore, supports the only conclusion which I think is permissible under the evidence, namely, that all that remained to be done when the boat was released from the snubbing post was the tying of the west cable rope to the railing. The evidence shows that the boat had proceeded anywhere from 100 to 166 feet before the accident occurred. The evidence without conflict also shows that ordinarily one or two men can manipulate the forward tackle and move the front end of the boat towards the cable, and place the boat in proper position for crossing the river. On the morning of and just prior to the accident, the boat was released from the landing on the west side of the river before the forward end of the boat had been moved upstream and placed in the usual position. Four men, notwithstanding the current of the river is much stronger on that side than it is on the east side of the river, succeeded in pulling the east end of the boat upstream and placing it in the usual position for crossing the stream. One witness, who was on the boat at the time of the accident, testified: "I was not surprised when the boat started before the west end rope was tied. I had seen it done before when the water was just as high as it was on that day."

The evidence which I have quoted fairly reflects, as I read the record, the circumstances under which the accident occurred. I think the only inference permissible from the undisputed facts is that the death of Madsen was due to an accident for which no

one was or is responsible. Assuming, for the sake of the argument, that the releasing of the rope from the snubbing post before the west end of the boat was moved upstream, the forward tackle adjusted, and the rope tied, was negligence, such negligence was not the proximate cause of the accident. The releasing of the rope from the snubbing post and permitting the boat to move forward into the stream created no element of danger on the boat that would not otherwise have existed. As herein pointed out, the boat, after it was released from its moorings, moved forward into the stream in the usual way and at the usual rate of speed of from 100 to 166 feet before the accident happened, and any moment after it was discovered that the current was carrying the west end of the boat downstream, if Madsen and the other parties who had hold of the rope with him had ceased pulling and let go of the rope and permitted the boat to reverse itself and float back to the landing from which it had just been released, the accident, in all probability, would not have happened. But instead of doing this, Madsen, after those who were pulling on the rope with him had released their hold, continued to hold to and pull on the rope until he was dragged or pulled over the railing of the boat into the river. One of the plaintiff's witnesses testified on this point as follows: "I saw Madsen, Ostenson, and Tucker pulling on the rope, and at one time saw Nielson pulling, and as they got toward the rail one after the other had to let go, and Madsen didn't let go. Madsen was holding onto the rope which drew him up onto the rail with his hands still on the rope."

Nielson testified that at the time Madsen was pulled or thrown into the river the boat had reversed its course and was moving back to the landing from which it had a moment or two before been released. While no other witnesses testified directly on this point, yet some of plaintiff's witnesses testified to facts which seem to corroborate Nielson's testimony. James B. Graham, a witness for plaintiff, testified that just before Madsen was drawn overboard "the rope kept getting away from (Madsen and the other parties who were pulling on the rope) until the boat got in line with the current and the water started coming over" onto the boat, and that it was after the water came onto the boat that Madsen was pulled, or, as stated by the witness, "thrown into the water." It necessarily follows, in fact the evidence without conflict shows, that immediately after the boat was drawn or forced in "line with the current," its position was reversed, and it started to move back to the east landing. I do not claim that Madsen was guilty of contributory negligence in holding onto the rope until he was pulled overboard, but I do say his acts and conduct in holding onto the rope under the circumstances approach much nearer the border line of negligence than

anything that Nielson did on that occasion. For these reasons, with those of Mr. Justice STRAUP, I concur in the reversal of the judgment.

FRICK, J. If it be true, as stated by Mr. Justice STRAUP, that there is sufficient evidence of negligence on the part of Mr. Nielson to authorize the submission of that question to the jury, and, further, that there is sufficient evidence respecting the question of what was the proximate cause of the accident, then I concur in all of the conclusions reached by him. I cannot yield assent, however, to the propositions that there is sufficient evidence respecting Mr. Nielson's negligence, or, if there be any, that the jury was authorized upon the whole evidence to say that anything that Mr. Nielson said or did caused or was the proximate cause of the death of the decedent.

From a careful scrutiny of the whole record, the whole substance of which is very clearly stated by Mr. Justice STRAUP, I am forced to the conclusion that to say Mr. Nielson is to be charged with the unfortunate accident rather than the deceased or any one else present at the time is mere conjecture. In my judgment that is also true with respect to what really was the proximate cause of the accident, whether it was Mr. Nielson's act or the act of some one else. True it is that the foregoing questions are ordinarily for the jury. It is, however, also true that where, as in this case, a verdict must necessarily rest upon mere conjecture, then it cannot stand; and, if it cannot be permitted to stand, the question should not have been submitted to the jury.

In my judgment the unfortunate occurrence was one of those unlooked for and unexpected accidents for which no one can be held legally liable. The record clearly shows that if it required any knowledge or skill to manage the boat, all who took part in its management at the time, including the deceased, knew quite as much about the handling of it and the danger, if any, incident thereto as did Mr. Nielson. They were therefore all upon an equal footing. The alleged negligence, whether of acts of commission or of omission, all occurred at the time of the accident. The witnesses all agree that the whole thing occurred so quickly that they hardly appreciated that it happened. There was no time for thought or reflection. What was done, therefore, was done, or had to be done, upon the spur of the moment. Under such circumstances, the law does not characterize mere error of judgment as negligence; and, if this be so, a jury may not do so.

If the decedent had not been thrown over the side rail of the boat, then, in my judgment, no one would have thought of charging Mr. Nielson with negligence, although his acts and conduct would have been precisely

what the witnesses say they were. In my judgment the whole matter of negligence is an afterthought, arising out of the sole fact that the deceased fell overboard and lost his life.

In view of the foregoing, while I concur in the reversal of the judgment, yet I am also of the opinion that under the evidence as it now stands the court should have granted the motion for a nonsuit or should have directed a verdict in favor of Mr. Nielson.

ROWE et al. v. STEVENS, District Judge.
(Supreme Court of Idaho. Nov. 29, 1918.)

(Syllabus to Opinion of Stewart, J.)

1. JUDICIAL POWER.

The Constitution (article 5, § 2), provides: "The judicial power of the state shall be vested in a court for the trial of impeachments, a supreme court, district courts, probate courts, courts of justices of the peace, and such other courts inferior to the Supreme Court as may be established by law for any incorporated city or town."

2. CORPORATIONS (§ 684*)—ACTIONS AGAINST—RIGHT TO BE SUED.

Section 3830, Rev. Codes, prescribes the powers of the district courts: "The district court has original jurisdiction: 1. In all cases both at law and in equity; 2. In all special proceedings; 3. In the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its powers. * * *

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2666; Dec. Dig. § 684.*]

3. CORPORATIONS (§ 684*)—ACTIONS AGAINST—RIGHT TO BE SUED.

Section 2787, Rev. Codes, has not been repealed or changed by the act of January 30, 1912 (Laws 1912, p. 13). This section provides: "Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution, are trustees of the creditors and stockholders, or members, of the corporation dissolved, and have full power to settle the affairs of the corporation." This section does not apply in this case, but only applies as to the right to do business in the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2666; Dec. Dig. § 684.*]

4. CORPORATIONS (§ 684*)—FOREIGN CORPORATIONS—RECEIVERS—RIGHT TO APPOINT.

Held, that there are no provisions in the statutes which limit the jurisdiction of the court in appointing trustees and receivers of a foreign corporation, which owns valuable property in the state and is making contracts and carrying on business, where such corporation becomes insolvent and has creditors and is unable to pay the debts of the corporation; and such corporation can be sued in the courts of the state, and the courts acquire jurisdiction of such corporation by reason of the fact that such corporation has appointed an agent and a principal place of business in the state, and the district court and the judge thereof has power to make such appointment. Section 4329, Rev. Codes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2666; Dec. Dig. § 684.*]

5. CORPORATIONS (§ 559*)—RECEIVERSHIP—POWERS OF CORPORATION.

Except so far as the control of the affairs of a domestic or foreign corporation is placed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the hands of the receiver, its officers and directors, except when enjoined by the court appointing the receiver, continue to exercise their functions as if no receiver had been appointed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2561, 2562; Dec. Dig. § 559.*]

6. CERTIORARI (§ 33*)—PARTIES—BENEFICIAL INTEREST—DIRECTORS OF FOREIGN CORPORATION.

Held, in this case, that the application and showing filed show no beneficial interest of the petitioners which would justify this court in issuing a writ of review to annul the order made by Judge Stevens at chambers, appointing a trustee or receiver for the ranch company.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 44; Dec. Dig. § 83.*]

7. CERTIORARI (§ 5*)—GROUNDS—APPOINTMENT OF RECEIVER—FOREIGN CORPORATION.

Held, that the present action, if brought by parties interested, might have been sufficient, because of the necessities and interests of the different parties, and that it would be more speedy and remedial than an appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

(Syllabus to Opinion of Aldrich, C. J.)

8. CORPORATIONS (§ 684*)—FOREIGN CORPORATIONS—RECEIVERS—RIGHT TO APPOINT.

Where a foreign corporation has complied with the laws of this state and engaged in business and acquired property in the state, and thereafter failed to pay the corporation license tax and forfeited the right to continue to do business in the state, and thereafter a mortgagee commenced an action against the corporation to foreclose the mortgage without knowing that such corporation had forfeited its right to do business in the state, and the directors of the corporation, resident of the state where the corporation was organized, not knowing of the state law requiring the corporation tax, employed an attorney and directed him to defend in the action, and an answer was filed and the trial of the case was actually entered upon, and thereafter the attorney for the corporation withdrew on the ground that under the statute the corporation was not entitled to defend in the action, *held*, that it was not in excess of the jurisdiction of the trial court to thereafter appoint a trustee of the corporation to defend the action, and that the power to do so is conferred upon the court both by the provisions of section 11, c. 6, p. 18, of the Laws of the Extraordinary Session of 1912, and by the provisions of subdivisions 5 and 6 of section 4329 of the Revised Codes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2686; Dec. Dig. § 684.*]

9. CORPORATIONS (§ 651*)—FOREIGN CORPORATION—ACTION AGAINST—RIGHT TO DEFEND.

A foreign corporation, duly organized and existing under the laws of a foreign state, which has complied with the foreign corporation laws of this state so as to entitle it to do business, and thereafter forfeited such right by reason of its failure to pay the corporation tax, is no longer entitled to prosecute or defend actions in the state, but it is not in all respects in the same condition as a domestic corporation which has been dissolved, or has expired by reason of the expiration of its charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2574, 2575; Dec. Dig. § 651.*]

10. CORPORATIONS (§ 667½*)—ACTION AGAINST FOREIGN CORPORATION—DUTY TO INTERVENE.

Where the directors of a foreign corporation have entered an appearance on behalf of the corporation and filed an answer and enter-

ed upon the trial of the case, and thereupon discovered that the corporation had forfeited its right to do business in the state, and is no longer entitled to defend in an action, it is the duty of such directors to intervene in such action and defend the same, if they do not want a trustee appointed by the court for the purpose of defending such action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2640; Dec. Dig. § 667½.*]

11. ABATEMENT AND REVIVAL (§ 35*)—FORECLOSURE OF MORTGAGE—FOREIGN CORPORATIONS.

In a suit in equity and in rem to foreclose a mortgage, an abatement of the action does not necessarily work a dismissal of the action, or destroy the cause of action, but merely operates to suspend the further prosecution thereof until the cause which resulted in the abatement is removed, when a revival may be had and the action may be prosecuted to final judgment.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 159; Dec. Dig. § 35.*]

12. CORPORATIONS (§ 662*)—FOREIGN CORPORATION—ACTION AGAINST.

Where a foreign corporation is shown to have complied with the laws of this state and to have lawfully entered upon business in this state, one dealing with such corporation or desiring to prosecute an action against it may presume that it has paid the corporation tax, and is still entitled to do business in this state, and he is not chargeable with the duty of making inquiry and examination to ascertain if it has kept in good standing so long as it has continued to do business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2544, 2568-2570; Dec. Dig. § 662.*]

Sullivan, J., dissenting.

Original petition and affidavit for writ of review by James H. Rowe and others against J. M. Stevens, Judge, etc. Writ quashed, and action dismissed.

A. C. Cherry, of Salmon City, and Jesse B. Roote, of Butte, Mont., for plaintiffs. E. W. Whitcomb, of Salmon City, for defendants.

STEWART, J. This is a petition based upon an affidavit for a writ of review. The petition and affidavit allege that the Shenon Ranch Company was at all times mentioned a corporation under and by virtue of the laws of the state of Montana, with its principal place of business in the city of Butte, Silver Bow county, Mont.; that on October 8, 1910, the Shenon Ranch Company (hereafter designated in this opinion as the ranch company), filed with the recorder of Lemhi county, said Lemhi county being the county within the state of Idaho in which the ranch company designated its principal place of business, a copy of its articles of incorporation, duly certified by the Secretary of State of Montana; that on October 17, 1910, the ranch company filed with the Secretary of State of the state of Idaho a copy of the articles of incorporation duly certified by the county recorder of Lemhi county, and paid to the Secretary of State at the time the same fees as are provided by law; that on November 10, 1910, and within three months,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

it commenced to do business in the state of Idaho. The ranch company designated W. H. Mulkey, a resident of Lemhi county, in which the principal place of business of the ranch company was located, on which its principal business was conducted, as its agent, upon whom process issued by authority of or under any law of the state might be served, and within the time aforesaid, or on or about the 10th of November, the ranch company filed in the office of the Secretary of State of Idaho, and in the office of the clerk of the district court of Lemhi county, such designation in writing; that said ranch company did not pay the license tax for the year 1912 required by chapter 6 of the General Laws of the state of Idaho passed by the extraordinary session of the state Legislature in 1912 and approved on January 30, 1912, and has not paid the said license tax required by said law for the year 1913, and has not paid the penalty prescribed by chapter 6 of the general laws on account of its failure to pay the license tax for the years aforesaid; that on October 1, 1912, the Secretary of State of Idaho made a report to the Governor, giving a list of the corporations which had become delinquent in the payment of the license tax provided in section 3 of the act above described, and thereupon the Governor issued his proclamation, declaring that the right to do business in the state would be forfeited unless payment of the license tax, together with penalty by law for such delinquencies, be made to the Secretary of State on or before the hour of 4 o'clock of the 30th day of November then next following, to wit, November 30, 1912; that the Secretary of State, in his report to the Governor, described the ranch company as being a foreign corporation that had failed to pay the license required by the law for the year 1912; that the ranch company has not at any time paid the license for the year 1912 required by the act above mentioned, and that the Governor's proclamation was duly published, and that at the hour of 4 o'clock on November 30th, the right of the ranch company to do business in the state of Idaho became forfeited to the state, and that the ranch company has no legal right to do business in the state since November 30, 1912, and has no power to sue or be sued in the state of Idaho; that the plaintiffs herein, James H. Rowe, James K. Heslet, Thomas Tomich, Charles Copenharve, and J. C. Phillips, were the sole and only directors and managers in office of the affairs of the ranch company at the hour of 4 o'clock p. m., November 30, 1912, and ever since have been and now are the sole directors of the said ranch company in the state of Montana, and that said directors by operation of law became ipso facto trustees of the ranch company for the benefit of its creditors and stockholders at the hour of 4 o'clock on November 30, 1912, and ever since have been and now are by

reason of the provisions of chapter 6 above mentioned; that on March 17, 1913, the Shenon Land Company (hereafter designated as the land company), a corporation then and now existing under and by virtue of the state of Idaho, attempted and pretended to bring an action in the district court of Lemhi county against the ranch company by filing in the district court of Lemhi county a complaint, which is made a part of the petition, and on March 17, 1913, a summons was issued in the action and the summons was directed to said ranch company, and in the month of March the summons was served by the sheriff of Lemhi county upon W. H. Mulkey as the agent of the ranch company; that within 20 days from such service upon Mulkey the plaintiffs, as directors of the ranch company in the state of Montana, caused an appearance of the ranch company to be entered in the action and a demurrer to the complaint to be filed in the district court, and on April 23, 1913, the plaintiffs as such directors caused an answer and cross-complaint to be filed in the said pretended action, a true copy of which is attached and made a part of the affidavit and petition for review, and on April 24th the land company filed in the action an answer to the cross-complaint of the ranch company; that on April 23d the action commenced by the land company against the ranch company came on for trial before Hon. J. M. Stevens and a jury. The trial continued from day to day over Sunday until April 28, 1913. On said day, upon opening court, James H. Rowe filed in the court and presented to the judge a suggestion in writing of the termination of the existence in the state of Idaho of the right to do business in the state of Idaho of the ranch company, and a copy of said written suggestion is attached and made a part of the petition. The court discharged the jury, and the trial terminated without any judgment of any kind being given or entered therein. Then on the following day, April 29, 1913, the plaintiffs commenced an action in the district court of Lemhi county against the land company by filing their complaint in the same court and having summons issued, and thereafter, the exact time being to this petitioner unknown, E. W. Whitcomb, one of the attorneys for the land company, presented to Hon. J. M. Stevens, judge, at his chambers, a motion, and on September 3, 1913, the judge, acting as judge of the district court, made an order which was filed in the action, and thereafter, on September 8, 1913, the land company filed in the action in the district court an amended complaint; it is further alleged that at the time of the commencement of the action by the land company on March 17, 1913, the ranch company had no legal existence in the state of Idaho, and had no right to carry on business, and that there was in fact no action pending against the ranch company, and that the or-

der made by the judge on September 3d was void and beyond his power and authority; that the plaintiffs are the parties beneficially interested in the order so made by the judge on September 3d, and that the judge had no authority or jurisdiction or power as judge of said district court to make an order appointing any person trustee to defend an action against the ranch company that was not pending at the hour of 4 o'clock, November 30, 1912, and that the directors and managers in office of the affairs of the ranch company at the time its right to do business in the state of Idaho was forfeited are the only persons capable of being sued with respect to or upon any claim or demand against the ranch company, and that the action commenced on March 17, 1913, by the land company was not instituted or commenced until after the forfeiture of the right of the ranch company to do business.

To this petition counsel for the defendant filed a motion to quash and dismiss the petition. We will consider this motion in the order in which counsel present it in their briefs upon the argument, which they designate as follows: (1) Did the lower court exceed its authority in making the order complained of? (2) If so, does certiorari lie to correct the error? (3) Are the plaintiffs beneficially interested so as to entitle them to invoke this court's power to issue a writ of review?

As to the question of the court's exceeding its authority, counsel for the plaintiffs call the court's attention to the authority conferred in section 11, chapter 6, of the Laws of 1912, and claim that section 11 confers no authority upon the court to appoint a receiver or trustee.

The main contention of the petitioners is that the district court had no authority to appoint, upon the petition filed in this case, any person as trustee to defend an action against the ranch company which was not pending at the hour of 4 o'clock p. m. on November 30, 1912, and that the only persons capable of being sued since November 30, 1912, with respect to or upon any claim or demand against the said ranch company are the persons who were directors or managers in office of the affairs of the said ranch company at the time its right to do business in the state was forfeited, at the hour of 4 o'clock p. m., November 30, 1912, under the act of March 17, 1913, and that no action or suit so commenced on March 17, 1913, by the land company was instituted or commenced in said court until after the forfeiture of the right of said company to do business in the state of Idaho; that it could not and cannot be prosecuted against any person or persons except the persons who were directors and managers in office of the affairs of the said company at the time its right to do business in the state of Idaho was forfeited, to wit, November 30, 1912.

The petitioners in their brief refer to an

act (chapter 6, Extraordinary Session Laws 1912, p. 13), which follows the general laws of the state passed at the eleventh session, and claim that the order of the trial court should be reviewed with reference to his action in appointing a trustee, and that a corporation organized under the statutes of this state and doing business in this state cannot sue a foreign corporation which has not complied with the act of January 30, 1912, above referred to herein, sections 1, 2 and 10.

[1] It is true from the record in this case that the ranch company was a corporation organized under the laws of the state of Montana, and the record does not show that the ranch company did comply with the laws of the state, but so far as appointing a trustee or receiver for the foreign corporation, the ranch company, there is nothing in the record to show that the court rested his jurisdiction to appoint a receiver wholly upon the act of January 30, 1912, except there was presented to the court the fact that the company had not complied with the act. The trial court no doubt rested upon the Constitution and the statutes enacted in carrying out its original jurisdiction in all cases both at law and in equity, and such appellate jurisdiction as may be conferred by law. Const. art. 5, § 20.

[2, 3] To carry out and give effect to this constitutional provision the Legislature has provided section 3830: "The district court has original jurisdiction: 1. In all cases both at law and in equity; 2. In all special proceedings; 3. In the issuance of writs of mandamus, certiorari, prohibition, habeas corpus and all writs necessary to the exercise of its powers. * * *" Also section 2787 of the Revised Codes, which was not repealed or changed by the act of January 30, 1912. This section provides: "Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution, are trustees of the creditors and stockholders, or members, of the corporation dissolved, and have full power to settle the affairs of the corporation." This section does not apply in this case, but only applies to the right to do business in the state.

[4] There is no provision in the act which limits the jurisdiction of the court in appointing trustees and receivers of a foreign corporation, which owns valuable property in the state and is making contracts and carrying on business, where such corporation becomes insolvent and has creditors, and is unable to pay the debts of the corporation, and there is no question but that such corporation can be sued in the courts of the state, and the courts acquire jurisdiction of such foreign corporation by reason of the fact that such corporation has appointed an agent and a principal place of business located in the state; and the district court and the judge thereof has power to make such appointment. Section 4329, Rev. Codes.

A receiver was appointed September 3, 1913, several months after the action of the land company against the ranch company was filed for the foreclosure of its mortgage, securing a promissory note issued by the ranch company for the sum of \$66,483.60, securing its mortgage deed, bearing date the 28th of May, 1910, covering certain property located in the state of Idaho.

In the case of *Hall v. Nieu Kirk*, 12 Idaho, 33, 85 Pac. 485, 118 Am. St. Rep. 188, this court held that under subdivisions 5 and 6 of section 4329 of the Revised Codes a receiver will be appointed where it is shown that the corporation is insolvent or in imminent danger of insolvency, and in all cases where receivers have heretofore been appointed by the usages of the courts of equity. The record in this case sufficiently shows that this rule is applicable to this case. In the former case the court cites many authorities applicable to the facts of this case, and in that case the court holds, under our statutes, an appointment of a receiver does not necessarily cause a dissolution of the corporation, unless the court so directs. The receiver may be appointed simply to manage the affairs of the corporation during the pendency of the litigation.

[5] High on Receivers, § 344b, lays down the rule announced in the above case, and also the following rule: "Except so far as the control of its affairs is placed in the hands of the receiver, it continues to exist for all purposes, and its officers, except as enjoined by the court appointing the receiver, continue to exercise their functions as if no receiver had been appointed."

The question of the right of a foreign corporation to sue without complying with the statutes has been under consideration a great many times by the different courts of the United States, and the jurisdiction and rule adopted in such constructions of courts have been collected in *Thompson on Corporations* (2d Ed.) vol. 5, §§ 6716 to 6726, inclusive, wherein the rule is stated that in many jurisdictions the failure to comply with the statutory requirements for doing business does not affect the right of a foreign corporation to maintain actions in the local tribunals. *Webster v. Ore. Short Line Ry. Co.*, 6 Idaho, 312, 55 Pac. 661; *Vermont L. & T. Co. v. McGregor*, 5 Idaho, 320, 51 Pac. 102; *Valley Lumber Co. v. Nickerson*, 13 Idaho, 682, 93 Pac. 24. In section 6718 (*Thompson on Corporations*, supra), many cases are cited where it is held that a foreign corporation cannot maintain an action, within the courts of the state, on any contract executed within the state, without complying with the required provisions. A foreign corporation is not permitted to sue in the domestic courts until it has placed itself in a position to be sued according to local statutes. This latter rule, we think, states the correct rule to be applied, with certain exceptions found in section 6717. In the present case we think

the rule stated in section 6718 is the rule to be applied to the facts shown in this case.

[6] On November 30, 1912, the time fixed by the Governor under the act approved January 30, 1912, the ranch company, its directors and officers, forfeited all rights as such or on its behalf, and they were disqualified to do business under the laws of this state, and such forfeiture continued from that time until the present, and by reason of that fact the ranch company and its directors on its behalf were prohibited to appear in the courts of this state affecting any transaction or contract, including the contract made between the land company and the ranch company at the time the same was entered into, and the plaintiffs in this case could not acquire an interest in the property in controversy except by an instrument in writing, subscribed by the parties creating, granting, assigning, surrendering, or declaring the same, or by the lawful agent thereunto, authorized by writing. Section 6007, Rev. Codes. Neither could the mortgage executed by the ranch company to the land company to secure the balance due on the purchase price of said land be renewed or extended, except by writing, executed with the formalities required in the case of a grant or conveyance of real property. Section 3389, Rev. Codes. Under these provisions of the statute it is clear that the plaintiffs, when this application was filed in this court, had no beneficial interest which would justify this court in issuing a writ of review to annul the order made by Judge Stevens at chambers, appointing a trustee or receiver for the ranch company, under the allegations and facts presented to the judge at the time he made the order appointing the receiver in this case.

[7] We think, also, that the present action, if brought by parties interested, might be sufficient, because of the necessities and interests of the different parties, and that it would be more speedy and remedial than an appeal.

Other reasons than those we have discussed and decided in this case were presented, but in our judgment they are not material, and do not control the questions involved.

We, therefore, hold in this case that Judge Stevens, judge of the district court of the Fifth judicial district, did not err in making the order, and was authorized to make the same. The writ is quashed, and the application dismissed. Costs awarded to defendants.

AILSHIE, C. J. (concurring specially). I have been somewhat in doubt as to just why this particular proceeding should have been deemed necessary. I am opposed to passing on moot questions, and especially so where a court is overrun with real, live controversies and litigation, as is the case in this court. This observation is prompted by the follow-

ing view which I gather from the record in this case: The foreign corporation as such was not entitled to defend in the foreclosure action in the district court, for the reason that it had failed to comply with the state statute in paying its license tax or excise under the provisions of chapter 6 of the Laws of the Extraordinary Session of 1912. The directors of the corporation, however, being residents of the state of Montana, and not being in fact aware of the statute and of the inability of the corporation to appear and defend in the action, employed attorneys and made a formal appearance in the case, filed their answer for the corporation, and went to trial. When the existence of the statute and fact of their noncompliance therewith were called to the attention of their attorneys, they immediately withdrew from the case. Apparently, as soon as the counsel for plaintiff was able to catch his breath and get his bearings, he applied to the district court for the appointment of a trustee to defend this action, and the court made an appointment. Now the directors of this non-complying corporation come to this court, *not as officers of the corporation*, but as "*trustees of the corporation and stockholders*," and seek to question the authority of the receiver to defend in the original foreclosure action, and yet it appears that they have never sought to intervene in that action, or to make any appearance whatever as trustees. While under the statute they cannot defend as a corporation, still they are clearly entitled to intervene and defend in the action and urge all the defenses which *trustees as such* could urge in any action, whether commenced directly against them or by them. Their right to appear and defend in this action has never been denied or questioned, and their right to the possession of the property is not involved in this proceeding, and for that very reason I fail to see where there is any real live issue presented to this court for its consideration in the present action. If they should be denied the right to intervene and defend in the foreclosure action, then they would have a real grievance, or if any question arises between them and the receiver as to the right of possession of the property, then there may be a real live question for the determination of the court. In the meanwhile, I see nothing but moot questions. It is clear to my mind that when these same men who are now acting as trustees of the noncomplying corporation were in court *as the officers of the corporation*, and then withdrew and neglected or refused to appear *as individuals* and trustees, they could not complain of the action of the court in appointing some one to represent this noncomplying corporation for the purpose of defending in the foreclosure action.

The complaint filed in this court, praying for a writ of review, alleges the incorporation and corporate existence of the Shenon Ranch

Company under the laws of the state of Montana, and its compliance with the Constitution and laws of the state of Idaho so as to entitle it to do business in this state, and its acquisition of property in this state, and its subsequent failure to pay the annual license tax, and the successive acts of the Secretary of State and the Governor forfeiting its right to do business in this state subsequent to November 30, 1912. It alleges that W. H. Mulkey was duly and regularly appointed the statutory agent of the corporation, with his residence at Salmon City, Lemhi county. The complaint then proceeds: "Thereafter, and within 20 days from the service of the said summons upon the said W. H. Mulkey, the plaintiffs herein, as directors of the said Shenon Ranch Company in the state of Montana, caused an appearance of the said Shenon Ranch Company to be entered in the said pretended action, and a demurrer to the said complaint to be filed in the said district court. Thereafter, and on or about the 23d day of April, 1913, the plaintiffs herein, as such directors, caused an answer and cross-complaint to be filed in the said pretended action, a true copy of which said answer and cross-complaint, marked 'Exhibit 2', is hereto attached and made a part of this affidavit and petition for a writ of review. Thereafter, and on or about the 24th day of April, 1913, the said Shenon Land Company, Limited, by its attorneys, E. W. Whitcomb and F. J. Cowen, filed in the said pretended action in the said district court, an answer to the said cross-complaint of the said Shenon Ranch Company, a true copy of which said answer to said cross-complaint, marked 'Exhibit 3,' is hereto attached and made a part hereof. On or about the 23d day of April, 1913, the said pretended action, so commenced by the said Shenon Land Company, Limited, against the said Shenon Ranch Company, came on for trial in the said district court of Lemhi county, Idaho, before Hon. J. M. Stevens and a jury. The trial of said pretended action continued thereafter from day to day and over Sunday, until the 28th day of April, 1913, on which last-named day, upon the opening of said district court, James H. Rowe filed in the said district court, and presented to the said judge thereof, a suggestion in writing of the termination of the existence in the state of Idaho of the right to do business in the state of Idaho of the said Shenon Ranch Company, a true copy of which said written suggestion, marked 'Exhibit 4,' is hereto attached and made a part hereof."

[18] It will be seen from the foregoing extract from the complaint that the directors of this corporation are residents of the state of Montana and that they joined in the employment of counsel and in directing the filing of an answer and prosecution of the defense in this case, and that the trial was actually entered upon. It is true that the stat-

ute prohibits a corporation defending in an action under such circumstances, and attaches a penalty for so doing. It is equally true that the statute (section 11, chapter 6 of the Laws of the Extraordinary Session of the Legislative of 1912) makes it the duty of the directors of a noncomplying corporation to act as trustees of the corporation and its stockholders in both the prosecution and defense of all actions then pending or subsequently instituted. The courts must look through and beyond mere technicalities and forms and names, and reach, if possible, the justice of the case as the facts disclose it. It would be a clear subversion of the ends of justice to say that these men, organized and doing business under the laws of Montana, and subsequently under the laws of Idaho, under a corporate name, can respond to the service of process, appear and answer, and enter upon the trial of a case in their corporate name, and then in the midst of the trial withdraw in their corporate name and capacity and decline to appear in their individual capacity, or as trustees which the law designates them, and then complain that the court is proceeding without jurisdiction when it appoints a receiver or trustee pendente lite to appear and defend the action. A court of justice ought to turn a deaf ear to such a complaint. If that kind of a practice were to be recognized and adhered to, it would place a premium on foreign corporations that have become indebted failing to pay their license tax and comply with the law, and thereby increase the difficulties and expense of a citizen of this state prosecuting an action for the collection of a debt or liability incurred by such foreign corporation. It would thus accomplish what the statute intended to prevent.

The order of the trial court appointing a receiver or trustee herein recites that the directors of this noncomplying corporation are nonresidents of the state and beyond the jurisdiction of the court, and that fact is not denied. The fact that these trustees filed a separate and independent action in the court by no means subjects them to the jurisdiction of the court in this action, unless they see fit to appear in the action, and only a constructive service could be had if the service must be had against them as individuals. It is true the order of the court appointing the receiver, in the closing part thereof, seems to be general in form, and clothes the receiver with full power and authority to settle the business and affairs of the corporation in general.

[8] The only question, however, here involved, and the only one of which I shall treat, is the appointment of this receiver for the purpose of defending this action, and the necessary and incidental authority to act during the collection of any judgment that may be obtained therein. I have no doubt of the right of the court to make the appointment under the provisions of section 11 of

chapter 6 of the Laws of the Extraordinary Session of 1912, as well as the provisions of subdivisions 5 and 6 of section 4329 of the Revised Codes. This court has previously held in two cases that a trial court possesses such power under the provisions of subdivisions 5 and 6 of section 4329.

In *Gibbs v. Morgan*, 9 Idaho, 100, 72 Pac. 733, this court said: "As far as possible, courts of equity should adapt their practice to the existing conditions of the business world and apply their jurisdiction to the changed conditions and cases arising thereunder, and should not too strictly adhere to forms and rules established under different circumstances, and decline to administer justice and enforce rights for which there is no other remedy."

In *Hall v. Nieuirk*, 12 Idaho, 33, 85 Pac. 485, 118 Am. St. Rep. 188, the *Gibbs-Morgan* Case was approved, and in the syllabus to the case, approved by the court, it is said: "Under our statute an appointment of a receiver does not necessarily cause a dissolution of the corporation, unless the court so directs; the receiver may be appointed simply to manage the affairs of the company during the pendency of the litigation."

[9] It was sought throughout the presentation of this case to apply to a noncomplying foreign corporation the same rule applicable to a dead domestic corporation or individual. Such a doctrine is unsound for any purpose except as a theory. It is a palpable fallacy. A domestic corporation is the creature of the laws of this state, and when its term of existence expires, it is dead and cannot have any existence here any longer or anywhere else; so, also, when its right to further do business has been forfeited or has been dissolved by legal procedure. Not so with a foreign corporation. Its ceasing to comply with the laws of the state and to further obey them simply results in excluding it from this jurisdiction, but it still lives in the jurisdiction of its creation and its officers and stockholders are still interested and continue to direct its affairs. While theoretically dead in this state, the actual facts show that it was very much alive. The directors who sent their attorney to this state to file an answer were acting as directors of the corporation, at least until their attorney reached the state line. Thereafter it may be admitted that he was merely representing these directors as the trustees of the corporation, but it must be apparent at once that any rights they acquire as trustees under the laws of Idaho will inure to the benefit of the corporation under the laws of Montana.

Let us now see what provision, if any, the act under consideration (section 11 of chapter 6, Laws Extraordinary Session 1912) makes for the appointment of a trustee or receiver. The statute says: "In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation whose

charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, or any other person or persons who may be appointed by any court of competent jurisdiction to perform that duty, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited." The statute has therefore only conditionally appointed the directors of the dissolved or noncomplying corporation as trustees, and it has left it to the discretion and within the power of the court to appoint some competent person or persons to act as trustee or trustees where the directors fail to act, or for any lawful reason the court may deem them disqualified or improper persons to so act.

Further pursuing the provisions of the statute, we find that it specially provides that no abatement shall take place in any action pending at the time of the forfeiture, and that the same may be prosecuted to final judgment and execution may issue thereon without bringing in anybody else, or substituting a receiver or trustee for the purpose of defending the action. The statute, however, is silent as to any action instituted after the forfeiture, and of course it could not be foreseen by the lawmaking body that a case of this kind would arise where the action would be instituted after the forfeiture had in fact been declared, and still the forfeiture would be unknown, both to the creditor and the corporation, and the corporation would actually appear and enter upon the defense of the action. If, however, we should take this statute as impliedly indicating that an *abatement* would take place in an action instituted after the forfeiture, there would still be no justification for the inference that by the use of the word "abatement" it was intended that the forfeiture would absolutely destroy any right of action a creditor might have, and that the abatement of the action would be permanent and result in a dismissal thereof.

[11] The present case was a suit in equity and in rem to foreclose a mortgage, and "in equity an abatement means merely a state of suspended animation, from which the suit may be revived." 1 Cyc. 21; Zoellner v. Zoellner, 46 Mich. 511, 9 N. W. 831, that is, the suit may revive when the reason for the abatement ceases, such, for example, as the appointment of a receiver pendente lite, or a guardian, pendente lite, or a special administrator, or a special representative to defend the action. In the case at bar, the action was abated until a trustee was appointed to represent the stockholders of the non-complying corporation.

[12] There is another principle of law everywhere recognized, the application of which would lead one to believe that an action commenced against a foreign corporation, even after the forfeiture of its right to do business, might not wholly fail, but

would only abate until such time as a proper party could be brought in to defend or a trustee might be appointed, and that is the presumption which arises that a person once in existence continues to live until the contrary is shown. In other words, if this foreign corporation had come into the state and complied with the laws thereof so as to give it the standing of a domestic corporation and entitle it to do business in this state, so long as it continues to do business, the presumption would arise that it is alive and complying with the laws of the state. No presumption of its death would arise, and it is doubtful if a party who has a cause of action against such corporation would be chargeable with the duty of investigating to determine before commencing his action whether or not it had terminated its existence by failing to comply with the law. It is unnecessary, however, to determine that question in this case, for the reason that we must pass upon cases in the light of the facts of each particular case, and in the present action the directors of the corporation responded to the service of summons on the statutory agent, and appeared and answered and actually entered upon the trial of the case. We hold that in such case the action should not be dismissed, but would only abate until such time as the trustees appeared or are brought in to defend or a proper trustee is appointed by the court to defend the action.

Upon a full view of this case as the peculiar facts are disclosed, I conclude that the action of the trial judge in appointing a receiver to defend in this action will not be vacated and set aside on writ of review, and that the directors of this Montana corporation have a right to appear in their individual capacities as trustees and defend in this action. It, therefore, becomes unnecessary to consider the proposition suggested on oral argument that the trustee appointed by the court does not intend to interpose any defense in this case. The writ should be quashed; and it is so ordered.

SULLIVAN, J. (dissenting). I dissent. The majority of the court in two opinions hold that the Shenon Land Company, a corporation organized under the laws of the state of Idaho, could commence and maintain an action against the Shenon Ranch Company, a corporation organized under the laws of Montana, which had forfeited all of its rights to do business in this state because of its failure to comply with the laws of Idaho in regard to paying its license tax, as provided by an act of the Legislature, requiring corporations to pay a license tax, passed at the special session of the Legislature held in January, 1912, which act was approved January 30, 1912, and is found in said Special Session Acts, at page 13.

The facts are quite fully stated in Mr. Justice STEWART'S opinion, which shows that under the provisions of said act said

Montana corporation had forfeited all rights to do business in this state. Section 10 of said act makes it unlawful for any corporation, domestic or foreign, which becomes delinquent in the payment of its license tax, under the provisions of said act, to exercise the powers of such corporation, or to transact any business in the state after the 30th day of November next following the delinquency, and if such delinquent corporation transacts any business after the forfeiture of the rights of such corporation, it is made guilty of a misdemeanor, and upon conviction may be punished by fine of not less than \$100, and not exceeding \$1,000, or by imprisonment in the county jail not less than 50 days and not more than 500 days, or by both such fine and imprisonment. Under the facts appearing from the record, it was made a crime for said Montana corporation to do any business in the state after the hour of 4 o'clock p. m. on November 30, 1912. Said corporation has not been reinstated, under the provisions of said act and has no authority whatever to do any business or to defend any suits in this state subsequent to the last-mentioned date. Its corporate rights were all forfeited, and, so far as this state was concerned, it was a dead corporation. Had it been a domestic corporation, it would have forfeited its charter.

Thereafter, on March 17, 1913, the Idaho corporation attempted to bring an action in the district court of Lemhi county against the Montana corporation, to foreclose a certain mortgage against said Montana corporation, by filing a complaint in the district court of Lemhi county. Service of summons in said action was made upon the person who had theretofore been designated as the agent of the Montana corporation, but whose agency terminated when the Montana corporation forfeited all its rights to do business in this state. However, the officers of the said Montana corporation employed attorneys to defend said corporation in said action, and caused an answer and cross-complaint to be filed in said action. Said officers and directors did not appear in said action any farther than to employ counsel to defend on behalf of the corporation. Thereafter, on April 24, 1913, the action came on for trial in the said court, and a jury was impaneled, and the trial continued from the 23d to the 28th of April, when the attorneys for the Montana corporation discovered said act of the Legislature under which all its rights to transact business in this state had been forfeited, and by which act it was made a misdemeanor for said Montana corporation to transact any business whatever in this state, and suggested to the court the discovery of said law, and that under it said corporation had no right to defend said action. Thereupon said court discharged the jury, and the trial was terminated without any judgment of any kind being entered in said matter. On the following day, April 29th, the plaintiffs in

this proceeding, who are the duly qualified and acting directors of said Montana corporation, brought an action against the Idaho corporation in said court, and had summons issued in such action, and said directors as plaintiffs sought to have said mortgage canceled and annulled. Thereafter (the exact date not appearing in the record) counsel for the Idaho corporation made application to said court for the appointment of a "trustee" for the Montana corporation, its stockholders and members, with power to settle the affairs of said Montana corporation in the state of Idaho, and with full power to maintain and defend any action or proceeding then pending against it, and to take such legal proceedings as might be necessary to fully settle the affairs of said corporation in this state "and to do all acts provided to be done in section 11, chapter 6, of the General Laws of Idaho passed by the extraordinary session of the 11th session of the Legislature, 1912" (Sess. Laws 1912, p. 18), thus recognizing that the plaintiff was proceeding in said application for the appointment of a trustee, and not under the general laws for the appointment of a receiver of an insolvent corporation. The following also appears in said application: "Also that such trustee may be made a party defendant with the defendant corporation in the above-entitled action, and that plaintiff may be permitted to file an amended complaint, and to have summons issue thereon to said trustee." On September 3, 1913, more than four months after the discharge of said jury, the court granted said motion, and appointed one C. G. Matthewson as trustee of the Montana corporation, its stockholders and members, with full power to settle the affairs of said corporation in the state of Idaho. The question directly presented is whether the court had jurisdiction to appoint said trustee under the provisions of said act.

The eleventh section of said act provides, among other things, as follows: "In all cases of forfeiture under the provisions of this act, the directors or managers in office of the affairs of any domestic corporation whose charter may be so forfeited, or of any foreign corporation whose right to do business in this state may be so forfeited, or any other person or persons who may be appointed by any court of competent jurisdiction to perform that duty, are deemed to be trustees of the corporation and stockholders or members of the corporation whose power or right to do business is forfeited, and have full power to settle the affairs of the corporation, and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to take such legal proceedings as may be necessary to fully settle the affairs of said corporation, and such directors or managers, as such trustees, may be sued in any of the courts of this state after such forfeiture by any person having a claim against any of said corporations: Provided,

always, that no action pending against any corporation, at the time of such forfeiture, shall abate thereby, but may be prosecuted to final judgment, and the same may be enforced by execution with the same force and effect, and in like manner as though no forfeiture had occurred." It will be observed from the provisions of said section that the directors or managers in office of the affairs of any domestic corporation whose charter may be forfeited under said act, or of any foreign corporation whose right to do business in this state may be forfeited, are deemed to be trustees of the corporation, or stockholders or members of the corporation, and have full power to settle the affairs of the corporation and to maintain or defend any action or proceeding then pending in behalf of or against any of said corporations, or to "take such legal proceedings as may be necessary to settle the affairs of such corporation." Said section provides that said managers, directors, or trustees may be sued in any of the courts of this state after such forfeiture, by any person having any claim against any of such corporations. It also specifically provides that no action pending against any corporation at the time of such forfeiture shall abate thereby, and does not provide that any action can be maintained against such corporation which is commenced after the forfeiture of its corporate rights. Under the provisions of said section, a domestic corporation forfeits its charter and all its rights on failure to comply with the provisions of said act, and it is then left to the directors or managers to settle up the affairs of the corporation. If they fail or neglect to do so, the court on proper application may appoint a trustee to wind up the corporation's affairs under the direction of the court. No showing whatever has been made to the effect that the officers and directors of said corporation have failed and refused to proceed and wind up the affairs of said corporation in this state, but the record shows exactly the contrary. It shows that as soon as they ascertained that the Montana corporation could not defend in said action, and that it was a crime for it to defend, they brought an action in the name of the directors, in which they subjected themselves to the jurisdiction of the trial court, and sought to bring to issue the right of the Idaho corporation to foreclose said mortgage. The record shows that such directors subjected themselves to the jurisdiction of the court, and sought to take charge of the property and affairs of said corporation and wind up its affairs for the benefit of its creditors and stockholders, as clearly contemplated by said act. Under the provisions of said act, the court ought not to appoint a trustee to displace the directors, in winding up the affairs of such corporation, only in case of neglect of duty or abuse of power by the directors, and only when required for the protection of the rights of creditors or stockholders. No neg-

lect of duty or abuse of power whatever has been shown in this case, as the directors, immediately upon discovering that said corporation had forfeited its rights to do business, submitted themselves to the jurisdiction of said court.

This action was brought about four months after the Montana corporation had forfeited its rights to do any business whatever in this state. The summons was served upon the person who had been designated as the statutory agent of the Montana corporation and was its statutory agent until it forfeited its right to do business in this state. After that he was not its statutory agent for any purpose whatever, and there was no authority whatever for service of summons upon him for said corporation. Would it be contended for a moment that a corporation which had no authority whatever to do business in the state could have a statutory agent upon whom process might be served? I think not. Then, no service of summons has been made in this case, and the only appearance made was for the corporation, which appearance was unlawful under said act. It is not quite fair to say that the directors appeared in said action. Their only appearance was on behalf of the corporation, and not as directors and officers of said corporation. The only thing they did was to file an answer for the corporation. No answer was filed by them as directors and trustees. Then there has been no service of summons in this case, and upon the theory of the majority, the court, or judge, may appoint a trustee upon whom service may be made, or who may appear in the case without any service of summons, and bind the corporation by his appearance. It seems to me that the statement of this proposition is sufficient to show its fallacy. The service of summons has not been made upon the corporation in this case and no one has appeared for it who had any authority whatever to appear.

The CHIEF JUSTICE names the person appointed by the court a "receiver," and in his opinion says that said "receiver" was appointed to defend in this action and to represent the stockholders of said corporation. The court, however, in his order calls him a "trustee." The application for the appointment calls him a "trustee," and asks that a "trustee" be appointed, and that plaintiff may be permitted to file an amended complaint, "and to have summons issued thereon to said trustee." Counsel for plaintiff thus concedes that the service of summons upon the Montana corporation was not sufficient, but had the court appoint a trustee upon whom the summons might be served. It must be conceded that there was no agent or any other person in this state at the time of the commencement of this suit upon whom summons could be legally served, and the court had no authority to appoint a trustee for that purpose. This is an action to foreclose a mortgage, and the statute provides

how service of summons may be made upon a nonresident defendant. Service of summons by publication could have been made under the law of this state, but no such service has been made.

The CHIEF JUSTICE holds that "abate," as used in section 11 of said act, means "suspended animation" from which the suit may be revived, but Bouvier in his Law Dictionary states that the word "abate," as applied to an action, is to cease, terminate, or come to an end prematurely, and says that the suit may be revived when the reason for the abatement ceases. Section 848, Equity Pl. & Pr., by Fletcher, as to procedure to revive an action. The word "abate" as used in said section 11 of said act refers to actions pending at the time of the forfeiture and to none other. If this action had been pending at the time of the forfeiture, it would have come under that provision of said statute which includes the word "abate," and is as follows: "Provided, that no action pending against any corporation at the time of the forfeiture shall abate thereby but may be prosecuted to final judgment." The action to foreclose said mortgage was brought four months after the forfeiture, and had no existence at the time of the forfeiture. It had no animation to suspend. After a forfeiture, suit may be brought, by any person having a cause against the corporation, against the directors as trustees; and, if they fail or refuse to appear and defend, the court may appoint a trustee to do so. Said action was brought against the Montana corporation, and the complaint in no manner makes the directors defendants therein.

The CHIEF JUSTICE states in his opinion that the directors of said Montana corporation caused an appearance of that corporation to be entered in said action. I would ask, How could the directors cause a legal appearance to be entered for the Montana corporation when under the law that corporation was prohibited from appearing or defending in any action or doing any business whatever in this state, and especially when it was made a crime for them to appear and defend in said case? Said directors could not appear for the Montana corporation under the provisions of said act.

The CHIEF JUSTICE states that the directors responded to the service of process, appeared and answered, and entered upon the trial of the case, and then in the midst of the trial, withdrew. The record, as I understand it, shows that the only appearance that was made was for and on behalf of the Montana corporation. The directors as directors, or trustees for creditors and stockholders, made no appearance whatever.

The CHIEF JUSTICE says in his opinion that the order of the trial court appointing the trustee recites that the directors of this noncomplying corporation are nonresidents of the state and beyond the jurisdiction of the court, "and that fact is not denied." The

record shows that that statement in the order of the district court is not true; the judge was there mistaken. The record shows that the directors had all appeared and submitted themselves to the jurisdiction of the court by bringing an action in said court to test the validity of the mortgage sought to be foreclosed in the original case, and that action was pending in that court from the 29th day of April, 1913, and was pending at the time said order was made, and a resident attorney of this state was one of the attorneys who appeared for said directors.

However, if the commencement of said action by the directors, involving the question of the validity of the mortgage that was sought to be foreclosed, did not give the court jurisdiction of the directors in the foreclosure suit, if the court holds that that action was still pending, and that service of summons had been properly made on the non-complying corporation, and that attorneys had appeared for it, the law would require the service of all motions and papers in that action to be made upon the attorneys appearing therein. It is contended that said action is still pending, and, if so, the attorneys who appeared therein for the defendant ought to have been served with a notice of said motion to appoint the trustee. Counsel for the plaintiffs ought not to be permitted to "play fast and loose" in this matter, and contend that the action is pending, and that service of summons and appearance has been made by counsel for the defendant corporation, and then refuse or decline to serve all papers in such action upon the attorneys.

The CHIEF JUSTICE would indicate by his opinion that he was a little doubtful whether the trial court or judge had power to appoint a "receiver" and clothe him with full power and authority to settle the business and affairs of the Montana corporation in general, but holds that the court had jurisdiction to appoint him to defend in said action, and in support of that proposition refers to two cases decided by this court under the provisions of section 4329. It is sufficient to say that the application for the appointment of said receiver was not made under the provisions of section 4329, but was made under the provisions of the act of 1912, and that law was not intended to be supplemented by the provisions of section 4329 in regard to the appointment of receivers for corporations. The act of 1912 was passed for the purpose of winding up the affairs of a corporation in this state that had forfeited its rights to do business therein. Under the provisions of said act, domestic and foreign corporations are placed on the same footing; neither has any right to do business in the state after the forfeiture. The CHIEF JUSTICE says that a domestic corporation is "dead" after the forfeiture, and I undertake to say that a foreign corporation is just as dead in this state as a domestic corporation,

after the forfeiture, so far as its doing business in this state is concerned.

The CHIEF JUSTICE states in his opinion that it is left in the discretion and within the power of the court to appoint some competent person or persons to act as trustee or trustees where the directors fail to act, or for any lawful reason the court may deem them improper persons so to act. The facts of this case show that the directors have not failed to act, and it is not shown that they were disqualified from acting. As before stated, the very next day after it was ascertained that the rights of the Montana corporation had been forfeited, the directors submitted themselves to the jurisdiction of the court, and employed a resident attorney to represent them. The mere fact that the directors of a noncomplying corporation are residents of another state does not deprive them of the right to represent the stockholders and creditors and authorize the court to appoint a trustee in their stead. The record clearly shows that the directors were desirous of representing the creditors and stockholders, and no fact or facts appear in the record that would indicate that they were in any manner disqualified from so doing, or that would justify the court in appointing a trustee to take their place.

In *Havemeyer v. Superior Court*, 84 Cal. 327, 24 Pac. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, the court held that, upon the involuntary, as well as voluntary, dissolution of a corporation, the administration and distribution of its assets is left, as a rule, to the directors in office at the date of dissolution, even though the dissolution be upon judgment of forfeiture, and that the appointment of a receiver is an exception to be made only in cases of neglect of duty or abuse of power by the directors, when required for the protection of the rights of a creditor or stockholder. That is a very instructive case, and construes section 400 of the Civil Code of California, which is identical with section 2787, Rev. Codes of Idaho, and is as follows: "Unless other persons are appointed by the court, the directors or managers of the affairs of such corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have power to settle the affairs of the corporation." Section 11 of the Idaho act contains, among other things, substantially the same provisions as does said section 400 of the California Code. In commenting on that section, the Supreme Court in the *Havemeyer* Case, said: "By its own unaided force, without the intervention, or any necessity for the intervention, of a court, it makes the directors managers of the affairs of the corporation and trustees for the creditors and stockholders, with full power of settlement." The court held that said directors are amenable to the jurisdiction of a court of equity, and may be called to account if they neglect their duty or

abuse their power; but it holds that until they are so called to an account in an independent action or proceeding by a party in interest, no court has any excuse for interference. Commenting on the decision of the superior court in that case, the court said: "Because a corporation has violated its duty to the public it does not follow that its members cannot be trusted to look out for their own interests," and suggests that creditors will be more quickly and certainly paid without a receiver than with one, as the expenses of a receivership may greatly reduce the assets of such corporation. When a corporation is thus dissolved, its property vests in its stockholders, under our law, subject only to the claims of the creditors, and after the dissolution of such corporation, the property of the corporation is held upon the same tenure, subject to the same conditions as similar property owned by natural persons, and whatever others may do with their property they may do after paying the debts of the dissolved corporation.

The Montana corporation has not forfeited its property rights by its failure to pay said license tax and comply with said law; it has simply forfeited its rights to do business in the state, but said act preserved to the directors the right to become the trustees of the creditors and stockholders of such corporation. Had the Idaho corporation, after the Montana corporation had forfeited its rights to do business in this state, brought its action against the directors of said corporation for the foreclosure of said mortgage, the action could have been maintained, and, although the directors were residents of Montana, plaintiff could have procured service on them by publication of summons. There would have been no difficulty whatever in that regard. There was no Montana corporation in existence in this state at the time said action was brought, and no action can be maintained against a nonexistent corporation any more than one can be maintained against a dead man. That corporation was dead so far as this state was concerned, and all the rights of the Idaho corporation could have been fully protected by complying with the provisions of said act of our Legislature in bringing its action, as said section 11 of said act provides that actions may be brought against such directors, and that they may maintain actions in the settlement of the property rights of such nonexistent corporations.

In *Crossman v. Vivlenda Water Co.*, 150 Cal. 575, 89 Pac. 335, it was held as follows: "It is settled beyond question that, except as otherwise provided by statute, the effect of the dissolution of a corporation is to terminate its existence as a legal entity, and render it incapable of suing or being sued as a corporate body or in its corporate name. It is dead, and can no more be proceeded against as an existing corporation than could a natural person after his death.

* * * As to this, all the text-writers agree, and their statement is supported by an overwhelming weight of authority."

Many authorities hold that all actions abate upon the dissolution of a corporation, voluntary or involuntary. However, said act of our Legislature provides that no action pending against any corporation at the time of such forfeiture shall abate thereby, but may be prosecuted to final judgment. This provision clearly indicates that the Legislature did not intend that any action could be brought and maintained against a corporation after its rights had been forfeited under the provisions of said act. The forfeiture of the rights of the Montana corporation in this state put an end to its existence, so far as this state is concerned, for all purposes whatsoever as a corporate entity, and destroyed all of its powers as such. In other words, the forfeiture of all its rights under the laws of this state meant its legal death, and there remained thereafter nothing but the settlement of its estate, and said act of the Legislature provides how that must be done.

It is stated in 5 Thompson on Corporations (2d Ed.) § 6550, as follows: "And while, as will further appear, statutes may provide that the directors and trustees at the time of dissolution shall be trustees of the creditors and stockholders, with power to settle the affairs of the corporation, yet even such a statute does not have the effect of continuing the corporate existence so as to enable it to prosecute or defend an action in its corporate name." And in section 6555, the author quotes from *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375, as follows: "The dissolution of a corporation implies its utter extinction and obliteration as a body capable of suing or being sued."

It may be contended that the Montana corporation is not dissolved. As I view it, there is nothing left of that corporation as a corporation; it is dissolved and dead so far as this state is concerned, and had it been a domestic corporation, under the provisions of said act of our Legislature, it would have forfeited its charter, and then would have been dead indeed, but no more dead than the Montana corporation now is, so far as this state is concerned.

It was held in *Combes v. Keyes*, 89 Wis. 297, 62 N. W. 89, 27 L. R. A. 369, 46 Am. St. Rep. 839, that after the dissolution of a corporation, the power to proceed judicially against it is wholly divested except as specially authorized by statute. The act of our Legislature referred to especially reserves the right to creditors and others to sue the directors and managers of the dead corporation in order to enforce any claims or rights that they may have against it after its rights are forfeited.

In Mr. Justice STEWART'S opinion, he quotes from section 4329, Rev. Codes, as supporting the doctrine that the court had jurisdiction to appoint a receiver in the case at bar. That section, as I view it, has nothing to do with the appointment of a trustee under the provisions of said act of 1912. There was no showing made by the Idaho corporation for the appointment of a trustee such as is required, under the provisions of said section 4329, for the appointment of a receiver. The law of 1912 was enacted for cases where corporations had forfeited their right to do business in the state by reason of their having failed to pay their license fee, and not for the appointment of a receiver on the grounds provided in said section 4329. The provisions of that section have no application whatever to this case, and none of the grounds authorizing the appointment of a receiver under section 4329 were attempted to be shown in the application to appoint said trustee.

I, therefore, conclude: (1) That under the provisions of said section the action of the Idaho corporation could not be maintained against the Montana corporation, it having been commenced subsequent to the forfeiture of the Montana corporation of its right to do business in this state; (2) that the trial court had no jurisdiction whatever to appoint a trustee to defend the Montana corporation in said action, as said action could not be maintained under the law. No creditor or stockholder of said corporation can lose any rights whatever by following the provisions of said act of 1912 in winding up the affairs of said corporation in this state. A right of action of any creditor would in no manner be destroyed or jeopardized by following its plain provisions. A peremptory writ of prohibition ought to issue.

TWIN FALLS COUNTY v. WEST et al.

(Supreme Court of Idaho. Nov. 29, 1913.)

1. RECORDS (§ 5*)—FEES—POWER TO CHANGE—COUNTIES.

Where a statute fixes the fees to be charged for recording written instruments, the board of county commissioners have no power or authority to change the fee and to direct and require the recorder to record such instruments at a less or different rate than that prescribed by statute.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

2. REGISTERS OF DEEDS (§ 7*)—ACTION ON RECORDER'S BOND—ESTOPPEL.

Where the board of county commissioners entered into an agreement or arrangement with the representative of a land and water company, whereby it was agreed that a certain class of instruments should be recorded at a flat rate of so much per instrument, irrespective of the number of folios contained in the instrument, and the amount charged was not equal to the amount required by statute, and the county recorder followed and carried out

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

the terms of the arrangement and agreement, and did the recording for the amount specified and returned the fees so collected to the county, and made his reports and settled with the county, and the board of commissioners approved and allowed his reports and accounts, and it is admitted that the recorder turned over to the county all the fees actually received by him, and after the expiration of his term of office and the term of office of the board of commissioners, who made and entered into such agreement, the board of commissioners commences an action against the recorder for the collection of the sum which represents the difference between the amount actually received and the amount required by statute, *held*, that it would be inequitable and unjust to allow the county to maintain such action against the officer and his bondsmen, and that the doctrine of estoppel ought to apply against the county in such case.

[Ed. Note.—For other cases, see Registers of Deeds, Cent. Dig. §§ 15, 16; Dec. Dig. § 7.*]

8. RECORDS (§ 5*)—FEES—RIGHT TO RECOVER.

Under such circumstances, the only remedy left to the county is to pursue the person or corporation that had the work done for the balance due under the statute.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 5.*]

Stewart, J., dissenting in part.

Appeal from District Court, Twin Falls County; C. O. Stockslager, Judge.

Action by Twin Falls County against H. T. West and others on an official bond. Judgment for plaintiff, and defendants appeal. Reversed.

S. H. Hays, of Boise City, and Sweeley & Sweeley and W. P. Guthrie, all of Twin Falls, for appellants. A. R. Hicks, Co. Atty., of Twin Falls, for respondent.

AILSHIE, C. J. This action was instituted against H. T. West and the U. S. Fidelity & Guaranty Company to recover on an official bond which West had given for the faithful discharge of the duties of clerk of the district court and ex officio county recorder of Twin Falls county.

Twin Falls county was formerly a part of Cassia county, and the territory now comprised in Twin Falls county was organized by act of the Legislature of February, 1907, and the appellant West was appointed to the office of clerk of the district court and ex officio county recorder. Prior to the creation of Twin Falls county, and while it was yet a part of Cassia county, the county recorder and board of commissioners of Cassia county had entered into some kind of an arrangement with the Twin Falls Land & Water Company, whereby the county was to give the latter corporation a straight flat rate of 40 cents each for recording what were commonly designated as water contracts, whereby the company contracted with purchasers of water rights for watering lands under their canal system for the sale of such right to the purchaser. At the time West went into office, the representative of the water company

appeared before the board of county commissioners of Twin Falls county, and asked the board to authorize and direct the recorder to continue the same arrangement and agreement in the latter county by continuing to record all water right contracts issued by this Land & Water Company at the flat rate of 40 cents each. The appellant West thereupon advised the board and the representative of the company that the new county was paying something like double the salaries that had been paid in the old county of Cassia, and that it would consequently cost more to have the instruments recorded, and that they should charge at least \$1 per instrument. It was finally understood and agreed that these instruments should be recorded at the flat rate of \$1 each, and the board of commissioners so agreed and instructed the recorder to charge accordingly. Thereafter and during West's term of office, he recorded a large number of these contracts, both for the Twin Falls Land & Water Company, and later on for the Twin Falls-Salmon River Land & Water Company, and from time to time made a report of his fees to the board of commissioners, and his reports were approved, settled, and allowed, and, after the completion of his term, he went out of office with his accounts all audited, allowed, and approved. Thereafter and on the 29th day of April, 1911, the county, acting through a new and different board of commissioners, caused an action to be instituted against West and the Surety Company on his official bond, for the recovery of the sum of \$8,791.41, together with interest, which represented the difference between the price which he had charged these land and water companies for recording contracts and the amount that the recording thereof would have actually amounted to had he made the regular charge prescribed by the statute for recording such instruments. Defendant West and the Surety Company appeared and answered, and the case went to trial and resulted in a judgment in favor of the plaintiff and against the defendants, from which this appeal has been prosecuted. The material facts of the case are substantially as above set out.

[1] The appellant contends that, under these facts, the county is estopped and precluded from maintaining its action against appellants for the recovery of the difference between the fees actually collected and that which should have been collected under the statute. The gist of this argument is that, since the board of commissioners are the chief and superior officers of the county, who have the supervision and control of the financial affairs of the county and the settlements with various county officers and the auditing and allowance of claims and accounts, they could not authorize and direct the recorder to do this recording for a fixed sum, and then, after he has done the work as directed,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and collected only the amount agreed upon and after he has settled with the commissioners, maintain an action against him for the collection of the deficiency.

The county, on the other hand, contends that, under the decision of this court in *Lincoln County v. Twin Falls North Side Land & Water Co.*, 23 Idaho, 433, 130 Pac. 788, the board of commissioners had no power or authority to give any such instructions, or to enter into any agreement, whereby the recorder should record instruments for any less sum than that prescribed by the statute (section 2124, Rev. Codes). In the opinion in that case, the court, in discussing the right of the county to sue the company that had the work done, and holding that it might maintain the action directly against the company, said: "It may pursue the officer and his bondsmen, or it may pursue directly the party who had the service performed." That language, however, was used in connection with the general discussion of the liability of the officer to respond to the county for the full statutory fees, as well as the liability of the person or company having the recording done, and accordingly, the court held that the right of action would lie against either the officer or the individual or corporation having the work done and directly liable for the payment of the fees. No question was discussed in that case of the liability of the officer directly to the county, where he had acted under instructions from the board of commissioners, and had turned over to the county all the fees that he had actually collected under those instructions.

It is also true that the recorder was not obliged to follow the instructions of the commissioners or any one else, when they ran counter to the statute. He might have nevertheless insisted on the statutory fees, and have required the payment of the same before doing the work. He no doubt thought, however, that it was his duty to follow the instructions of the board of commissioners, and accordingly did the work here in question at the uniform flat rate of \$1 per instrument recorded. It is admitted that the appellant accounted for and turned over to the county all the fees actually received by him. It is evident at a glance that a great wrong and injustice would be done appellant if, acting under these instructions and directions and the evident belief that he had a right to follow the advice and directions of the board of commissioners, he should now be obliged to pay to the county the difference between the fees actually received and the fees which he would have received had he demanded the amount provided by statute. Why the county should prosecute an action against the officer, who did not receive the fees, for the collection of something he did not receive, rather than prosecute an action against the real debtor at whose instance and request the work was done, does not appear.

[3] It is nevertheless clear that, under the decision of this court in the *Lincoln county* case, the person or corporation having the work done is liable for the balance which should have been paid at the time the work was done.

[2] The question arises under the facts of this case as to whether the doctrine of estoppel, which under similar circumstances would unquestionably be applied to an individual, should not be applied to the county as a municipal corporation. We are aware that this rule is very rarely applied to the state, county, or municipal corporations. It has, however, been adopted in exceptional and unusual cases against municipal corporations in a number of instances and was so applied by this court in *Boise City v. Wilkinson*, 16 Idaho, 177, 102 Pac. 157, and in commenting upon the rule, the court said: "We recognize that, as a general rule, the doctrine of estoppel does not apply to municipal corporations, and we are not unmindful of the fact that the courts of many states have absolutely refused to apply it to such corporations. We are not prepared, however, to announce an unalterable and unexceptionable rule in this state which would inevitably result in perpetrating wrong and injustice in exceptional cases like this. Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exceptions would be to rob such courts of much of their efficacy and power for administering even-handed justice. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity, they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen."

A large number of authorities were cited in support of the conclusion there reached. In addition to the authorities cited in that case, the following are also in point: *Jordan v. City of Chenoa*, 166 Ill. 530, 47 N. E. 191; *City of Los Angeles v. Cohn*, 101 Cal. 373, 35 Pac. 1002; *Hubbell v. City*, 64 Kan. 645, 68 Pac. 52; *Board of Commissioners v. City of Denver*, 30 Colo. 13, 69 Pac. 586; *Oliver v. Synhorst*, 48 Or. 292, 86 Pac. 376, 7 L. R. A. (N. S.) 243; and *City of Colorado Springs v. Colorado City*, 42 Colo. 75, 94 Pac. 316.

It strikes us that it would shock the sense of honesty and fair dealing of the average citizen as quickly for a county or other municipal corporation to recover a judgment against an officer, under facts and circumstances such as are disclosed here, as it would for one individual to recover against another, under a like state of facts and cir-

circumstances. Estoppel is an equitable doctrine to be applied in a court of conscience for the purposes of accomplishing even-handed justice. The application of that doctrine to the present case, in an action between the county of Twin Falls and this appellant, will certainly accomplish substantial justice and equity between the two litigants. The fact that Twin Falls county had lost over \$8,000 by this transaction, and that it ought to be able to recover it from the real debtor would not justify the courts in allowing the county to recover that sum from the officer, who acted under the direction of the board of commissioners of the county, and who might be obliged to lose the whole sum if a judgment like this should stand.

From what has been said, it follows that the judgment in this case ought to be reversed, and it is so ordered, and the cause is remanded to the trial court, with direction to dismiss the action. Costs awarded in favor of appellant.

SULLIVAN, J. (concurring specially). I concur in the conclusion reached by the majority of the court to the effect that the plaintiff cannot recover in this action. I am also of the opinion that the county cannot recover from any one on the claim sued on herein. In my dissenting opinion in the case of *Lincoln County v. Twin Falls, etc., Co.*, 23 Idaho, 441, 130 Pac. 788, my views are expressed as to the right of the county to recover such fees as are claimed in this case.

STEWART, J. I concur in the opinion of Chief Justice AILSHIE in this case, except in the Chief Justice's language in approving the language used by the same Chief Justice in the opinion of *Lincoln County v. Twin Falls North Side Land & Water Co.*, 23 Idaho, 433, 130 Pac. 788, as follows: "It may pursue the officer and his bondsmen, or it may pursue directly the party who had the service performed." The reason for this is that in the present case we hold that the officer is not liable, by reason of the facts shown in the case (and in that I concur), and the same reasoning, in my judgment, should also apply to both the bondsmen of the officer and the party who had the service performed. I see no reason for distinguishing the party from the bondsmen, who only guaranteed the performance of the duty of the officer according to law, and the party who had the services performed paid the money with the understanding that the charge made by the officer was the charge agreed to and approved by the county commissioners. While the language used above is perhaps true as a general rule, as was stated in that case and in the present case, the distinction I hold is that such rule should not be applied to the facts in this case.

BLOMQUIST et al., Idaho Tax Commission, v. BOARD OF COM'RS OF BAN- NOCK COUNTY.

(Supreme Court of Idaho. Nov. 29, 1913.)

1. TAXATION (§ 446½*)—EQUALIZATION—TAX COMMISSION—CONSTRUCTION OF STATUTE.

Held, that the Legislature in creating the Idaho Tax Commission (Sess. Laws 1913, p. 167) did not intend to deprive any of the constitutional officers or boards of duties imposed upon them by the express or implied provisions of the Constitution, and that it was not intended that said Tax Commission should usurp or perform the duties of the assessors or county boards of equalization.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 788; Dec. Dig. § 446½.*]

2. TAXATION (§ 446½*)—EQUALIZATION—TAX COMMISSION—VALIDITY OF STATUTE.

Held, that said act is not in conflict with the provisions of the Constitution.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 788; Dec. Dig. § 446½.*]

3. TAXATION (§ 450*)—EQUALIZATION—TAX COMMISSION—POWERS.

Held, that said Tax Commission has not the power or authority to compel a county board of equalization to adopt its views or judgment in equalizing the value of certain property for taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 800-804; Dec. Dig. § 450.*]

4. TAXATION (§§ 319, 449*)—ASSESSOR—BOARD OF EQUALIZATION—POWERS.

The words "assessor" and county "board of equalization," as used in the state Constitution, carry with them the powers usually conferred on officers or boards of like names.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 514, 527-529, 532-534, 790-799; Dec. Dig. §§ 319, 449.*]

5. TAXATION (§ 449*)—ASSESSMENT AND EQUALIZATION—LEGISLATIVE POWER TO CHANGE.

Under the provisions of section 6, art. 18, of the Constitution, it is essential that the assessment of property located wholly within a county shall be made by the assessor elected by the voters of the county, and after such assessment is made, the county board of equalization may equalize such assessments.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 790-799; Dec. Dig. § 449.*]

6. TAXATION (§ 317*)—ASSESSMENT AND EQUALIZATION—LEGISLATIVE POWER TO CHANGE.

Under the provisions of the state Constitution, the Legislature cannot assess property, nor can any appointive board do so.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 525, 526; Dec. Dig. § 317.*]

7. TAXATION (§ 449*)—ASSESSMENT AND EQUALIZATION—LEGISLATIVE POWER TO CHANGE.

Since the Constitution provides a method or system for the assessment of property, with the object and purpose of arriving at a uniformity of valuation, and has designated certain officers to perform the duties relative thereto, it is beyond the power of the Legislature to take from such officers such duties.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 790-799; Dec. Dig. § 449.*]

8. TAXATION (§§ 449, 497*)—EQUALIZATION—POWERS OF TAX COMMISSION—MANDAMUS.

When the county board of equalization exercises its legal discretion in regard to equalizing the valuation of property for assessment,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and does so in good faith and without fraud, the Tax Commission had no authority to set aside such action and substitute its own judgment therefor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 790-799, 911, 912; Dec. Dig. §§ 449, 497.*]

9. TAXATION (§ 25*)—CHANGE OF METHOD—LEGISLATIVE POWERS.

Since the Constitution provides a scheme or framework for the administration of the revenue laws of the state, the Legislature cannot substitute another and different scheme or method therefor.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. § 25.*]

10. TAXATION (§ 25*)—CHANGE OF METHOD—LEGISLATIVE POWERS.

Section 6, art. 18, of the state Constitution provides for the biennial election of county commissioners, and section 12 of article 7 provides that the boards of county commissioners of the several counties of the state shall constitute boards of equalization in their respective counties, whose duty it shall be to equalize the valuation of taxable property in their respective counties.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. § 25.*]

11. TAXATION (§ 276*)—ASSESSMENT—SITUS OF PROPERTY.

A state board of equalization is provided for by section 12, art. 7, of the state Constitution, consisting of five state officers. That board has power to equalize the assessment of property between different counties of the state, and also to assess the property of railroads, telegraph, telephone, and transmission lines of the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453, 466-468; Dec. Dig. § 276.*]

12. MANDAMUS (§ 72*)—EXTENT OF RELIEF—DISCRETIONARY ACTS OF OFFICERS.

In mandamus proceedings, if the action required is judicial and discretionary in its nature, the court could only compel the officer to act, but could not compel him to decide in any particular manner.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 134; Dec. Dig. § 72.*]

13. TAXATION (§ 25*)—CHANGE OF METHOD—LEGISLATIVE POWERS.

The Legislature has no power or authority to set aside the revenue system of the state for assessing, equalizing, and taxing property established by the Constitution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. § 25.*]

14. TAXATION (§ 276*)—ASSESSMENT—SITUS OF PROPERTY.

Where the situs of property for taxation is not wholly within any one county, such as railroads, telegraph lines, etc., such property may be assessed as a whole by the officers having jurisdiction thereof, such as the State Board of Equalization in this state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 453, 466-468; Dec. Dig. § 276.*]

15. TAXATION (§ 450*)—BOARDS OF EQUALIZATION—DECISION—APPEAL.

The Legislature has not provided an appeal from the decision of Boards of Equalization.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 800-804; Dec. Dig. § 450.*]

16. TAXATION (§§ 449, 497*)—EQUALIZATION—POWERS OF TAX COMMISSION—MANDAMUS.

The Idaho Tax Commission is not given the power, under the provisions of said act, to compel the county board of equalization, where

such board has acted within its legal discretion, and fairly and honestly, to change such action and make it conform to the judgment of the Commission in such matter.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 790-799, 911, 912; Dec. Dig. §§ 449, 497.*]

Original proceedings by J. A. Blomquist and others, as the Idaho Tax Commission, for a writ of mandate to compel the County Commissioners of Bannock County, acting as a Board of Equalization, to change its equalization of the value of certain property to conform to the views of the Tax Commission in regard thereto. Alternative writ quashed, and peremptory writ denied.

D. Worth Clark, of Pocatello, and James E. Babb, of Lewiston, for plaintiffs. J. H. Peterson, Atty. Gen., J. J. Guheen and T. C. Coffin, Asst. Attys. Gen., and McDougall & Jones, of Pocatello, for defendant.

SULLIVAN, J. This is an application by the Tax Commission of the state for a writ of mandate to the Board of County Commissioners of Bannock County, sitting as a Board of Equalization for Bannock County, to compel said board to equalize the taxes of Franklin & Hays in the amounts fixed by an order made by said Idaho Tax Commission, and to compel them to comply with said order in all respects. Upon the application of said Tax Commission, the alternative writ of mandate was issued, and the said board made due return thereto, and the cause came on for hearing before this court upon the petition and affidavit and motion to quash interposed by the defendants. Briefly, the facts are as follows: N. G. Franklin and R. J. Hays constitute a partnership doing business in Pocatello, Bannock county. The property of the partnership was assessed by the assessor of said county for taxes for the year 1913, as follows: Improvements situated upon block 39, \$15,000; machinery, \$5,000. Thereafter application was made to said Board of Equalization for a reduction in this valuation, with the result that the board refused to reduce the assessment as to the improvements, but reduced the assessment on machinery to \$3,000, making the total assessment as equalized \$18,000 on said improvements and machinery. Said partnership then filed their complaint with the Idaho Tax Commission, the plaintiffs herein, after which a hearing was had, where all parties interested appeared, and evidence was taken before said Commission as to the actual cash value of said property, and upon consideration of such evidence the commission entered an order, which was duly served upon the defendants, a part of which order is as follows: "It is therefore ordered that the order of the said Board of Equalization, reducing the valuation of said machinery to the sum of \$3,000, and their refusal

and neglect to reduce the valuation fixed by the assessor upon the brewery building aforesaid, be and the same is hereby set aside and declared erroneous and of no effect. It is further ordered that the said Board of Equalization, consisting of Meyers Cohn, George Glittins, and W. B. Wright, be and they are hereby directed that immediately upon receiving notice of this order, to enter upon the assessment roll of the said Bannock county, state of Idaho, or cause to be entered thereon in accordance with the statute in such cases provided, the valuation of the aforesaid improvements upon said lots at the sum of \$10,000, and the machinery above referred to at the sum of \$1,000, and that when such change in said assessment shall have been made as herein directed, the same shall become the equalized assessment of said property, upon which shall be computed the taxes to be paid by the said owner of said property for the year 1913." The Board of Equalization of Bannock county refused to comply with said order so made, and the Idaho Tax Commission now seeks in this proceeding to compel said board to comply with said order.

[1, 2] The constitutionality of the act of the Legislature creating the Idaho Tax Commission, and providing for its organization and defining its powers and duties, etc. (Sess. Laws 1913, p. 167), is raised by this proceeding, and if it be determined that said act is constitutional, then the question of the duties of said Tax Commission is also raised.

It is contended by counsel for the Tax Commission that said act was intended to give plenary powers to said Commission as set forth in section 8 of the act, which section is as follows: "The Commission shall supervise the administration of all laws relating to the assessment of property, and the levy, collection, apportionment and distribution of taxes, and shall exercise power and authority to enforce all such laws, and in so doing shall oversee all boards of assessment, boards of equalization and all officers upon whom any duties devolve under the revenue laws of this state, and require all such boards and officers to perform the duties imposed upon them by such laws, and may examine all books, records and accounts of such boards and officers, and require such boards and officers to furnish the Commission such records, data and information as may be had from the records in their several offices and as the Commission may deem necessary." It will be observed from the provisions of said section that it does not confine the supervision and administrative powers of the Tax Commission to any one department or feature in the levy, collection, apportionment, or distribution of taxes, but makes its powers in this respect general, so as to cover all features of the revenue laws of the state providing for the assessment, levy, collection,

apportionment, and distribution of taxes. It is clear that if the provisions of said section must be so construed as to run counter to, or be in conflict with, any of the provisions of our Constitution in regard to the assessment, collection, etc., of taxes, then said act must be held to be in violation of the Constitution; but if the duties imposed upon said board by said act do not take away from or impinge upon the duties of the constitutional officers who are authorized to assess, equalize, collect, and distribute taxes, then said act is not in conflict with the Constitution and is valid.

[3, 4] The direct question at issue in this case is, Has the Tax Commission power to compel a county board of equalization to adopt its views in equalizing the value of certain property for taxation? The assessor is required to assess the property in his county at its actual cash value, according to his honest opinion and best judgment, and if the opinion of the Tax Commission is different from that of the assessor, the Tax Commission cannot compel the assessor to change such assessment and make it conform to the opinion of the Tax Commission. And so with the Board of Equalization. It has certain discretion in the equalization of the values placed upon property within its county by the assessor; and, while the Tax Commission has full power and authority to consult and advise with the Board of Equalization in regard to the true cash value of the property sought to be equalized, they have no power or authority under said act to compel the Board of Equalization to equalize according to the Commission's views rather than its own, so long as the officer or board performs the duties imposed by law, and acts in good faith and according to his best judgment and discretion.

[4-7] The words "assessor" and county "board of equalization," as used in the Constitution, carry with them the powers usually conferred upon officers or boards of like names. Under section 6, art. 18, of the Constitution, it is essential that the assessment of property located wholly within a county shall be made by the assessor elected by the voters of the county, and if the assessor has no discretion in placing a value upon the property assessed, he is nothing more than a listing officer, without any power to assess property at its cash or any other value, according to his best judgment or legal discretion. It may be said that the duties devolving upon the assessor and county board of equalization can still be performed, but such duties are no more than empty forms, if appointive boards and officers desire to act and fix values, and do so act. The fact that it is left entirely to the judgment of such appointive boards and officers as to whether or not they will act is not controlling.

Before taxes can be levied upon any property, the property must be assessed; that is,

it must be listed and valued for taxation. Under our Constitution this duty devolves upon the officers whose title of office indicates that duty, to wit, the assessors. The Legislature cannot assess property, nor can any appointive board assess property, for taxation under the Constitution of the state of Idaho, and the essential duties of an assessor and a county board of equalization must be preserved until a change is made by proper amendments to the state Constitution.

It is stated in Cooley on Taxation (3d Ed.) p. 778, that a board to review assessments, having power to make changes, is in effect a board of assessors, and if by the law assessors must be elected by the people, the members of such board must be so chosen.

[9] The Constitution provides a method or system for the assessment of property, with the object of arriving at a uniformity of valuation, and designates certain officers to perform certain duties involving the exercise of their legal discretion or individual judgment, certainly as to the value of property, and it is beyond the power of the Legislature to pass any law that would take from the assessor his individual judgment in regard to the value of property, or controlling the exercise of his judgment, in the first instance, except that the Board of Equalization may equalize such assessments. If an officer exercises his legal discretion in good faith and without fraud, then he is performing his duty under the law, otherwise not; and, if not, then he fails to perform his duty, and is liable for a failure to faithfully perform his duties.

It is stated in Cooley on Taxation (3d Ed.) pp. 427-429, that where the Constitution provides a scheme or framework for the mechanical administration of the revenue laws of the state, the Legislature cannot substitute another method therefor. When the Constitution devolves a duty upon a particular person, the Legislature may not substitute any other person to perform that duty.

What has been said in regard to the assessor applies equally to the county board of equalization. As bearing upon this question, see *State v. Tonella*, 70 Miss. 701, 14 South. 17, 22 L. R. A. 346; *People v. Raymond*, 37 N. Y. 431. Those decisions are along the line that the assessment and equalization of property should be made and done by the officer designated and elected by the voters, as provided in the Constitution.

[10, 11] Section 6 of article 18 of the state Constitution provides for the biennial election of county commissioners, and section 10 of the same article provides that the board of county commissioners shall consist of three members, and section 12 of article 7 provides that the board of county commissioners of the several counties of the state shall constitute boards of equalization in their respective counties, whose duty it shall be to equalize the valuation of taxable property in their

respective counties, under such rules and regulations as shall be prescribed by law. All of said officers are elected by the people.

First the assessor makes the assessment, and then the county board of equalization reviews the assessments and equalizes them. The third step provided by the Constitution is that the State Board of Equalization shall equalize the assessment of property between the different counties of the state, and also assess the property of all railroads, telegraph, telephone, and transmission lines of the state. The State Board of Equalization is provided for by section 12, art. 7, of the state Constitution, which board shall consist of the Governor, Secretary of State, Attorney General, State Auditor, and State Treasurer, whose duties shall be prescribed by law. The duties of the State Board of Equalization, as prescribed by law, are of two kinds, and as such were clearly considered by the framers of our Constitution. The duties of the State Board will be referred to hereafter in this opinion.

This Board of Equalization is composed of elective officers. These elective boards have been provided for the purpose of equalizing taxes, and each has particular duties to be performed which are prescribed by law. The state has been under this system since statehood.

The case of *State ex rel. Brown County v. Myers*, Judge, 52 Wis. 628, 9 N. W. 777, cited by counsel for plaintiffs, advances a startling doctrine, as we understand it, suggested in certain dicta in that case. Referring to the assessment and collection of taxes, the statement is as follows: "For this whole matter is within the control of the Legislature, which, doubtless, might abolish the present system and create a state board for the assessment and equalization of the value of the taxable property of the state." Is it possible that in Wisconsin the Legislature is above the Constitution and the people, and may inaugurate a different system for the assessment and equalization of the value of taxable property in that state than that provided by the Constitution? This court is not willing to adopt the rule that the Legislature is above the Constitution adopted by the people themselves. The people in adopting the state Constitution have provided a method for its amendment, and under that provision the Legislature is not authorized to amend it. Sections 1 and 3, art. 20. Under said section 1 it is made the duty of the Legislature to submit any amendment or amendments to the electors of the state, and by said section 3, whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to call a convention to revise or amend the Constitution, they may do so, as provided in said section.

The doctrine is advanced by some people that even the Constitution of the United States is old and antiquated, and that Congress ought not to pay much attention to it,

and also that the state Constitutions may be disregarded by the Legislatures. We cannot concur in that doctrine. If the Constitution of the state of Idaho is not satisfactory to a majority of the people, let them amend it in an orderly way, and as has been provided by the Constitution itself. The amendment of the Idaho Constitution is not a difficult matter, but the people themselves have provided in their Constitution that it can only be amended as therein provided.

The case of *State v. Daniels*, 143 Wis. 649, 128 N. W. 565, is relied upon by the plaintiffs. It appears from that case that in 1905 the Wisconsin Legislature passed an act providing that whenever it was to appear to the State Tax Commissioners that the assessment of property in any assessment district was not made in substantial compliance with the law, and that the interests of the public would be promoted by a reassessment, such commissioners should have authority to order a reassessment and name one or more persons who should make the same, and also that the commissioners might appoint a board of review to review the assessment made by its appointees for that purpose. This law was passed under constitutional provisions somewhat similar to the constitutional provisions of Idaho, providing for the election in the taxing districts of local assessors. It is stated in the opinion that it is conceded by both sides in that case that the law under consideration did not deprive, nor purport to deprive the local communities of the right to elect their own assessors and boards of review, and that the appointees were selected merely to perform a specific act, and that when that was performed their powers and functions ceased. Under those facts the following question was suggested by the court: "Does the act unlawfully deprive the local officers of the right to exercise their functions and the electors of the municipality of the right to choose their agents to do the particular work?" The opinion then proceeds more upon the ground of supposed public policy than of law, as we view it, to the effect that the legal officers are not interfered with, and that their functions are not curtailed so long as they do not violate the law which they are bound to obey. We are unable to understand by what rule of logic it can be said that the Wisconsin act did not have the effect of depriving the assessors of duties imposed upon them by the Constitution. The Constitution of Wisconsin provided for an original assessment by a particular officer, and a review thereof by a particular body, both elected by the persons directly affected by the action of such officer and board. We fail to understand how this act of the Legislature which provided for reassessment and review of such assessment by officers appointed and not elected can have any other effect than to deprive the local officers of the right to perform those duties. It may be said that the officers still may perform those

duties. But they are not permitted to perform them as contemplated by the provisions of the Constitution. Assessors in that state are charged with the performance of certain duties, and to act in a particular manner, and have the right to the exercise of their judgment in assessing property. The court has the power to compel them to act wherein they have failed to act, but the limit of the court's power would be to order that the assessor exercise his honest judgment in conformity with the law, and not require him to place a value upon property different from what his good judgment and legal discretion required him to do. If that be true, how can a Legislature confer upon an appointive board the right to say whether the honest judgment exercised by an equalizing board or officer has been legally exercised, when the only fault to be found is that the honest judgment of the assessor or the equalizing board differed from the honest judgment of the appointive board?

In *Pittsburg, etc., Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 103, the court states: "Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined."

[12] In *People ex rel. Green v. Board of Com'rs*, 176 Ill. 576, 52 N. E. 334, in passing upon the power of courts in mandamus proceedings to compel boards or officers to perform certain acts, the court held that if the act sought to be enforced by mandamus is judicial and discretionary in its character, the court will only compel the defendants to act, but never compel them to decide in a particular manner. Those are the limits of powers of courts in matters of this kind, and the principle applies equally to a Legislature when the office is a constitutional one.

[13] Can the people of this state by their Constitution reserve to themselves the right to select officers and boards who shall judge as to whether or not the assessments have been properly made? They certainly can, and in this case have done so. It is not within the power of the Legislature to provide for appointive boards to usurp this particular function of the local board. We are not inclined to follow any decisions which hold that the Legislature has power or authority to set aside the system or scheme for assessing, equalizing, and taxing property established by the Constitution and enact one of its own.

Reliance is placed by the plaintiffs upon the case of *Ames v. People*, 26 Colo. 83, 56 Pac. 656. It appears from that case that in 1891 the General Assembly of Colorado passed an act for the better assessment and collection of revenue. By that act it was made the duty of the State Board of Equalization

to assess all the property in the state owned, used, or controlled by railroad, telephone, telegraph, and sleeping and other palace car companies. The Constitution of Colorado had a provision somewhat similar to that of our own, providing for the election biennially in every county of the state of an assessor. The precise question raised and decided in that case was as to whether or not the county assessor was the only officer in the state who could assess property, and the court there held that the assessor did not have the exclusive right to assess a class of property the situs of which is not in a single county but in several counties.

[14] The fundamental idea, it seems, of the framers of our own Constitution, and of all Constitutions, in providing systems for the assessment and collection of revenue is to arrive at a uniform valuation of property throughout the state; and one of the fundamental ideas, in practically all of the states for the accomplishment of this purpose, is by providing for the local assessment of property. By local assessment, however, is not meant that property shall be assessed by county officers, but rather that property shall be assessed within the county in which the property is located, and a railroad company, having its lines in many counties of the state, or in all of the counties, would hardly ask that its property be assessed in different units by the assessor of each particular county, acting independently of each other. The situs of such property is not in any one county, but in the state, in a number of counties, and to follow out the spirit of the constitutional provision is to provide some means whereby such property is assessed as a whole by officers having jurisdiction of the whole.

The case of *Ames v. People*, supra, is authority for the position taken by the defendants in this case. Those considerations controlled the Colorado court in upholding the act above referred to, and are stated as follows: "While it may be, and we may, for our present purposes, concede it to be true, that except as limited by statutes, the office of assessor provided for in the Constitution, without specifying the duties of the officer filling it, implies the usual and ordinary incidents thereof, the proper construction of the section is not that the Legislature is prohibited by it from conferring upon some other tribunal the power to assess a class of property which the assessors cannot, in the very nature of things, so assess as to bring about its just valuation commanded by other constitutional provisions." Under the reasoning and authority of that case, we think it clear that the State Board of Equalization has power and authority, under rules to be established by the Legislature, to assess railroad, telegraph, and telephone lines, and other property whose situs extends to more than one county. As we understand it, the rule established by the Colorado case is di-

rectly against the contention of plaintiffs here.

In the case of *People ex rel. Crawford v. Lothrop*, 3 Colo. 428, the question presented was the power of the State Board of Equalization to raise the aggregate value of the assessable property in the state as returned to them by different counties. In speaking of the assessor in this regard, the court said: "The Constitution provides (section 8, art. 14) for the election in each county, each alternate year, of a county assessor. He is thus a constitutional officer, and though his duties are left unprescribed, the essential duties of an assessor must be presumed to have been contemplated. Is there not here a plain intention on the part of the people to preserve local control over the valuation of property for purposes of taxation?" In the same opinion, referring to the power claimed to be possessed by the State Board of Equalization, the court said: "This claim, if well founded, makes them practically a board of assessors, with power to fix and determine values, as well as adjust and equalize valuations." See, also, *Taxation of Mining Claims*, 9 Colo. 635, 21 Pac. 476.

In *Davies v. Board of Supervisors*, 89 Mich. 295, 50 N. W. 862, the ground of the decision is well stated by the court at page 863 of the Northwestern citation. It appears in that case that the Legislature had sought to deprive certain constitutional officers of some of the functions of their offices, and to confer those functions upon a board appointed by a power removed from the situs of the property to be assessed and not responsible to local authority, and it was held that the Legislature had no more power to deprive such officers of their authority and confer that authority upon officers not of local selection than it has to abolish the offices, and that it was just as essential to local self-government that the functions of elective officers be preserved to such officers as that the right of election be protected. See, also, *People v. Highway Commissioners*, 15 Mich. 347.

The cases of *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437, and *Nevada Tax Commission v. Campbell*, 135 Pac. 609, do not seem to be in point in this case, for the reason that the Nevada Constitution has no provisions in regard to revenue officers even remotely similar to those contained in the Constitution of the states where the questions raised in this proceeding have been determined.

In Kentucky the Legislature provided for the election of a state board of equalization, with power to equalize the different classes of property between the different counties. The Constitution provided for local assessors and the local board of equalization, but did not provide for a state board of equalization. The constitutionality of the act providing for the State Board of Equalization was raised in the case of *Spalding v. Hill*, 86 Ky.

662, 7 S. W. 27, and the act was upheld. The reasons for upholding said act are apparent. The state board was not given power to equalize except as to certain classes of property between counties. It had no authority over such assessments, and hence was not a reviewing board of the local assessing officer and boards of equalization.

In New York state the court had under consideration an act of the Legislature which vested the appointment in the Governor, with the consent of the Senate, of a commissioner of taxes and assessments in the city and county of New York, and the court held that under the provisions of that act the city was deprived of all local control of the assessment of the property of the people in that county for the purposes of taxation, and held: "It thus deprives the people of the state of a right secured to them by the Constitution, and is therefore void."

Some reliance has been placed on the case of *Missouri Riv. Power Co. v. Steele*, 32 Mont. 433, 80 Pac. 1093. Section 3698 of the Political Code of Montana provided, in substance, that in all counties of Montana having an assessed value of eight millions of dollars or more the district judge should appoint three resident taxpayers to constitute a board of appraisers, whose duty it was to fix the value of real estate in the county for the purpose of assessment by the county assessor, which valuation so fixed by the board should constitute the true value of the real estate, and that the assessor in making up his assessment list should not assess any real estate at a greater or less valuation than that fixed by the board. It was the contention of the plaintiffs in that case, who attacked the law, that under article 16, § 5, of the Constitution which provided for the election of an assessor in every county, no other person than the assessor was authorized to assess property, and that the Legislature had no authority to provide for the assessment by any other body or person than the assessor. The court in that case in effect held, without, however, referring to any authority, that if the duties of assessor are not fixed by the Constitution, any duties in regard to the assessment of property might be devolved upon appointive or other officers as the Legislature saw fit. Under that holding the law was held constitutional. That decision was based on the premise that the Montana Constitution did not prescribe the duties of the assessor, and the court said: "Of course, in so far as the Constitution has defined those duties, as in the instances mentioned—of the county clerk, treasurer, the Board of Equalization—the Legislature may not enact any law in conflict therewith." The earlier cases decided by the Montana Supreme Court are neither expressly modified nor overruled in that decision.

In the case of *Life Ins. Co. v. Martien*, 27 Mont. 437, 71 Pac. 470, the court held that

the word "assessor" and the word "collector" as used in the constitutional provision, construed in the *Power Company Case*, conferred such powers upon those officers as are conferred upon officers of similar names. See, also, *State v. Equalization Board*, 18 Mont. 473, 46 Pac. 266, which follows the rule of the *Colorado case* in *People v. Lothrop*, 3 Colo. 423.

[15] There is no doubt but that the Legislature could provide an appeal from the action of the Board of Equalization, but this court held in *Feltham v. Board of Equalization*, 10 Idaho, 182, 77 Pac. 332, that the Legislature had not provided an appeal from an order of the Board of Equalization equalizing assessments. See *Humbird Lumber Co. v. Morgan*, 10 Idaho, 327, 77 Pac. 433, and *Fenton v. Board*, 20 Idaho, 392, 119 Pac. 41. If an appeal were authorized, it would not necessarily follow that the court could review and modify the acts of such officers when exercising discretion in passing upon the facts before them.

[16] We conclude that the act in question was not intended to and does not confer the power on the Tax Commission contended for by the plaintiffs. The Tax Commission has not the authority or power to equalize assessments and to compel the Board of Equalization to adopt such equalization. If we were to construe the intent of the Legislature in passing said act to mean that said Tax Commission could set aside assessments made by the assessor where they were legally made, and could set aside the equalization made by the Board of Equalization, whether county or state, it would necessitate the holding of said act unconstitutional. The Legislature did not intend to create an appointive board composed of three members, who might review and set at naught all actions of the assessors and boards of equalization provided by the Constitution. No such plenary power was intended.

The powers conferred upon said Commission are referred to in section 8 of said act, which section provides, among other things, that the Commission "shall supervise the administration of all laws relating to the assessment of property and the levy, collection, apportionment and distribution of taxes, and shall exercise power and authority to enforce all such laws." While the taxpayers have authority to institute proceedings to compel revenue officers to perform their duties under the law, this Tax Commission is constituted for the purpose of looking after those matters which the taxpayers neglect or are not for any reason able to do. The taxpayer is not paid for doing that kind of work, but the Tax Commission is paid for doing it, and for making proper investigations and advising and consulting with the revenue officers, and if such officers illegally or fraudulently neglect to perform the duties imposed upon them by law, it is the duty of

the Tax Commission to bring proper proceedings in the courts to compel such officers to comply with the law. The intention of the Legislature in passing said act was not to supersede the rights of the revenue officers of this state in the exercise of their judgment and discretion in the performance of the duties imposed on them. The Tax Commission is given power to oversee assessors and Boards of Equalization and all officers upon whom any duties devolve under the revenue laws of the state, and "require all such boards and officers to perform the duties imposed on them by law," by proper proceedings in the courts. But the Legislature evidently considered that a special board for that purpose would be more efficient in stimulating such officers in the performance of their duties than if it were left to the taxpayers and citizens of the county and state, who generally have private affairs sufficient to occupy their time. If such boards or officers act illegally or fraudulently, it is the duty of said Tax Commission to bring proper proceedings to set such illegal and fraudulent acts aside.

Plaintiffs have cited the *Great Northern Ry. Co. v. Snohomish County*, 54 Wash. 23, 102 Pac. 881, and other Washington cases for the purpose of showing the meaning of the expression "general supervision." The distinction between the Washington commission act and the Idaho act will appear from the following language used in the Washington act, giving the commissioners power: "To exercise general supervision over assessors and county boards of equalization, and to determine an assessment of the taxable property in the several counties, cities and towns of the state." The constitutionality of that act was not raised in those cases. The Idaho act, however, confers no general supervision on the Commission, but power to supervise the administration of laws. There is a difference in the wording of the powers granted by the Washington act and the Idaho act. It was clearly the manifest intention of the Legislature of Idaho to limit the Idaho Tax Commission to a certain field. They were given power to consult and advise with and oversee revenue officers in the discharge of their duties, and power to enforce a compliance with the laws of this state upon the part of all revenue officers, but if the action required of revenue officers is judicial and discretionary in its nature, and the officer refuses or neglects to act, the Commission can compel them to act, but cannot compel them to decide in any particular manner, nor review their determination of any particular act, where they have acted legally and without any fraud. In other words, where they have acted within their legal discretion fairly and honestly, the Commission cannot compel them to change such action and make it conform to the judgment of the Tax Commission in such matter.

There is ample field for the legitimate ex-

ercise of all the powers intended to be given to said Tax Commission without infringing in any way upon the duties imposed by the Constitution and law upon other officers that have to do with the revenue of the state. Such duties are so varied and important in connection with the revenue system that there is ample room and opportunity for it in the state, without in any manner interfering with the legitimate duties of the taxing officers.

Assessors and boards of equalization and others having duties under the revenue laws of the state ought to carefully consider the suggestions and opinions of the Tax Commission in regard to their duties, and ought to adopt them when those suggestions and opinions will result in a more equitable and more just equalization of the taxes, and where they will make such assessment and equalization more uniform upon the same class of subjects within the state, and thus secure a more just valuation for taxation of all property, both real and personal, within the state. It is a matter of history that said Tax Commission has already discovered considerable property that ought to have been assessed by the State Board of Equalization, and has already discovered some mistakes and inequalities in the equalization made by said board, and upon suggestion to the state board by the Tax Commission, the state board at once proceeded to adopt the view of the Tax Commission. So assessors and county boards of equalization should give careful consideration to the opinions and suggestions of said Tax Commission and conform to them whenever such suggestions will make the tax more uniform upon the same class of property.

The issues involved in this case affect every board and every officer upon whom devolve any duties under our revenue laws. It affects the judgment and discretion of the assessors when assessing property; county boards when equalizing property in their several counties; the State Board of Equalization when equalizing property between the counties and when assessing railroads and telegraph lines; and the county commissioners when fixing the levy for the purposes of taxation, and the county collectors when collecting taxes. The Tax Commission under the provisions of said act has certain advisory and supervisory power over such officers and boards.

The Legislature, however, in enacting that law did not intend to deprive any of the constitutional officers or boards of duties imposed upon them by the express or implied provisions of the Constitution. The said Tax Commission was established for the purpose of gathering information and advising with all officers connected with the revenue of the state, and it was not intended that the Commission should usurp or perform the duties of the assessors or boards of equalization of the state. It is clear that said act is not in conflict with the provisions of the Constitu-

tion when construed according to the intent of the Legislature. The Tax Commission is clearly an advisory board.

We, therefore, hold under the provisions of said tax commission act that the Tax Commission is not entitled to a peremptory writ of mandate, requiring the Board of Equalization of Bannock County to enter or cause to be entered upon the assessment roll of said county the valuation of said property of Franklin & Hays in the amount fixed in said order of said Commission.

The alternative writ is quashed and the peremptory writ of mandate denied. No costs are awarded in this proceeding.

STEWART, J., *concura*.

AILSHIE, C. J. (concurring). I concur in denying the writ. It seems to me, from an examination of the whole act creating the Tax Commission and the simultaneous act embodying the revenue laws, that the Legislature had no intention of conferring any such power on the Commission as is claimed for it. The revenue law was passed and approved the same day as the tax commission act, and must be considered and construed as a simultaneous act, under the same rule of construction as if a part of this act. When we so consider it, there can be no doubt but that the Legislature intended that the assessor and the county board of equalization and State Board of Equalization should still retain the same powers and exercise the same functions that have heretofore been exercised by them. Indeed, the revenue act specifically so provides.

Again, if the act were open to the construction claimed for it, we would then be met by a well-established rule to the effect that where a statute is open to two constructions, one of which would render it unconstitutional and the other constitutional, the court should adopt the construction which will hold the act valid and give it force and effect. *Northern Pacific Ry. Co. v. Gifford*, 136 Pac. 1131; *In re Gale*, 14 Idaho, 761, 95 Pac. 679.

BLACKMAN v. PETTENGILL.

(Supreme Court of Idaho. Dec. 3, 1913.)

1. BANKS AND BANKING (§ 80*)—INSOLVENCY—RECEIVERSHIP—PAYMENT OF DIVIDENDS.

Under section 3005, Rev. Codes, the entire procedure of the payment of dividends by the receiver of an insolvent bank is left to the order of the court, bound by the requirements of law as generally applied and administered in such cases.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

2. BANKS AND BANKING (§ 80*)—INSOLVENCY—RECEIVERSHIP—RIGHTS OF DEPOSITORS.

Section 5911, Rev. Codes, relating to proceedings in insolvency, should be read with the provisions of sections 65 and 66 of the bank-

ing act of 1911 (Sess. Laws 1911, pp. 405, 406, c. 124) in considering the status of a secured depositor of an insolvent bank, as compared with unsecured depositors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

3. BANKS AND BANKING (§ 80*)—INSOLVENCY—DISTRIBUTION OF ASSETS—SECURED DEPOSITORS.

Under sections 65 and 66 of the banking act of 1911 (Sess. Laws 1911, pp. 405, 406, c. 124), a preference is given to depositors of an insolvent bank over all other creditors, and such depositors are to be classed on an equal footing. Under this statute distribution of assets to depositors must be made ratably, and no depositor can be given any advantage by reason of collateral or other security which he may hold from the bank for his deposit.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

4. BANKS AND BANKING (§ 80*)—INSOLVENCY—DISTRIBUTION OF ASSETS—SECURED DEPOSITORS.

Held, that the receiver of the Boise State Bank, Limited, an insolvent bank and trust company, has no authority to pay a dividend under an order declared by the district court upon a claim filed by B., a depositor holding real estate security valued at about \$12,000, and B. cannot collect dividends on the full amount of his deposit, \$14,144.14, and the receiver should treat said real estate as not embraced in the general assets. B. should not be allowed to enforce his claim against the other assets, irrespective of the value of the specific security, when it is shown that B. is prosecuting the foreclosure of a mortgage given him by the bank upon said real property to secure his deposit, and the receiver is contesting the validity of the mortgage, until that matter is determined. If the receiver is successful in that action, then B. should be entitled to receive the dividends that are paid to the other depositors. On the other hand, in case B. is successful in the foreclosure suit, his claim should be held by the receiver without payment of dividends, and the net proceeds of such foreclosure proceedings should be applied on his claim against the bank. If there is a deficiency, B. should receive the same dividends on such deficiency that have been and will be paid to other depositors.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Action by William H. Blackman against Ben Q. Pettengill, receiver, to determine the authority of the trial court to make an order in the matter of the receivership of the Boise State Bank, Limited. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Martin & Cameron, of Boise, for appellant. Wyman & Wyman, of Boise, for respondent.

STEWART, J. This is an appeal from an order made in the matter of the receivership of the Boise State Bank, Limited, an insolvent bank and trust company. An affidavit was filed in the district court showing that the Boise State Bank was a banking corporation existing under the laws of the state and

*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

at all times mentioned prior to December 19, 1911, was engaged in the banking business under the laws of the state; that on December 19, 1911, V. W. Platt was the duly appointed, qualified, and acting bank commissioner of the state of Idaho, and at that time took charge of the affairs of the bank and its books and assets to wind up its business and to collect all debts due and claims owing to said bank; and that on the same day the district court made an order that the receiver take over into his possession the books, records, and assets of the bank and proceed to collect all debts, dues, and claims and to wind up the affairs of the bank, and that said receiver duly qualified and performed his duty until discharged by the court February 7, 1913. On said date Ben Q. Pettengill was duly appointed special deputy state bank commissioner with authority, as receiver of the Boise State Bank, for the purpose of winding up the affairs of the bank under the jurisdiction of the court; and on the same day V. W. Platt requested that he be discharged as liquidating officer and receiver of the bank, and upon the petition duly filed of A. E. Reed, the duly appointed, qualified, and acting state bank commissioner of the state, Platt's resignation as such officer was accepted February 10, 1913, and Ben Q. Pettengill was duly appointed special deputy state bank commissioner of Idaho with authority, as receiver of the said bank, to take possession of the books, records, and assets of the bank, and on the 8th day of February he qualified as such receiver. It is also shown that William H. Blackman, the petitioner, on November 10, 1910, deposited to his own account in the bank the sum of \$13,483.60 and received a certificate of deposit for the same, and the bank promised and agreed to pay the said sum of money six months thereafter, with interest at 4 per cent. per annum until paid; that on November 3, 1911, there was due thereon from said bank to the petitioner the sum of \$14,144.14 and on that date the plaintiff agreed with the bank to extend the time of payment of said certificate for the period of four months, and the bank agreed to pay interest on said certificate and the money due thereon at the rate of 8 per cent. per annum; that on March 4, 1912, the petitioner presented his claim growing out of the matters aforesaid against the said bank to V. W. Platt, as state bank commissioner and receiver, and that said claim was allowed and approved for the sum of \$14,144.14, with interest from November 3, 1911, at 8 per cent. per annum and that no part thereof has been paid. The petitioner alleges that a dividend of 10 per cent. upon all of the approved claims has been declared and ordered paid by the above-entitled court in the above-entitled matter, but that the receiver and special deputy bank commissioner, Ben Q. Pettengill, declines and refuses and has not paid to the petitioner any sum whatever. The petitioner prays that the receiver

be required to pay him the amount due him, to wit, 10 per cent. of said claim, and for such other relief as may be just.

Pettengill filed an answer and in the answer denies the deposit stated in the petition as having been made on November 10, 1910, and that said bank promised and agreed to repay the petitioner the sum named six months thereafter, with interest at 4 per cent. per annum until paid, except as further alleged, and also denies that on November 3, 1911, or at any other time there was due upon the certificate of deposit the sum of \$14,144.14, or that the petitioner agreed with the bank to extend the time of payment four months, and denies that the bank agreed to pay petitioner interest on said certificate and the money due thereon at the rate of 8 per cent., except as further alleged, and also denies that the claim was allowed and approved for the sum of \$14,144.14, with interest from November 3, 1911, at 8 per cent., but alleges the fact to be concerning the presentation of said claim as set forth hereafter. It is then alleged that on February 16, 1909, Blackman, the petitioner, made a deposit in the bank in the sum of \$12,440.43, payable to the order of himself as set forth in a certificate of deposit received by him on that date on return of said certificate properly indorsed six months after date, with interest at 5 per cent. per annum, or, if paid before maturity, with interest at 4 per cent. per annum, said sum to draw no interest after maturity, and said sum to be not subject to check; that on September 1, 1909, Blackman surrendered the certificate and received in its place and stead a certificate of deposit bearing date September 1, 1909, certifying that Blackman had deposited in the Boise State Bank, Limited, \$12,777.34, being the said original deposit of \$12,440.43, with interest at 5 per cent. per annum from February 16 to September 1, 1909, or \$336.91 added thereto, payable to the order of Blackman on return of certificate properly indorsed six months after date, with interest at 5 per cent. per annum or, if paid before maturity, with interest at 4 per cent. per annum; that on May 10, 1910, Blackman surrendered said certificate and received in its place and stead the certificate of May 10, 1910, which certified that Blackman had deposited with the bank \$13,219.22, being the original deposit of \$12,440.43, with interest at 5 per cent. per annum from February 16 to September 1, 1909, making \$12,777.34, with interest at 5 per cent. per annum from September 1, 1909, to May 10, 1910, or \$441.88, payable to the order of Blackman on return of certificate properly indorsed six months after date. On December 10, 1910, petitioner surrendered certificate No. 1200 and received in its place certificate of deposit No. 1271, bearing date November 6, 1910, for the sum of \$13,483.60, being the original deposit and

the interest added for 6 months and 15 days, making \$12,777.34, with interest added for 4 months and 24 days, making \$13,483.60, payable to Blackman, on return of certificate No. 1271 properly indorsed, six months after date with interest at 5 per cent. per annum, or, if paid before maturity, with interest at 4 per cent., and that on March 4, 1912, Blackman filed certificate of deposit No. 1271 and presented his claim against the above-named bank and V. W. Platt, state bank commissioner, as receiver thereof, upon said certificate of deposit No. 1271, claiming \$14,144.14, the same being \$13,483.60, with interest of \$660.54 to November 3, 1911, at 5 per cent. per annum, and claiming interest at 8 per cent. per annum on said sum of \$14,144.14 from November 3, 1911, and claiming that said sum was secured, but did not set forth the nature of said security; and alleges that the claim was filed, but that no further action was taken thereon by the receiver as to its being allowed or disallowed or approved or disapproved; that said receiver has not paid dividends on any amount whatsoever upon any claim or claims except the original deposits and only on the original deposits and not on the interest upon said principal sums. It is also alleged that Ben Q. Pettengill is informed and believes and so alleges that Blackman claims to hold security for the payment of the sum above set forth in the form of a note and mortgage on real property of the bank as follows: Lots 1, 2, 3, 4, and 5, block 13, Riverside addition to Boise City, Ada county, as the same appears on the official plat, together with the tenements, hereditaments, etc.; that said property is of the value approximately of \$18,000 and is free and clear of all liens and incumbrances except the taxes, not to exceed \$400, and except lien, if any lien is valid, for this same debt owing to Blackman. Then follows the prayer that Blackman be ordered to produce and set forth the nature of his claimed security and claimed lien before Pettengill is required to pay any sum or amount on the claim, and that, in the event that Blackman is adjudged to have a valid and subsisting lien or mortgage upon any of the assets of said bank, Blackman be compelled first to exhaust his security; or, second, that he be only admitted as a creditor for the balance of the debt, after deducting the value of said mortgaged property, said value to be ascertained in such manner as the court may direct, and that, in any event, the amount of the claim of Blackman be considered as \$12,440.43, without interest, as all other claims have been considered by the receiver, and, in the event that said claim of Blackman is duly adjudicated to be an unsecured claim, that the receiver be only ordered to pay upon the sum of \$12,440.43, and that it be ordered that unless Blackman set forth his claim for security before any dividend

is ordered paid, or before he accepts any dividend payment, he be forever debarred from realizing upon or claiming any security whatever in or to the assets of said bank.

Upon this record the trial court issued an order: "That the said Ben Q. Pettengill, as special deputy bank commissioner of the state of Idaho, and as receiver in the matter of winding up the affairs of the Boise State Bank, Limited, an insolvent bank and trust company, do pay to the said William H. Blackman the dividend of 10 per cent. heretofore declared by this court upon the claim filed by the said Blackman." This is the order from which this appeal has been taken.

The question presented by this record, and which has been presented to this court in the brief of counsel and in their oral argument, is this: Do the law and the facts presented warrant the petitioner, a depositor holding security valued at about \$12,000, in collecting dividends on the full amount of his deposit, \$14,144.14, or should the receiver treat the \$12,000 worth of real estate as not embraced in the general assets, and this creditor be allowed to enforce his whole claim against the other assets irrespective of the value of the specific security acquired by his lien?

[1] On March 6, 1905, the Legislature of the state enacted House Bill No. 167 (Sess. Laws 1905, p. 175). In that act provision was made for the appointment of a state bank commissioner, and section 39 relates to the involuntary liquidation of bankrupt banks, and that the bank commissioner "shall proceed to administer the assets of the bank in accordance with law." The entire procedure of payment of dividends is left to the order of the court bound by the requirements of law as generally applied and administered in such cases. There was no provision in the statute of any limitations of the procedure, and there was no statutory direction or limitation whatever. Section 47 of that act provides that "in the event of insolvency or bankruptcy of any person, firm, copartnership or corporation maintaining, operating or conducting a bank or a banking department or doing business within the meaning of this act, depositors of such bank or banking department shall have a first and prior lien on all the assets of such bank or banking department, and in the distribution of such assets or the proceeds thereof, the same shall first be applied to satisfy the amount due such depositors." This section also makes provision that "the depositors of any such bank or subordinate bank or banking department shall have a first and prior lien upon all the assets of such bank, * * * or banking department where such deposit was made or credit extended, and in the distribution of such assets or the proceeds thereof, the same shall first be applied to satisfy the amount due such depositors." Section 47 of the act of 1905 was incorporat-

ed in the Revised Codes as section 2990 as a part of the article relating to "transaction of banking business." While section 39, which provides in effect that the assets shall be distributed according to law, is incorporated in the Code as section 3005 as a part of the article of the banking law entitled "Supervision of Banks by the Commissioner."

When the banking law of March 1, 1911 (Sess. Laws 1911, p. 386), was enacted, section 66 was placed in the act, which provides: "No creditor or creditors of any individual banker or of individual members of any copartnership doing a banking business in this state shall be permitted to attach or seize under writ of attachment or execution or to hold liable for such individual indebtedness any of the assets of the bank until all the depositors and creditors of such bank have been fully paid." Under this provision counsel for respondent contend that the law of 1905 directs that the assets be administered in accordance with the law, and that the Legislature has not changed that law up to the time covering the failure of the Boise State Bank, and that the bank's certificates of deposit were surrendered from time to time as they fell due, and new ones issued, the last bearing date November 6, 1911, and that the certificates issued to Blackman continued in full force and effect as the original unsecured debt, and that the renewals of certificates of deposit and the giving of a mortgage to secure the indebtedness of the bank on the bank's real property did not change and remove the effect of the first certificate. This court does not feel inclined to follow this rule, and during this opinion we will further discuss this question.

[3, 4] Referring now to sections 65 and 66, c. 124, Laws of 1911, pp. 405, 406, section 65 provides: "In the event of insolvency or bankruptcy of any person, firm, copartnership or corporation maintaining, operating or conducting a bank or trust company doing a banking business, or doing business within the meaning of this act, depositors of such bank or trust company shall have the first and prior lien on all the assets of such bank or trust company, and in the distribution of such assets or the proceeds thereof, the same shall first be applied to satisfy the amount due such depositors."

Section 66 provides: "No creditor or creditors of any individual banker or of individual members of any copartnership doing a banking business in this state shall be permitted to attach or seize under writ of attachment or execution or to hold liable for such individual indebtedness any of the assets of the bank until all the depositors and creditors of such bank have been fully paid."

By these two provisions above referred to, we have no doubt but that the Legislature intended to give depositors a preference over all creditors and to place the depositors on an equal footing. The provisions are silent as to preferences among depositors but class all

depositors together; preferences or unequal advantages among depositors are not sanctioned; and the only conclusion is, and we think this court is fully justified in holding, that the statute places all depositors in a class, and that distribution of assets under the statute to depositors is to be made ratably, and that it was not intended by the Legislature that one depositor should be given any advantage or benefit by reason of a security he may hold for a deposit, and thereby withdraw from the general assets a dividend on his accumulated claim the same as depositors who have no security, because the result would be an advantage over the general depositors, and he would receive more than his ratable share of the assets. 5 Cyc. p. 570.

Blackman filed certificate of deposit No. 1271 and presented his claim against the above-named bank and Platt, state bank commissioner, as receiver, upon said certificate of deposit No. 1271, claiming \$14,144.14, the same being \$13,483.60, with interest of \$660.50 to November 3, 1911, at 5 per cent. per annum, and claiming interest at 8 per cent. per annum on said sum of \$14,144.14 from November 3, 1911, and claiming that said sum was secured. The trial court entered an order directing Pettengill, as deputy bank commissioner and receiver, to pay to the said Blackman the dividend of 10 per cent. heretofore declared by the court upon the claim filed by Blackman.

It will thus be seen that the trial court classed Blackman as a depositor of the bank without any security and thereby allowed him to remove and set aside \$12,000 worth of property from the general assets and allowed him to set up that same \$12,000 as a part of his claim of \$14,144.14 against the remaining assets of the bank, and Blackman was allowed to enforce his whole claim against the other assets, irrespective of the value of the special security acquired by the lien. This decree of the trial court is clearly erroneous and in violation of the provisions of chapter 124, §§ 65, 66, Laws of 1911. These provisions above quoted state the same rule that the courts have universally followed, where there were no statutes governing, in determining that dividends should be declared out of the general assets after the secured creditors have withdrawn the amount of their security.

Chief Justice White, in his dissenting opinion in *Merrill v. Nat. Bank of Jacksonville*, 173 U. S. 150, 19 Sup. Ct. 368, 43 L. Ed. 647, in dealing with this question says: "Thus a secured creditor who takes collaterals maturing on the same day with the debt owing to himself, which collaterals consist of negotiable notes, the makers of which and indorsers upon which are peculiarly responsible, finds the collaterals promptly paid when deposited for collection, and, if his debtor should become insolvent the day after payment, the creditor could only claim for the

residue of the debt still unpaid. On the other hand, a creditor of the same debtor, the debt to whom matures at the same time as that owing the other creditor and is secured by collaterals also due contemporaneously, has the collaterals protested for nonpayment, and when the debtor fails the collaterals have not been realized. While the first debtor, who had received first-class collateral, can collect dividends against the estate of his insolvent debtor only for the unpaid portion of the claim, losing a part of such residue by the inability of the estate to pay in full, the debtor who received poor collateral collects dividends out of the general assets on his whole claim and, if he eventually realizes on his securities, may come out of the transaction without the loss of one cent. These illustrations, to my mind, adequately portray the inequality and injustice which must arise from the application of the rules of distribution now sanctioned by the court." This opinion of Justice White was concurred in by Justice Harlan and Justice McKenna. Judge Gray, a member of the court, also dissented, and says: "I cannot avoid the conclusion that, under every act of Congress directing the ratable distribution among all creditors of the estate of an insolvent person or corporation, and making no special provision as to secured creditors, an individual creditor, holding collateral security from the debtor on part of the estate in course of administration, is not entitled to a dividend upon the whole of his debt without releasing the security or deducting its value; and that therefore the judgment of the Circuit Court of Appeals should be reversed."

This rule announced by Justice Gray, which is the correct rule where the conditions are such as he relates in his conclusion, is applicable to the facts in the present case, as Blackman is attempting to collect his entire full claim, and the security he has is withdrawn from the general assets of the bank, and Blackman is claiming a dividend on his entire claim, without reference to the security he holds, and he has made no effort to enforce the security he holds, which is a mortgage and could be foreclosed and the property sold and the amount that would be secured from the sale, less the expenses and costs, that Blackman would receive, could have been credited upon his entire claim, and thereby the general creditors would have been benefited to the extent of the credit of Blackman. This same rule is also considered by the House of Lords in the case of *Soc. Gen. de Paris v. John Gen.*, Law Reports, App. Cases, vol. 8, p. 606: "Under ordinary circumstances each creditor is at liberty to pursue at his discretion the remedies which the law gives him; but when insolvency intervenes, and the debtor is unable to pay his debts, the position of all parties is altered; the fund has become inadequate, and the policy of the law is to lead to equality. In pursuing that policy the bankrupt law endeavors

to enforce an equal distribution, whilst it respects the rights of those who have previously, by grant or otherwise, acquired some security or some preferable right."

Justice Story in 1845, in *Re City Bank*, 3 How. on page 315, 11 L. Ed. 603, discussing the same question involved in this case, says: "If they have a pledge or mortgage therefor, they may apply to the court to have the same sold and the proceeds thereof applied towards the payment of their debts pro tanto and to prove for the residue."

In the case of *Merrill v. Nat. Bank*, supra, Justice White calls attention to the change that has taken place in Great Britain with reference to the distribution of the assets of an insolvent estate: "The same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable * * * as may be in force for the time being under the laws of bankruptcy, with respect to the estates of persons adjudged bankrupt." So that now, in Great Britain, in all proceedings involving the distribution of an insolvent fund, a secured creditor can only prove for the balance which may remain after deduction of the proceeds or value of collateral security."

Several of the courts, in considering the method of distribution where the creditor holds collateral for his claim, hold that he can sell his collateral or take into account its value and prove for the residue. 5 Cyc. p. 571; *Wurtz v. Hart*, 13 Iowa, 515; *Security Invest. Co. v. Richmond Nat. Bank*, 58 Kan. 414, 49 Pac. 521; *Rogers v. Citizens' Nat. Bank*, 93 Md. 613, 49 Atl. 843; *Merchants' Nat. Bank v. Eastern R. Co.*, 124 Mass. 518; *Vanderveer v. Conover*, 16 N. J. Law, 487; *Searle v. Brumback*, 2 Ohio Dec. 653; *Winton v. Eldridge*, 3 Head (Tenn.) 361; *In re Frasch*, 5 Wash. 344, 31 Pac. 755, 32 Pac. 771.

There are a large number of cases in each of the states, from which we have cited a single case, that support the rule stated in this opinion, and it would require a good deal of space to cite all the cases supporting the rule.

[2] In connection with the rule announced by the authorities cited above, and sections 65 and 66 of chapter 124, Laws of 1911, section 5911, Rev. Codes, which is a part of title 12 of proceedings in insolvency, provides as follows: "When a creditor has a mortgage or pledge of real or personal property of the debtor, or a lien thereon, for securing the payment of a debt owing to him from the debtor, he must be admitted as a creditor only for the balance of the debt, after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court or judge may direct; or the creditor may release or convey his claim to the assignee, upon such property, and be admitted to prove his whole debt. If

the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the debtor's right of redemption thereon on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon, and in either case the assignee and creditor respectively must execute all deeds and writings necessary or proper to consummate the transaction. If the property is not sold or released, and delivered up, the creditor must not be allowed to prove any part of his debt."

Under this latter section, when read with the subsequent act (chapter 124, Laws of 1911), we think there can be no question whatever but that the plaintiff in this case was not permitted to receive the dividend ordered to be paid by the district court.

Counsel for respondent has cited a number of cases to the effect that the rule never has been otherwise than a rule peculiar to bankruptcy and utterly rejected as being a part of the English common law. Those cases perhaps state the correct rule governing the facts under the common law and in equity, but the Legislature of this state has refused to adopt that rule and has by proper legislation provided for the distribution of the assets of an insolvent bank, and this rule results in a requirement compelling the ratable distribution of insolvent assets by the banking law enacted and considered in the opinions, which law prefers depositors and places them in the same class in a ratable distribution and should apply in distributing the assets to the depositors, whether the depositors are secured or unsecured, and as to debts and liabilities provable as may be in force at the time under the bankruptcy statute, with respect to the assets of persons adjudged bankrupt; and, in all proceedings involving the distribution of an insolvent fund, a secured creditor can only prove for the balance which may remain after deduction of the proceeds or value of collateral security; and, where a creditor holds collateral for his claim, he can sell his collateral or take into account its value and prove for the residue.

It follows from this opinion that the trial court erred in allowing Blackman's claim against other assets and not against the security. The mortgage was in Blackman's possession and still is held by Blackman, as against an asset of the bank, and his claim is against the general assets, and he has not taken steps to foreclose the same at the time the bank closed, or thereafter, or before he filed the claim. There was not a ratable distribution of the assets of the bank. He was not entitled to a dividend of 10 per cent. the same as other depositors who held no security.

The record in this case shows that a dividend of 10 per cent. upon all of the approved claims has been declared and ordered paid by the court in the above-entitled matter, but that the receiver and special deputy commis-

sioner, Ben Q. Pettengill, declines and refuses to pay and has not paid to the petitioner any sum whatever, and this action was brought for the purpose of securing a judgment requiring the commissioner to pay said dividend. Blackman should be required to proceed and foreclose his mortgage and have the mortgaged property sold as provided by law, and apply the net proceeds of such sale, after paying the court costs of foreclosure, etc., upon his claim against the insolvent bank, and, if there is any deficiency remaining, the deputy bank commissioner should pay him the same dividends on said deficiency as are paid to all other depositors, and this applies to the claim involved in this case. It was stated on oral argument that an action to foreclose has already been begun, but that the deputy bank commissioner was contesting the validity of said mortgage, and, if the commissioner is successful in that matter, then of course Blackman should be entitled to receive the dividends that are paid to other depositors. Blackman's full claim should remain filed with the commissioner, and, in case he is successful in his foreclosure suit, the net proceeds of such foreclosure proceedings should be applied on his claim against the bank, as above stated. If there is a deficiency, he should receive the same dividends on such deficiency that have been and will be paid to other depositors.

The judgment is reversed, and the trial court is directed to enter judgment in accordance with this opinion. Costs awarded to appellant.

SULLIVAN, J., concurs. AILSHIE, C. J., sat at the hearing but did not participate in the consideration or decision of the case.

KASER v. KASER.

(Supreme Court of Oregon. Dec. 16, 1913.)

1. WILLS (§ 442*)—CONSTRUCTION—INTENT OF TESTATOR.

Under L. O. L. § 7347, requiring courts and others to have due regard to the directions of a will, and the true interests and meaning of the testator in all matters brought before them, the testator's intent is controlling, unless it cannot be carried into effect without a violation of the rules of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 959; Dec. Dig. § 442.*]

2. WILLS (§ 634*)—CONSTRUCTION—VESTED OR CONTINGENT INTERESTS.

Though generally no interests vest under a mere direction in a will to divide the property in the future, yet if the postponement is to enable an intermediate enjoyment for life, the presumption is rebutted and the interest of the remainderman vests, either absolutely or defeasibly, on the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1489-1510; Dec. Dig. § 634.*]

3. WILLS (§ 547*)—CONSTRUCTION—DESIGNATION OF BENEFICIARIES—CLASSES.

A testamentary disposition of personality to several colegatees, naming them, is not a gift

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to a class, does not create survivorship, and the share of a legatee dying before the time of distribution will not go to the survivors unless survivorship is distinctly expressed or clearly implied.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1179-1181, 1185; Dec. Dig. § 547.*]

4. WILLS (§ 481*)—CONSTRUCTION—TIME FROM WHICH WILL SPEAKS.

Though a will may, for some purposes, speak from the date of execution, as a general rule it expresses the testator's intention at the time of his death, unless a fair construction manifests a purpose to speak as of a different date.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1005-1007; Dec. Dig. § 481.*]

5. WILLS (§ 545*)—CONSTRUCTION—CONTINGENCIES—DEATH OF BENEFICIARIES.

A will which leaves property, after the death of testator's wife, to his children, and provides that, in the event any of his children "die leaving lawful issue," such issue shall take the share left to their parent, but, if any of the children "should marry and die" leaving no issue, the surviving husband or wife should take nothing, by the will, refers to death at some future time.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. § 545.*]

6. WILLS (§ 545*)—CONSTRUCTION—DYING WITHOUT ISSUE.

A will providing that if any of testator's children, to whom he leaves property after the death of his widow, should marry and die without issue, the surviving husband or wife should take nothing by the will, refers to a definite failure of issue, or dying without lineal descendants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. § 545.*]

7. WILLS (§ 865*)—CONSTRUCTION—PARTIAL TESTACY.

A will gave all of testator's property to his wife for life, directed its division at her death among his seven children, and provided that if any of the children should die and leave issue such issue should take the share left to the parent, but if any should marry and die leaving no issue the surviving husband or wife should take nothing by the will. *Held* that, as to the share left to a child who died leaving a wife but no issue, the testator died intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188-2199; Dec. Dig. § 865.*]

8. WILLS (§ 800*)—RIGHTS OF LEGATEES—ELECTION.

L. O. L. § 7349, subd. 4, gives to the widow out of decedent's property as to which he dies intestate one-half of the personalty remaining after an allowance to the widow and the payment of debts. *Held*, that her acceptance of a provision in the will giving her the use of all of testator's property during her life does not waive her rights under this section to a portion of the remainder as to which testator dies intestate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2074-2076; Dec. Dig. § 800.*]

9. WILLS (§ 865*)—PERSONS ENTITLED AND SHARES.

Where a will leaves all of testator's property to his wife for life, and then to his seven children, and provides that if any of the children die without issue the surviving husband or wife of such child shall take nothing by the will, where a child dies without issue during the life of testator's widow, the child's widow is entitled

to one-seventh of one-seventh of one-half of the property as intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2188-2199; Dec. Dig. § 865.*]

Department 1. Appeal from Circuit Court, Multnomah County; Robert G. Morrow, Judge.

Suit by Elizabeth Kaser, as administratrix, against Hannah M. Kaser. From a decree sustaining a demurrer to the complaint and dismissing the suit, plaintiff appeals. Reversed, demurrer overruled, and decree entered.

This is a suit to establish an interest in personal property, and to require the defendant to execute an undertaking with sureties conditioned that such property shall, without waste or destruction, be delivered to plaintiff upon the death of the defendant. The complaint charges in effect that on June 11, 1911, J. R. Kaser died intestate in Multnomah county. A copy of his will is set forth, from which the following excerpts are taken:

"First. I give, devise and bequeath all the property of which I may die possessed, of whatever name and nature and wherever situated, to my beloved wife, Hannah Maria Kaser, for the term of her natural life.

"Second. Upon the death of my wife, Hannah Maria Kaser, it is my will that all my said property be divided between my said children, Kyle H. Kaser, Armintha L. Kaser, Mary Esther Kaser, Loren Hartwood Kaser, Welrose Rudolph Kaser, Elmo Hilly Kaser, and Clarence Kaser, share and share alike.

"Third. In the event that any of my children named in paragraph two hereof die leaving lawful issue, it is my will that said issue take the share thereby left to their parent; providing, however, that if any of my children should marry and die leaving husband of (or) wife surviving but no issue, it is my will that such surviving husband or wife of my child or children, as the case may be, take nothing by this will."

The complaint further alleges, in substance: That on July 2, 1911, Clarence Kaser, one of the beneficiaries above named, died in that county intestate, without issue, but leaving a widow, Elizabeth Kaser, the plaintiff herein. That the will of J. R. Kaser was admitted to probate in that county. That the executors named by the testator, having duly qualified, caused to be filed an inventory, showing the value of that estate to have been appraised as follows: Nonperishable personal property, \$4,472.67; and real estate, \$5,215. That on March 22, 1912, the remaining devisees, named in such will, executed to their mother, the defendant herein, an assignment of their respective interests in and to all money and personal property of their father's estate. That on May 28, 1912, such executors having filed their final account, and due notice thereof having been given, the estate of J. R. Kaser was closed and they were discharged. That on October 3, 1912, the plaintiff was duly appointed ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ministratrix of the estate of Clarence Kaser, deceased. That the interest which he had in the nonperishable personal property of his father's estate is in danger of being lost, and that an action at law is not an adequate remedy for the protection of such interest. A demurrer to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of suit, was sustained, and, the plaintiff declining further to plead, the suit was dismissed, and she appeals.

J. F. Sedgwick and Geo. D. Smith, both of Portland, for appellant. Frank Schlegel, of Portland, for respondent.

MOORE, J. (after stating the facts as above). The only question to be considered is whether or not the plaintiff, as the administratrix of the estate of Clarence Kaser, deceased, has any interest in the personal property of the testator's estate, after the determination of the defendant's life interest in the property the use of which did not result in a consumption thereof.

"Originally, where a chattel mortgage or other personal estate," says Mr. Justice Mulkey, in *Welsch v. Belleville Savings Bank*, 94 Ill. 191, 204, "was given to one for life with a limitation over to another, the former took the absolute title, and the limitation over was void, both at law and in equity. In the course of time, however, equity—which has ever been a pioneer in the interests of justice and right—in the case of a devise of a chattel real to one for life with a limitation over to another, interposed on behalf of the remainderman, holding the limitation over good as an executory devise, but not as a remainder. And even now such limitations over are not, strictly speaking, remainders; for it is as true now, as then, one cannot, in the common-law sense of the term, have an estate in money or a mere chattel. The interest thus conferred, in so far as it is acquired by an express limitation over, and is not to be enjoyed in possession until a future day, is analogous to that of a remainder, and it is only called a remainder by way of analogy."

By the early rule, prevailing in England, it was determined at law that an interest in personal property could not be created by way of a remainder; but in equity it was ruled that, if a chattel personal were bequeathed to A. for life and upon his death to B., the property was considered as belonging to B., and that A. had only the use thereof. *Gray, Perpet.* (2d Ed.) § 84. In America, however, a future limitation by will of a chattel personal passes a legal interest both at law and in equity. *Id.*, § 88; 40 Cyc. 1640.

By the bequest of a chattel for life the legatee under the rules of the ancient law took the property absolutely, and every limitation over was ineffectual for any purpose, for the reason that an estate for life in personal property was treated as the highest

possible interest which could be acquired in or to a chattel, and hence nothing remained to be limited over. That doctrine, however, has been repudiated in the United States, where the rule is quite general that, though a bequest of nonperishable personal property, without express words of limitation, evidences an unconditional gift, yet the testator may, by the employment of proper words, restrict the bequest to the use of the chattels for life by the legatee, which testamentary disposition will be upheld.

[1, 2] In construing the clauses of a will, the purpose sought to be accomplished is to discover, if possible, the testator's intent with respect to the disposition of his property after death, and when that intention is ascertained it is controlling unless such purpose cannot be carried into effect without a violation of the rules of law. *Li. O. L.* § 7347; *Shadden v. Hembree*, 17 Or. 14, 18 Pac. 572; *Jasper v. Jasper*, 17 Or. 590, 22 Pac. 152; *Portland Trust Co. v. Beattie*, 32 Or. 305, 52 Pac. 89; *Proprietors of the Church in Brattle Square v. Grant*, 3 Gray (Mass.) 142, 158, 63 Am. Dec. 725. An examination of the first and second clauses of the will, as hereinbefore quoted, shows an unmistakable purpose on the part of the testator to give the use of all the real and the nonperishable personal property of which he might die seised or possessed to the defendant, during her natural life, upon the termination of which all such property was to be divided equally among his seven children, naming them. It will be observed that there are no words of gift to the children, except in so far as a donation can be implied from the direction to divide all the testator's property upon the death of the widow. In such case, it is generally held to prevent a vesting until the time for partition; but, if the postponement was to enable an intermediate enjoyment by a tenant for life, the presumption raised by such expression is rebutted, and the interest of the remainderman vests, either absolutely or defeasibly, on the death of the testator. *Rood, Wills*, §§ 590, 591.

In *Proprietors of the Church in Brattle Square v. Grant*, 3 Gray (Mass.) 142, 148 (63 Am. Dec. 725), in speaking of a condition marking the period which determines an estate, without any act on the part of him who has the next expectant interest, Mr. Justice Bigelow says: "The limitation over being executory, and depending on a condition, or an event which may never happen, passes no vested interest or estate."

[3] The third clause of the will is the paragraph the meaning of which is doubtful. It is there stated: "In the event that any of my children * * * die, leaving lawful issue, it is my will that said issue take the share left to their parent." The time of the death of such child is not specified. Whether such death was contemplated before the death of the testator, upon the death of the defendant, or at any other time, is not specif-

ically indicated. That clause further provides that, if any of the testator's children should marry and die leaving a spouse but no issue, such surviving husband or wife was to take nothing by the will. In that case what was to become of the real and personal property so devised and bequeathed to such child is wholly a matter of speculation for the will is silent upon the subject. A testamentary disposition of personal property to several legatees, naming them, is not a gift to a class, and does not create survivorship, so that the share of a legatee dying before the time of distribution will go to those that live after such death, unless survivorship is distinctly expressed by the terms of the will, or is clearly implied therefrom. 40 Cyc. 1507.

[4] In order, therefore, to ascertain the testator's intention as to the disposition of his property after his death, resort must be had to the rules adopted for the construction of wills in doubtful cases. Though a will, for some purposes, may be construed as speaking from the date of execution, as a general rule its expressions are supposed to give utterance to the testator's intention at the time of his death, unless by a fair construction the language manifests a purpose to speak as of a different date. 40 Cyc. 1424; Rood, Wills, § 87. The will under consideration was executed December 14, 1905, or nearly five and a half years before the testator died.

[5] An examination of paragraph 3 of the will would seem to indicate that the language there used was intended to apply to the future. Thus the word "die" in the sentence, "In the event that any of my children * * * die," etc., implies death at any time. So, too, the word "should" as subsequently employed in the sentence, "If any of my children should marry and die," etc., signifies a demise at some future time. If the will had bequeathed to the testator's children, naming them, "and their issue" each child so named would have taken an absolute title to the personal property. Rood, Wills, § 556. The qualification "and their issue" is not used anywhere in the will.

[6] In the third clause the testator directs that if any of his children should marry and die leaving a husband of (or) wife surviving "but no issue," etc. Here the term "dying without issue" evidently means a definite failure of issue; that is, dying without lineal descendants. *Buchanan v. Schulderman*, 11 Or. 150, 1 Pac. 899. A gift of personalty over on a definite failure of issue is valid as an executory bequest, thereby divesting the previous interest on the happening of the condition. Rood, Wills, §§ 634, 638.

Whether there were any issue in being of the children of the testator when he died does not appear from the averments of the complaint; but, however this may be, a bequest to the issue of his children who were not in esse at the time of his death is never-

theless executory. 1 *Jarman, Wills* (6th Ed.) *822. Such a bequest, when, as in the case at bar, it does not violate the rule against perpetuities, is regarded as a valid testamentary disposition of property. *Buchanan v. Schulderman*, 11 Or. 150, 1 Pac. 899; *Shadden v. Hembree*, 17 Or. 14, 18 Pac. 572; *Love v. Walker*, 59 Or. 95, 115 Pac. 296. "When the disposition of an aliquot part of the residue itself," says a noted author, "falls from any cause, that part will not go in augmentation of the remaining parts, as a residue of residue, but will devolve as undisposed of." 1 *Jarman, Wills* (6th Ed.) *719.

[7] Looking at the entire will with a view of giving effect to each of its provisions, so as to carry out the testator's intentions, it is believed that it was his purpose, after bequeathing to his wife an interest for life in the nonperishable personal property, also to give to each child an interest for life therein, with an executory bequest over to the lawful issue of such child; but, if any child married and died without issue, the interest which such child took by division upon the death of the defendant thereupon failed for want of apt words in the will as to which interest J. R. Kaser died practically intestate.

What has been here said with respect to the duration of the estate and interest which each child will take by will upon the death of the defendant is used only by way of illustration, for the remark can have no binding force upon the testator's surviving children, since they are not parties to the suit. The conclusion thus reached does not exclude the plaintiff, as the widow of Clarence Kaser, from receiving a share of the testator's nonperishable personal property.

[8, 9] Assuming that J. R. Kaser died intestate with respect to an undivided one-seventh of such property the possession of which would have gone to Clarence Kaser on the death of his mother if he had lived, it remains to be seen what interest the plaintiff took by inheritance in such chattels. The defendant, upon the death of her husband, after the allowance prescribed by law had been made, was entitled to receive one-half of the remainder of all the personal property in her own right. L. O. L. § 7349, subd. 4. It might seem that, since by the provision of the will she accepted the use of such entire property during her natural life, she thereby waived her right to insist upon the distribution which the statute thus gave her. Such is not the rule, however, and she must be given the share of the intestate property, though she may have elected to take under the will. Rood, Wills, § 497. It will be remembered that the nonperishable personal property was appraised at \$4,472.67, one-seventh of which is \$638.95. The defendant is entitled to one-half interest thereof, or \$319.47. The plaintiff as the widow of Clarence Kaser, who died without issue, is entitled to the share which her husband would

have taken by inheritance in the intestate property. L. O. L. § 7349, subd. 4. That is, she is entitled to one-seventh of the remainder, or \$45.63, upon the death of the defendant.

The decree is therefore reversed, the demurrer overruled, and a decree will be entered, requiring the defendant to give a good and sufficient undertaking whereby the sureties upon her death will pay or cause to be paid to the plaintiff the sum of \$45.63.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

REEDER et al. v. REEDER et al.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. PARTITION (§ 95*)—DISPOSITION OF CAUSE—MODIFICATION OF DECREE.

Where a decree in partition recites the report of the referees, which correctly describes the tract involved, and the decree further describes the tract, omitting one line, the description will be corrected to conform to the report of the referees.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 300-316; Dec. Dig. § 95.*]

2. PARTITION (§ 114*)—ACTIONS—COSTS.

Under the express provision of L. O. L. § 483, the costs of partition, including the fees of referees and other disbursements, must be paid by the parties in proportion to their respective interests and may be specified in the decree.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 440-449; Dec. Dig. § 114.*]

On petition for rehearing. Petition denied.

For former opinion, see 135 Pac. 176.

S. B. Huston and Robert A. Miller, both of Portland, for appellants. S. H. Haines, Allan R. Joy, and A. G. Thompson, all of Portland, for respondents.

BEAN, J. [1] In a petition for rehearing, counsel for plaintiffs first call attention to a mistake in the description in the decree of the lower court of one of the tracts of land involved in this suit for partition, known as the "Old Home Place." From the record it appears that the report of the referees correctly describes the tract, but the decree, after reciting the report of the referees, further describes the tract, omitting the north line thereof. This description should therefore be corrected so as to conform to the report of the referees.

[2] As to the costs, section 483, L. O. L. provides in part that the costs of partition, including the fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. The costs in the lower court and in this court will therefore, according to that section, be apportioned, one-eighth thereof to the defendants and one-eighth to each of the plaintiffs.

With the exception of these modifications the former opinion is adhered to. The rehearing is denied.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

JOHNSON et al. v. SEABORG et al.†

(Supreme Court of Oregon. Dec. 23, 1913.)

1. LANDLORD AND TENANT (§ 112*)—FORFEITURE OF LEASE—WAIVER OF RIGHT.

The request for, and acceptance of, partial payments of rent before they fell due, such payments being voluntary, does not waive the landlord's right to a forfeiture in accordance with the terms of the lease for subsequent failure to pay the rent within the time required by the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

2. LANDLORD AND TENANT (§ 112*)—FORFEITURE OF LEASE—WAIVER OF RIGHT.

Under a lease providing for forfeiture without notice on failure to pay the annual rent within 30 days after it became due, the acceptance of rent after it became due in a given year, though a waiver of default for that year, did not make a rule for the next year.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

3. LANDLORD AND TENANT (§ 112*)—PAYMENT OF RENT—ABSENCE OF LANDLORD.

That neither of the lessors was in the state when rent became due does not waive a default, when their agent, to the knowledge of the tenant, is present and authorized to accept payment of the rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 343-349; Dec. Dig. § 112.*]

4. LANDLORD AND TENANT (§ 208*)—RENT—ASSIGNMENT OF LEASE.

By accepting the assignment of a lease the assignee becomes liable for the rental, but the assignor is not thereby released.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 737, 821-831; Dec. Dig. § 208.*]

5. LANDLORD AND TENANT (§ 213*)—RENT—PLACE OF PAYMENT.

Where a lease provides no place of payment of rent, it is payable in the city where the lease was executed and the property located, to the lessors or their agents.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 846-848, 850, 852, 854, 856, 857-860; Dec. Dig. § 213.*]

6. LANDLORD AND TENANT (§ 231*)—RENT—ACTIONS—BURDEN OF PROOF.

In case of controversy between lessors and assignees of the lease as to the amount of rent due, one of the lessors, contending that he had credited a payment on a balance due for a previous year, had the burden of proving that there was at least that amount due on the present lease, as the lessors could not apply a payment by the assignees on rent due under a prior lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 926-934; Dec. Dig. § 231.*]

7. CORPORATIONS (§ 656*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

A foreign corporation which has not complied with the requirements of L. O. L. §

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 27, 1914.

6727, as to filing a declaration of intention to engage in business within the state and other documents, and paying a filing fee, has no right to take an assignment of a lease of an island in the state for fishing purposes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2578-2587; Dec. Dig. § 656.*]

8. CORPORATIONS (§ 679*)—FOREIGN CORPORATIONS—CERTIFICATE—EFFECT.

A certificate of authority to do business issued by the Secretary of State, pursuant to L. O. L. § 6728, to a foreign corporation while it is insolvent and its assets in the hands of a receiver, does not give validity to the business acts of the corporation within the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2656-2658, 2680; Dec. Dig. § 679.*]

Department 2. Appeal from Circuit Court, Clatsop County; Thomas A. McBride, Judge.

Action by T. K. Johnson and another against B. A. Seaborg and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The plaintiffs were the owners of a certain island in the Columbia river, near Astoria, in Clatsop county, Or., known as Tenas Illi-hee, where the tide ebbs and flows. It borders on the tide lands and tide flats of the river, and is of great value for the purpose of operating fish traps and for hauling seines and dragnets thereon. On the 23d day of December, 1905, they leased it to the defendant Seaborg, for the term of 9 years, for a rental of \$1,200 per year, payable in advance on the 15th day of April of each year, conditioned that if the rent should not be paid within 30 days after the same should become due, "then it shall and may be lawful for the said parties of the first part (plaintiffs), or either of them, * * * to re-enter said premises and said fishery * * * and to declare this lease and all of said rights and privileges hereinbefore set forth terminated and forfeited; and if the first parties shall so determine and elect the said second party waive all notice to quit or intention to declare said forfeiture or re-entry"—said lease being in writing and signed by the parties. On the 29th day of January, 1906, the defendant B. A. Seaborg assigned in writing the said lease to the defendant Seaborg Packing Company, in which assignment the said Seaborg Packing Company assumed to fulfill all the conditions and stipulations of the lease to be observed by Seaborg; Seaborg having the option to declare the assignment forfeited and to re-enter for failure of the Seaborg Packing Company to perform the terms of the lease assumed by it. Immediately after the assignment of the lease the Seaborg Packing Company entered upon the possession of the premises and used the same thereafter until plaintiff, on the 21st day of May, 1907, forfeited the lease for nonpayment of the rent. The Seaborg Packing Company by force entered upon the premises thereafter, and drove location stakes

for three pound net fish traps in the tide land and fishery grounds, and refused to permit plaintiffs to operate their fishery, and threatens to continue and will continue to prevent plaintiffs' use thereof unless restrained by order of this court. This suit was commenced for the purpose of restraining the defendants from so obstructing plaintiffs' use of the property, and a preliminary injunction was issued pending the trial. The issues were tried by the circuit court, and a decree was rendered in favor of plaintiffs; the injunction being made perpetual. The defendants appeal.

John H. Smith, of Astoria (John H. & A. M. Smith, of Astoria, and Frank Oleson, of Seattle, Wash., on the brief), for appellants. G. C. Fulton, of Astoria, for respondents.

EAKIN, J. (after stating the facts as above). [1] It is contended by defendants that plaintiffs waived their right to declare a forfeiture of the lease for nonpayment of the rental, without notice to defendants and on opportunity to pay, by their agreement to a departure from the terms of the lease whereby, as defendants allege, part of the rent was paid to plaintiff Mrs. Johnson as she needed it. There was no agreement by which the payment of the rent for the year 1907 might be delayed or postponed beyond the maturity thereof, nor were any payments made or received thereafter. If the rent had been paid on May 16th, the day after the default, when called for by the plaintiff Johnson, that would have been a waiver of the default for that year; but the advance payments of interest and taxes on the order of Mrs. Johnson and the \$200 to her were voluntary, and made prior to the default, and the requests therefor were not a waiver of prompt payment when due. Calling for or accepting partial payments prior to the default in payment would not amount to an agreement to waive prompt payment.

[2] The acceptance of payment of rent for the year 1906, after maturity, was a waiver of default for that year, but did not make a rule for the next year. Time was of the essence of the contract, and it was defendants' duty to pay on the day it was due, or within 30 days thereafter, namely, May 15th.

[3] There is a suggestion that neither of plaintiffs was in Oregon at the time the rent was due, but O. F. Morton, at Astoria, was the agent of plaintiffs, with authority to receive and receipt for the rent, and defendants had knowledge of that fact.

[4] By accepting the assignment of the lease the defendant Seaborg Packing Company became liable for the payment of the rental; yet Seaborg was not thereby released.

[5] There was no place of payment provided in the lease. Therefore it was payable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the plaintiffs or to their agent at Astoria.

[6] There was some controversy as to the amount of rent due on May 15th, Johnson contending that he had credited the \$200 paid May 7th on the balance due for the year 1906; but the burden was upon plaintiffs to prove that there was that amount due on the present lease before they would be entitled to apply the payment thereon, the application of which was not directed by the defendants. The exhibits introduced by plaintiffs show the payment of the 1906 rent in full. If there was anything due plaintiffs upon a prior lease, they could not apply money paid by the defendant packing company upon it, as its liability covered only the new lease, and a tender of the amount of the rent for the year 1907 would have been sufficient to prevent a forfeiture of the lease. Defendants contend that Johnson agreed to accept the rent on May 22d, while Johnson admits he extended the time of payment until the 21st of May only. But, without determining the date to which the time of the payment was extended, no tender was made, either on the 21st or on the 22d. A formal tender was made Thursday, the 23d, being beyond the time to which payment was extended.

[7] There is another matter that has a strong bearing upon this question. Defendant is a foreign corporation, and until the commencement of this suit had not complied with the statute of this state entitling such corporations to do business in this state. Its right to do business in this state is conditioned upon its filing with the Secretary of State a declaration of its purpose to engage in business within the state, and other data required by section 6727, L. O. L., filing a power of attorney, appointing a resident attorney with authority to acknowledge service of summons or other process, and paying a filing fee of \$50 and the amount of the license fees as elsewhere provided. Without so doing the defendant Seaborg Packing Company did not have the right to take the assignment of the lease of the property here involved. It was not subject to the jurisdiction of the courts of this state. By entering upon said property and using the same in its business of fishing it must necessarily have employed laborers and incurred indebtedness in Oregon, and was liable for personal injuries, if any were occasioned by its negligence, for all of which there should be a remedy in the courts of this state; and its case was just such a one as was contemplated to be covered by this statute for the protection of the state and its citizens. Therefore the assignment of the lease attempted to be executed to the packing company by Seaborg was void, and it could not transact business thereunder. Its attempt to make tender of the rent under the lease was ineffectual, and it acquired no rights against the plaintiffs by

reason thereof or of the assignment of the lease.

[8] On February 26, 1907, on the application of creditors of the defendant packing company, its affairs were placed in the hands of a receiver in the courts in the state of Washington, on the ground that it was unable to pay its debts, which are alleged to be more than \$62,000, with assets amounting to about \$60,000, showing that it was insolvent. On July 3, 1907, it applied to the Secretary of State for a certificate showing its authority to do business within the state provided for by section 6728, L. O. L., while it was still insolvent and its assets in the hands of a receiver, and on that day the Secretary issued to it the certificate provided for by said section, to the effect that it had complied with the statute entitling it to engage in business in Oregon. The said section further provides that said certificate shall be prima facie evidence of the legal existence of the corporation and of its right to do business in Oregon. The pleadings and record in the case show that it was not entitled to the certificate or to do business in Oregon. It is contemplated by the statutes that the certificate shall issue to a solvent corporation with capital as shown by the application and as contemplated by the certificate. That statute was intended to be a protection to the people of the state having occasion to do business with the packing company, as well as to secure to the state the license fees and power to control it in the particulars named. Although it has produced in evidence the certificate of the Secretary of State, yet, in view of the facts disclosed by this record, the certificate is impeached, and the court cannot recognize the contract entered into in violation of the statute, or its acts in relation thereto. The effect of such a contract is fully discussed in *Hirschfeld v. McCullagh*, 64 Or. 502, 127 Pac. 541, 130 Pac. 1131; *Cyclone Mining Co. v. Baker Light & Power Co.* (O. C.) 165 Fed. 996; *La Moine Lumber & Trading Co. v. Kesterson et al.* (O. C.) 171 Fed. 980. Therefore the court was justified in approving a forfeiture of the lease by plaintiffs and their re-entry upon the premises, and they were entitled to the injunction against the defendants to prevent further interference by them.

The decree is affirmed.

BEAN and McNARY, JJ., concur. McBRIDE, C. J., not sitting.

THOMSON v. SWANK et al.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. MORTGAGES (§ 270*)—ASSIGNMENT—VALIDITY—EVIDENCE.

Evidence held to show that a mortgagor, in the presence of the mortgagee, stated to one to whom the mortgagee afterward assigned the mortgage that the property covered was valu-

able for coal, timber, and fruit, when in fact it was valueless for timber, nearly worthless for fruit, and no coal had been found on the land, and its worth for that purpose was wholly problematical.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 608, 609; Dec. Dig. § 270.*]

2. MORTGAGES (§ 239*)—ASSIGNMENT—VALIDITY—FALSE REPRESENTATIONS.

A mortgagee who is negotiating for the sale of the mortgage is responsible for false representations as to the character of the land by the mortgagor in his presence to the proposed purchaser.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 606, 607; Dec. Dig. § 239.*]

Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by W. G. Thomson against Evva L. Swank and another. From a decree for plaintiff, defendants appeal. Affirmed.

George I. Brooks and Fred W. Bronn, both of Portland, for appellants. C. E. Lenon, of Portland (Jeffrey, Lenon & Ambrose, of Portland, on the brief), for respondent.

MOORE, J. This is a suit by G. W. Thomson against Evva L. Swank and J. D. Swank, her husband, to set aside a conveyance of real property alleged to have been induced by fraudulent representations, and also to recover the sum of \$115 paid on account of the transfer. From a decree granting the relief prayed for in the complaint, the defendants appeal.

The admitted facts are that on April 2, 1912, the plaintiff, owning at No. 1137 Glen avenue, Portland, Or., a house and lot, published in a newspaper of that city a notice offering to sell and convey the premises for \$2,450, one-half thereof to be paid down, and the remainder on time. The defendant Swank, having seen the advertisement, telephoned the plaintiff to call upon him with a view of effecting a sale of the property. Pursuant to the invitation Thomson called upon Swank, who, acting for his wife, offered for the lot the sum so demanded by assigning a mortgage of 40 acres of land in Coos county, executed to Mrs. Swank September 19, 1911, by C. L. Burton and his wife, to secure the payment of a promissory note of \$2,500 due on or before three years, with interest at the rate of 8 per cent. per annum, payable at maturity. By this proposal the plaintiff was to give, in addition to a conveyance of his lot, the sum of \$50, one-half of which was to be paid when he accepted the offer, and the remainder when, upon an examination of abstracts of title to the mortgaged land and to the plaintiff's premises, an exchange of the deed and assignment was effected. Thomson thereupon visited Burton and made inquiry as to the value of the land so mortgaged, and, being satisfied from the representations made by the mortgagor that the security was ample, accepted the offer, and entered into a written contract wherein, referring to Swank and Thomson respectively, it was stat-

ed in respect to the accrued interest on the note: "And it is further agreed that the party of the first part is to collect one hundred dollars from the party of the second part when he collects the interest on said and above mortgage, due on the 19th day of Sept. 1912." Complying with the terms of such writing, the plaintiff, on April 4, 1912, executed to Mrs. Swank a promissory note for \$100, payable in six months, with interest from the date at the rate of 7 per cent. per annum. A deed, executed by the plaintiff and his wife to Mrs. Swank, of the lot was placed in escrow, as was also the latter's assignment of the mortgage to Thomson. An abstract of the mortgaged premises having revealed the existence of a prior mortgage of \$1,000, the plaintiff called upon a Mr. Amadon, who at one time had owned the land, and also visited Burton, the second mortgagor, and from them he learned that the prior mortgage was of 160 acres of land which included the 40 acres described in the second mortgage. The plaintiff being satisfied with the value of the security offered, his deed and the assignment of the mortgage were respectively delivered. Thomson, on April 12, 1912, in consideration of the surrender of his note of \$100, maturing October 4th of that year, and a discharge of the \$50 which he was to give for an assignment of the security, paid Mrs. Swank \$135, in full of such demands. This suit was instituted May 2, 1912, and prior to the trial of the cause the plaintiff, for the expressed consideration of a conveyance to him of the lot in the city of Portland, executed to the defendants a reassignment of the mortgage.

The plaintiff testified that Swank represented to him that he had owned in Coos county the 40 acres of land which he had sold to Burton for \$6,000, receiving on account thereof \$3,500, and taking the mortgage referred to of \$2,500 as security for the payment of the remainder of the purchase price; that, in negotiating the trade, Swank took the witness to see Burton, who said the land was valuable for coal, timber, and fruit; that, after an exchange of the deed and the assignment of the mortgage, the witness visited and examined the 40-acre tract in company with the county surveyor of that county, and found about five or six acres of bench land that was fairly level, the remainder being broken and cut up by ravines; that about three acres had at one time been under cultivation, but had been allowed to grow over with brush; that about 60 years prior thereto a fire had consumed most of the timber in that vicinity, and only a second growth was then standing on the premises; and that the value of the land did not exceed \$1,000.

The deposition of S. B. Cothcart, the county surveyor of Coos county, is to the effect that he examined the 40 acres of land referred to in company with the plaintiff,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

whose testimony is corroborated with respect to the condition and the character of the premises. In referring to the cleared land, Cothcart further deposed that a part of it consisted of an orchard containing about 100 apple trees that had been neglected and were more or less broken. He also stated, upon oath, that he did not consider the timber of any value; that he found a prospect hole on the premises, but did not discover any evidences of coal; that about two miles from the land coal had been discovered, the value of which was doubtful; and that from his knowledge of the 40 acres the worth thereof was only \$1,000.

His sworn declarations are corroborated by the deposition of Arthur Demarest, who further stated that he had cultivated an adjoining tract, in referring to which he said it was very poor land.

The defendant J. D. Swank, as a witness, denied that he represented to the plaintiff that the Coos county land was of the value of \$6,000, but that he asserted such sum was the price he asked for the premises. Referring to what he declares he detailed to Thomson about the 40-acre tract, Swank stated, upon oath: "I told him that I considered the greatest value of the land to be from a mineral standpoint and from a coal standpoint, and that it was good timber land. * * * I told him that is the way they were represented to me by a fellow who had seen the property. * * * I told him that I had not seen the property."

On cross-examination Swank testified that the mortgage note was transferred to plaintiff "without recourse" because he indorsed all notes in that manner, and that he knew the mortgage was given to secure a part of the purchase price.

W. W. Sinclair, as defendants' witness, testified that he was sitting at a desk a few feet away from Swank, and heard the latter tell the plaintiff that he had never seen the Coos county land, but that this defendant thought it was chiefly valuable for minerals; that it would raise fruit; that there was on the premises considerable timber which when removed would render the land good for agriculture and for fruit.

W. W. Groves, as defendants' witness, testified that he had seen the 40-acre tract, and that it would be difficult to farm the land in any condition.

[1] We do not rest our decision on the value placed by the witnesses of either party upon the 40-acre tract but on the representations made by Burton to Thomson as related by the latter, who stated, upon oath, that the mortgagor, in the presence of Swank, told the plaintiff that the Coos county land was valuable for coal, for timber, and for fruit.

The evidence indisputably shows that the 40-acre tract is valueless for timber, and

nearly worthless for agriculture and for fruit, that no coal had ever been found in the land, and that its worth for that purpose was wholly problematical.

[2] Burton did not appear as a witness for either party. It will be remembered that Swank stated, upon oath, that he was not present when Thomson interviewed Burton respecting the character of the Coos county land. It is believed, however, that the plaintiff's declaration in this respect is true. This conclusion is deduced from the written contract entered into April 2, 1912, wherein it is asserted that the sum of \$100 as accrued interest on the promissory note would become due September 19th of that year, when by the express terms of the negotiable instrument no interest was payable until two years thereafter. This writing confirms Thomson's testimony to the effect that, when the offer to assign the mortgage was originally made, Swank represented to him that the interest was payable annually. When, however, the note was later exhibited to the plaintiff, he discovered that the interest was not payable until September 19, 1914. As Burton's representations were not qualified by the statement that he had never seen the land, they amounted to an assertion that he was describing the character of the premises as they appeared to him from a personal examination thereof, and, such declarations having been made in the presence of Swank, he is responsible therefor, and hence the decree should be affirmed.

McBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

OBERSTOCK v. UNITED RYS. CO.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. APPEAL AND ERROR (§ 837*)—REVIEW—QUESTIONS OF FACT—DENIAL OF NONSUIT.

The denial of a motion for nonsuit will not be disturbed if plaintiff's omission to produce sufficient evidence is supplied by the subsequent introduction of evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.*]

2. STREET RAILROADS (§ 81*)—OPERATION—CARE REQUIRED.

Where a railroad runs along a street, the rights of the railroad and of travelers must each be exercised with due regard to the rights of the other, in a reasonable and duly careful manner, depending largely upon the peculiar circumstances of each case; greater care being required of a railroad in such a case than where it has exclusive use of the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. § 81.*]

3. EVIDENCE (§ 492*)—OPINION EVIDENCE—SPEED OF CAR.

In an action for injuries from being struck by an electric car, testimony of plaintiff as to the speed of the car is competent; its weight being for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2270; Dec. Dig. § 492.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. STREET RAILROADS (§ 117*)—OPERATION—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries from being struck by an electric car while crossing the track at a point other than a street crossing, evidence held to present a question for the jury as to the condition of the street at that point.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

5. NEGLIGENCE (§ 121*)—ACTIONS—EVIDENCE.

Mere proof of an accident does not per se prove negligence but, together with circumstances from which the jury may fairly infer that the accident happened by reason of a negligent act or omission, is sufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. § 121.*]

6. STREET RAILROADS (§ 93*)—OPERATION—CARE REQUIRED.

Where a motorman has a clear and unobstructed view of a traveler on the track and fails to give warning, he is negligent, though the place is not at a street crossing; employees being bound to keep a lookout along the tracks, where persons are likely to be found, in order to give proper signals.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.*]

7. STREET RAILROADS (§ 117*)—OPERATION—ACTIONS FOR INJURIES—QUESTION FOR JURY.

In an action for injuries from being struck by an electric car, evidence held to present a question for the jury whether the accident happened as plaintiff was riding between the tracks and trying to escape or plaintiff's horse backed upon the track just before being struck.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.*]

8. WITNESSES (§ 252*)—EXAMINATION—REFERENCE TO MAPS.

When a witness refers to a map, he should be required to designate thereon, or by language, to what reference is made in such a manner that the whole testimony can be considered from the record.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 866, 867; Dec. Dig. § 252.*]

9. STREET RAILROADS (§ 118*)—OPERATION—ACTIONS FOR INJURIES—INSTRUCTION.

An instruction that, if the railroad track where the accident occurred is located on the public highway or street in the town of L., plaintiff would have the right to pass over it, and would not be confined to any regular or particular crossing, is not objectionable as requiring the railroad to exercise the same care at all points in its course, being confined in its application to a street in the town of L.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Valencie Oberstock against the United Railways Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a personal injury action which was tried before a jury and a verdict rendered in favor of plaintiff. From a judgment thereon, defendant appeals.

The United Railways Company operates a line of electric railway from Portland in a

northerly direction along the Willamette river to and through the town of Linnton. For a considerable distance outside the town of Linnton the railway is constructed on one side or the other of the public highway known as the Linnton road. This road, as it passes through Linnton, becomes the principal street of the town for a distance of a few blocks upon which stores and other buildings front. The travel spreads out and occupies practically the entire street, including the space between the rails of the defendant's railway; the street on both sides of the railroad being macadamized for about 150 feet north of the most northerly store building in the town, known as Lemme's store. Proceeding north the railway track swings gradually to the extreme west of the highway where the part of the road occupied by the tracks is given exclusively to railway use. The traveled part of the highway is macadamized; the macadam extending to the easterly rail of the track. Between the rails the ground is lower. A short distance north of Lemme's store the railway coming from the north curves out from the west side of the road to the middle of the street, and at this point the main travel swings across the tracks.

On the morning of June 14, 1912, plaintiff started south from Burlington on horseback. He proceeded on the macadamized road towards Linnton at a slow gait until he arrived at the outskirts of said town, where he met with the accident resulting in his injury. Plaintiff alleges that at this time he was riding on horseback along the public highway and the main street in the town of Linnton in a careful and prudent manner and was passing along, over, and across the railway line and track at a point in said public highway and the main street in the town of Linnton when the defendant wrongfully, carelessly, and negligently, and through want of ordinary care and prudence, and without any or sufficient notice of warning to plaintiff, negligently and carelessly ran one of defendant's electric cars upon and against the plaintiff and the animal upon which he was riding with such force and violence as to knock the animal down and throw plaintiff upon the ground and railway track, and ran said electric car over and upon the left foot and leg of plaintiff, which crushed and lacerated the same to such an extent as to necessitate amputation. Defendant denies any negligence on its part and alleges that plaintiff's own negligence caused or contributed to the accident resulting in the injury in that he failed to use reasonable, ordinary care in driving his horse upon the highway to and upon the tracks of defendant's railway and did not take precautions to ascertain whether a car was approaching; and that he did not take ordinary precautions to guide his horse away from the defendant's tracks when he became aware that a car was approaching.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

We note excerpts of the testimony bearing upon the points contested upon this appeal as follows:

Mr. B. W. Taylor, witness for plaintiff, who took measurements and made a map of the premises (Plaintiff's Exhibit A), testified in part that the railroad runs cornerwise across the street coming in from Burlington from the north; that it comes along the edge of the street next to the high bank; that, as the track approaches the middle of the street, the travel is on both sides of the street, starting in along the lower (east) side of the track; that the street for at least 150 feet north of Lemme's store is macadamized so that travel would be practically as much on one side as the other, angling across the track, just as people took a notion; that there is a cut about 500 feet north of the store; that a car would disappear 1,200 feet north of the store; that the bulk of travel coming from Burlington crosses pretty well towards Lemme's store or from one building to another.

Plaintiff testified in his own behalf to the effect that at the time of the accident, June 14, 1912, he was coming up to Linnton from Burlington on horseback, between 9 and 10 o'clock in the morning; that he was coming into the town on the east side of the track, and when about five feet from the track, as he went to cross the railroad, he looked forward and backward and listened for a car; that he did not see nor hear any car back of him; that his horse was walking slowly and following the beaten tracks made by the wheels; that he continued along angling across the track, and that somewhere between the two rails he heard something coming and looked around quickly and saw a car coming in about 200 feet back of him; that he jerked the horse and made an effort to get him off the track, but that the horse shied, and before he could get over the track the car knocked him off the horse; that the car hit him slightly in the back and passed over his foot; that the street at this place was traveled upon both sides of the railroad; that the car was running very fast and came so quickly that he did not see how it could possibly stop; that they sounded no bell or whistle and gave no warning; that he estimated the distance from Lemme's store to the place of the accident to be about 150 feet. Joe Lemme, storekeeper, witness for plaintiff, testified that at the time of the accident the car stopped close to the store; that they went back 140 or 150 feet and found blood on the rail and a shoe heel; that the crossing is level there and wagon tracks cross the railroad at that place.

It appears from the record that the jury visited the place of the accident for the purpose of examination. Several photographs of the locus in quo were introduced in evidence. A. G. Smith, witness for defendant and motorman on the car, testified in substance that on June 14, 1912, as he was coming into the

town he approached the crossing 1,158 feet north of town at probably 20 miles an hour and slowed down; that after he passed the crossing he whistled for the town at the whistling post and whistled again before getting into town; that he rang the gong; that when he came near the horse it was going along all right apparently, on the road parallel with the track; that when he got up within 100 feet of the horse the man apparently heard the bell or something and looked around and pulled the left rein as though to steer for the road and the horse turned around; that it seemed as though the man became excited and pulled too hard and kicked the horse with his heel, and the horse backed up towards the track. He further stated that he applied the air on the emergency; that the horse kept backing and the car kept going, and that the man backed the horse in just in time to have the horse's hips strike the back of the car; that he passed plaintiff about 75 or 80 feet; that at the time of the accident the speed of his car was about 12 miles per hour; that he could stop the car in about 100 feet; that there is an old house and a new house near the place of the accident; and that people cross the track there. He stated, "You can't see them until you get close;" that the speed capacity of the car at full voltage was about 35 miles per hour; that they ran about 80 feet past the plaintiff after the car struck him.

W. J. Miller, witness for defendant, testified in part that at the time of the trial the travel was 30 feet farther up towards Lemme's store than it was last June.

S. E. Wright, witness for defendant, testified, in describing the manner of crossing the track, that the people cross wherever it is necessary to cross; that one could ride across there at the place of the accident if one wanted to.

W. W. Judson, section foreman, witness for defendant, testified in part that he was on the front of the car near the motorman at the time, and that when he first saw the plaintiff they were 150 feet from him and the speed of the car was from 10 to 15 miles per hour; that at the crossing 1,158 feet north of Lemme's store the speed of the car was 15 to 20 miles per hour; that the whistle for Linnton was given, but that he did not notice whether or not the motorman sounded the gong; that the plaintiff was struck about 138 feet from Lemme's store.

Charles Rhodes, conductor on the car at the time, testified that the place of the accident was about 50 feet, or a little more, north of the crossing by Lemme's store; that the road as marked on the map (Defendant's Exhibit 2) curves too sharp across the track; that the car was on time and stopped suddenly; that the speed of the car farther back was 25 or 30 miles per hour; that the gong rang.

Chris Suganthalor, a restaurant man, also

witness for defendant, testified that he came out into the street after the car stopped and that the car was down by a little red house; "that there was a crossing down there too."

Mr. Osberg, section man, testified that where they picked the plaintiff up it was level with the rail on the street side and on the inside of the rails down about four inches lower; that there was no travel across there; that one could cross on horseback.

C. A. Hart, of Portland (Carey & Kerr, of Portland, on the brief), for appellant. Leroy Lomax, of Portland, for respondent.

BEAN, J. (after stating the facts as above). After the close of plaintiff's evidence defendant interposed a motion for a nonsuit, the denial of which is the first error assigned. There is a dispute as to the condition of the street where the accident happened. It is the contention of plaintiff, and there was evidence tending to show, that the street through the town of Linnton upon which the railway is situated is used upon both sides of the railway, and that the travel crosses back and forth diagonally from one side of the street to the other; that this condition extends north of Lemme's store for a distance of about 150 feet; and that the accident occurred along the street where the travel crossed in the manner indicated. It is the contention of defendant that the accident did not happen on the crossing at all; that there is a regular crossing of the highway over the railroad immediately north of Lemme's store, and that in traveling south at this point the center of the crossing is opposite the door of Lemme's store; that the plaintiff and his horse were struck at a point at least 150 feet farther north where there is no crossing; that the mishap resulted from the backing of the horse across the highway and against the car as the latter was coming to a stop; that the testimony of plaintiff does not show negligence on the part of defendant.

[1] Upon what basis shall we determine the question as to the nonsuit? It is a settled rule that to determine this we should consider all the evidence in the case, for the reason that, although plaintiff at the time of resting may have failed to offer proof sufficient to entitle the cause to be submitted to the jury, a ruling denying such motion will not be disturbed if the omission is supplied by the subsequent introduction of evidence. *Trickey v. Clark*, 50 Or. 516, 519, 93 Pac. 457; *Crosby v. Portland Railway Co.*, 53 Or. 496, 100 Pac. 300, 101 Pac. 204; *Hofer v. Smith*, 129 Pac. 761.

[2] Mr. Elliott, in his work on *Railroads*, vol. 3 (2d Ed.) § 1093, states: "As a general rule a railroad company has the exclusive right to use its own track, and one who goes upon it, without an invitation or license from the company, is a trespasser. But this rule does not apply at highway crossings, nor,

under ordinary circumstances, where the track is laid longitudinally upon the surface of a street, whether it be that of a commercial or street railroad company. The public, exercising due care, still have a right to use the street. And so the railroad company, likewise exercising due care, has also the right to use that portion of the street upon which its track is laid. Their rights are in most respects mutual, reciprocal, and equal, neither being superior or paramount to the other, except that, as the company cannot so readily stop its trains or cars and is confined to its track, it has the right of way of passage thereon, and persons who are upon the track must leave it and give way until the train or car has passed. Where the track is laid along a street, a traveler, although a pedestrian, in the exercise of due care, may cross it at any point and is not confined to the regular crossings."

The general rule in all cases where a railroad runs along the surface of a street is that the rights of the company and of travelers must each be exercised with a due regard to the rights of the other, in a reasonable and duly careful manner. This usually depends very largely upon the peculiar circumstance of the particular case, and, in order to constitute reasonable care under the circumstances, greater care would be required of a railroad company where its cars run along a street which is continually used by travelers than where it has the exclusive use of its track. In a recent case a commercial railroad company was held liable to one who, in walking along the track in a street but not at a crossing, had his foot fastened between a rail of the track and a plank inside the track and was run over by a train. The court held that he was not a trespasser, and that the company was negligent both in failing to properly construct and maintain the track and in the management of the train. 3 Elliott on Railroads (2d Ed.) § 1094.

As to the rate of speed, Mr. Elliott says in section 1160: "In the absence of any statute or ordinance upon the subject, no rate of speed is negligence per se. But when considered in connection with other circumstances, as it must be in some cases, the court may sometimes be justified in declaring that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of the particular case. Ordinarily, however, the question is one of fact for the jury. * * * A high rate of speed may be perfectly proper at country crossings, although it might be considered negligence at a crossing in a populous city."

The railroad company should regulate the rate of speed of its cars with proper regard for the safety of human life and property, especially when running through towns and cities, even at places where there are no public crossings. 2 Thomp. on Neg. § 1874.

[3] It is contended on behalf of defendant that the testimony of the plaintiff describing the circumstances of the accident and the speed of the train was incompetent and not sufficient to be submitted to the jury. In *White on Personal Injuries on Railroads*, § 104, we find it stated that, when properly in issue in a given case, it is generally held competent to establish the speed of trains by any one familiar therewith, whether experts or not. And for this purpose also the schedule time of a train over its entire run may be shown, the distance and time consumed by a round trip of the train, or the time made just before or after a given place was passed, as bearing upon the rate of speed made at such place. No objection was made to the testimony of plaintiff upon this subject, and it appears that he described the circumstances at the time of the injury fully. The defendant appeared to understand this and introduced evidence tending to show the rate of speed at the crossing some distance north of where the accident occurred, and also at the place. The case differs from that of *Yingst v. Lebanon & A. St. Ry. Co.*, 167 Pa. 438, 31 Atl. 687, relied upon by defendant.

[4, 5] The complaint made is as to the weight of plaintiff's evidence rather than its competency. It therefore became a question for the jury. A similar statement may be made as to the condition of the street at the place where the injury was received, which, as counsel for defendant state in their brief, was vigorously contested. The mere proof of an accident does not per se prove negligence, but proof of the accident, together with facts and circumstances from which the jury may fairly infer that the accident happened by reason of an alleged negligent act or omission of defendant, is sufficient. *Hecker v. Oregon R. Co.*, 40 Or. 6, 10, 66 Pac. 270; *Geldard v. Marshall*, 43 Or. 438, 444, 73 Pac. 330; *Lillstrom v. Northern Pac. R. Co.*, 53 Minn. 464, 55 N. W. 624, 20 L. R. A. 589.

The jury, having heard all the evidence and having examined the premises, were peculiarly qualified to pass upon this disputed question. We have nothing to do with the conflict in the evidence. The record contains about 250 pages of printed evidence which we have carefully read. There is a direct conflict in the testimony as to whether or not any signal or warning was given to the plaintiff at the time he was seen by the motorman. There is not so much difference in regard to the exact place where the accident happened as to the condition of the street at that point. The jury could reasonably have concluded that the accident was within the town of Linnton where the defendant should use reasonable care in the operation of its cars. In the passage of cars through towns, cities, and villages, the management thereof should be consistent with the safety of the passengers and those who have occasion to cross the track in traveling with

due care upon the highway. 2 Thomp. on Neg. § 1873.

[6] Where a motorman of a car has a clear and unobstructed view of a traveler on the track and fails to give warning to the traveler of the car's approach, he is negligent, though the place of the accident was not at a street crossing. Employees in charge of a motor car are bound to keep a lookout along its tracks, where persons are likely to be found, in order to give proper signals in case of danger. *Nellis on Street Railways*, § 380.

[7] If the jury believed the statement of the plaintiff that at the time of the casualty he was crossing the track and trying to get off, this, in connection with the evidence of the motorman that he saw the plaintiff when the car was about 100 feet from him, may have caused the jury to believe that the motorman had time to stop the car before striking plaintiff's horse, as the motorman says he could stop the car within 100 feet. There is a conflict in the evidence in this regard; the motorman asserting that plaintiff was upon the highway at the side of the railroad and backed his horse against the car. This question was for the jury to solve. The speed of the car was not the only matter for the jury to consider in order to determine whether or not the defendant was negligent. Negligence of defendant is predicated upon excessive speed and lack of warning in the operation of the car at a place where people customarily crossed the railway tracks. Even the maps offered in evidence by the respective parties exhibit the locus in quo with a marked difference. As explained they appear to be correct, as far as they show.

[8] For the guidance of trial courts and attorneys, we mention that much of the evidence given relates to the maps. The witnesses indicated to the jury; the reporter noting the word "indicating," without the record showing what the indications were or to what place on the map they referred. This makes the record extremely difficult for us to understand. When a witness refers to a map or exhibit he should be required to designate thereon, or by language, to what reference is made and in such a manner that the whole testimony can be considered from the record.

[9] Defendant asserts that the trial court erred in giving the following instruction: "If you find from the evidence that the railroad track of the defendant at the point where the accident occurred is laid or located upon the public highway or street in the town of Linnton, then the plaintiff would have the right to pass over the track, in the exercise of due care, and would not be confined to any regular or particular crossing." Defendant complains that this instruction would require the company to operate its cars along this highway all the way from Portland to Burlington with the same speed and care as when upon the streets of the city.

The instruction, however, refers to the "street in the town of Linnton," and, taken with the other instructions to the jury, we think was proper and fair under the evidence.

Finding no error in the record, the judgment of the lower court is affirmed.

McBRIDE, C. J., and MAKIN and McNARY, JJ., concur.

FIELDS v. WESTERN UNION TELEGRAPH CO.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS BY COURT.

The trial court's findings of fact stand as the verdict of a jury, which, under Const. art. 7, § 3, can be set aside only when the court can say affirmatively that there is no evidence to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

2. EVIDENCE (§ 597*)—WEIGHT AND SUFFICIENCY.

Evidence to support the verdict or the court's findings of fact must cover all the material issues as to which the prevailing party had the burden of proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. § 597.*]

3. TELEGRAPHS AND TELEPHONES (§ 67*)—FAILURE TO DELIVER MESSAGE—DAMAGES—ANTICIPATED PROFITS.

The amount of commissions which a traveling salesman would have earned during 11 days he was kept from his territory through defendant's failure to deliver a telegram, as shown by evidence of the amount of his sales in the corresponding time in preceding years, his sales before and after the time in question, and his sales the year previous on his trip into the territory he would have canvassed during the 11 days, was not too remote to form the basis for the assessment of damages.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by George T. Fields against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hall S. Lusk, of Portland (Dolph, Mallory, Simon & Gearin, of Portland, on the brief), for appellant. Lester W. Humphreys, of Portland, for respondent.

RAMSEY, J. This is an action by which the plaintiff seeks to recover damages resulting to him from the negligent acts of the defendant. The plaintiff is a traveling salesman of the Edward Thompson Company, of Northport, Long Island, N. Y. On the 27th day of May, 1910, the plaintiff, being out of funds to defray his traveling expenses, and being in Portland, and desiring

to go to Tillamook and the Columbia river country next, on the business of selling books in which he was engaged, wrote the following telegram and delivered it to the defendant, to transmit over its wires, to said Edward Thompson Company at Northport, Long Island, N. Y.: "Edward Thompson Company, Northport, Long Island, N. Y. Wire me \$100.00. Charge same to weekly advance. Will make Tillamook and Columbia river country next. [Signed] George T. Fields, Hotel Calumet, Portland, Oregon." The plaintiff paid to the defendant, at the time he delivered said message to said company, the defendant's charges, in full, for transmitting said message by wire to the Edward Thompson Company, and the defendant received said message and agreed to transmit it. At the time that said message was delivered to the defendant, the plaintiff was staying temporarily at said Hotel Calumet, Portland, Or. The plaintiff at the time he delivered said message to the defendant, registered his name and address with the defendant. When said message was so delivered to the defendant, the receiving clerk of the defendant drew a pencil line around the words "Hotel Calumet, Portland, Oregon," without the knowledge or consent of the plaintiff, and, by reason of said pencil lines being so drawn around said words, said words were not sent by the defendant as a part of said message. The omitted words showed the Portland address of the plaintiff at which he expected to receive the answer to said message, but the defendant failed to transmit said words. The plaintiff failed to receive any answer to said message, and called frequently at the office of the defendant, and there inquired of the defendant whether any answer to his said message had been received by the defendant, and was informed by the defendant that no answer had been received. The Edward Thompson Company immediately answered said message, granting the plaintiff's request for a remittance of \$100; but the defendant failed to deliver said message to the plaintiff. The plaintiff called several times and asked the defendant for said message, but the defendant failed to deliver it to him, although the defendant had received said answer. The complaint charges the defendant with negligence in not delivering said message from said Edward Thompson Company to the plaintiff, granting his request for \$100 for expense money, etc., and claims damages in the sum of \$250. The court below tried the case, without a jury, and made findings and entered judgment in favor of the plaintiff for \$110 as damages. The defendant appeals, and assigns several alleged errors, but, on the hearing, argued only the assignments that the court erred in its findings of fact and law. We will regard the points not argued as waived.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] 1. The first question for determination is as to the sufficiency of the evidence to support the findings of fact made by the trial court. The court's findings of fact stand as the verdict of a jury, and can be set aside only for the reasons for which the verdict of a jury can be set aside. Since the recent amendment of our Constitution, the verdict of a jury can be set aside only when the court can say affirmatively that there is no evidence to support it. See article 7, § 3, of the Constitution.

[2] Of course, evidence to support a verdict, or the trial court's findings of fact, must cover all the material issues with reference to which the party, in whose favor the verdict or findings were rendered, had the burden of proof. We are unable to say that there is no evidence to support the court's findings of fact, and hence they will be sustained.

[3] 2. The main question for decision is whether the court's conclusion of law, that the plaintiff is entitled to a judgment for \$110 and costs and disbursements, is justified by the findings of fact. The plaintiff delivered to the defendant a message to be transmitted to the Edward Thompson Company in New York asking that company to wire him \$100 for traveling expenses, stating that he would make Tillamook and the Columbia river country next, etc. The defendant failed to transmit a portion of said message, but the company received it, and immediately answered it, granting the request for the funds. The answer was received by the defendant, but the latter negligently failed to deliver it to the plaintiff, and he was unable to continue his business as a traveling salesman for the period of 11 days. The trial court found that, by the defendant's negligence, the plaintiff was prevented from pursuing his usual occupation for the period of 11 days; that the reasonable value of the plaintiff's time and his customary earnings were at least \$10 per day; and that he was damaged in the sum of \$110 by the defendant's negligence.

Counsel for the defendant contends that the plaintiff's claim for damages for the 11 days' loss of time is too remote and uncertain to be allowed, and that his demand for what he claims that he could have made in commissions during the 11 days' time that he lost, through the negligence of the defendant, is a claim to recover speculative profits, and cannot be sustained. This involves one of the vexed questions of the law, upon which the decisions of the courts are not in harmony.

There are many cases that hold that the loss of anticipated profits cannot, as a general rule, be recovered as damages; but the later decisions are more favorable, than the older ones, to the recovery for the loss of expected gains.

In 8 Am. & Eng. Ency. Law (2d Ed.) pp. 616-618, it is said: "A statement of frequent

occurrence, therefore, is that prospective or anticipated profits are not recoverable, on account of their inherently uncertain and conjectural character. It has been said in this connection, that the earlier cases, both in England and America, generally concurred in the exclusion, in actions of tort as well as on contract, of profits which merely might have been realized had the injury not been done or the contract been performed; but that this early policy of the exclusion of profits has been considerably modified with reference to torts, and somewhat thoughtless so, in actions on contract. However this may be, there is certainly much conflict in the decisions in the applications of the principles, directly opposite results being observable in many cases of almost exact analogy as to facts. One thing at least, however, may be regarded as now settled; there is no ground for excluding recovery of profits simply because profits. It is believed that in the main the general rules controlling other elements of damage are applicable without exception to profits, with only, perhaps, a greater conflict among the cases than in other branches of the subject."

13 Cyc. pp. 49 and 50, says: "The earlier cases, both English and American, have generally concurred in excluding, as well in actions of tort as in actions on contracts, from the damages recoverable, profits which might have been realized if the injury had not been done or the contract had been performed. * * * Under the later day decisions recovery of profits as damages is not excluded because they are claimed as profits per se; but they must be the natural and proximate cause of the acts complained of, and, when this can be ascertained, without uncertainty, the principle of compensation will be adopted." The same volume, on pages 46 and 47, states the law thus as to loss of time: "In estimating damages, the plaintiff is entitled to recover for the reasonable amount of time that may have been lost by him in consequence of the injury complained of. This question, when connected with actions for personal injuries, is more specifically treated under the action on impairment of earning capacity; but in all actions when loss of time has resulted, as a direct consequence of the injury inflicted, upon proper evidence thereof, the plaintiff is entitled to recover therefor. In all actions, however, in order to recover for loss of time, the plaintiff must show proof of business, its extent, and the particular part transacted by himself."

In *Cranmer v. Kohn*, 7 S. D. 247, 64 N. W. 125, the facts were that a traveling salesman of goods was to have a definite salary if his sales should amount to a stated amount, but, if they should fall below a stated amount, he was to receive 7% per cent. as commissions on his sales, and it was shown that his commissions on sales would have been 7% per cent., if he had been permitted to go on

selling under his contract. His employer discharged him, and he sued for damages. In passing on this case, the court said, *inter alia*: "The plaintiff was entitled, therefore, to the amount of his commissions, at the rate of 7% per cent. upon the amount of goods that he could have sold during the remaining three months of the year. * * * But the respondent contends that there is practically no method of determining the amount of his sales for the three months; that evidence upon that question would be merely speculative in its character, and tend to prove uncertain and prospective profits, and would consequently be inadmissible. But this would not be any more speculative or calculated to prove prospective profits than was the evidence that plaintiff's services were of the value of \$300 per month. Would not the value of his services depend entirely upon the amount of goods he could have sold during those three months if he had been allowed to continue his sales for defendant? Most certainly it would. We see no great difficulty in proving facts that would enable a jury to determine approximately the amount of goods the plaintiff would have sold during the three months, in this case. He had been a traveling salesman for the defendant the two preceding years, and his sales during the months of October, November, and December of those years could have been shown, and the conditions of the crops, the state of the markets, the number of his regular customers, and his average sales would furnish a jury facts from which they could approximately determine the amount of his sales during the three months in controversy."

In *Lund v. Tyler*, 115 Iowa, 236, 88 N. W. 333, the facts were that the defendant had assaulted and beaten the plaintiff, and the plaintiff sued the defendant for damages for the beating, and claimed that, by reason of the injury to him, he was unable to pursue his occupation for a time. His occupation was fishing for a living, which is not a very certain kind of business, and, passing on the case, the court says: "Certainly plaintiff might recover loss of earnings during the time. The business was one involving, not speculative profits, but merely the personal efforts of the plaintiff, the profits in which could be considered as earnings, and therefore loss of time therein might be shown as resulting in loss of earnings. * * * It seems to us that the question properly called for an answer as to what plaintiff's reasonable earnings (in fishing) during such time would have been."

In the case of *Schumaker v. Heinemann*, 90 Wis. 251, 74 N. W. 785, the facts were that

the plaintiff was a traveling salesman for the defendant, and the plaintiff was to receive a stated per cent. in commission on the sales made by him, as his compensation. He was discharged by the defendant without cause, before the expiration of the period of his employment. He sued for damages for what he could have made during the unexpired term of his contract. The syllabus of the case is: "When a contract of employment has been unjustly terminated, the employé is entitled to compensation for such damages as the employer might reasonably have anticipated would result to his employé by the discharge. If such damage consists of profits lost, and the evidence furnishes reasonable data upon which to compute them, such lost profits are a proper measure of damages, and are recoverable."

In *Blagan v. Thompson*, 23 Or. 254, 31 Pac. 652, 18 L. R. A. 315, the court says: "The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all. It only applies to such damages as are not the certain result of the breach, and not to such as are the certain result but uncertain in amount."

The case of *Altman v. Western Union Tel. Company* (Sup.) 84 N. Y. Supp. 54, is a case much like this case, but the court disposes of the point involved in this case in less than two lines as follows: "Another independent ground for reversal is that the damages proved were all together too remote and speculative."

The plaintiff in this case had been working for the Edward Thompson Company for four years, selling books on a commission, and the evidence showed what his commissions were during those four years, and also what they were for the seven days prior to May 27, 1910 (the date of sending the telegram), and what they were for the month of May, 1910, and what they were on the Tillamook trip which he made in June, 1910. The above facts were sufficient as a basis for finding approximately what his earnings would have been during the 11 days that he was prevented by the acts of the defendant from pursuing his occupation.

We find that the damages allowed by the trial court were sufficiently certain, and that they were recoverable.

The judgment of the court below is affirmed.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

SEAMAN v. CITY OF PORTLAND.†

(Supreme Court of Oregon. Dec. 23, 1913.)

MUNICIPAL CORPORATIONS (§ 654*)—STREETS—PRESCRIPTION—EVIDENCE.

In a suit to quiet title to land, evidence held to show that defendant city had been in open, notorious, continuous, and adverse possession, improving the property as a street, for over 30 years.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1428; Dec. Dig. § 654.*]

Department 2. Appeal from Circuit Court, Multnomah County; J. U. Campbell, Judge. Suit by Norma G. Seaman against the City of Portland. From a decree for defendant, plaintiff appeals. Affirmed.

This is a suit to quiet title to a triangular piece of land situated near the intersection of Ankeny, Sixth, and Pine streets in the city of Portland. The diagram inserted in appellant's brief shows the relation of the triangular strip to the streets in question. It is approximately 14 feet wide at the large end and 14 feet long, tapering to a point on the north. The original plat and dedication of the streets was by Benjamin Stark, through whom plaintiff claims title. Defendant answered, claiming title under sales of the property for street assessments in which the property was bid in by the city; one sale of all except the northeast quarter being made February 10, 1872, and another covering the remainder of the property being made June 19, 1877. Upon the sale of the first parcel a deed was issued to the city and recorded. There is no evidence of the issuance of a deed upon the second sale. There was a plea that Stark had made an implied dedication of the property to public use, and a further plea of title in defendant by adverse possession and use of the property as a public street for more than the statutory period.

Newton McCoy and H. B. Nicholas, both of Portland, for appellant. L. E. Latourette, of Portland (Frank S. Grant, of Portland, on the brief), for respondent.

MCBRIDE, C. J. (after stating the facts as above). Waiving all the other propositions in the case, we are satisfied that the city has been in open, notorious, continuous, and adverse possession of the property in question, using it and improving it as a street, since 1873. This is not a case of mere permissive travel over vacant ground. On the contrary, the city went upon the premises under claim of right and color of title, filled it in, and laid pavement upon it in the same manner that it improved the rest of its streets, and it and the public generally have used it as a public street for a third of a century.

The manner and extent of this improvement and use is stated by Mr. D. W. Taylor, formerly city surveyor, as follows: "Q. What was the general appearance of the block at

that time? A. Well, to some extent that fractional block was a hole in the ground; it was below the grade of the street; kind of a hole there. Q. A low place? A. Yes, sir. Q. Can you tell what was done by the city of Portland relative to improving that property along about the year '78? A. The street committee decided to fill it up so it could be used for street purposes. * * * Q. What did you do at that time? A. I prepared an estimate for the common council. * * * Q. Was the work completed according to the estimates that were contained in Exhibit 1 just introduced in evidence? * * * A. It was completed according to the estimates. Q. I hand you a document marked 'Certificate P. G. Baker, fractional block between 5th and 6th, filed June 19, 1878. R. L. Durham, Auditor and Clerk.' A. One side is the certificate I signed stating that the work had been completed according to Ordinance No. 2143. It is practically a statement that the work had been completed and practically the estimates of the cost that were filed. Q. Is that your statement? A. Yes, sir. Q. Is that your signature [indicating]? A. Yes, sir. * * * Q. Mr. Taylor, how long did that pavement remain on that block? A. Well, I can't tell definitely whether it was ever raised above that or not; but the macadam improvement was in 1894. Q. Describe what kind of pavement was laid under the ordinance introduced here. A. It was macadamized. Q. State whether or not it was laid all over the block. A. It was laid over the block and in front on Sixth. I don't know to what extent; but my impression is it was—my impression or recollection is that Pine street had already been improved prior to that time on the south side of the block. Q. If I understand you correctly, this pavement was laid all over this block and on all sides but Pine street? A. Yes, sir. Q. How was that street used thereafter? A. That block was to all intents and purposes a portion of the street; they crossed it and recrossed it in every direction. Q. Since when? A. 1878. Q. When, if you know, was this block repaved? A. Well, the block itself—a portion of it was repaved in 1893 under a contract for asphalt pavement from Morrison street to Hoyt street. That improvement contemplated improving Sixth street; but Snell, Heltsu & Woodward, who put up the Commonwealth Building, they had a wide door, and they paid partly for putting asphalt on a portion of that street in order to get travel to it. Then in 1894 there was an ordinance passed improving Pine street from Sixth street to Seventh, and also Ankeny street between Sixth and Seventh, and at that time this whole block was paved over with an asphalt pavement. Q. Has that been there ever since? A. Yes, sir; since '94. * * * Q. Was the use of it for street purposes open? A. Yes, sir. Q. Was it vis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 17, 1914.

ble? A. A party not familiar with the tract would not think of any fractional block being in there; any private property. Q. State whether or not the use for street purposes was open and notorious? A. Yes, sir; it was. Q. Was it exclusive? A. I don't know what you mean by exclusive; it was used for no other purpose. Mr. McCoy: Object as calling for the opinion of the witness. Q. Will you state to what extent travel existed over and across this block from 1878 on down to a year ago, when this metal booth was placed on it? A. Traffic going up and down Ankeny street would invariably cross this block; the street was narrow anyway, anyway on the south side; and any one traveling down Sixth street, going north, would cross this block. Q. State whether or not this block was improved with different kinds of pavement in substantially the same manner as the adjacent streets since 1878. A. It was improved just the same as the rest of the street adjacent to it. Q. State whether or not it was used just the same as the adjacent street. A. Yes, sir; it was. Q. Was there anything there, any curb or anything else, to indicate a line of demarcation between the public highway and private property? A. Not since 1878; not to my remembrance."

D. J. Zan, another witness, who lived close to the premises, testified in substance that from 1878 to 1911 it was used as a street, "all the time, all day long and night long, as far as that goes"; that it was finished and improved in the same manner as abutting streets; and that he was surprised to hear that it was anything else than a street. Other witnesses testify to the same effect.

It is plain that neither Stark nor his heirs have ever, within the last 40 years, laid any claim to the property, and none was made until it was sold upon a trumped up claim, which is suspicious in its inception, by an administrator, who was appointed with the evident view of securing this property, not for the estate of Stark, but for his own private purposes.

The decrees of the circuit court is affirmed.

BEAN, EAKIN, and McNARY, JJ., concur.

Ex parte STEINER.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. CONSTITUTIONAL LAW (§§ 205, 206, 238, 275*) —MASTER AND SERVANT (§ 13*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAW—PRIVILEGES OF CITIZENS—LABOR LAW.

Laws 1913, p. 90, declaring eight hours a day's labor in all cases of labor employed by the state or its auxiliaries, either directly or through the agency of a contractor, is not violative of Const. art. 1, § 20, prohibiting laws granting to any citizen or class of citizens privileges which, upon the same terms, shall not equally belong to all citizens, nor of Const. U. S. amend. 14, prohibiting states from abridging the privileges and immunities of citi-

zens of the United States, or denying due process of law or equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 591-624, 625-648, 688, 690, 695, 706-708, 830, 835, 839, 843-846; Dec. Dig. §§ 205, 206, 238, 275;* Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

2. MASTER AND SERVANT (§ 13*)—REGULATION OF HOURS OF SERVICE—STATES—"LABOR."

In Laws 1913, p. 90, declaring eight hours a day's labor in all cases where labor is employed by the state, county, etc., "labor" is used in its broadest sense, as comprehending all persons employed by the state or its auxiliaries, whether skilled or unskilled, and includes the engineer of the heating plant at the State Hospital.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3948-3951.]

3. MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE—STATES—CRIMINAL RESPONSIBILITY.

Laws 1913, p. 91, § 6, making it a misdemeanor for any contractor, subcontractor, or agent, or persons whatsoever in authority or in charge, to violate the provisions of the act, which fix eight hours as a day's labor for the state or its auxiliaries, includes the superintendent of the Oregon State Hospital among those criminally responsible for violation of the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

Burnett, J., dissenting.

En Banc. Original application by R. E. Lee Steiner, for writ of habeas corpus. Denied.

Roy F. Shields, of Salem (McNary, Smith & Shields, of Salem, on the brief), for petitioner. James W. Crawford, Asst. Atty. Gen., and C. E. S. Wood, of Portland (A. M. Crawford, Atty. Gen., on the brief), for the State.

McNARY, J. This is an original application in this court for a writ of habeas corpus. On October 31, 1913, O. P. Hoff, Labor Commissioner of Oregon, filed two criminal complaints in the justice's court for Salem district, Marion county, Or., charging R. E. Lee Steiner, superintendent of the Oregon State Hospital, with the violation of the provisions of chapter 61 of the General Laws of Oregon for 1913. In one of the complaints the superintendent is charged with having employed and required one W. L. Davis to perform labor on October 29, 1913, as a farm hand at the asylum farm, for more than eight hours. In the other complaint, the accused is alleged to have employed and required one Morton Mortensen to perform labor as an engineer at the same time and place, for a period of time in excess of eight hours. Seasonably following the arrest of Mr. Steiner, he applied to this court for a writ of habeas corpus, assigning as reasons therefor that: "There is no law within the state making the acts complained of illegal, and that chapter 61, of the Laws for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1913, does not apply to laborers employed by the state," and for that account the justice of the peace had no jurisdiction to issue the warrants of arrest.

The material provisions of the statute, including the title of the act, under which the petitioner is prosecuted, reads:

"An act * * * defining the duties of state officials in awarding and carrying out contracts; declaring eight hours to be a day's labor in all cases where the state or any county, school district, municipality or division is concerned, and prescribing a penalty for violation of the law.

"Section 1. Every contract made with the state, county, school district, municipality, municipal corporation or subdivision shall contain a condition that * * * no person shall be employed for more than eight hours in any one day, or forty-eight hours in any one week, unless in case of emergency when no other competent labor is available, and in such cases such laborer shall be paid double wages for all overtime."

"Sec. 4. In all cases where labor is employed by the state, county, school district, municipality, municipal corporation, or subdivision, either directly or through another, as a contractor, no person shall be required or permitted to labor more than eight hours in any one day, or forty-eight hours in any one week, except in cases of necessity, emergency, or where public policy absolutely requires it, in which event the person or persons so employed for excessive hours shall receive double pay for the overtime so employed; and no emergency, necessity, or public policy shall be presumed to exist when other labor or like skill and efficiency which has not been employed full time is available.

"Sec. 5. Eight hours shall constitute a day's labor in all cases where the state, county, school district, or any municipality, municipal corporation or subdivision is the employer of the labor, either directly or indirectly, by contract with another.

"Sec. 6. All contractors, subcontractors, or agents, or persons whatsoever in authority or in charge, who shall violate the provisions of this act as to the hours of employment of labor as herein provided, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty dollars nor more than one thousand dollars, or with imprisonment in the county jail for a period of not less than five days nor more than one year, or by both such fine and imprisonment, in the discretion of the court."

[1] The first and by far the most serious question presented by counsel for petitioner involves the constitutionality of the statute which attempts to limit the hours of laborers employed by the state or its auxiliaries, either directly or through the agency of a contract-

or. The validity of the statute is challenged upon the ground of an alleged violation of the fourteenth amendment of the Constitution of the United States, which inhibits a state from enacting any law which will abridge the privileges and immunities of citizens of the United States, deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law. Also, the statute is assailed as being in contravention of section 20, article 1, of the state Constitution which provides: "No law shall be passed granting to any citizen or class of citizens, privileges * * * which, upon the same terms, shall not equally belong to all citizens."

An examination of the several provisions of the statute, and of the record on appeal, discloses that no question can here arise concerning the power of the Legislature to pass a law limiting the hours of labor in purely private work in which the public has no concern. That question we have now no occasion to consider. Confessedly, the legislative enactment has application only to a laborer employed directly or indirectly by the state, or by one of its political agencies. The Constitution of our state does not reveal any express or implied restriction upon the power of the lawmaking body to determine the maximum number of hours an employé may either be required or permitted to labor for the state, or its agencies of government.

The state has undoubted power to prescribe for itself such rules of conduct as it deems best suited for the particular work in which it is engaged. It may dictate rules for its own guidance which would be intolerable if applied to private persons in the prosecution of their own activities. But that situation cannot enter into a legal estimate of the statute, or be considered in applying the rules by which its constitutional measure must be taken, as matters of that nature only provoke considerations of public policy with which the courts have no concern. By the legislative act in question the state simply declares that no person shall be permitted or required to perform labor for it, or for any of its administrative agencies, more than eight hours in a calendar day, and that none need apply who desire longer hours of employment. To the contractor of state work, it says no one can work for you in excess of eight hours in a day. No barrier is placed about a laborer preventing him from seeking employment elsewhere. His liberty of selection is not interfered with, nor his right to labor frustrated. Any individual may, with propriety, declare a policy not to employ within the line of his undertaking any person for a longer period of time than eight hours in a day, or any other unit of time that might appeal to his altruism, and direct his agent to observe that regulation. And by parity of reason, the state, speaking

through the Legislature, may, with equal fitness, inaugurate a rule of conduct not to work its employes more than eight hours a day, and legally direct its instrumentalities of government faithfully to observe such mandate. The terms of the employment are by this statute publicly proclaimed, and if a person insists upon working more than the hours limited by the act, he must seek elsewhere the engagement of his labor.

In the case of *United States v. Martin*, 94 U. S. 400, 24 L. Ed. 128, in passing upon an act of Congress declaring that eight hours shall constitute a day's work, for laborers, workmen, or mechanics employed by or on behalf of the government, the court said: "We regard the statute chiefly as in the nature of a direction from a principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest."

A careful dissection of this statute warrants the conclusion that the act does not transgress upon any rights vouchsafed, either by the federal or state Constitutions, and that the objections which are urged against the law involve matters of political expediency with which the lawmaking bodies of the state alone are concerned, and to which institutions only may an appeal for correction be made. Indeed, we think the law applicable to this case was settled by the Supreme Court of the United States in the excellently considered case of *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, wherein Justice Harlan, speaking for the court, in part said: "We can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it, or for one of its municipal agencies, should permit or require an employe on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations, and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern. If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public work to permit or require his employe to perform labor upon

that work in excess of eight hours each day is in derogation of the liberty both of employes and employer, it is sufficient to answer that no employe is entitled, of absolute right and as part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." A case of striking analogy to the one in mind is *Re T. J. Dalton*, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380.

We are not unmindful of an impressive number of cases, the leading one of which is *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, that hold those legislative acts unconstitutional which attempt to regulate the right of free contract upon the part of the individual, either as employer or employe. But in our view of the law, that situation does not here present itself. We conclude on this phase of the case that chapter 61, General Laws of Oregon for 1913, is a mere declaration of policy on the part of the state and its political subdivisions, and does not conflict either with the Constitution of the United States or of this state.

[2] The other proposition suggested by counsel for petitioner is whether the engineer of the heating plant at the State Hospital is a laborer within the meaning of the enactment. The statute plainly employs the term "labor" in its widest sense, as reference to section 4 of the act will denote: "In all cases where labor employed by the state, county, school district, municipality, municipal corporation or subdivision * * * no person shall be required or permitted to labor more than eight hours. * * ." Section 5 reads: "Eight hours shall constitute a day's labor in all cases where the state, etc., is the employer of the labor." Had the Legislature intended to use the word "labor" in a restricted sense, or with reference to a special class of endeavor, a qualifying word or phrase would have been used in connection with the term. The language of the statute is comprehensive, and includes all persons who perform labor for the state or its auxiliaries, whether that labor is skilled or unskilled, so long as the character of the work comes within the definition of the term "labor." Labor is defined in *Bouvier's Law Dictionary*, vol. 2, p. 95 (Rawle's Rev.) as, "work requiring execution or effort, either physical or mental; toil."

In the case of *Stryker v. Cassidy*, 78 N. Y. 50, 32 Am. Rep. 262, the question arose whether an architect employed by the owner to superintend the erection of a house was entitled to lien for his services. As an act of the Legislature authorized a lien to be created in favor of "any person who shall perform any labor * * * by virtue of a contract with the owner," the court held

that the services of the architect were encompassed within the word "labor," and held the lien to be valid. *Knight v. Norris et al.*, 13 Minn. 473 (Gil 438); *Sleeper v. Goodwin*, 67 Wis. 577, 31 N. W. 335.

Considered in the glow of these precedents, we find no other alternative than to declare that the duties of the engineer came within the embrace of the word "labor" as used in the statute.

[3] As a final reflection, it will be observed that the statute designates in section 6 those individuals who may be punished for an infraction of the law as "all contractors, subcontractors, or agents, or persons whatsoever in authority, or in charge." The language employed is sufficiently general to embrace within its fold all persons in charge of a public undertaking, whether acting in the capacity of a contractor, subcontractor, or agent, or in the position of one having authority over or in charge of the work.

Indubitably the language of the act, as well as its aim and purpose, is to place the responsibility of a faithful observance of the law upon those individuals who have charge of the labor in a given public work, thereby reducing to a minimum the wrong which the Legislature deemed the statute would correct. By the record, it is admitted that petitioner is the superintendent of the Oregon State Hospital, and as such employs laborers on behalf of and as agent of the state, and was acting in that capacity at the time of the transgressions laid in the criminal complaints. Truly the petitioner comes within the statute, and is responsible for a violation thereof.

The writ will be denied, and the petitioner remanded to the custody of the law.

BURNETT, J., dissenting, and MOORE, J., not sitting.

BURNETT, J. (dissenting). The Legislative Assembly at its twenty-seventh regular session enacted a law with this title: "To protect subcontractors, materialmen, and laborers performing labor for the state or any municipality or subdivision; requiring a sufficient bond to protect the state from liens; defining the duties of state officials in awarding and carrying out contracts; declaring eight hours to be a day's labor in all cases where the state or any county, school district, municipality, or division is concerned, and prescribing a penalty for violation of the law." After a section providing that every contract made with the state, or any county, school district, or municipality therein shall be conditioned, among other things, that no person shall be employed for more than 8 hours in any one day or 48 hours in any one week, except in cases of emergency when no other competent labor is available, etc., section 4 reads thus: "In all cases where labor is employed by the state, county, school district, municipality,

municipal corporation, or subdivision, either directly or through another, as a contractor, no person shall be required or permitted to labor more than eight hours in any one day, or forty-eight hours in any one week, except in cases of necessity, emergency, or where public policy absolutely requires it, in which event the person or persons so employed for excessive hours shall receive double pay for the overtime so employed; and no emergency, necessity, or public policy shall be presumed to exist when other labor of like skill and efficiency which has not been employed full time is available."

Section 6 is as follows: "All contractors, subcontractors, or agents, or persons whatsoever in authority or in charge, who shall violate the provisions of this act as to the hours of employment of labor as herein provided, shall be deemed guilty of a misdemeanor and upon conviction shall be fined in a sum of not less than fifty dollars nor more than one thousand dollars, or with imprisonment in the county jail for a period of not less than five days nor more than one year, or by both such fine and imprisonment, in the discretion of the court."

Operating under this act, one O. P. Hoff, on October 31, 1913, filed an information under oath before a magistrate of Marion county, charging that "R. E. Lee Steiner, defendant above named, was at all times herein mentioned, and is now the duly appointed, qualified, and acting agent and superintendent of the Oregon State Hospital of the state of Oregon, and as such employs laborers to perform labor for and on behalf of the state of Oregon. That said R. E. Lee Steiner in Marion county, Or., on the 29th day of October, 1913, then and there being, did then and there, as agent and superintendent of the Oregon State Hospital of the state of Oregon, have in his employ W. L. Davis, and did then and there as such superintendent and agent require and permit the said W. L. Davis to then and there perform labor for the state of Oregon, as a laborer on the asylum farm, more than 8 hours during the 24 which constitute the said day; that the said W. L. Davis was not then and there employed in a case of necessity or emergency, or where public policy absolutely required it, and that there was then and there laborers of like skill and efficiency as the said W. L. Davis, who had not then and there employed their full available time." Upon this information the magistrate issued a warrant, under which the constable with whom it was lodged took custody of the petitioner here. Like proceedings were had upon an information filed by the same party with respect to an engineer. Thereupon the defendant in the information applied to this court by an original petition for a writ of habeas corpus, and the constable has made a return setting forth the information and warrant under which he is acting. The question arises upon demurrer to the return.

It may be conceded that the state can exercise reasonable legislative power in declaring conditions and hours of labor affecting its own employes, and that the statute in question is effective for the purpose of incorporating into every contract the conditions named in the statute. That, however, is not all the issue involved. The direct question to be determined here is whether the statute imposes upon the petitioner a duty, the violation of which will constitute a crime. In its supposed aspect as a criminal statute this law is subject to the rule declared by Mr. Justice Prim in *State v. Mann*, 2 Or. 255: "A crime or public offense is some act forbidden by law; and it is a well-settled rule of law that no one can be punished for doing an act, unless it clearly appears that the act sought to be punished comes clearly within both the spirit and letter of the law prohibiting it. The act constituting the offense should be clearly and specially described in the statute, and with sufficient certainty, at least, to enable the court to determine, from the words used in the statute, whether the act charged in the indictment comes within the prohibition of the law."

In *Cook v. State*, 26 Ind. App. 278, 281, 59 N. E. 489, 490, the doctrine is thus laid down: "The language of a criminal statute cannot be extended beyond its reasonable meaning, and, wherever the court entertains a reasonable doubt as to the meaning, the doubt must be resolved in favor of the accused. The court must expound what it finds written, and cannot import additional meaning without sufficient indication thereof in the words of the statute, with such aids thereto as the established rules of law authorize."

In *Rohlf v. Kasemeier*, 140 Iowa, 182, 118 N. W. 276, 23 L. R. A. (N. S.) 1284, 132 Am. St. Rep. 261, 17 Ann. Cas. 750, the court says: "It must be remembered that the word is found in a criminal statute, and that in the interpretation of such statutes different rules apply from those which obtain in civil matters, or where contracts are involved. Nothing is to be added to such statutes by intendment, and, as a rule, they are to have a strict construction." See, also, *State v. Dalley*, 76 Neb. 770, 107 N. W. 1094; *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *Austin v. State*, 71 Ga. 595; *State v. Fisher*, 53 Or. 38, 98 Pac. 713.

Referring to the language of section 4, we find that "no person shall be required or permitted to labor more than eight hours in any one day." It would appear from this language that a person who labored more than eight hours without permission would thereby violate the law. No one besides the employe is mentioned in the inhibition of the section, and for the purposes of criminal prosecutions we cannot include persons not named therein. The language of this section, as well as that of section 6, is purely impersonal. It is not stated in the law who shall have power to require or permit any one to

labor. In other words, no direct limitation is placed upon any one having authority over labor, the violation of which limitation would constitute a crime. What constitutes a violation of the statute under section 6 is not defined. No act constituting a crime is described in the statute with the certainty required by the rule established in *State v. Mann*, supra. It is left to inference and speculation. No citizen ought to be adjudged guilty of a crime or deprived of his liberty on mere implication or strained construction. As a criminal statute, the enactment is void for uncertainty.

Moreover, the terms of that section are directed against "all contractors, subcontractors, or agents, or persons whatsoever in authority or in charge who shall violate the provisions of this act." Under well-known rules of statutory construction, these terms, being associated together, must mean substantially the same thing, so that, construing this section in favor of a defendant liberally as the rule requires, it is fair to say that it refers only to contractors and those standing in the same class. Taking the whole act together, it manifestly applies to contracts made with the state, or some municipal corporation therein, and at best provides a penalty only for the violation of the terms of such agreements.

Again, if the matter is to be affected by the authority of some one to require or permit an employe to labor, much light may be thrown upon the situation by consulting the act of February 21, 1913 (Laws 1913, pp. 119, 121). This act creates what is known as the Oregon State Board of Control, consisting of the Governor, Secretary of State, and State Treasurer. By that act the board of control is vested with authority over the Oregon State Insane Asylum, thereafter to be known as the Oregon State Hospital. Section 3 confers upon the board "full authority and exclusive government, direction and supervision over the several institutions enumerated in section 2 of the act." That section, after conferring upon the board authority to appoint superintendents, provide by-laws, prescribe the duties of the executive heads of the several institutions, and to suspend or discharge them or their subordinates, fix the salaries of all officers and employes, contract for supplies and betterments, exercise the power of eminent domain, take, receive, and hold property of all kinds, etc., closes with these words: "And to do and perform all legal and peaceful acts requisite and necessary for the successful management and maintenance of said institutions." It would thus appear that the board has all authority, short of the power to declare martial law, in the management of the institutions and the employes; for we find that it is restricted to "all legal and peaceful acts requisite and necessary." The conclusion is plain that, so far as the statute discloses, it is the board alone which has authority to

require or permit labor for more than eight hours in one day. The defendant, himself an employé, cannot be in a statutory situation, either to permit or require extra service within the meaning of the law, and ought not to be made the scapegoat of those who employ him.

The prisoner should be discharged.

LAFKY v. ALBERT.

(Supreme Court of Oregon. Dec. 30, 1913.)

LIBEL AND SLANDER (§ 97*)—ACTIONS—PLEADING—COMPLAINT.

Where the language alleged in a complaint for libel is not libelous per se, and there is no innuendo, a demurrer is properly sustained.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 234-236; Dec. Dig. § 97.*]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by F. J. Lafky against J. H. Albert. From a judgment for defendant, plaintiff appeals. Affirmed.

Grant Corby and George G. Bingham, both of Salem, for appellant. C. M. Inman and John A. Carson, both of Salem (Carson & Brown, of Salem, on the brief), for respondent.

McBRIDE, C. J. This is an action for libel. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. We have examined the record, and are of the opinion that the language used is not libelous per se; and, there being no innuendo, the demurrer was properly sustained. As no good purpose would be served by perpetuating in the Oregon Reports the article over which the action arose, we omit it from the opinion.

The judgment is affirmed.

MOORE, BURNETT, and RAMSEY, JJ., concur.

McFARLAND v. CARLSBAD HOT SPRINGS SANITARIUM CO. et al†

(Supreme Court of Oregon. Dec. 23, 1913.)

1. FRAUD (§ 41*)—ACTIONS—PLEADING.

In an action for damages for deceit, the complaint held to state a cause of action, though containing statements which did not constitute fraud and some indefinite allegations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

2. FRAUD (§ 58*)—ACTIONS—EVIDENCE.

Evidence that the name of a defendant appears on the outside of a prospectus which appears to have been issued by a corporation as a director thereof does not sustain a cause of action against him for fraud in the prospectus, when there is nothing to connect him with its issuance or circulation.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

3. FRAUD (§ 64*)—ACTIONS—QUESTIONS FOR JURY.

Evidence that a defendant assisted in preparing a prospectus for a corporation containing fraudulent representations is sufficient to go to the jury as against such defendant.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.*]

4. FRAUD (§ 9*)—ELEMENTS IN GENERAL.

An action of deceit cannot be maintained, unless the representations were false, and either known by the maker to be false or made recklessly as of his own knowledge, with the intent that they should be acted on by the party seeking relief, and such party believed them, acted upon them, and was injured.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8, p. 7686.]

5. CORPORATIONS (§§ 306, 495*)—OFFICERS AND AGENTS—LIABILITY FOR CORPORATE ACTS.

Where a corporation and one or more of its officers or agents have been guilty of fraud, both the corporation and such officers or agents are liable; but a director or other officer who had no part in making the representations is not liable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458, 1906; Dec. Dig. §§ 306, 495.*]

Department 1. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by W. R. McFarland against the Carlsbad Hot Springs Sanitarium Company and others. From a judgment for plaintiff, defendants, except F. A. Clark, appeal. Reversed and remanded, with directions.

J. E. Magers and R. A. Leiter, both of Portland (Griffith, Leiter & Allen, of Portland, on the brief), for appellants. Charles E. Lenon, of Portland (Jeffrey & Lenon, of Portland, on the brief), for respondent.

RAMSEY, J. [1] The defendant the Carlsbad Hot Springs Sanitarium Company is a corporation. The plaintiff, about March 22, 1911, purchased of the defendant company \$2,000 in stock of said company, and paid said defendant company therefor \$2,000. This company was incorporated to build, equip, and conduct a sanitarium at certain hot springs about two miles east of North Powder in Baker county, Or.

The complaint charges that the plaintiff was induced to buy said stock by false and fraudulent representations made by the defendants. The complaint is couched in turgid rhetoric, rarely equaled in judicial proceedings, and based, in part, on a prospectus printed and issued by the defendant company. On the back of said prospectus is a statement that said company is capitalized at \$500,000, and that its stock is nonassessable. On the back of said pamphlet it is stated that Edgar H. Thornton, M. D., is president, F. E. Foster, vice president, and J. F. Monte is secretary and treasurer of said company, and that the directors are

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—14

† Rehearing denied January 13, 1914.

Edgar H. Thornton, M. D., J. K. Locke, M. D., Ernest A. Sommers, M. D., F. A. Clark, F. E. Foster, Oliver Gallup, and J. F. Monte.

The complaint does not mention this pamphlet or prospectus. Divested of its tumid rhetoric, the complaint alleges, in substance, that the defendants falsely and fraudulently represented to the plaintiff, in order to induce him to buy the stock, that the defendant company was the owner of 101 acres of land two miles east of North Powder, Baker county, Or.; that the same contained a number of mineral springs whose healing powers had been tested by analysis; that its healing powers had been proved by the experience of numerous invalids who had been restored to health by the use of the waters of said springs; that said lands contained much of the finest building granite in the world, and that it was easily and cheaply available for use in the cities of the northwest; that the curative properties of said mineral waters were already proven facts; that a stately, beautiful, fireproof sanitarium and hotel was already designed and in course of construction from native granite on said property, etc. The complaint alleges that the defendants, when they made said allegations, knew them to be false.

The gist of the complaint is that the defendants made various false and fraudulent representations to the defendant to induce him to purchase the stock, and that these representations were false, and that the defendants knew them to be false when they made them, and that he believed them to be true, and acted upon them, and bought the stock, and was damaged, etc.

Nearly all of the material allegations of the complaint were denied by the answer, in which all of the defendants joined, excepting F. A. Clark. The new matter of the answer was denied by the reply.

The complaint charges that all of the defendants made the said fraudulent representations, and it does not allege that either of the defendants was an officer or agent of the defendant company. There was no demurrer to the complaint, nor was any motion made to strike out any part thereof. While the complaint contains statements that do not constitute fraud, and others of its allegations are indefinite, we think that it states facts sufficient to constitute a cause of action.

After the plaintiff's evidence in chief was in, counsel for defendants made a motion for a judgment of nonsuit as to the defendant Ernest Sommers, and as to all of the defendants, on the ground that the plaintiff had not produced evidence sufficient to be submitted to the jury. These motions were denied.

The defendants assign various errors committed by the court, including the refusal of the court to grant the judgment of nonsuit and its refusal to instruct the jury to find a verdict for each of the defendants.

The motions for judgment of nonsuit and

for instructed verdicts raise substantially the same question.

[2] 1. In this case there was no evidence whatever against the defendant Dr. Ernest Sommers. The plaintiff testifies that he does not know him, and that Sommers never made any representations to him. A prospectus that appears to have been issued and circulated by the defendant company, and which is relied on, in part, by the plaintiff, has on the outside thereof the name of Dr. Sommers as a director of the defendant company; but there was no proof that he was a director, and there is nothing in evidence to connect him with the issuance or circulation of the said pamphlet. Then on the stand, as a witness, he stated he had nothing to do with said prospectus, and never saw a copy of it until it was shown to him at the trial.

[3] 2. As to the defendant company, the defendants Monte and Dr. Thornton, we think there was evidence sufficient to be submitted to the jury, although the evidence as to Dr. Thornton is very weak. However, he assisted in preparing the prospectus. The evidence is not strong as to either of the defendants.

3. As to the defendants Dr. Locke, F. E. Foster, Oliver Gallup, J. W. Bruce, F. A. Clark, and George Woodnorth, we find that there was not sufficient evidence to be submitted to the jury, or to support a verdict against either of them. It does not appear that either of them made any representations of a false or fraudulent character to the plaintiff.

A man named Campbell wrote the prospectus referred to, and it is not shown that either of these defendants participated in the issuing or circulation of this prospectus, or had knowledge of its contents or that it was being circulated. Mr. Monte seems to have circulated it; but there is little evidence as to its circulation. A copy of it was given to the plaintiff. The plaintiff talked with some of these defendants concerning the springs and property belonging to the defendant company; but he fails to testify to any representations made by either of them that would form the basis for an action for deceit. Nor is there any evidence that anything said by either of these defendants was false, or that either of them knew it to be false.

[4] In this state the rule is settled, by a long line of decisions, that an action of deceit, based on fraudulent representations, cannot be maintained, unless the representations were false, and either known by the person making them to be false or were made by him recklessly as of his own knowledge, without knowing whether they were true or not, with the intent that they should be acted on by the party seeking relief, and such party believed them to be true, and acted upon them, and was injured. *Bailey v. Frazier*, 62 Or. 142, 124 Pac. 643; *Anderson v. Adams*, 43 Or. 627, 74 Pac. 215;

Martin v. Eagle Development Co., 41 Or. 448, 60 Pac. 216; Wilde v. Oregon T. & S. Bank, 59 Or. 554, 117 Pac. 807; Rolfe v. Russel, 5 Or. 401, 402; Smith v. Cox, 9 Or. 327; Britt v. Marks, 20 Or. 223, 25 Pac. 636; Cawston v. Sturgis, 29 Or. 335, 48 Pac. 656.

In Rolfe v. Russel, supra, the court says: "In fact it is the old action on the case for deceit and sounds in tort. The gist of this class of actions being *fraud*, in order to maintain them it is necessary to aver and prove: (1) That the representations made were false; (2) that defendant *knew* them to be false; (3) that they were made with intent to defraud; and (4) that plaintiff, relying upon the representations was induced to enter into the contract."

In Bailey v. Frazier, supra, the court says: "The plaintiff endeavors to avoid the effect of the quitclaim deed of himself and wife * * * to the defendant by averring that the same was induced by fraud. It has often been laid down as a rule for pleading fraud in this state that the representations must have been false; that the defendant making them knew they were false; that they were made with the intent to defraud; that the party seeking to be relieved from the fraud must have relied upon such representations."

In Wilde v. Oregon T. & S. Bank, supra, the receiver of the bank had sold some bonds of the bank to the plaintiff, and the plaintiff sought relief on the ground of fraud. Passing on the case, the court says: "Neither does the petition state facts sufficient to show any fraud on the part of Wilde or Devlin. It states that they represented to the petitioner that certain bonds were as good as money, and that he would get his money sooner by entering into the contract to take a part of it in bonds than by waiting for liquidation of the insolvent bank. He states that he afterwards discovered these representations to be false or untrue, but does not state that Wilde or Devlin knew them to have been untrue when they made them, or that they were made with intent to deceive him."

In Anderson v. Adams, supra, the court says: "In an action of deceit, the plaintiff must set out in the complaint the representation, and allege the falsity thereof. * * * To constitute a fraud by false representations, so as to entitle the plaintiff to relief, three things must concur: (1) There must be a knowingly false representation; (2) the plaintiff must have believed it to be true, relied thereon, and have been deceived thereby; and (3) that such representation was of a matter relating to the contract about which the representation was made, which, if true, would have been to the plaintiff's advantage, but, being false, caused him damage."

[5] The action of deceit lies only against the persons guilty of the fraud, and, where a corporation and one or more of its officers

have been guilty of fraud, a director or other officer of the company who had no part in making the fraudulent representations is not guilty of the fraud perpetrated by the company or the guilty officers.

Cook on Corporations (5th Ed.) § 158, says: "The directors are not liable to an action of deceit by reason of the fraud of their agents, nor is an innocent director liable for the fraudulent representations of his codirectors, not even though the evidence of their fraud were entered on the corporation books; there being no general grounds for suspicion on his part. The directors of a bank are not personally liable in a common-law action of deceit for false statements as to the condition of the bank, unless it is shown that they knew the statements to be false."

Prof. Pomeroy, in section 881 of volume 2 of his Equity Jurisprudence (3d Ed.) says, inter alia: "Relief against the directors personally requires a much stronger case of fraud than relief against the company. The purchase of shares may be set aside, and the purchaser relieved from his liability as a contributory, without any knowledge of the untruth on the part of those who issued the document. *Recovery from the directors personally requires knowledge of the untruth on their part*, or else that the statement should be made under such circumstances that knowledge will be imputed to them."

Discussing the liability of directors, Clark & Marshall, in volume 3 of their work on Corporations, page 2264, says: "*It is necessary*, of course, in order that a particular director or other officer may be held liable in these and similar cases, that he shall have participated in the fraud. The fraud must be brought home to him individually. Directors of a corporation are not personally liable for false representations made by brokers employed on behalf of the corporation, not authorized or participated in by them."

The syllabus of the case of Mason v. Moore, 73 Ohio St. 275, 76 N. E. 932, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240, is: "In an action against the directors of a national bank by one who purchases some of its stock, relying on the statements contained in its report to the comptroller of the currency as to its resources and liabilities, *which report was attested by the directors and published* as the statute directs, some of which statements are false, whereby the purchaser is damaged, it is not error for the court to charge the jury that: 'It must appear by a preponderance of the evidence that, at the time of the attesting and publication of said report, the directors so attesting this report, or who assented to and directed the publication of the same, did so knowing said report to be false, or under such circumstances as will warrant the jury in finding, by a preponderance of the evidence, that such director, or directors, by the exercise of or

dinary care and prudence, would have known that said report was false in some one or more particulars set forth in the petition."

In *Arthur v. Griswold*, 55 N. Y. 406, the court says: "The mere fact of being a director and stockholder [of a corporation] is not per se sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged. * * * The pamphlet or prospectus was, in fact, printed before the organization of the company, and was mainly prepared by one Remington, who was the active promoter and manager of the company; but that Mr. Corning had any connection with it or knowledge of its existence is not shown. Again, there is no evidence that he knew that any of the statements contained in the pamphlet were false."

In *Movius v. Lee* (C. C.) 30 Fed. 306, 307, the court says: "That a director is not liable for the faults or frauds of a codirector appears to be well recognized in New York. * * * There is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a director, in which he had no part, and which was perpetrated without his connivance or knowledge."

In *Perry's Case*, 34 Law J. (N. S.) 716, Bacon, V. O., says: "It is no part of the duties of a director to take part in every transaction which is conducted at a board meeting. His business or pleasure may call him elsewhere, and it would be a most unheard-of thing to say that, if anything wrong was done at a board meeting, he being named among the directors, but not present, he is liable for what was done in his absence."

Directors of corporations may be liable to the corporation or to persons interested therein for negligence; but the gravamen of this case is actual fraud, and hence no question of negligence is involved.

If a lawful agent of a corporation, acting within the scope of his authority, makes fraudulent representations orally or by printed pamphlets, by which another is injured, both the company and the agent may be liable in an action for deceit; but, in order to maintain an action for deceit against an officer or agent of a corporation, it is necessary to allege and prove that such officer or agent in some manner participated in the fraudulent representations.

In this case there is a failure to produce any legal evidence tending to prove that the defendants J. K. Locke, Ernest Sommers, F. E. Foster, Oliver Gallup, J. W. Bruce, F. A. Clark, or George Woodnorth participated in any fraudulent representations alleged in the complaint, and hence the motions for nonsuit and for instructed verdicts should have been sustained, and the court below

erred in not allowing them. The motion for a nonsuit and for an instructed verdict for the defendant company and the defendants Monte and Thornton were properly overruled. The judgment in this case is a joint one against all of the defendants, and it will have to be reversed.

The judgment of the court below is reversed, and a new trial is ordered as to the defendant company and the defendants Monte and Thornton; but as to all the other defendants this action should be dismissed by the court below, and this cause is remanded to the court below for further proceedings in accordance with this opinion.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

OBENCHAIN v. DAGGETT, County Treasurer.

(Supreme Court of Oregon. Dec. 30, 1913.)

1. COUNTIES (§ 190*)—COUNTY COURT—POWERS.

The county court in the exercise of its taxing power is one of special and limited jurisdiction, and its power must be conferred by law either in direct terms or by necessary implication.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.*]

2. COUNTIES (§ 192*)—POWER OF COUNTY COURT—"PROVIDE."

In L. O. L. § 937, subd. 1, giving the county court power to provide for the erection of courthouses, etc., the term "provide" is one of comprehensive signification, and implies power of the county court to raise a fund for the purpose named by taxation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300-302; Dec. Dig. § 192.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5747-5749.]

3. COUNTIES (§ 190*)—POWER OF COUNTY COURT—CREATION OF SPECIAL FUND.

L. O. L. § 937, subd. 1, gives the county court power to provide for the erection of a courthouse. Section 3662 provides that, for raising revenues for county purposes, the county court shall, in its January term, levy a tax sufficient to defray the expenses of the county. Section 3663 provides that the county court shall, at its January term, levy any other taxes it is required or permitted to levy. Section 3675 provides that, when any moneys shall have been collected for a specified object, no portion shall be applied to any other object without due authority. *Held*, that a county court has power to create by taxation a special fund for the erection of a courthouse, though the general fund of the county is in debt in excess of the constitutional limit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 303, 304; Dec. Dig. § 190.*]

4. COUNTIES (§ 191*)—POWER TO TAX—"COUNTY PURPOSE."

The building of a courthouse is not a "county purpose" within L. O. L. § 3662, providing that, for raising revenues for county purposes, the county court shall, at its January term, levy a tax sufficient to defray the expenses of the county; the quoted term apply-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing only to the constantly recurring expenditures, such as salaries of county officers.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 300, 305; Dec. Dig. § 191.*

For other definitions, see Words and Phrases, vol. 2, pp. 1666, 1667.]

Department 2. Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Application by M. M. Obenchain for mandamus to Claude H. Daggett, Treasurer of Klamath County. From a decree for defendant, plaintiff appeals. Affirmed.

This was a proceeding in mandamus to compel the county treasurer of Klamath county to pay a warrant issued upon the general fund and held by plaintiff. The circumstances out of which it arose are as follows: The general fund of Klamath county being in debt in excess of the constitutional limit, the county court of that county, wishing to construct a courthouse with cash, levied a special tax for that purpose, the proceeds to go into a special cash fund to be used for that purpose alone. The plaintiff, being a holder of one of the outstanding general fund warrants, sought to have the warrant paid from any money belonging to the county, whether in the courthouse special fund or general fund, claiming that the special fund arrangement impaired his warrant and preferred other creditors of later date to himself, in violation of the law that county orders should be paid in the order of registry. Upon the trial the court rendered a decree in favor of defendant, and plaintiff appeals.

D. V. Kuykendall, of Klamath Falls (Kuykendall & Ferguson, of Klamath Falls, on the brief), for appellant. John Irwin, of Klamath Falls, for respondent.

McBRIDE, C. J. (after stating the facts as above). [1] The following provisions of our Constitution and statutes bear upon the matter now under consideration: Section 3, art. 9, thereof is as follows: "No tax shall be levied, except in pursuance of law." Under this provision of the Constitution the Legislature of our state, in section 937, L. O. L., declares that the county court has the authority and powers pertaining to county commissioners to transact county business, and, among other things, provides: "1. To provide for the erection and repairing of court houses, jails, and other necessary public buildings for the use of the county. * * * 7. To estimate and determine the amount of revenue to be raised for county purposes, and to levy the rate necessary therefor, together with the rate required by law for any other purpose, and cause the same to be placed in the hands of a proper officer for collection." Section 3661, L. O. L., provides as follows: "The county court of each county shall, at its term in January in each year, estimate the amount of money to be raised in its county for county purposes, and apportion

such amount, together with the amount of state and school tax, and other taxes required by law to be raised in its county, and such other taxes as it may in its discretion as authorized by law determine shall be raised, according to the valuation of the taxable property in the county for the year, and such determination shall be entered in its records." Section 3662, L. O. L., provides: "For the purpose of raising revenues for county purposes, the county court for each county in the state shall, in its January term in each year, levy a tax upon all taxable property in its county, which tax will be sufficient in its amount to defray the expenses of the county." Section 3663, L. O. L., provides as follows: "The county court shall, at its January term in each year, levy any other taxes which by law the county or county court or board of county commissioners is required to levy, and any other taxes which it may determine to levy and which by law it is permitted to levy." Section 3675 reads: "When any moneys shall have been collected or received by any officer for any distinct and specified object, no portion of them shall be paid or applied to any other object or purpose without due authority, but shall be kept a separate fund for such specified object; and any officer failing to comply with the provisions of this section shall be liable to a fine not exceeding \$500, or to imprisonment in the county jail not exceeding six months." It is well settled in this state that in its exercise of the taxing power the county court is a court of special and limited jurisdiction, and that such power must be conferred by law either in direct terms or by necessary implication. 2 Dillon, Municipal Corp. (4th Ed.) § 763; Corbett v. City of Portland, 31 Or. 407, 48 Pac. 428.

[2, 3] We will now consider the sections of the statute above quoted in order to determine whether by necessary implication they confer upon the county court the power to levy a special tax for the purpose of creating a courthouse. The first subdivision of section 937, L. O. L., gives the courts the power to provide for the erection of courthouses. The word "provide" is one of comprehensive signification. It is variously defined as follows: "To make ready for future use." Ware v. Gay, 28 Mass. (11 Pick.) 106. "To provide is to procure beforehand; get, collect, or make ready for future use." City of Savanna v. Robinson, 81 Ill. App. 471. "To procure as suitable or necessary; to prepare; to make ready for future use; to finish; to furnish or supply." Webster's International Dictionary. The authority thus being given, it would seem to follow as a matter of necessity and unmistakable implication that the means by which this authority may be exercised are also given. Thus in Swartz v. Board of Com'rs of Lake County, 158 Ind. 141, 63 N. E. 31, it was held that, where a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

statute prescribed that the board of county commissioners "shall provide a suitable and convenient place for the holding of the superior courts for certain counties," the word "provide" was to be construed as assigning a legislative intent to leave the question as to how the duty imposed should be performed to the wisdom and sound discretion of the board, and that therefore the board might purchase a suitable building. Now, as the county courts are not provided with Aladdin's lamp, by the rubbing of which they can provide for the erection of courthouses, they must follow the usual mode of procedure, and that is by taxation, and we do not understand counsel for the plaintiff to question seriously the authority of the court to exercise that power under certain conditions and restrictions. The main contention is that it has no power to make a special levy to create a special fund for that purpose. They base their argument upon section 3662 heretofore quoted, and argue with much plausibility and force that the building of a courthouse is a county purpose, and that as a necessary result there can be but one fund out of which all orders must be paid, and that the orders issued by the county must be paid in the order of their registration. The logical result of this argument is that, if the present courthouse of Klamath county, if it has one, should be destroyed by fire, and the county should be in debt several hundred thousand dollars, as it confessedly is, the county court would have no authority to build, buy, or rent a courthouse until such indebtedness was reduced to a sum within the constitutional limit. In the meantime the court would have to be held and public business transacted in the open air. Justice Wolverton, with his usual keen foresight and good business judgment, realized the dilemma into which the counsel's present contention might plunge a county when he made use of the following language: "We do not mean to say that there might not be a special levy to meet special liabilities about to be incurred, or a setting aside of particular or surplus funds to meet such intended liabilities, which might not be obnoxious to the constitutional inhibition." To the same effect is the statement of Mr. Justice Bean in *Eaton v. Mimnaugh*, 43 Or. 465, 73 Pac. 754; also in *Brix v. Clatsop County*, 46 Or. 223, 80 Pac. 650; *Bowers v. Nell*, 64 Or. 104, 128 Pac. 433. The principal question seems to be as to the authority of the county to create a special fund for the particular purpose of building a courthouse. As already intimated, we think this authority can be found in subdivision 1, § 937, L. O. L. A man is said to "provide for a rainy day" when he lays by a fund for his maintenance in case of adversity. He provides for meeting an indebtedness when he accumulates a fund to pay it when due. It will be observed that, while many of the ordinary expenses of the county are

not specified in section 937, *supra*, there are five deemed so important that they are singled out and given prominence. The first of these is the authority to provide for the erection of courthouses, jails, and necessary public buildings; the second, the authority to provide offices, furniture, books, etc., for the county officers; the third, to establish, vacate, and alter county roads; the fourth, to provide for the construction and repair of public bridges; and, the fifth, to provide for the maintenance of paupers. The reason for expressly selecting these matters and making them prominent is evident. They are all urgent public necessities. As well remarked by the trial judge in passing upon the case at bar: "It seems perfectly plain that, if the county court has power to provide for the erection of a courthouse, there is complete and ample warranty of law expressed therein for taking any necessary steps for raising revenue to carry out their purpose."

[4] While the building of a courthouse is a county expense, and raising money for its construction is a county purpose, we are of the opinion that it is not such within the meaning and intent of section 3662, *supra*, but that this section rather refers to the common and constantly recurring expenditures which go to make up the usual county budget, such as the salaries of county officers and the like; that it is in the nature of an extraordinary expense occurring only once perhaps in a generation, and which from its magnitude it would often be impractical and even oppressive upon the taxpayer to collect at one levy; and that it may well be embraced in the terms of section 3663, L. O. L., which provides that the county court shall, at its January term in each year, levy any other taxes which by law it is required to levy and any other taxes which it may determine to levy and which it is permitted to levy. The provisions of section 3662, when read together, requiring the county, at its January term, to levy a tax sufficient to defray its expenses, when read in connection with section 3663, evidently mean that the county court shall, at its January term, levy, first, a tax sufficient to pay the ordinary expenses of the county, and, second, such other extraordinary levies as may be deemed necessary to meet particular and unusual exigencies. Section 3675, L. O. L., apparently contemplates the creation of particular funds to meet such exigencies. It was evidently passed with the intention that a county court could not, under the pretext of providing a fund for a specific purpose, such as improvement of county roads, erection of a courthouse or a jail, accumulate an amount of money in the treasury, and thereafter break faith with the taxpayers by applying it to some other purpose. Many authorities from other states have been cited bearing more or less remotely upon the question under discussion; but, as they arise upon statutes and Constitutions different from ours, we prefer

to put our decision upon what we deem a fair construction of our own statutes.

The decree of the circuit court is affirmed.

BEAN, EAKIN, and McNARY, JJ., concur.

SAYRE v. MOIR et ux.

(Supreme Court of Oregon. Dec. 30, 1913.)

1. REFORMATION OF INSTRUMENTS (§ 45*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence, in a suit to reform a deed on the ground of mistake as to the location of the corner from which the description in the deed commenced, held insufficient to sustain a judgment for plaintiff.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Relief will be granted in cases of written instruments only where there is a plain mistake clearly made out by satisfactory proof, and not when the evidence is loose or contradictory.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

3. REFORMATION OF INSTRUMENTS (§ 43*)—EVIDENCE—BURDEN OF PROOF.

In a suit to reform a deed, the burden is on plaintiff to show that the mistake was mutual or shared in by both parties.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. § 43.*]

4. REFORMATION OF INSTRUMENTS (§ 16*)—GROUNDS—MISTAKE.

To reform a deed on the ground of mistake, it should be shown that the mistake did not arise from the gross negligence of plaintiff, and that an unfair advantage has been gained by the defendant through the mistake, and that it is against good conscience to allow the mistake to stand.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.*]

Department No. 2. Appeal from Circuit Court, Marion County; William Galloway, Judge.

Suit by Ruth E. Sayre against John Moir and wife. From a decree for plaintiff, defendants appeal. Reversed, and complaint dismissed.

This is a suit brought to reform a deed made by plaintiff to conform to the description of the property sold to defendants. The land in dispute is a strip about 18 inches in width along the west side of the defendants' property which plaintiff alleges was not intended to be conveyed. The circuit court rendered a decree in favor of plaintiff, and defendants appeal.

It is alleged in the complaint that on or about the 9th day of December, 1910, the plaintiff executed and delivered to the defendants a deed; that the description therein was erroneous, in that it commenced at the southeast corner of block No. 5 in Roberts' addition to the city of Salem, Or., in Marion

county, instead of the southeast corner of the property then owned and actually inclosed by the plaintiff; that the measurement of 74 feet on Chemeketa street was made from the southeast corner of the land so actually inclosed by the plaintiff to an iron stake in the boundary line of Chemeketa street; that it was not the intention in the sale of the land to the defendants that the measurement should run farther west than said iron stake, and that the description was not to include any of the plaintiff's property lying west from two iron stakes, one planted in the southerly boundary of the block, and the other planted northerly therefrom at a distance of 82½ feet from the said southerly boundary; that, at the time the property was sold, it was the intention to convey to the defendants only such property of the plaintiff as was lying east of the iron stakes.

Plaintiff owned a tract of land in the southeast corner of block No. 5, Roberts' addition to the city of Salem, Or., 127 feet and 3 inches east and west on Chemeketa street by 82½ feet north and south on Fourteenth street. On the 9th day of December, 1910, in consideration of \$2,850, plaintiff, Mrs. Sayre, executed a deed of the following described premises, to wit: "Beginning at the southeast corner of block No. 5, in Roberts' addition to the city of Salem, in Marion county, Oregon, and running thence westerly along the northerly limit of Chemeketa street, 74 feet; thence northerly at right angles to Chemeketa street aforesaid, 82½ feet; thence easterly parallel with Chemeketa street aforesaid 74 feet to the westerly limit of Fourteenth street; thence southerly along said westerly limit of Fourteenth street, 82½ feet, to the place of beginning."

The trial court decreed that the deed be reformed so as to describe the lot as follows: "Beginning at the southeast corner of block No. 5, in Roberts' addition to the city of Salem, in Marion county, Oregon, and running thence westerly along the northerly limit of Chemeketa street, 72½ feet more or less, to an iron pin; thence northerly at right angles to Chemeketa street aforesaid, 82½ feet, to an iron pin; thence easterly parallel with Chemeketa street aforesaid, 72½ feet, more or less, to the westerly limit of Fourteenth street; thence southerly along said westerly limit of Fourteenth street, 82½ feet, more or less, to the place of beginning."

After the execution and delivery of the deed, Mr. Moir employed a surveyor to measure the ground for the purpose of constructing a line fence between his land and that of plaintiff. This survey disclosed that the 74 feet from the southeast corner of block No. 5 along the north side of Chemeketa street would make Mr. Moir's west line about 18 inches farther west than plaintiff claims she had sold. Plaintiff maintains that the east

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

line of the premises which she formerly owned on Fourteenth street was that distance farther east than the true street line, and that she had had possession of such small strip over 20 years. Defendant Moir refused to recognize this contention, as the result of which this suit was instituted.

A. O. Condit and Geo. G. Bingham, both of Salem, for appellants. John A. Carson, of Salem (Carson & Brown, of Salem, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1] From the evidence it appears that in June, 1910, plaintiff and defendant John Moir commenced negotiations for the purchase of the real estate in controversy; that on the east side of the property there was a hedge which had been planted about two years previous; that during the time of the negotiations plaintiff measured off 74 feet with a tapeline from an old post near the sidewalk, whereas the surveyor fixed the true corner at about the center of the hedge and about 18 inches farther west. Some delay being caused in the completion of the abstract of title to the property, on August 9, 1910, Mrs. Sayre executed to Mr. Moir a contract for the sale of the tract, describing the same as 74 feet on Chemeketa street by 82½ feet on Fourteenth street. The survey was made in April, 1911, by W. J. Culver, deputy county surveyor, according to established monuments in that part of the city, measuring 74 feet from the southeast corner of the block. Plaintiff contends that she sold to defendants a tract extending west to a row of rose bushes, while that described in the deed would include one-half of the rose bushes. Early in the negotiations Mr. Moir asked Mrs. Sayre how much land she would sell with the house, and she answered, "Up to the rose bush." He then inquired, "How much ground is there?" She stated that she did not know, that they would have to measure it. Mrs. Sayre states: That a short time afterwards, when they measured the lot, she designated a peg or part of an old post just outside the hedge as her (S. E.) corner, and said: "This is our corner, supposed to be our corner; it has been ever since we lived here, because the fence was here when we came." And that they measured from there to the rose bush, where they drove an iron peg. That the north line was measured and marked in a similar way. This was before the contract was signed. Each party cultivated to the line as measured until the survey. Mr. Moir says: That, when Mrs. Sayre gave him a price on the lot, she said that the size of the lot was "75 feet on Chemeketa by 82½ feet on North Fourteenth street"; that he made a deposit of \$50 on the lot June 14, 1910. That after they moved into the house, the first part of July, a controversy arose as to the number of feet on Chemeketa street that he

was to get, and that Mrs. Sayre claimed it was 73 feet. That they compromised on 74 feet, the number which was afterwards inserted in the contract. That they first measured with a 3-foot measure, and about a week later measured with a tapeline; plaintiff placing the end of the line on the cement sidewalk which defendant had constructed on Fourteenth street, and measuring therefrom and setting the pegs. That he then said: "This may be your measurement; as soon as we get your deed and your abstract, we will have it officially surveyed." That as soon as he got the deed he employed Mr. Culver to do the surveying.

The fact that Mrs. Sayre assisted in measuring the lot 74 feet from Fourteenth street, or from what she deemed to be the line on Fourteenth street, would indicate that she intended to sell 74 feet frontage on Chemeketa street. Whatever her understanding may have been, it appears from the record that Mr. Moir understood that he was purchasing the size of lot mentioned in the deed. The contract was made and earnest money paid June 14, 1910. The written memorandum was not signed until August 9th of that year, giving ample time to ascertain a definite description. The lot was given the same dimensions in the preliminary contract of that date as in the deed.

[2] Relief will be granted in cases of written instruments only where there is a plain mistake clearly made out by satisfactory proof, and not when the evidence is loose or contradictory. 1 Story's Equity Juris. (13th Ed.) § 157. Mr. Pomeroy, in his work on Equity Jurisprudence (3d Ed. vol. 4, § 1376), says: "Equity has jurisdiction to reform written instruments in but two well-defined cases: (1) Where there is a mutual mistake—that is, where there has been a meeting of minds—an agreement actually entered into, but the contract, deed, settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto; and (2) where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties." The plaintiff has failed to prove a cause coming within either of these cases.

[3] It is not shown that the mistake, if any, was mutual or shared in by both parties. Upon this issue the burden of proof is upon the plaintiff. *Stein v. Phillips*, 47 Or. 545, 549, 84 Pac. 793; *King v. Holbrook*, 38 Or. 452, 461, 63 Pac. 651. It is not an uncommon occurrence for one to purchase a city lot by the front foot. Equity does not seem to require that the defendant should take, or attempt to take, a portion of the 74 feet which he purchased, in the street; or that the deed should describe any less land than he purchased. The real cause of the controversy was a misunderstanding on the part of plaintiff as to the

true location of the east line of the block. This can be definitely located from the plat.

[4] In order to reform a deed on the ground of mistake, it should be shown that the mistake did not arise from the gross negligence of plaintiff, and that the circumstances are such that an unfair advantage has been gained by the defendant through the mistake, and that it is against good conscience to allow such mistake to stand. *Lewis v. Lewis*, 5 Or. 169. It is not attempted to be proved that the price paid for the part of the lot conveyed is inadequate. It is not shown by a preponderance of the evidence that the defendants obtained any more land by the deed than they expected to obtain by the terms of the original contract. About the first question asked of plaintiff was in regard to the size of the lot. The evidence in this suit does not present a case like *Johnson v. Taber*, 10 N. Y. 319, where land not owned by the grantor, and which neither of the parties intended to include in the conveyance, was by mistake embraced in the description therein. In the case at bar the proof does not require the interposition of a court of equity to prevent an injustice.

It follows that the decree of the lower court must be reversed, and one entered here dismissing plaintiff's complaint.

McBRIDE, C. J., and BAKIN and McNARY, JJ., concur.

CRAWFORD v. DISTRICT SCHOOL BOARD FOR SCHOOL DIST. NO. 7, IN KLAMATH COUNTY, et al.

(Supreme Court of Oregon. Dec. 30, 1913.)

1. APPEARANCE (§ 19*)—GENERAL APPEARANCE—DEMURRER TO PLEADING.

The circuit court, being one of general jurisdiction, and being given jurisdiction to grant writs of mandamus by L. O. L. § 614, where defendants appeared and filed demurrers to the alternative writ of mandamus, the court had jurisdiction of the persons of defendants and of the subject-matter of the action.

[Ed. Note.—For other cases, see *Appearance*, Cent. Dig. §§ 79-82, 84-90; Dec. Dig. § 19.*]

2. MANDAMUS (§ 148*)—PERSONS ENTITLED TO SUE.

A father, being the natural guardian of his children and chargeable with their support and education, and being guilty of a misdemeanor, under L. O. L. § 4120, and Laws 1911, p. 428, if he fails to send them to the public schools according to law, has the right to maintain mandamus to compel a school board to permit his minor children to attend the public schools and be instructed therein.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 289; Dec. Dig. § 148.*]

3. PARTIES (§ 75*)—"DEFECT"—DEFENDANTS.
"Defect" means too few, not too many, and there is a defect of parties defendant only when one or more parties that should have been made defendants have not been made parties.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.*]

For other definitions; see *Words and Phrases*, vol. 2, pp. 1933, 1934; vol. 8, p. 7631.]

4. PARTIES (§ 75*)—DEFECTS—SUFFICIENCY OF DEMURRER.

When one demurs to a complaint for defect of parties, it is necessary to state in the demurrer who the omitted party is, to enable the plaintiff to amend his pleading by including all the necessary parties.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 115, 116, 167; Dec. Dig. § 75.*]

5. MANDAMUS (§ 187*)—APPEAL—RECORD—MATTERS CONSIDERED.

Under L. O. L. § 616, requiring the material facts stated in a petition for mandamus to be recited in the alternative writ, and sections 618-620, limiting the pleadings in mandamus to the alternative writ, answer, reply, and demurrers to these pleadings, and providing that the pleadings may be amended, and issues made up and tried, as in an action, when the alternative writ is amended, the petition and original writ cannot be considered for any purpose, on an appeal from a judgment sustaining demurrers to the amended writ.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 427-437; Dec. Dig. § 187.*]

6. MANDAMUS (§ 163*)—PLEADING—DEMURRER—ADMISSIONS.

Demurrers to an amended alternative writ of mandamus admit all the material allegations thereof to be true.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 341-343; Dec. Dig. § 163.*]

7. SCHOOLS AND SCHOOL DISTRICTS (§ 151*)—PUBLIC SCHOOLS—RIGHT TO ADMISSION—HALF INDIAN BLOOD.

Where children of half Indian and half white blood and their parents are citizens of the United States and of the state, are not members of any Indian tribe, and conform to the customs and habits of civilization, the children are prima facie entitled to be admitted as pupils in the public school of the district in which they live.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 322; Dec. Dig. § 151.*]

8. SCHOOLS AND SCHOOL DISTRICTS (§ 13*)—PUBLIC SCHOOLS—SEPARATE SCHOOLS FOR COLORED CHILDREN.

While the state may enact laws for separate schools for colored children, black or red, school boards cannot, under L. O. L. § 4052, subsec. 18, requiring them to admit free of charge to the schools of their districts all persons between the ages of 6 and 21 residing therein, and in the absence of statutory provision permitting it, establish separate schools for Indian children and compel them to attend such schools.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 15; Dec. Dig. § 13.*]

9. SCHOOLS AND SCHOOL DISTRICTS (§ 55*)—PUBLIC SCHOOLS—POWERS OF SCHOOL BOARDS.

School boards have no powers except those expressly granted, and those necessarily implied from those that are granted.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 137, 138; Dec. Dig. § 55.*]

Department 1. Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Application by William Crawford for writ of mandamus to the District School Board for School District No. 7, in Klamath County, and others. From a judgment sustaining demurrers to the amended alternative writ and dismissing the proceeding, the petitioner

appeals. Reversed and remanded, with instructions.

This is an application by William Crawford for a writ of mandamus to compel the School Board of District No. 7, of Klamath County, to permit his two children, namely, Juanita and Naoma Crawford, to attend the public school held in said district, and to receive instructions as pupils therein. Demurrers to the amended alternative writ of mandamus issued in said proceeding were sustained, and said proceeding was dismissed by the court below. The petitioner appeals. Reversed.

C. M. Oneill, of Klamath Falls, for appellant. D. V. Kuykendall, of Klamath Falls (Thomas Drake and Kuykendall & Ferguson, all of Klamath Falls, on the brief), for respondents.

RAMSEY, J. The petitioner and his wife are of half Indian blood, and their children are half Indians also. The petitioner is a native of Yreka, Cal., and his wife is a native of Klamath Falls, in this state, and both the petitioner and his wife, and also their children, are citizens of the United States and of this state, and residents of Klamath county. The fathers of the petitioner and of his wife were white men and their mothers were Indian women. The petitioner and his wife and their children are, and for some time prior to the commencement of this proceeding were, residents and inhabitants of school district No. 7, of Klamath county, and the petitioner was and is a taxpayer in said school district. The petitioner and his wife and their children live separate from any Indian tribe. The petitioner and his wife have five children, and two of these children are Juanita Crawford, aged nine years, and Naoma Crawford, aged eight years. The petitioner and his wife and each of their children hold completed allotments of and patents for land on the Klamath Indian Reservation, but they do not live on said reservation. The petitioner, his wife, and his children, have voluntarily adopted the customs, usages, and habits of civilized life. The petitioner's said two children attended the public schools of said school district for two years prior to September 27, 1912, and received instructions therein the same as other children did. The amended alternative writ of mandamus sets forth facts showing that the petitioner's two said children were in all respects entitled to be admitted to attend the public schools of said school district, and to receive instructions therein free of charge, under subsection 18 of section 4052, L. O. L., unless their being of half Indian blood disqualified them to attend the public schools and receive instructions therein. It appears from said writ that the teacher, who taught the public school in said school district No. 7, by orders of the school board of said school district, excluded

said Juanita Crawford and Naoma Crawford from the public school taught in said district, and from receiving instructions therein. The defendants filed demurrers to said amended alternative writ of mandamus, alleging the following grounds thereof: (1) That the court has no jurisdiction of the persons of the defendants, or of the subject of this action; (2) that the plaintiff has not capacity to sue; (3) that there is a defect of parties defendant; (4) that the said writ does not state facts sufficient to entitle the petitioner to the relief demanded. Their demurrers were sustained, and said proceeding was dismissed by the court below. The petitioner assigns as error the sustaining of said demurrers and the dismissal of said proceeding.

[1] 1. The court below acquired jurisdiction of the persons of the defendants by service of process and by their appearances. They appeared and filed demurrers to the writ. This would have conferred jurisdiction of their persons, if they had not been duly served with process.

The court below is a court of general jurisdiction, and the statute expressly confers jurisdiction upon circuit courts to grant writs of mandamus. Section 614, L. O. L. The court below had jurisdiction of the persons of the defendants and of the subject-matter of the proceeding.

[2] 2. A father is the natural guardian of his minor children, and is charged by law with the duty of attending to their support and education. Under our statute he is guilty of a misdemeanor if he fails to send his children to the public schools according to law. Section 4120, L. O. L., and page 428 of Laws for 1911.

The petitioner, as father of his children, has the right to maintain this proceeding to compel the school board to permit his minor children to attend the public schools and to be instructed therein, according to law. High on Extraordinary Legal Remedies (3d Ed.) § 438.

[3] 3. The third point made by the demurrers is that there is a defect of parties defendant. Defect means too few—not too many. There is a defect of parties defendant only when one or more parties that should have been made defendants have not been made parties to the suit or proceeding.

In Sutherland on Pleading, section 273, the author says: "This phrase means too few—not too many. When it appears upon the face of the complaint that the presence of other parties is necessary to a complete determination of the controversy, a demurrer will lie for a defect of parties, plaintiff or defendant."

[4] It is also a rule of pleading that when one demurs to a complaint for a defect of parties plaintiff or defendant, it is necessary for the demurrant to state, in the demurrer, who the omitted party, plaintiff or defendant, as the case may be, is, in order to enable

plaintiff to amend his pleading by including all the necessary parties.

Speaking upon this subject, Sutherland, in section 276, vol. 1, of his work on Pleading, says: "A demurrer under this subdivision, following the words of the Code, that there is a defect of parties defendant is insufficient for not specifying the particular defect. It must show who are the proper parties from the facts stated in the bill, not indeed by name, for that might be impossible, but in such a manner as to point out to the plaintiff the objection to his bill, and to enable him to amend by making proper parties."

Bliss, in his work on Code Pleading (3d Ed.) § 411, inter alia, says: "The defect of parties for which a demurrer is allowed is a deficiency, not an excess of parties. * * * A demurrer for this cause will not lie unless it affirmatively appears by the pleading demurred to that the person who should have been made a party is living at the time the action is commenced; if it does not so appear, the objection must be taken by answer, and, in either case, the names of the omitted parties must be given."

The demurrers do not point out any person who should have been made a defendant, and hence they raise no question for determination on that point.

[6] 4. The principal point made by the demurrers is that the amended alternative writ does not state facts sufficient to entitle the petitioner to the relief demanded. It was claimed, on the argument, that school district No. 7, had established a school for Indian children and children that are part Indian, separate from the school attended by white pupils, and that the petitioner's children were excluded from the school which they desired to attend, and that they were directed to attend the school established for them and other children who were part Indian; but the amended alternative writ does not show such a state of facts. It is claimed by the defendants that the petition for the writ and the original writ set out these facts. The defendants had copies of the petition and the original writ sent up for the purpose of showing those facts. The petition for a writ of mandamus is presented to the court for the purpose of obtaining the issuance of a writ, and, as soon as a proper writ has been issued, the petition becomes functus officio, and the writ cannot be aided by reference to the petition. An alternative writ of mandamus, properly drawn, is required to state concisely the facts, as stated in the petition, showing the obligation of the defendant to perform the act desired, and his omission to perform it, etc. In other words, the material facts stated in the petition should be recited in the alternative writ. Section 618, L. O. L. The defendant on the return day may show cause, either by demurrer or by answer (section 618, L. O. L.), and the demurrer or answer is to be made

to the writ, in the same manner as to a complaint. The only pleadings in a mandamus proceeding are the alternative writ, the demurrer or the answer to the writ, and the demurrer or the reply to the answer. Sections 618-619, 620, L. O. L. Pleadings may be amended, and issues made up and tried, in like manner and effect, as in an action. Section 620, L. O. L. When the writ was amended, the amended writ took the place of the original, and the latter ceased to be of any force in the proceedings. We cannot consider either the petition or the original writ for any purpose on the appeal.

In *Elliott v. Oliver*, 22 Or. 45, 46, 29 Pac. 2, the court says: "The facts stated in the writ should be the same facts stated in the petition for the writ, as no resort or reference can be had to the petition in aid of the writ."

In *McLeod v. Scott*, 21 Or. 111, 112, 29 Pac. 1, the court says: "The petition is no part of the pleadings. * * * This being so, the writ must be sufficient in itself to show what is claimed and the facts upon which the claim is made. It stands for the complaint and may be demurred to or answered in the same manner as a complaint in an action. * * * That the writ is wanting in material allegations to support the proceeding is not questioned; and, upon reconsideration, we do not think it can be aided by reference to the facts in the petition."

In *Shively v. Pennoyer*, 27 Or. 84, 39 Pac. 397, the court says: "The alternative writ is deemed the complaint in mandamus proceedings; and by it their sufficiency must be tested, and not by the petition."

[6] The demurrers to the amended writ admit all the material allegations thereof to be true.

[7] The facts stated in the amended writ show prima facie that the petitioner's children were entitled to be admitted as pupils of said school district No. 7, and to receive instructions therein in all respects as the white children. They and their parents are citizens of the United States and of the state of Oregon, and reside in said school district. They are not members of any Indian tribe, and they conform to the customs and habits of civilization. These children are half white, and their rights are the same as they would be if they were wholly white.

[8] 5. The question, whether school districts in this state can establish separate schools for Indian children and compel them to attend such schools is not necessarily involved in this appeal, for the reason that the amended writ falls to show that school district No. 7 had provided a separate school for Indian children. However, this question was argued at the hearing, and, if the defendants should answer the writ, setting up the supposed fact that the school board had provided a separate school for Indian children and those that are partly of Indian

blood, this question will then be directly involved. For this reason, and to obviate the necessity for another appeal, we will express an opinion on this subject.

In 1849 the Supreme Court of Massachusetts, in the case of *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, held that the general school committee of Boston had power, under the Constitution and laws of the commonwealth, to make provision for the instruction of colored children, in separate schools, established expressly for them, and to prohibit their attendance upon the other schools, without there being any express authority for doing so in the statutes of Massachusetts at that time. Our attention has not been called to any other case holding that school boards can establish separate schools for colored children and exclude them from schools intended for white children when not expressly authorized by statute to do so.

In 1868, the fourteenth amendment to the Constitution of the United States took effect. This section of the amendment is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state, wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Commenting on said amendment, the Supreme Court of the United States in *Strauder v. West Virginia*, 100 U. S. 307, 25 L. Ed. 664, says inter alia: "It [the fourteenth amendment] ordains that no state shall make or enforce any laws which abridge the privileges or immunities of citizens of the United States. * * * It ordains that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored, exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to a subject race."

The states may enact laws providing for the establishment of separate schools for colored children, whether black or red, but such schools must be equal in equipment and efficiency to the schools provided for white children; but in this state we have no statute expressly providing for the establishment of separate schools for colored children.

Subsection 18 of section 4052, L. O. L., specifying the duties of school boards, says: "They shall admit free of charge to the schools of their districts all persons between the ages of six and twenty-one residing therein, and all other persons may be admitted on such terms as the district may direct." It is the imperative duty of all school boards of our public school system to admit to the schools within their districts all children residing therein, between the ages of 6 and 21, without discrimination as to color or race. When the state Legislature has not passed an act expressly authorizing them to do so, school boards, created for carrying on the public schools of the state, have no lawful power to provide separate schools for the education of white and colored children.

In the case of *Board of Education v. Tinnon*, 26 Kan. 18, the Supreme Court holds that the board of education had no power to establish separate schools for colored children, and inter alia, says: "Has the Legislature of Kansas given, or attempted to give, to boards of education in cities of the second class, the power to establish separate schools for the education of white and colored children, and to exclude from the schools established for white children all colored children, for no other reason than that they are colored children? Prima facie, the question should be answered in the negative. The tendency of the times is, and has been for several years, to abolish all distinctions on account of race, or color, or previous condition of servitude, and to make all persons absolutely equal before the law. Therefore, unless it appears clear beyond all question that the Legislature intended to authorize such distinctions to be made, we should not hold that any such authority has been given."

In *Clark v. Board of Directors*, 24 Iowa, 276, 277, the court says: "Our statute has expressed the sovereign will, that all the youths of the state between the ages of 5 and 21 years shall be entitled to the privileges and benefits of our common schools, and it is not competent for the board of directors to resist that sovereign will and declare that, since 'public sentiment in their district is opposed to intermingling of white and colored children in the same school,' they will deny equal privileges to some of these youths. In other words, all the youths are equal before the law, and there is no discretion vested in the board of directors, or elsewhere, to interfere with or disturb that equality. The board of directors may exercise a uniform discretion equally operative

upon all, as to the residence, or qualification, or freedom from contagious disease, or the like, of children, to entitle them to admission to each particular school; but the board cannot, in their discretion or otherwise, deny a youth admission to any particular school because of his or her nationality, religion, color, clothing, or the like." The court held in that case that the board could not establish a separate school and compel colored children to attend it.

In the later case of *Dove v. Independent School District*, 41 Iowa, 689, the court approved the last preceding case, and the syllabus of the case is as follows: "A pupil cannot legally be excluded from the public schools on account of color or descent, nor can he be compelled, if colored, to attend a separate school for colored children."

At one time California had a statute requiring the establishment of separate schools for children of African descent and for Indian children, and this law was sustained in *Ward v. Flood*, 48 Cal. 37, 17 Am. Rep. 405. Later the Legislature revised its school laws and omitted the provision requiring separate schools for colored children, and the case of *Wysinger v. Crookshank*, 82 Cal. 588, 23 Pac. 54, arose under the latter law. The syllabus of the latter case is as follows: "Subsequent to the act of April 7, 1890, repealing sections 1669-1671 of the Political Code, and under the existing laws touching the education of children in the public schools, it has not been, and is not now, within the power of boards of education or school trustees to establish public schools exclusively for children of African descent, or to exclude them from the public schools established for white children."

In the case of *People v. Board of Education*, 101 Ill. 308, 40 Am. Rep. 196, the facts were that the school board of Quincy had established separate schools for colored children and excluded them from the schools intended for white children, and the Supreme Court held that they could not legally do so, saying *inter alia*: "Whether the fourteenth amendment would prohibit school directors or boards of education from excluding colored children from public schools by the adoption and enforcement of such rules as have been adopted in this case (separate schools being provided for the colored children) is a question which we do not deem it necessary to determine here. We base our decision on the Constitution and laws of the state. * * * Under our law, aside from the fourteenth amendment, directors of schools and boards of education, like defendants in error, have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion. * * * Whether our Constitution and the acts of the Legislature passed in pursuance of it, which place all children, regardless of color, upon a perfect equality so far as admission into the public schools is concerned,

are to be regarded as wise or unwise legislation is a matter with which the courts have no concern. We are bound to declare the law as we find it written, and if it is not satisfactory to any section of the state, the remedy is in the legislative department of the government and there alone."

In the case of *Knox v. Board of Education*, 45 Kan. 152, 25 Pac. 616, 11 L. R. A. 830, the syllabus of the case is as follows: "Until the Legislature clearly confers power upon boards of education of cities of the second class to establish separate schools for the education of white and colored children, no such power exists."

In *Board of Education v. State*, 45 Ohio St. 556, 16 N. E. 373, the court says: "The power to establish and maintain separate schools for colored children was conferred on boards of education by section 4008, and not by section 4013 of the Revised Statutes, * * * and section 4008 having been repealed by the act of the General Assembly passed February 22, 1887, * * * separate schools for colored children have been abolished, and no regulation can be made under section 4013 that does not apply to all children irrespective of race or color."

In *People v. Board of Education*, 18 Mich. 409, Chief Justice Cooley says: "Such being the division of the state into school districts, the Legislature of 1867 passed an act amendatory of the primary school law, one section of which is as follows: 'All residents of any school district shall have an equal right to attend any school therein: Provided that this shall not prevent the grading of schools according to the intellectual progress of the pupils, to be taught in separate places, when deemed expedient. * * *' It cannot be seriously urged that with this provision in force, the school board of any district which is subject to it may make regulations which would exclude any resident of the district from any of its schools, because of race or color, or religious belief, or personal peculiarities. It is too plain for argument that an equal right to all the schools, irrespective of all such distinctions, was meant."

[9] School boards have no powers excepting those expressly granted, and those necessarily implied from those that are granted. *Baxter v. Davis*, 58 Or. 109, 112 Pac. 410, 113 Pac. 438; *School Directors v. Wright*, 43 Ill. App. 270; 35 Cyc. pp. 899, 901. There is no statute in this state expressly granting authority to school boards to establish separate schools for black or red children, and to exclude the colored children from the schools intended for white children; nor can this power be implied from any power that has been granted to school boards. We are satisfied that school boards have no such power in this state under existing laws.

We find that the demurrers to the amended alternative writ should have been overruled, and that the trial court erred in sustaining them.

The judgment of the court below is reversed, and this proceeding is remanded to the court below, with instructions to overrule said demurrers, and for further proceedings in accordance with the terms of this opinion.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

YOCOM et al. v. CITY OF SHERIDAN et al.
(Supreme Court of Oregon. Dec. 23, 1913.)

1. BRIDGES (§ 2*)—DEFINITION—APPROACHES.
The word "bridge" has generally been construed to mean the structure spanning a hollow, which was erected as a means of crossing a deep gap, and includes the approaches whereby a passageway to, from, and across the bridge is acquired (citing 1 Words and Phrases, 871).

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 1, pp. 869-874.]

2. BRIDGES (§ 7*)—MAINTENANCE—DUTY OF STATE.

The obligation to build and maintain adequate public highways, including bridges, devolves primarily upon the state, which, unless prohibited by the fundamental law, may itself discharge the trust, or delegate it to a municipal or quasi municipal corporation.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 9-18, 15, 16; Dec. Dig. § 7.*]

3. HIGHWAYS (§ 105*)—USE FOR TRAVEL—RIGHTS OF PUBLIC.

A highway, whether laid out as a rural road, under the jurisdiction of a county court, or as a city street, subject to the control of a common council, so far as it subserves the easement of passage and its incidents, is free and at all times controlled by legislative authority.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. § 105.*]

4. BRIDGES (§ 21*)—LEGISLATIVE AUTHORITY.

The legislative assembly, in the absence of constitutional restriction, may grant the supervision and control of city streets, including bridges thereon, to some other governmental agency than the city, so long as the way is not diverted to a use inconsistent with, or substantially different from, that originally designed, and the change imposes on the municipality no debt incurred by another.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.*]

5. BRIDGES (§ 21*)—PUBLIC IMPROVEMENTS—AUTHORITY TO MAKE.

Under the charter of the town of Sheridan (Laws 1880, p. 146) § 5, providing it shall not be liable to build or replace with a new one any bridge across the Yamhill river, and the charter of the city of Sheridan (Laws 1891, p. 386) § 133, as amended by Laws 1895, p. 247, giving the city control of all streets, bridges, and roads within the corporate limits except the bridge over the Yamhill river at Bridge street, which bridge shall be the property of the county, the county is obliged to maintain the bridge excepted, and the common council of the city has no authority to assess property holders for the expense of rebuilding the approaches.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.*]

6. BRIDGES (§ 21*)—STREETS—SUPERVISION—LEGISLATIVE AUTHORITY.

Whether or not a county road ceases and becomes a street when a city is incorporated, the legislative assembly, treating the way as public, may impose the burden of maintaining a bridge thereon on the county.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.*]

7. BRIDGES (§ 21*)—MAINTENANCE—LIABILITY OF COUNTY.

The city charter of Sheridan (Laws 1891, p. 386) § 133, as amended by Laws 1895, p. 247, gives the city control of all streets, bridges, and roads within the corporate limits, except the bridge over the Yamhill river, and gives the city authority to collect road taxes from its inhabitants and on the property situate therein. L. O. L. § 937, subd. 4, gives the county court of each county authority to provide for the erection and repairing of public bridges on any highway established by public authority. Section 6366 provides that the expense of building or repairing bridges is to be liquidated from any money in the county treasury not otherwise appropriated. Section 6326, prior to its repeal by Laws 1913, p. 105, provided for the collection of ordinary road or poll taxes by counties. *Held*, that the provision of the city charter authorizing the city of Sheridan to collect road taxes did not relieve the county of its duty to maintain the bridge across the Yamhill and its approaches.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.*]

8. BRIDGES (§ 21*)—MAINTENANCE—LIABILITY OF COUNTY.

A provision in the city charter of Sheridan (Laws 1891, p. 373) § 57, as amended by Sp. Laws 1901, p. 209, exempting the city from liability for an injury from any defect in any bridge unless the city had actual notice thereof and a reasonable time to repair it, does not absolve the county from the duty of maintaining the approaches to a bridge which the charter expressly excepts from the control of the common council and places under the control of the county court.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 48-55; Dec. Dig. § 21.*]

Department 1. Appeal from Circuit Court, Yamhill County; Wm. Galloway, Judge.

Suit by Allyn Yocom and others against the City of Sheridan and others. From a decree dismissing the suit, plaintiffs appeal. Reversed and rendered.

This is a suit to enjoin the sale of real property for an alleged delinquent street assessment. The facts are that in the year 1910, the county court of Yamhill county caused to be rebuilt the main span of a bridge across the Yamhill river at Bridge street in the City of Sheridan. Thereafter the entrances of the bridge becoming out of repair and the county court refusing to put them in condition, the common council of Sheridan, in the manner prescribed for making street improvements, caused the approaches to be rebuilt at an expense of \$2,326.58, and assessed the cost thereof upon the abutting property of the plaintiffs. The sums so charged were entered in the docket of the city liens, but, not having been liquidated, the defendant Joseph F. Scott, as city marshal, was proceeding to collect the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

same by sale of the lands, whereupon this suit was instituted. The case being at issue was tried, resulting in a decree dismissing the suit, and the plaintiffs appeal.

James McCain and W. T. Vinton, both of McMinnville (McCain, Vinton & Galloway, of McMinnville, and Simpson & Lewis, of Sheridan, on the brief), for appellants. W. O. Sims, of Sheridan, for respondents.

MOORE, J. (after stating the facts as above). It is maintained by plaintiffs' counsel that the approaches to the bridge are a part of that structure, the erection and maintenance of which are enjoined by law upon Yamhill county; that the city of Sheridan has no authority to assess abutting property for any part of the expense of constructing the approaches, and, such being the case, errors were committed in dismissing the suit and in failing to grant the relief sought.

Section 133 of the present charter of Sheridan (Laws 1891, p. 386), as amended by an act of the legislative assembly approved February 12, 1895, reads: "The said city of Sheridan to have control of all the streets and bridges and roads within the corporate limits of said city, except the bridge (over) the Yamhill river at Bridge street in the City of Sheridan, said bridge to be the property of the county of Yamhill, state of Oregon, and the inhabitants of said city within said limits, and all property therein shall be exempt from the payment of road taxes of any and every kind to the county of Yamhill, state of Oregon, and the city marshal, under the direction of the city council, is hereby invested with the sole power of collecting annually from each male inhabitant of said city within said limits between twenty-one and fifty years of age, except a public charge or active or exempt fireman and persons who are too infirm to perform labor, the sum of three dollars as a poll tax; provided, that any person in lieu of paying three dollars may do two days' work on the streets of the said city, at such a time and place as the marshal may direct. All taxable property within said limits shall be liable to assessment for the road or street work in the ratio of one day's work for each and every thousand dollars; provided, that any person may in lieu of each day's work pay to the city marshal the sum of one dollar and fifty cents. The marshal in said city is hereby authorized to collect said road tax and assessment for road and street work, and for that purpose shall possess the same power and authority and have the remedy granted by the general laws of the state to road supervisors for collection of road taxes. The common council shall by ordinance fix the time within which the said tax and assessment shall be collected." Laws Or. 1895, p. 247.

Section 57 of the charter as amended February 11, 1901, authorizes the council to lay

out, establish, vacate, widen, extend, and open streets or parts of streets, but the city shall not be liable to damage to any person for an injury which he may sustain by reason of a defect in any bridge, unless the city shall have had actual notice of such defect and a reasonable time to repair the same. Special Laws 1901, p. 209.

It is maintained by defendant's counsel that these clauses of the charter evidence an intention on the part of the legislative assembly to place upon the city the obligation to build and maintain the approaches, for which purpose the power to levy and collect road taxes from persons residing in and from property situate within the municipality, is given to it, and that when the span of the bridge was built across the channel of the river by the county it had discharged the whole duty devolving upon it.

[1] The word "bridge" has generally been construed to mean the structure spanning a hollow which was erected as a means of crossing a deep gap, and includes the approaches whereby a passageway to, from, and across the bridge is acquired. 1 Words and Phrases, 871, and cases cited; 4 Am. & Eng. Ency. Law (2d Ed.) 919; 5 Cyc. 1052; Savannah Florida & W. R. Co. v. Daniels, 90 Ga. 608, 17 S. E. 647, 20 L. R. A. 416.

[2] The obligation to build and maintain adequate public highways, including bridges to be erected thereon over ravines or other obstructions to travel, devolves primarily upon the state, which sovereignty, unless prohibited by the fundamental law, may itself discharge the trust, or delegate the duty to a municipal or a quasi municipal corporation. Cooley, Con. Law (6th Ed.) 725; Bank of Idaho v. Malheur Co., 30 Or. 420, 45 Pac. 781, 35 L. R. A. 141.

[3] Whether the laying out or opening of a rural road is under the jurisdiction of a county court, or the establishing or maintaining of a city street is subject to the control of a common council, such highways, so far as they subserve the easement of passage and its incidents, are free and at all times controlled by legislative authority. Elliott, Roads & Streets (3d Ed.) §§ 25, 511; East Portland v. Multnomah Co., 6 Or. 62; Multnomah County v. Sliker, 10 Or. 65; Little Nestucca T. R. Co. v. Tillamook County, 31 Or. 1, 48 Pac. 465, 65 Am. St. Rep. 802.

[4] The streets of a city are not its private property, but they are for the use of the public, whose general agent is the legislative assembly, which, in the absence of any constitutional restriction, has paramount authority over such highways, including bridges thereon, and may grant the supervision and control thereof to some other governmental agency, so long as the way is not diverted to a use inconsistent with or substantially different from that which was originally designed, provided, however, that the change is not intended to impose upon one municipality a debt incurred by another. Portland.

etc., *Ry. Co. v. Portland*, 14 Or. 188, 12 Pac. 265, 58 Am. Rep. 299; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171. In construing the provisions of organic acts of Medford, Mr. Justice Bean in *Bowers v. Neil*, 64 Or. 104, 109, 128 Pac. 433, 435, says: "A county government is an arm of the state, so also is a city, acting in its public governmental capacity; and at the time of the enactment of the several charters referred to the Legislature had power to impose upon a county the duty of building, maintaining, and repairing a bridge, on a county road within the limits of a city of the county."

[5] The town of Sheridan was originally incorporated October 25, 1880. Section 5 of that charter contained a clause as follows: "Provided that said town shall not at any time be liable to build or replace with a new one, any bridge across the Yamhill river within the limits of said town." Laws Or. 1880, p. 146. The section referred to was amended October 17, 1882, but no material change was made in the language last quoted. Laws Or. 1882, p. 96. The charter was again amended February 18, 1891; section 183 thereof being as follows: "The said city of Sheridan to have control of all streets and bridges and roads within the corporate limits of said city except the bridge across the Yamhill river at Bridge street in the city of Sheridan, said bridge to be the property of the county of Yamhill, state of Oregon." Laws Or. 1891, p. 361.

[6] The next amendments of the charter were made February 12, 1895, and February 11, 1901, as first hereinbefore quoted and the substance thereof stated. From the provisions of the fundamental law of that city it is fair to presume that when Sheridan was originally incorporated there then was within the boundaries of the municipality a bridge that had been constructed by Yamhill county on a county road crossing the river, which bridge has subsequently been maintained by the quasi corporation that built it. Whether or not such county road ceased and thereupon became a street when Sheridan was incorporated is unimportant, for the legislative assembly, treating the way as public, had the right to impose the burden of maintaining the bridge upon the county.

[7] Nor is that quasi corporation relieved

of the duty in this respect because the city of Sheridan is authorized to collect road taxes from persons residing within the municipality, and from property situate therein. The county court of each county has authority to provide for the erection and repairing, within the county, of public bridges upon any road or highway established by public authority. L. O. L. § 937, subd. 4. The expense incurred in building or repairing bridges is to be liquidated from any money in the county treasury not otherwise appropriated. L. O. L. § 6366. The money thus paid out is not obtained by the collection of ordinary road or poll taxes, authorized by section 6326, L. O. L., prior to the repeal thereof, February 19, 1913, and which section was in force when the approaches were built. Laws Or. 1913, p. 105. Yamhill county was therefore obliged to build and maintain the bridge and the approaches at the place indicated, notwithstanding the structure may have been rebuilt on a city street that had once been a county road. *Heiple v. East Portland*, 18 Or. 97, 8 Pac. 907; *Simon v. Northup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; *Bowers v. Neil*, 64 Or. 104, 128 Pac. 433.

[8] The amendment of the charter approved February 11, 1901, exempting Sheridan from liability for an injury sustained by reason of a defect in any bridge, unless the city had actual notice thereof and a reasonable time to repair the same, does not in express terms relate to the bridge in question. It is reasonable to suppose that there are other bridges within the limits of the city, and this clause of the charter does not absolve the county from a performance of the duty imposed by the legislative assembly upon it. The bridge approaches being thus taken out of the jurisdiction of the city of Sheridan, the common council thereof had no authority to impose upon the property of plaintiffs an assessment for any part of the improvements involved herein.

It follows from these considerations that the decree should be reversed, and one entered granting the relief prayed for in the complaint; and it is so ordered.

MCCBRIDE, C. J., and BURNETT and RAMSEY, JJ., concur.

BALL et al. v. CROISAN.

(Supreme Court of Oregon. Jan. 6, 1914.)

ANIMALS (§ 92*) — TRESPASS — FAILURE TO FENCE.

L. O. L. §§ 5762, 5763, require all fields and inclosures to be inclosed with a lawful fence, and prescribe the requisites of such a fence. Section 5575 provides that, on vote by a county and notice published by the county clerk, it shall be unlawful for stock to run at large, under penalty collectible in a civil action in the name of the state. Section 5765 defines the liability of the owner of any horse, cattle, or stock breaking into an inclosure inclosed by a lawful fence. *Held*, that the owner of premises not inclosed by a lawful fence is not entitled to recover for trespass thereon by stock of another, though the county has voted and given the notice as prescribed by section 5575.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 330-333; Dec. Dig. § 92.*]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by William Ball and another against E. M. Croisan. From a judgment for plaintiffs, defendant appeals. Reversed and remanded for new trial.

The plaintiffs allege in substance that they are the owners of certain lands in Marion county, Or., whereon is a growing peach orchard inclosed by a sufficient fence; that, notwithstanding the electors of that county, at the general election of 1910, had voted against stock running at large therein, and the county clerk had given notice of that decision of the electorate, the defendant had subsequently allowed his goats to escape from his adjacent premises; and that they had destroyed many peach trees belonging to plaintiffs to their damage in the sum of \$1,000. The answer admits the title of the plaintiffs to the lands and orchard, but denies that it was inclosed by a sufficient, or any, fence. The defendant also confesses to the ownership of the goats, but denies that they escaped from his premises, or injured the plaintiffs' orchard. The complaint is otherwise wholly traversed. From a verdict and judgment for plaintiffs, the defendant appeals.

John H. McNary and W. T. Slater, both of Salem, for appellant. John A. Carson and Geo. G. Bingham, both of Salem (Carson & Brown, of Salem, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). As the sole ground for reversing the judgment against him, the defendant contends that the court erred in giving to the jury the following instruction: "It is also a proposition of law by which you should be guided . . . that, where live stock is trespassing upon premises, if it goes over such premises, or such property, whereon it is originally trespassing, and does damage to

other property which it goes upon, it is not a defense to say such other property was not inclosed by a lawful fence, for the person who permits his stock to trespass where it does not rightfully belong cannot be heard to say that the damage caused by such stock was caused by reason of the failure to inclose the premises upon which it goes from the place of its original trespass, or by reason of a defective inclosure of the premises."

There was testimony tending to show that the fence inclosing the orchard was defective to such an extent that the goats could go through it, and that it was not what is defined to be a lawful fence within the meaning of sections 5762 and 5763, L. O. L. The first of these sections provides that "all fields and inclosures shall be inclosed with a fence sufficiently close, composed of posts and rails, posts and palings, posts and poles, posts and planks, palisades, or rails alone, laid up in the manner commonly called a 'woven' fence or turf, with a ditch on either side, or wall of rock or stone four and a half feet high." And the latter states that "all such fences composed of posts and rails, posts and palings, posts and poles, posts and planks, or palisades, shall be at least four and a half feet high; those composed of turf shall be at least four feet high, with trenches on either side at least three feet wide at the top and three feet deep; and what is commonly called a 'woven' fence shall be at least five feet high to the top of the rider; if not ridered, shall be five feet to the top rail, and the corners shall be locked with strong rails, poles, or stakes."

As amended by the act of February 21, 1911 (L. 1911, p. 210), section 5575, L. O. L., declares in substance that if, at an election held for that purpose, a majority of all the votes is cast against stock running at large, the county clerk shall give notice by publication in some newspaper to the effect that in 60 days from the date of the notice it shall be unlawful for stock to run at large under penalty of \$10 for the first offense, and \$20 for each subsequent offense, to be recovered from the owner of the stock in a civil action in the name of the state, for the benefit of the common school fund. Constables and road supervisors are specially charged with the enforcement of this law. The contention of the plaintiffs, grounded upon this statute, is that it is a substantial re adoption of the common-law rule whereby the owner of animals is liable in any event for damages sustained by reason of trespassing on lands of another. Section 5765, L. O. L., provides in substance that, if any horse, cattle, or stock break into any inclosure, the fence being of the height and sufficiency defined by the sections of the statute already quoted, the owner of such animal shall be responsible for the first trespass in the true value of the damages, and for subsequent trespasses in double

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—15

damages. Construing this section, this court decided, in the case of *Campbell v. Briedwell*, 5 Or. 311, that, in an action for trespass by the animals of another, the complaint must set forth facts showing an inclosure built in substantial compliance with the statute. The effect of that decision in the portion of the state to which the statute is applicable, including Marion county, is to reverse the common-law rule, and compel the landowner to fence against stock, instead of requiring the owner of the stock to keep it within his own inclosure. The section mentioned was part of the act of 1870 (L. 1870, p. 21). The subsequent statute of 1907 of which section 5575, L. O. L., is a part contains nothing necessarily conflicting with the former legislation. It provides a penalty in favor of the state for the use of the school fund for a violation of the rule to be established by a majority of the votes against stock running at large. As road supervisors are specially charged to see that the law is obeyed, it seems that the legislative intent was that, whereas stock was formerly allowed to run on any uninclosed lands, including highways, now by vote of the people such animals may be excluded from public roads and other open places, but that the rule is to be enforced by a penalty, and has nothing to do with damages to individuals. It does not affect private causes of action. Adverting to the well-known rule that all statutes are to be considered to stand, unless the conflict among them is irreconcilable, and that repeals by implication are not favored, we find that these enactments are not incompatible with each other, but that the later one merely furnishes a cumulative remedy against stock running at large. The new law creates a cause of action in favor of the state, and does not in any sense trench upon or modify the cause of action provided by the former for an individual sufferer from the trespassing of stock.

In other words, the former statute has limited the rights of the landowner, and defined his duties upon which depend his recovery of damages caused by trespassing stock. The mandatory language of the statute applicable to that part of the state in which Marion county lies is that "all fields and inclosures shall be inclosed with a fence sufficiently close," etc. The landowner must bring himself within the conditions imposed by the statute, else he cannot prevail, for the former law is quite as obligatory upon him as the later statute is upon the stockowner. The tenant of the close, being the moving party, must recover on the strength of his own cause of action, and can take nothing by the weakness of his adversary's situation. Besides this, the statute forbidding stock to run at large, after an adverse vote, is penal in its nature, and is to be construed strictly, so that it cannot be held to confer new

rights or impose consequences not directly defined by its terms. A statute designed mainly to obviate the evil of the obstruction of highways by roaming stock, and imposing a penalty, ought not to be construed so as to enlarge a remedy for private parties which is already defined and limited by another law to which no reference is made by the later enactment. The court was therefore in error in stating to the jury that the defendant could not be heard to say that the premises of plaintiffs were not inclosed by a sufficient fence.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for a new trial.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

GRIFFITH v. KLAMATH WATER USERS' ASS'N.

(Supreme Court of Oregon. Dec. 30, 1913.)

1. WATERS AND WATER COURSES (§ 238*)—IRRIGATION—WATER USERS' ASSOCIATION.

A by-law of an association of water users under an irrigation project, not organized for profit, providing that revenues shall be raised by assessment against shares of stock appurtenant to land for which water is available from the canals of the project, is valid, and the directors of the association cannot levy an assessment against shares appurtenant to land for which water is not available.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 238.*]

2. CORPORATIONS (§ 54*)—"BY-LAWS"—VALIDITY.

A "by-law" of a private corporation is a permanent rule of action adopted by the stockholders, in accordance with which the corporate affairs are to be conducted, and it should not conflict with the statute or charter nor with the vested rights of stockholders, and it must operate equally on all persons of the class it is intended to govern.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 151, 153-156; Dec. Dig. § 54.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 936-938; vol. 8, p. 7594.]

Department 2. Appeal from Circuit Court, Klamath County; Henry L. Benson, Judge.

Suit by S. H. Griffith against the Klamath Water Users' Association. From a decree for plaintiff, defendant appeals. Affirmed.

This is a suit to restrain the collection of a certain assessment levied by the Klamath Water Users' Association against certain lands of the plaintiff which are included in his stock subscription and contract. It is shown by the complaint that the plaintiff is the owner of certain lands within the Klamath irrigation project; that on June 14, 1905, he executed a certain stock subscription and contract (a copy of which is annexed to the complaint), which was accepted by the defendant, which shares of stock are appurtenant to plaintiff's lands; that section

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1 of article 4 of the by-laws of the corporation reads as follows: "Revenues necessary for the accomplishment of the purposes of this association shall be raised by an assessment from time to time against the shares of stock thereof appurtenant to land for which water is available from the canals of the Klamath project." The complaint further alleges: "That the real estate herein described and owned by this plaintiff and to which said shares of stock are appurtenant is not land for which water is or has at any time set forth herein been available from the canals of the Klamath project." That on the 17th day of February, 1912, the directors of defendant imposed an assessment of ten cents per share on plaintiff's shares of stock, ignoring said by-law, and that said shares of stock were not assessable under said by-law. Defendant demurred to the complaint. The trial court overruled the demurrer and, the defendant failing to further plead, entered a decree in favor of plaintiff as prayed for in the complaint. From this decree defendant appeals.

John Irwin, of Klamath Falls, for appellant. D. V. Kuykendall, of Klamath Falls (Kuykendall & Ferguson, of Klamath Falls, on the brief), for respondent.

BEAN, J. (after stating the facts as above). [1] It appears that the United States requires that the landowners of the different reclamation projects form some sort of organization with which the government can deal conveniently, instead of having to deal with each individual landowner. The association is not organized for profit, nor does it follow any commercial pursuits. The assessment in question was for the expenses of the association. The defendant questions the validity of the by-law quoted above upon the ground that the burden of the corporation must fall on each shareholder alike.

The stock subscription contract of plaintiff stipulates that no payment of shares of capital stock of the association shall be required except the amount paid to the United States for a water right; and that when all payments requisite for such right shall have been made, and proper evidence of the perfection of such water right has been issued, the subscriber's stock shall be deemed to have been fully paid up, and, until fully paid, the payments due thereon shall be a lien on the land and shares. The contract further provides that assessments shall become, from time to time as they are made and levied, a lien on the land and the shares of stock, and that the manner of enforcing said lien shall be by foreclosure. It is claimed by counsel for defendant that the by-law in question is in conflict with the provision in the contract relating to assessments, but it does not appear from the face of the com-

plaint that there is any such conflict. The contract does not provide a definite time when a shareholder shall become liable for assessments for expenses, and it is very appropriate that a time should be fixed by the by-law which in effect designates that such time shall be when water for the land is available from the project. It provides for two classes of stockholders, one class for whose land water is available, and the other for whose land water is not available. It was proper for the association to provide in its by-laws what portion of the burden of expenses each class should bear. In so far as the record shows, this by-law meets with the approval of the Department of the Interior of the United States and is not inequitable nor unreasonable.

[2] A by-law of a private corporation is a permanent rule of action adopted by the stockholders, in accordance with which the corporate affairs are to be conducted. By-laws should not conflict with the statute or charter. They must not interfere with the vested and substantial rights of the stockholders and must operate equally upon all persons of the class which they are intended to govern. 1 Cook on Cor. (6th Ed.) § 4a; 10 Cyc. 355, 356. The by-law in question directs the internal affairs of the association. No outside party appears to be interested therein, and the association has no capital to be impaired. The case at bar differs from that of *Willis v. Nehalem Coal Co.*, 52 Or. 70, 96 Pac. 528, and other cases cited by defendant's counsel. The proper mode of procedure, as far as suggested by the record, there being no answer, would be to amend the by-law if it is not satisfactory. By its terms the stockholders have agreed among themselves as to the manner of raising the revenues of the association. No reason is shown why the same should be ignored by the directors. Under the plain provision of this by-law of the association, the directors were not authorized to levy the assessment of which complaint is made.

The demurrer to the complaint was properly overruled. The judgment of the lower court is therefore affirmed.

McBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

BARNARD & BUNKER v. HOUSER.

(Supreme Court of Oregon. Dec. 23, 1913.)

1. CUSTOMS AND USAGES (§ 12*)—EVIDENCE—SUFFICIENCY.

In proving a custom it is necessary to show, not only that it is universal in the locality where it obtains, but also that it was known to the parties contracting with reference thereto, or is of such general acceptance that knowledge thereof is necessarily implied.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 23, 24; Dec. Dig. § 12.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. CUSTOMS AND USAGES (§§ 15, 16*)—EFFECT—INTERPRETATION OF CONTRACT.

Custom is used in evidence only as a means of interpretation of a contract, and not to import into it new terms.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 27, 28, 30–33; Dec. Dig. §§ 15, 16.*]

3. SALES (§ 82*)—CONSTRUCTION OF CONTRACT—TIME FOR PAYMENT OF PRICE.

A contract to sell a quantity of barley and to deliver it f. o. b. steamer between certain dates, being merely executory, denotes that tender of payment must be made contemporaneously with delivery of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229–233; Dec. Dig. § 82.*]

4. CUSTOMS AND USAGES (§ 17*)—CONSTRUCTION OF CONTRACT—EFFECT.

Under a contract to sell a quantity of No. 1 barley, Portland Standard, and to deliver it f. o. b. steamer, custom cannot be relied on to show a further agreement that the seller must furnish a certificate that the barley is of the quality provided in the contract; such an agreement being in contradiction of the contract making payment of price and delivery dependent covenants.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.*]

5. PLEADING (§ 8*) — MATTERS OF FACT OR CONCLUSIONS.

An allegation in the complaint that defendant has failed to deliver barley sold to plaintiff in accordance with the terms of the contract, without showing wherein the delivery failed to comply with the contract, does not state facts, but merely a conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28½, 68; Dec. Dig. § 8.*]

Department 1. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Action by Barnard & Bunker, a corporation, against M. Houser. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The plaintiff, a California corporation, brings this action against a grain dealer residing in this state. The complaint alleges: "That on or about November 7, 1911, plaintiff contracted and agreed with defendant to buy of him, and the defendant contracted to sell to the plaintiff, 150 tons of No. 1 feed barley, Portland Standard, at the price of \$1.65 per hundred pounds, and at said time defendant further contracted and agreed to deliver said barley f. o. b. steamer at the city of Portland, Or., for shipment between November 15, 1911, and December 15, 1911." The complaint also alleges, in substance, that the term "No. 1 feed barley, Portland Standard," was understood by plaintiff and defendant to mean a quality equal to samples of No. 1 feed barley approved by the Chamber of Commerce, Portland, Or. There is in the initial pleading this allegation: "That at the time said contract was made it was and is now the custom and usage of trade and commerce carried on in said city of Portland and the state of Oregon, and particularly among those engaged in the business of buying and selling grain thereat and with others, that upon delivery of barley sold upon

contract calling for 'No. 1 feed barley, Portland Standard,' the seller is required to furnish the buyer with a certificate issued by the official inspector of the said Chamber of Commerce or other disinterested and competent person to the effect that the barley delivered is of the quality provided in the contract before the buyer is required to pay for same, and said custom and usage was at all times well understood between the plaintiff and defendant herein." It is agreed that the contract was modified by mutual consent so that delivery should be made free on board dock at Portland, Or., instead of on the steamer. The complaint further alleges, in substance, that the contract was further modified so that the defendant had the option either to furnish the certificate already mentioned, or a sample of the barley showing the same to be as provided in the contract; but this modification is denied. The complaint closes with this averment: "That defendant has failed, neglected, and refused to deliver said barley to plaintiff in accordance with the terms of said contract and defendant wholly failed, neglected, and refused to furnish plaintiff with either the said certificate or sample mentioned in paragraph 6 of this complaint, and plaintiff has thereby lost profits and has sustained damage in the sum of \$450." The making of the contract is admitted, except that it is denied that the barley was to be Portland Standard. The alleged custom is also denied, as well as the failure to deliver. The court heard the same without a jury and made findings of fact and conclusions of law which are identical with the complaint. From a judgment in favor of the plaintiff in the sum of \$300, the defendant appeals.

S. B. Huston, of Portland, for appellant.
W. W. Banks, of Portland, for respondent.

BURNETT, J. (after stating the facts as above). [1] In proving a custom it is necessary to show not only that it was universal in the locality where it obtains, but also that it was known to the parties contracting in reference thereto, or that it was of such general acceptance that knowledge of the same would be necessarily implied. There is no testimony in the record showing that the custom was universal. On the contrary, every witness speaking on the subject says that by far the greater part of the grain handled at the port of Portland was marketed without any certificate whatever, and the testimony further fails to show that the defendant knew of the alleged custom. The utmost that is shown by the testimony concerning plaintiff's knowledge is that on two occasions a certificate of the quality of the grain sold was furnished.

[2] Custom is used in evidence only as a means of interpretation of a contract, and not for the purpose of importing into it new

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

terms. *Holmes v. Whitaker*, 23 Or. 319, 31 Pac. 705; *Savage v. Salem Mills Co.*, 48 Or. 1, 85 Pac. 69, 10 Ann. Cas. 1065.

[3] The contract pleaded was merely an executory one for the sale of the commodity named. It denotes that the tender of payment must be made contemporaneously with the delivery of the goods. Payment and delivery in such contracts are dependent covenants.

[4] It does not imply that the seller shall do the further act of furnishing a certificate of the quality of the goods. Having alleged that the plaintiff agreed to buy and the defendant agreed to sell the grain in question, it would be a contradiction of that express contract if custom could be relied upon to dispute its plain terms of payment and say that, although one has agreed to buy and the other to sell, yet custom will eliminate the feature of mutual dependent covenants and make them successive.

[5] Still further, the allegation of the complaint, reiterated as a finding of fact, is "that defendant has failed, neglected, and refused to deliver said barley to plaintiff in accordance with the terms of said contract." This does not state facts, but merely a conclusion. If the plaintiff would recover, he should allege facts showing wherein the delivery did not comply with the terms of the contract, so that the court could judge whether compliance had been accomplished or not. In this sense the findings of fact do not justify the judgment.

For these reasons, the judgment is reversed, and the cause remanded for further proceedings.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

HILLS v. SHAW.

(Supreme Court of Oregon. Dec. 30, 1913.)

1. PLEADING (§ 367*)—MOTIONS—MAKING MORE DEFINITE AND CERTAIN.

In an action against a surgeon for malpractice, there was no error in refusing to require plaintiff to make more definite and certain a complaint which alleged that defendant's negligence consisted of not bringing and keeping the broken parts of plaintiff's bone into apposition, and while the broken parts overlapped in placing them in a wire splint and afterwards in a plaster cast, and permitting them to remain in that condition for 16 weeks.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. § 367.*]

2. PHYSICIANS AND SURGEONS (§ 18*)—ACTIONS FOR MALPRACTICE—EVIDENCE.

In an action for malpractice, an allegation of the complaint that defendant was a practicing physician and surgeon practicing his profession in a city in the state, in connection with the laws regulating the practice of medicine and surgery, implies that defendant had, prima

facie, the requisite skill and ability to practice his profession in the state.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

3. PHYSICIANS AND SURGEONS (§ 15*)—LIABILITY FOR MALPRACTICE—CASE AND SKILL REQUIRED.

If a regularly licensed physician with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error of judgment, and the mere fact that an untoward result ensues is not evidence of negligence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 32; Dec. Dig. § 15.*]

4. PHYSICIANS AND SURGEONS (§ 18*)—ACTIONS FOR MALPRACTICE—EVIDENCE.

In an action against a surgeon for malpractice, evidence held insufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 34-41, 43-46, 48; Dec. Dig. § 18.*]

Department 1. Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

Action by Thomas Curtis Hills against H. M. Shaw. From a judgment for plaintiff for \$6,000, defendant appeals. Reversed and remanded, with directions to enter a judgment of nonsuit.

H. D. Norton, of Grants Pass, for appellant. C. L. Reames, of Portland (R. G. Smith, of Grants Pass, on the brief), for respondent.

BURNETT, J. It appears in the record that the plaintiff's leg was broken on June 4, 1910; that the defendant was called to treat the same and undertook to reduce the fracture. It is admitted that at all the times mentioned in the pleadings he was a physician and surgeon practicing his profession in Ashland, Or. The complaint specifies the negligence imputed to the defendant in these words: "That the negligence, unskillfulness, and carelessness of the defendant of which the plaintiff complains herein consisted of the defendant's not bringing and keeping said broken parts of said bone into apposition together; in placing said bone and said leg, while said broken parts were not in apposition together, and while said broken parts of said bone overlapped each other in a wire splint or mesh and afterwards in a plaster cast, and in permitting and suffering said leg and said bones to remain in that position and condition for 16 weeks, thus rendering it impossible for said broken bones to either unite, heal, or to grow together." The court overruled a motion made by the defendant to require the plaintiff to make the complaint more definite and certain so as to show with greater particularity what act or duty the defendant failed to perform in attempting to bring the parts of the fractured bone into apposition. The answer admitted the breaking of the bone, and that the defendant attended the plaintiff for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

purpose of treating him on that account. It alleges that the defendant reduced the fracture by the application of treatment and methods generally used and applied in such cases, and by an approved and recognized system of surgery; that he attended the plaintiff up to July 23, 1910, when the defendant removed to Coos county, Or., and thereupon terminated his attendance upon the plaintiff with the latter's consent, and that thereafter he never treated the plaintiff in any manner. It is admitted in the reply that on July 23, 1910, the defendant was about to remove from Ashland to Coos county, and left the plaintiff in care of another physician of Ashland, who continued to treat the plaintiff for about a period of one month afterwards; but the reply further alleges that the second physician was acting solely for the defendant. At the close of plaintiff's case the defendant moved for judgment of nonsuit on the ground that the plaintiff had failed to prove a cause sufficient to be submitted to the jury. This motion was overruled, and at the close of the whole case on the testimony the defendant moved the court to direct a verdict in his favor on the ground that the plaintiff had proved no cause of action against the defendant. The court also refused the motion of the defendant to set aside the verdict against him. The rulings of the court upon these several motions constitute the assignments of error relied upon by the defendant on this appeal.

[1] We will consider only the ruling of the court upon the motion to make the complaint more definite and certain, and the decision on the motion for nonsuit. It is safer and better pleading, in cases like the one in hand, for the plaintiff to set out with particularity the acts or omissions counted upon to establish the negligence imputed to the defendant. We are not prepared to say, however, that the court was in error in refusing the motion to make the complaint more definite.

In *Cederson v. Navigation Co.*, 38 Or. 343, 62 Pac. 637, 63 Pac. 763, one of the defendant's trains left the rails on which it was running, and killed plaintiff's decedent, who was walking near the track. Negligence was imputed to the defendant in general terms in connection with the death of the decedent. The court declared in that case that "It cannot be supposed that strangers should be intimately cognizant of the immediate condition of the appliances and the exact manner of the management and operation of a railroad and its engines and cars. These are matters peculiarly within the specific knowledge of the persons or company having the road in charge. * * * Under such conditions, it was not error to deny the motion: *Chicago City Ry. Co. v. Jennings*, 157 Ill. 274, 41 N. E. 629; *Young v. Lynch*, 66 Wis. 514, 29 N. W. 224; *Atchison, etc., R. R. Co. v. O'Neill*, 49 Kan. 367, 30 Pac. 470; *San Antonio, A. & P. Ry. Co. v. Adams*, 6 Tex. Civ. App. 102, 24 S. W. 839; *Fitts v. Wal-*

deck, 51 Wis. 567, 8 N. W. 363." In approving this case, Mr. Justice Slater, in *Kennedy v. Hawkins*, 54 Or. 164, 168, 102 Pac. 733, 734 (25 L. R. A. [N. S.] 606), said: "It is always necessary in pleading negligence to allege that some act was negligently done, or that something that ought to have been done was omitted, but it is not necessary to set forth the particular facts that show the act or omission to have been negligent. * * * This, however, does not relieve the plaintiff from proving a particular act of negligence upon which she bases her right to recover. * * *"

The court was not wrong in denying the motion to make the complaint more definite.

The testimony for the plaintiff shows this state of facts: The defendant was called to treat the broken leg on June 4, 1910, assisted by Dr. Brower, who administered the anæsthetic. After adjusting the broken parts of the bone, the defendant first applied wire splints, surrounding the thigh, and attached a weight hung over a pulley so as to keep the leg in extension and prevent lapping of the bones, with consequent shortening of the limb. A few days later, when the swelling had subsided somewhat, the dressing was changed, and a plaster cast was put around the limb with the extension weights still applied. The cast was changed from time to time as the swelling decreased further, and on July 23d of that year the defendant notified the plaintiff of his intention to remove to Coos county, Or., and left the case in charge of Dr. Brower. To all appearances, so far as the testimony discloses, the leg was treated by the usual methods known and approved by reputable surgeons. About a week after the defendant had gone, Dr. Brower removed the cast, installed another one, and removed the extension weights. About this time the plaintiff began to sit up in bed, and later got up, moved about the hospital on crutches, and sat up almost daily on the porch. Some time during the month of August, Dr. Brower took the plaintiff in his automobile into the town of Ashland, assisted him out upon the street, and left him to himself for possibly an hour. The plaintiff testifies that during the time he was moving about the town he began to suffer excruciating pain in his leg, and was compelled to go into a store and sit down with the leg propped up. Dr. Brower took him back to the hospital, and, as he testifies, began to suspect soon afterwards that a union of the bone had not been achieved. He then called other surgeons, who confirmed his suspicion that the bone had not united, and on September 19th they operated upon the leg by cutting into it at the point of fracture. It was then discovered for certain that the bone had not united, that the ends had slipped past each other about two inches, and that in so doing the lower fragment had turned halfway round upon its axis, so that the two ends of the oblique fracture were, as

one witness puts it, "back to back." In the operation which ensued it became necessary to remove part of the bone, so that when the fracture finally healed the plaintiff's right leg was about three inches shorter than the other. The question to be determined is whether there is proof of negligence on the part of the defendant sufficient to be submitted to the jury.

[2-4] It is not urged that the defendant was not possessed of the requisite skill and ability to practice his profession in this state. On the contrary, it is alleged and admitted that "the defendant has been and now is a practicing physician and surgeon practicing said profession in Ashland, Jackson county, Or." In connection with the laws regulating the practice of medicine and surgery, this necessarily implies that *prima facie*, at least, he had the requisite skill and ability. The essence of the charge is that he did not exercise the skill of which he was possessed.

In the well-considered case of *McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870, in speaking of a surgeon, among others, certain rules are thus laid down: "He does not undertake to warrant a cure, and is not responsible for want of success, unless that want results from failure to exercise ordinary care, or from his want of ordinary skill. * * * If he possesses ordinary skill, and exercises ordinary care in applying it, he is not responsible for mistake of judgment. * * * The fact that an injured limb is defective after treatment is not evidence of negligence on the part of the physician treating it." That was a case where negligence was imputed to the defendant, a surgeon, in the treatment of a fractured arm. The court further said: "Defendant requested an instruction to the effect that the fact that perfect or even good results were not obtained is not of itself any evidence that the physician was negligent, and that, in determining the question of whether the defendant, upon the facts in evidence, was negligent or not negligent, the condition of plaintiff's arm at the time of trial, or when defendant's treatment ceased, was not to be considered as evidence bearing upon that question. The instruction was refused, and its equivalent or substance was not given. Both from reason and authority it is clear that the result obtained from an operation, or treatment, in a case of medicine or surgery, is ordinarily neither *prima facie*, nor any evidence of negligence. * * * A surgeon may be assiduous, painstaking, and careful to the last degree, using all the recognized means at his command, both ordinary and extraordinary, and still fail. In such case it is manifest that failure is neither the result nor evidence of neglect. Negligence on the part of a physician consists in his doing something which he should not have done, or in omitting to do something which he should have done. By allowing the jury to consider any imperfect position

of the fragments of the bone which had been broken, as evidence of negligence, appellant was not tried for what he did or omitted to do, but by the criterion of results. If the jury could regard an imperfect position of the bone as evidence on the question of appellant's exercise of care, then the doctrine of *res ipsa loquitur* applies. * * * The maxim *res ipsa loquitur* has no place nor application in a case like this, and the jury should have been so advised."

In *Ewing v. Goode* (C. C.) 78 Fed. 442, the court said: "A physician is not a warrantor of cures. If the maxim, *res ipsa loquitur*, were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'"

The following precedents are instructive: *Langford v. Jones*, 18 Or. 307, 22 Pac. 1064; *Williams v. Poppleton*, 3 Or. 139; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Wells v. Ferry-Baker Lbr. Co.*, 57 Wash. 658, 107 Pac. 869, 29 L. R. A. (N. S.) 426; *Staloch v. Holm*, 100 Minn. 276, 111 N. W. 264, 9 L. R. A. (N. S.) 712; *Haire v. Reese*, 7 Phila. (Pa.) 138; *Wood v. Barker*, 49 Mich. 295, 13 N. W. 597; *Wurdeemann v. Barnes*, 92 Wis. 206, 66 N. W. 111; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147; *Sweeney v. Erving*, 35 App. D. C. 57. The substance of the doctrine taught by these cases is that if a regularly licensed physician with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error of judgment, and that the mere fact that an untoward result ensues is not in any sense evidence of negligence. There are so many elements combating the surgeon in his efforts to restore a patient to bodily soundness that he can do no more than exercise his best skill and judgment to accomplish the desired result. It has been said: "The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform, and, bringing to bear all his professed experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out, then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence. No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of

which he has no time to judge. Such act or omission, if faulty, may be called a mistake, but not carelessness." The Tom Lysle (D. C.) 48 Fed. 890, 893.

The ideal to achieve which the surgeon strives in cases of this kind is to establish coaptation of the broken parts of a bone with the surfaces of the fresh fracture touching each other so that the bone is restored to its original situation, and then by bandages or other appliances to keep it in position until healing ensues. This is the utmost that the highest degree of surgical skill can accomplish. Nature must do the rest. What, then, is proven here showing that the defendant was remiss in his duty? It is admitted that he properly diagnosed the case as a fracture of the right femur. Did he endeavor to ascertain by palpation whether the parts of the bone were in apposition? The testimony shows that he did make such an effort. Did he apply proper dressings to maintain that situation? The record of the trial affirms this. Did he install extension weights to overcome the natural muscular contraction tending to displace the bone? It is admitted by the testimony of the plaintiff himself. The treatment was not done in a corner. It was performed in a public hospital, in the presence of another physician and the attendant nurses. The testimony gives no history of any shortening of the leg or sidewise displacement of the foot during the defendant's connection with the case, both of which would have been apparent to any layman if during that time the broken bone had got into the unnatural position discovered at the final operation performed by the other surgeons. It was not until after the plaintiff had begun to sit up and move around on crutches and had gone into town in the automobile that a misplacement or nonunion was suspected. Dr. Brower, testifying as plaintiff's witness, states that it was not until after the automobile excursion that he even feared that anything was wrong about the broken bone. No lack of application of the ordinary remedies is shown. Reduced to its lowest terms, the case is one where the surgeon has treated a case in which the result was a failure. There is nothing to show that he did not do his best with what skill he possessed. The error of plaintiff's contention consists in relying upon the abortive result of the treatment as an evidence of negligence on the part of the defendant, without showing further that some careless act or omission of his produced that undesirable consequence. To hold the defendant liable under such circumstances would be to make him an absolute insurer of success in every operation which he undertook. Such a rule would be too drastic to be applied to the medical and surgical profession, and is not borne out by the authorities. However deplorable the condition of the plaintiff, there

is a hiatus in the testimony on his behalf between the time the defendant ceased to treat him and the subsequent discovery of the nonunion of the bone which breaks the connection of the defendant with the untoward result so far as negligence is concerned.

The cause is remanded, with directions to enter a judgment of nonsuit.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

ROSEBERRY v. EDWARD F. NIEHAUS & CO. (S. F. 6,181.)

(Supreme Court of California. Dec. 6, 1913.)

1. NEGLIGENCE (§ 136*)—ACTIONS—JURY QUESTION.

In an action for damages for personal injuries to plaintiff, while upon defendants' premises on a business errand, the question of plaintiff's contributory negligence in going near a defectively placed lumber pile *held* for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 68*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

Where plaintiff visited defendants' premises to see to the removal of a boiler purchased by plaintiff's master from defendant, plaintiff is not chargeable with knowledge of the effect of the vibration, caused by the truck on which the boiler was loaded, upon a lumber pile, because not knowing upon what substance the lumber was laid.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 86-89; Dec. Dig. § 68.*]

3. NEGLIGENCE (§ 69*)—CONTRIBUTORY NEGLIGENCE—FORGETFULNESS.

Forgetfulness of a known danger will not always defeat a recovery by one injured; to forget not being negligence, unless it shows want of ordinary care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 96; Dec. Dig. § 69.*]

4. NEGLIGENCE (§ 136*)—LICENSES.

While one who unnecessarily remains upon the premises of another after finishing his business may become a licensee or a trespasser, plaintiff did not, as a matter of law, become a licensee or trespasser where he was an invitee on defendants' premises, and after finishing his business remained a short time to tell the representative of defendant good-bye.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

5. NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE.

That plaintiff, who was upon defendants' premises to see to the removal of a boiler purchased by his master, attempted to walk out the wagon gate behind the wagon loaded with the boiler, that fact will not render him guilty of contributory negligence as a matter of law, even though he could have stepped through defendants' office in absolute safety.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Robert B. Roseberry against Edward F. Niehaus & Co. From a judgment for plaintiff and an order denying the mo-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

tion for new trial, defendant appeals. Affirmed.

James M. Koford, of Berkeley, for appellant. J. K. Johnson, of San Francisco, for respondent.

MELVIN, J. Plaintiff was injured by the falling of lumber which had been piled on the premises of defendant. He was awarded damages in the sum of \$2,000. The defendant appeals from this judgment, and from an order denying its motion for a new trial.

The plaintiff was employed as a stationary engineer by Messrs. Poetsch and Peterson, tanners. About the 11th of April, 1909, he went with Mr. Poetsch to examine a boiler which the corporation now defendant herein had for sale at its premises. They met Mr. Niehaus, one of the officers of the corporation, and after some talk Mr. Poetsch purchased the boiler, together with certain fittings. On April 21, 1909, workmen were sent with a truck to the premises of the defendant to detach the boiler from its place and to remove it to the factory of the new owners. Plaintiff was sent by his employers to see that everything properly appertaining to the boiler and purchased by them should be brought away from the place of business of Edward F. Niehaus & Co. The work of dismantling the boiler was not to be done by plaintiff, but by one Odermatt, who had been hired for that purpose by Poetsch & Peterson. Plaintiff went to defendant's place of business, met Mr. Niehaus, and together they indicated to Odermatt and his helpers the pipe and fittings which were to go with the boiler. The boiler was loaded upon a truck at the rear of a gangway opening on Brannan street. Mr. Niehaus had left plaintiff, and later plaintiff started to depart from the premises, but stopped to converse with a friend. He then went to the office to say good-bye to Mr. Niehaus, but, not finding him, turned in the door to leave, when he saw the loaded truck starting out by the gangway leading to Brannan street. He waited for the truck to pass, and then walked behind the men who were following it. Before he reached the open gate the lumber fell upon him, broke his leg, and inflicted other serious injuries.

[1] Appellant's counsel make numerous contentions, the principal ones being that plaintiff knew of the dangerous condition of the pile of lumber, and was guilty of contributory negligence in going near it, and that, having finished his business, and having been allowed ample time to leave the premises, he became a trespasser, or at most a mere licensee, to whom defendant owed no duty of furnishing a safe passageway along the gangway to the street.

The first of these contentions is based partly upon the fact that, just after entering the premises, in passing near the place where this lumber was being piled, he noticed defendant's workmen placing the boards par-

allel with the gangway instead of piling it with the ends toward the gangway. He said, in testifying: "I saw this defect. * * * I certainly say from my experience that I know that was not a safe way to do it." Appellant's counsel insists that in going near a known danger he was guilty of negligence, and that the facts of this case bring it within the rule announced in such cases as Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 Pac. 962, 39 L. R. A. (N. S.) 896; Davis v. California Street Cable Ry. Co., 105 Cal. 131, 38 Pac. 647; Brett v. Frank & Co., 153 Cal. 274, 94 Pac. 1051; s. c., 162 Cal. 736, 124 Pac. 437; and McGraw v. Friend, etc., Lumber Co., 120 Cal. 574, 52 Pac. 1004. But respondent asserts that the difference between those cases and this one lies in the circumstance that in each of those cases the court was discussing an obvious danger, which was encountered by a person who had knowledge of its existence, but had carelessly forgotten it, while here the plaintiff was menaced by a hidden peril. We think the distinction is legitimate. While the plaintiff did consider that the lumber was not being piled in a manner that would satisfy a man of his experience, he subsequently saw the defendant, through its agents, permitting and inviting his fellow servants to pass near it with a heavily loaded truck. It was for the jury to say, under all of the circumstances, whether the conduct of the plaintiff amounted to contributory negligence. The court instructed the jurors that if they found the existence of danger from the manner of piling the lumber was as much open to the observation of the plaintiff as to that of the defendant, their verdict should be in favor of the defendant. The instructions upon this phase of the case were very full. The jurors might well have thought that plaintiff's opinion of the piling of the lumber merely amounted to a criticism of the method of placing the boards parallel with the gangway, instead of having the ends toward that passageway.

[2, 3] There was some testimony that the vibration caused by the truck was largely responsible for the falling of the lumber, and of course plaintiff was not charged with full knowledge of the substance upon which the boards were piled, and its liability to sway when a loaded vehicle should be driven along the gangway. He testified that he did not think of the lumber pile when he returned from the office and started to follow his fellow servants to the street. Forgetfulness of a known danger will not always operate to prevent recovery of damages by a person who is injured. To forget is not negligence, unless it shows a want of ordinary care. Giraudi v. Elec. Imp. Co., 107 Cal. 125, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114; Jacobson v. Oakland Meat, etc., Co., 161 Cal. 430, 119 Pac. 653, Ann. Cas. 1913B, 1194. Generally the question is one for the jury.

[4, 5] Numerous authorities are cited by appellant's counsel to fortify the rule that

one who unnecessarily remains upon the premises of another may become a mere licensee or a trespasser, and also the rule that under certain circumstances one having business upon another's property must seek a safe rather than a dangerous passage to the street. There is no doubt regarding the rules announced, but we cannot say that in the present case the evidence showed, either that the plaintiff was a trespasser, or that he was negligent in trying to reach the street through the passageway that had just been used by Odermatt and the other workmen, instead of through the door opening from the office directly upon the street. All of these matters were presented to the jury very fully, and were determined in favor of the plaintiff.

No other alleged errors require attention. The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

IMPERIAL LAND CO. et al. v. IMPERIAL IRR. DIST. et al. (S. F. 8,800.)

(Supreme Court of California. Dec. 8, 1913.)
COURTS (§ 207*)—MANDAMUS.

An application for mandamus to compel the board of directors of an irrigation district to call an election upon the question of an assessment upon property in the district, under section 59 of the "Bridgford Act" (St. 1897, p. 274), as amended by St. 1911, p. 1111, involving the hearing of evidence and a determination as to the genuineness of the 681 signatures to the election petition, which would require more time than the court could give to such matters, would not be taken up where the superior court, or some other court, had concurrent jurisdiction; the fact that the judge of the superior court of the county was disqualified to act in the case not ousting that court of jurisdiction, since another judge might be called in or be designated by the Governor to sit in such case.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 512; Dec. Dig. § 207.*]

In Bank. Application for mandamus by the Imperial Land Company and others against the Imperial Irrigation District and others. Dismissed without prejudice.

Valentine & Newby, of Los Angeles (McCutchen, Olney & Willard, of San Francisco, of counsel), for petitioners.

PER CURIAM. This is an application in mandamus to compel the board of directors of Imperial Irrigation District to call an election upon the question of a 2 per cent. assessment upon the property in the district, made under the provisions of section 59 of the so-called "Bridgford Act" (St. 1897, p. 274), as amended in 1911 (St. 1911, p. 1111). It is claimed that a petition for such election, signed by the required number of electors of the district, has been filed with the board, and that thereby an election is made mandatory, under the provisions of said section. This court is asked to hear evidence and decide as to the genuineness of

the 681 signatures to the election petition, a question which will necessarily require much more time than we have at our disposal for such matters. The cases which must be decided by this court because no other court has jurisdiction are so numerous that we are unable to take up original proceedings of which there is concurrent jurisdiction, where it is possible to present them to some other competent court. The fact that the judge of the superior court of Imperial county is disqualified to act upon this particular assessment does not oust that court of jurisdiction. It is easily possible by calling in a judge to hold an extra session, or by securing from the Governor a designation of some other judge to sit in that county for this case, to obtain a trial there by a qualified judge. The interested parties may by this means pursue in that court any remedy they may have, whether by mandamus or other form of proceeding or action.

For these reasons the application is dismissed, without prejudice to an application or action in any other court.

SHARP v. PITMAN et al. (L. A. 3,190.)

(Supreme Court of California. Dec. 9, 1913.)

1. PLEADING (§ 237*)—AMENDMENT—MATERIAL VARIANCE—CONFORMITY TO PROOF.

Where the original complaint, in an action to enforce a contract for the payment of money and a note and mortgage given as security therefor, alleged that the consideration for the promisor's undertaking was the release of an attachment previously levied against certain property belonging to another of the defendants in an action brought on plaintiff's claim, the allowance of a trial amendment, alleging that the consideration was the payment of plaintiff's claim against such other defendant for services rendered, to conform to the proof as found by the trial court, was justified under Code Civ. Proc. §§ 469, 470, declaring that no variance shall be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his defense upon the merits, and providing that where the variance is not material, the court may order an immediate amendment.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

2. CONTRACTS (§ 322*)—SUFFICIENCY OF EVIDENCE—CONSIDERATION.

In an action upon a written contract for the payment of money, secured by the pledge of a note and mortgage of another defendant, evidence held to sustain a finding that the services rendered by plaintiff to such other defendant were not wholly without value to him, and that he had agreed to pay plaintiff therefor the sum of \$1,650.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534-1542, 1754, 1768, 1772, 1801, 1802, 1804-1808, 1815, 1816; Dec. Dig. § 322.*]

3. TRIAL (§ 397*)—FINDINGS—"MATERIAL ISSUE."

The rule that a decision is against law where the trial court fails to find upon numerous issues tendered by a special defense applies only where the issues, upon which there are no findings, are material in the sense of being such

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as would countervail or destroy the effect of the other findings.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940-945; Dec. Dig. § 397.*

For other definitions, see Words and Phrases, vol. 5, p. 4407.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Edgar Sharp against Susie B. Pitman and others. Judgment for plaintiff, and from an order denying a new trial, defendants appeal. Order affirmed.

Anderson & Anderson, of Los Angeles, for appellants. Leonard B. Slosson, of Los Angeles, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from an order denying their motion for a new trial. On June 6, 1910, plaintiff and defendant Susie B. Pitman entered into a written contract wherein the latter agreed to pay plaintiff \$1,200 in installments of \$400 each, and pledged to him as security for the payment thereof a note of defendant W. H. Pitman of even date for \$1,650 and interest, and a mortgage given her by said W. H. Pitman on the same date to secure the payment of said note; the same covering certain land in Los Angeles and Riverside counties. This note was given by defendant W. H. Pitman to defendant Susie B. Pitman to repay her for \$450 which she then paid from her own funds to plaintiff, and for the \$1,200 additional, which she had agreed to pay him, in payment and satisfaction of a claim of plaintiff against said W. H. Pitman for certain services rendered by him as an attorney. Plaintiff had then commenced a suit against said W. H. Pitman therefor, and procured the levy of an attachment therein, and upon the execution of said agreement plaintiff caused the dismissal of such suit and the release of such attachment. On August 24, 1910, said defendant Susie B. Pitman, without the knowledge or consent of plaintiff, entered on the margin of the record of said mortgage a satisfaction thereof, and defendant W. H. Pitman on the same day made a conveyance of the mortgaged property to his wife, defendant Helen A. Pitman. No part of said \$1,200 has ever been paid to plaintiff. All three of said defendants knew, at the time of said attempted satisfaction and conveyance, that the mortgage and note had been pledged by said Susie B. Pitman to plaintiff, and that the same had not been paid, and such satisfaction of mortgage and conveyance were made for the purpose of defrauding and defeating plaintiff's rights as pledgee. This action was brought to enforce plaintiff's right under the agreement and pledge by having said satisfaction of mortgage vacated and set aside, the conveyance of W. H. Pitman to Helen A. Pitman decreed to be subject to said mortgage, and the note and mortgage sold to

satisfy the claim of plaintiff against Susie B. Pitman under said agreement, and to obtain a personal judgment against her for any deficiency remaining due after the application of the proceeds of such sale.

The facts we have recited are all established either by undisputed allegations of the complaint, or findings of the trial court, which are amply supported by the evidence.

[1] In the original complaint it was alleged that the consideration for the undertaking of Susie B. Pitman upon which this action is based was the release of an attachment theretofore levied against certain property belonging to W. H. Pitman in an action brought on plaintiff's claim, and the dismissal of said action, the same being brought by one Colburn, as the assignee of plaintiff, to collect the amount thereof for plaintiff. At the close of the trial, the court allowed plaintiff, over the objection of defendants, to file an amended complaint, the only amendment being in the matter of the consideration for the undertaking of Susie B. Pitman. By the amendment, it was alleged that the consideration was the payment and discharge of a claim and demand on the part of the plaintiff against the defendant W. H. Pitman, for services theretofore rendered by the said plaintiff to said defendant. The trial court, as we have seen, found in accord with this amendment. Defendants were never given any opportunity to answer the complaint as amended, and assign as error the action of the court in thus permitting the amendment. The amendment was one made to make the complaint conform to the proofs, which sufficiently showed that the undertaking was given not merely in consideration of the dismissal of an action and the release of an attachment issued therein, but in full discharge of the claim upon which such action was based. The variance was of such a nature that it could not possibly have misled defendants to their prejudice in maintaining their defense on the merits, and the court was fully justified in allowing the amendment to be thus made. Sections 469 and 470, Code Civ. Proc. The defendants in their answer had denied that there was any consideration whatever for said undertaking of Susie B. Pitman, and there was no necessity for any amendment of the answer in that regard.

[2] The trial court found that the services rendered by plaintiff to said W. H. Pitman, on which his claim against the latter was based were not wholly without any value to said defendant, and that said defendant agreed to pay plaintiff therefor the sum of \$1,650. We are absolutely unable to see any good warrant for a claim that this finding is without sufficient support in the evidence. Extended discussion of the evidence bearing upon this matter would serve no useful purpose. It suffices to say that there was suffi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cient evidence to sustain the following conclusions, viz.: That defendant W. H. Pitman's wife had departed from his home, and that her whereabouts were unknown to him; that all of the real property in Los Angeles and Riverside counties in which he and his wife had any interest had been put in the name of the wife; that all of the same was community property; that W. H. Pitman was exceedingly anxious to learn as to the whereabouts of his wife, and to obtain from her deeds of such realty; that plaintiff's services were rendered in connection with this matter, with the result that the deeds were obtained; that the deeds were not obtained under such circumstances as to render them worthless, or as would warrant the setting aside of the same on the ground of undue influence or coercion or fraud, or want of understanding on the part of the grantor; and that defendant W. H. Pitman freely and voluntarily agreed to pay plaintiff \$1,650 for his services in the matter. The evidence as to the circumstances under which the deeds were obtained was of such a nature as to present a question of fact as to their validity, for the determination of the trial court, and its determination that they were valid cannot fairly be held to be without sufficient support in the evidence. It is to be borne in mind that under the findings of the court as to the character of this property, as being separate or community property, the only effect of the deeds was to put community property of the spouses in the name of the husband. There was sufficient evidence to support the conclusion that the real property was wholly community property, notwithstanding that the legal title was in the name of the wife. There was evidence of W. H. Pitman himself that he bought the property with money which he made out of his olive and oil business, and there was other evidence to the effect that he had said that they had accumulated the real property subsequent to marriage, and that he carried it in his wife's name to avoid payment of a debt. Although both W. H. Pitman and his wife were witnesses, neither made any claim that it had ever been given by the husband to the wife. What we have said sufficiently disposes of the claim made in the brief of learned counsel for respondents as to certain findings of fact being without sufficient support in the evidence. One or two other findings, complained of in the brief, we regard as immaterial, as, for instance, the finding that plaintiff did not state to Helen A. Pitman that he was taking an assignment of certain jewelry for the purpose of recovering it for her.

[3] It is urged in the brief of defendants that the decision is against law, in that the trial court failed to find upon a large number of the issues tendered by defendants' special defense. We have carefully examin-

ed the issues referred to, and are satisfied that in so far as the subject-matter of the same is not sufficiently covered by findings made, they were immaterial. It was substantially said in *Brison v. Brison*, 90 Cal. 328, 27 Pac. 187, that the rule contended for by defendants is applicable only where the issues upon which there is no finding are "material," and a material finding in this connection was there defined as being one which "would have the effect to countervail or destroy the effect of the other findings." It was further said: "If a finding upon such issues would not have this effect, the issues cannot be disregarded as material, and the failure to make a finding thereon would not be prejudicial. * * * If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues which, if made, would not invalidate the judgment. If the issue presented by the answer is such that a finding upon it in favor of the defendant would not defeat the plaintiff's right of action, a failure to make such finding is immaterial."

This being an appeal only from the order denying a motion for a new trial, we are limited to the matters that may be considered on such an appeal, which in this case, in view of the grounds specified in the notice of intention to move for a new trial, are the alleged insufficiency of the evidence to justify the decision; that the decision is against law for failure to find on certain issues, and errors in law occurring at the trial. We see no good warrant for a new trial on any of these grounds.

The order denying a new trial is affirmed.

We concur: SLOSS, J.; SHAW, J.

NATIONAL LUMBER CO. v. RIPPLE et al. (L. A. 3,235.)

(Supreme Court of California. Dec. 9, 1913.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW.

The decision of the trial court on a substantial conflict of evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. PLEADING (§ 377*)—ADMISSIONS BY FAILURE TO DENY.

A fact alleged in the complaint, not being denied by the answer, is admitted, and therefore need not be supported by testimony.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1228-1231; Dec. Dig. § 377.*]

3. MECHANICS' LIENS (§ 281*)—ENFORCEMENT OF LIEN—SUFFICIENCY OF EVIDENCE.

Testimony merely, in a materialman's lien suit, that when the building was completed there was near by quite a large pile of rough lumber, without any proof as to its value, or that it was part of the lumber included in the claims sued on, does not warrant reversal of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the order denying defendant's motion for new trial, asked for on the ground of insufficiency of the evidence to sustain the finding that the materials allowed for were used in the building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 565-572; Dec. Dig. § 281.*]

4. PLEADING (§ 387*)—VARIANCE.

The allegation of the complaint as to terms of sale being admitted by failure of the answer to deny, any evidence as to the terms being otherwise cannot be considered on the question of variance.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.*]

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by the National Lumber Company against Betty A. Ripple and another. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant Ripple appeals. Affirmed.

E. H. Jolliffe, of Ontario, Cal., for appellant. R. L. Horton, of Los Angeles, for respondent.

SHAW, J. The transcript embraces two actions to foreclose liens for materials alleged to have been furnished for and used in two buildings erected by the defendant Miller, as contractor, for the defendant Ripple, the owner. The two actions were consolidated and tried together. Miller made default. Findings and judgment went for the plaintiff. The defendant Ripple appeals from the judgment and from an order denying a new trial.

The appellant urges three propositions as ground for reversal. They are: First, that the evidence does not show that the amount allowed by the court below to plaintiff was the reasonable value of the materials furnished and used or that they were sold at the current market prices; second, that there was no proof that all the materials included in the claims allowed were used in the buildings; third, that there was a fatal variance between the pleadings, the claims of lien, and the proof.

[1, 2] Where there is a substantial conflict in the evidence, the decision of the trial court as to the fact is conclusive on appeal. It is useless, therefore, to discuss in detail the discrepancies in the evidence of the various witnesses. The allegation of the complaint in each case is that the materials were sold by the plaintiff to the contractor at the current market prices in Ontario, Cal., and that said prices were the reasonable value thereof. The findings of the court on this subject are in the language of the complaint. The allegations that the materials were sold at the current market prices and that said prices were the reasonable value thereof were not denied. Consequently they were admitted as facts, and it is unnecessary to determine whether the evidence supported the

facts or not, so far as the contract of sale is concerned. The testimony of the salesman of the plaintiff was to the effect that the prices charged for the goods embraced in the claims sued on were the reasonable market value of the goods at that time in Ontario, Cal. Miller, the contractor, testified substantially to the same effect. There was other evidence of similar character. This sufficiently sustains the allegation that the goods sold were of the value claimed for them.

[3] At the trial the appellant admitted that the materials were sold to the contractor to be used in the buildings, and that they were actually delivered to him on the premises. The men who erected the two buildings testified that the materials so delivered were all used in the buildings. On cross-examination one of them said, regarding the rough lumber, that there was not much of it left over when the rough work was finished. The other, referring to the finishing material, said that he did not remember that any of it was left over. Two witnesses for the defendant testified that, when the buildings were completed except the painting, there was a pile of rough lumber near by large enough to make three-quarters of a two-horse wagonload and that it afterwards disappeared. Its value was not shown, and no attempt was made to prove that it was a part of the lumber included in the claims sued upon. This evidence might create some uncertainty or suspicion that some of the material may not have been used in the buildings, but it is clearly not sufficient to justify this court in reversing the order denying a new trial because of the insufficiency of the evidence to sustain the finding that the materials allowed for were used in the buildings. It is further claimed that two doors included in the bills were not put into the buildings. We cannot say from the evidence in the record that this discrepancy actually existed. The witness Miller testified that a bill of particulars exhibited to him enumerated 16 doors as among the materials furnished and that the plan of the building showed only 14 doors. It is not clear that the bill of particulars shown him was the one upon which the charge was made. The order denying the motion for a new trial was made on the condition that the plaintiff remit \$13.70 from the judgment, which it accordingly did. This may have been ordered because of this discrepancy in regard to these two doors. The reason therefor is not shown. In the condition of the record we do not feel justified in reversing the order for this small discrepancy, supposing it to have existed.

[4] The claim that there is a variance between the pleadings and the proof is based upon the theory that the evidence shows that the goods were sold for an agreed price, as a lump sum, and not for the reasonable value or for the current prices. So far as the sup-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

posed variance between the pleadings and proof is concerned, the point is entirely disposed of by the fact, above noted, that the allegation as to the terms of the contract is not denied. By this admission it became an established fact, and evidence to the contrary cannot be considered. Being a fact established in the case which could not be controverted by the evidence, it is obvious that the statement in the claim of lien as to the terms of sale was also established as a fact by this admission of the pleadings. It may be added, however, that the evidence does not conclusively show the variance claimed. It appears that the contractor presented to plaintiff's salesman an itemized statement of the materials he desired for each building separately; that the salesman then extended opposite each item the current market price thereof at Ontario; and that these sums for building No. 1 amounted to \$880.72 and for building No. 2 to \$668.92. Thereupon the salesman marked the price for building No. 1 at \$880 and for building No. 2 at \$650. It was shown that this was the customary method of fixing reduced prices for bills for materials in those quantities. This could hardly be considered a substantial variance from the allegation that the sale was made at the current market prices. We find no substantial ground for a reversal.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

CELLULOSE PACKAGE MFG. CO. v. CALHOUN. (L. A. No. 3,199.)

(Supreme Court of California. Dec. 9, 1913.)

1. JUDGMENT (§ 238*)—PARTIES—JOINT DEFENDANTS.

Under Code Civ. Proc. §§ 414, 578, authorizing judgment against one or more joint defendants, a joint judgment against two parties to a joint contract is not invalid as to one of the parties simply because it is void as to the other, who was not served with process.

[Ed. Note.—For other case, see Judgment, Cent. Dig. §§ 415, 416; Dec. Dig. § 238.*]

2. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

In the absence of evidence to the contrary, the law of Illinois, with reference to the validity, as to one defendant, of a joint judgment which is void as to the other defendant, will be presumed to be the same as that of California.

[Ed. Note.—For other case, see Evidence, Cent. Dig. § 101; Dec. Dig. § 80.*]

3. JUDGMENT (§ 501*)—COLLATERAL ATTACK—GROUNDS—ERRORS.

Under Code Civ. Proc. § 1908, declaring that the judgment of a court having jurisdiction shall be conclusive, where a court has jurisdiction of the parties and of the subject-matter, its judgment cannot be impeached collaterally, though it may appear on the face of the record that error was committed in determining the rights of the parties.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 941; Dec. Dig. § 501.*]

4. JUDGMENT (§ 504*)—COLLATERAL ATTACK—GROUNDS—DEFECTS AS TO PARTIES.

Under the Illinois decisions, holding that, in an action on a joint contract, it is reversible error to give judgment against one joint defendant alone, the rendition of judgment by an Illinois court against two of three joint contractors was a mere error of law and did not affect the court's jurisdiction of the controversy, so as to open the judgment to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 944-947; Dec. Dig. § 504.*]

5. CORPORATIONS (§ 32*)—FOREIGN CORPORATIONS—EVIDENCE OF CORPORATE EXISTENCE.

Evidence held to support a finding that the plaintiff was a corporation existing under the laws of Illinois.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 106-118, 2086, 2087; Dec. Dig. § 32.*]

6. CORPORATIONS (§ 32*)—CORPORATE EXISTENCE—EVIDENCE.

That the contract forming the basis of an Illinois judgment sued on recited that plaintiff was a corporation under the name in which it now sues, and the judgment thereon was recovered in that name, was sufficient proof of plaintiff's corporate capacity and that it was operating under that name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 106-118, 2086, 2087; Dec. Dig. § 32.*]

7. CORPORATIONS (§ 47*)—CORPORATE NAME—CHANGE OF NAME—"CHANGE OF ORGANIZATION."

A change in the name of a corporation was not a "change of organization," within the Illinois statute requiring the publication of notice of "changes of organization."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 134, 135; Dec. Dig. § 47.*]

8. APPEAL AND ERROR (§ 1170*)—REVIEW—HARMLESS ERROR—UNIMPORTANT MATTERS.

That no proof was offered of publication of a change in the name of the plaintiff, a corporation organized under the laws of Illinois, was not of sufficient importance to justify reversal of a judgment for plaintiff, even though such publication be required by the Illinois statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4032, 4066, 4075, 4098, 4101, 4434, 4540-4545; Dec. Dig. § 1170.*]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by the Cellulose Package Manufacturing Company against George Calhoun and another. From an order denying his motion for a new trial, defendant named appeals. Affirmed.

James Donovan, of Los Angeles, for appellant. C. E. Arnold and Rowen Irwin, both of Bakersfield, for respondent.

SHAW, J. The defendant appeals from an order denying his motion for a new trial.

The action is based upon a judgment recovered by the plaintiff in the superior court of Cook county, Ill., against George Calhoun and J. W. McGrath. In the Illinois court both of said defendants appeared by attorneys and demurred to the declaration; the demurrer was overruled; they were ruled to plead, but failed to do so, whereupon the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment was rendered against them. The court below made findings that McGrath was never served with process in the Illinois action and that the attorneys who entered an appearance for him in that action had no authority to do so; that the contract there sued on was the joint contract of Calhoun, McGrath, and one Kindt; that under the law of Illinois a separate judgment could be entered against either of the parties to such a joint contract without entering judgment against all; and that under that law the judgment sued on was valid as against Calhoun but void as against McGrath. Upon this finding judgment was given against Calhoun alone.

[1] The appellant claims that under the authorities, if a joint judgment is rendered against two or more, and it appears from the record, or is shown aliunde, that such judgment is invalid as to one of them for want of jurisdiction over him, the joint judgment is void as to all. This theory is based upon a rule prevailing in some jurisdictions to the effect that, if it is shown that the judgment rendered upon a joint contract is void as to one joint contractor, it is a nullity and void as to all. No proof was made that this is the law of Illinois, where the judgment was rendered, nor is any decision of the courts of that state cited which so holds. The extent of their decisions is that it is error to give judgment, in such an action, against one such joint defendant alone, and that a judgment so given will be reversed on appeal because of such error. None of them holds that such judgment would be void on collateral attack against the person served. This alleged rule that a joint judgment on a joint contract is invalid entirely, if shown to be invalid as to one of the joint defendants, is discussed by Mr. Freeman in an elaborate note to the case of *St. John v. Holmes*, 20 Wend. (N. Y.) 609, 32 Am. Dec. 604. He there shows that the original announcement of the rule in *Hall v. Williams*, 6 Pick. (Mass.) 246, 17 Am. Dec. 356, in 1828, was made without any discussion, upon the authority of a case which does not support it, and that it is against the weight of more recent authority. It is condemned in the text-books on the subject. *Van Fleet on Collateral Attack*, § 744; 1 *Black on Judg.* § 211; 1 *Freeman on Judg.* § 136. It is not the law of this state. *Seaver v. Fitzgerald*, 23 Cal. 92; *Tay v. Hawley*, 39 Cal. 94; *Lewis v. Clarkin*, 18 Cal. 400; *Bailey Loan Co. v. Hall*, 110 Cal. 490, 42 Pac. 962; *Code Civ. Proc.* §§ 414, 578.

[2] There being no evidence to the contrary the law of Illinois is presumed to be the same as that of California. *Marsters v. Lash*, 61 Cal. 622; *Estate of Richards*, 133 Cal. 526, 65 Pac. 1034; *Estate of Harrington*, 140 Cal. 247, 73 Pac. 1000, 98 Am. St. Rep. 51; *O'Sullivan v. Griffith*, 153 Cal. 507, 95 Pac. 873, 96 Pac. 323.

[3] Such a rule is obviously contrary to

the fundamental principle everywhere prevailing that, where a court has jurisdiction of the person of the parties and the subject-matter of the controversy submitted to it by them, its judgment thereon cannot be impeached collaterally or otherwise than by some form of direct attack, although it may appear on the face of the record that an error was committed by the court in determining the rights of the parties involved in the case. *Crew v. Pratt*, 119 Cal. 151, 51 Pac. 38; *Code Civ. Proc.* § 1908.

[4] The conclusion of the Illinois court that the judgment should be rendered against two of the joint contractors, although the other one had not been served, was a mere error of law and did not go to the jurisdiction of the court over the controversy. Under the California authorities above cited, the fact that such judgment was not valid against McGrath would have no effect whatever upon its validity against Calhoun. The finding that it was valid against him is therefore sustained by the evidence. If it is considered as a conclusion of law, it was correct.

[5, 6] The court further found that the Cellulose Package Manufacturing Company is and was at all the times involved in the action a corporation existing under the laws of Illinois. There is a claim that this finding is contrary to the evidence. It appears that the company was originally incorporated under the name of "E. W. Ward Cellulose Package Manufacturing Company," and that afterwards the name was changed, under the Illinois law, by striking "E. W. Ward" therefrom. The certificate showing regular proceedings whereby such change was effected was duly filed with the secretary of state of Illinois as the statute required. This statute provided for divers other changes in corporate affairs, such as a change of place of business, of the objects for which the corporation was formed, of the amount of the capital stock, of the par value thereof, of the number of directors, and a change to consolidate with other corporations. It also provided that, upon the filing of such certificate, the corporation should cause to be published "a notice of such changes of organization" for three successive weeks. No evidence was given that this notice had been published. For this reason it is claimed that the finding that the plaintiff was a corporation is not sustained by the evidence. We find, however, that the contract sued on, which was executed by Calhoun and the other parties thereto, recites the fact that the plaintiff was a corporation under the name of Cellulose Package Manufacturing Company. The Illinois judgment was recovered by it under that name. This is sufficient proof of its corporate capacity and of the fact that it was operating under that name.

[7, 8] Furthermore, it can scarcely be said that a change of name is the same thing as a

change of organization. Inasmuch as the statute of Illinois required notice only of a change of organization, we do not think that it can be held that a failure to publish a notice of a change of name would invalidate a proceeding for a change of name. The statute does not require notice of such change. We have discussed this question on its merits, but we are of the opinion that it would not be of sufficient importance to justify a reversal of the judgment even if we were mistaken as to the effect of the Illinois law.

These are all the points presented in support of the appeal. We think that they are devoid of merit, and that the order should be sustained.

The order is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

MAXON-NOWLIN CO. v. NORSWING.
(L. A. 3194.)

(Supreme Court of California. Dec. 9, 1913.)

1. FRAUD (§ 20*)—DECEPTION CONSTITUTING FRAUD—RELIANCE ON REPRESENTATIONS.

To entitle a person to relief because of a false representation, it is not enough to show that it was material, known by the maker to be false, and made with the intent to deceive, but it must be shown that it actually misled and deceived the party complaining.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

2. FRAUD (§ 58*)—ACTIONS—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence, in an action to recover damages for fraudulent misrepresentations as to the size of a parcel of land made in connection with a transfer thereof, held to sustain findings that the plaintiff did not believe and did not rely on the alleged representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

3. FRAUD (§ 21*)—DECEPTION CONSTITUTING FRAUD—RELIANCE ON REPRESENTATIONS.

A party who relies upon and is deceived by misrepresentation may claim relief, even though he had an opportunity to learn the truth by prosecuting inquiries or otherwise; but a party who had actual knowledge of the truth cannot recover.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 9, 10, 23; Dec. Dig. § 21.*]

4. APPEAL AND ERROR (§ 1071*)—REVIEW—HARMLESS ERROR—FINDINGS BY COURT.

Any errors in findings as to the making of alleged misrepresentations to plaintiff were harmless, where the court further found that plaintiff did not rely on the representations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

Department 1. Appeal from Superior Court, Los Angeles County; Gavin W. Craig, Judge.

Action by the Maxon-Nowlin Company against K. B. Norswing. From a judgment for defendant, and an order denying a new trial, the plaintiff appeals. Affirmed.

E. W. Freeman, of Los Angeles, for appellant. E. B. Drake, of Los Angeles, for respondent.

SLOSS, J. This action was brought to recover damages for alleged fraudulent misrepresentations in connection with a transfer of real property.

The complaint alleges that on May 29, 1911, the plaintiff was the owner of a tract of land in Orange county, and the defendant was the owner of a parcel of land, fronting on Main street and Slauson avenue, in the city of Los Angeles. On said day, it is alleged, and prior thereto, the defendant represented to plaintiff that the said parcel had a frontage on Main street of 398 feet, and a depth on Slauson avenue of 661 feet. The plaintiff fully believed said representations, and acted wholly upon them. Relying on their truth, the plaintiff, on the 29th day of May, 1911, entered into an agreement with the defendant for the exchange of said properties, and such exchange was consummated by the delivery of deeds from and to the parties respectively. The complaint alleges, further, that the said representations were false, in that the frontage of the property conveyed by defendant was only 378 feet on Main street, and its depth on Slauson avenue was no more than 591.75 feet. The defendant at all times knew of the falsity of his representations; but plaintiff did not discover the facts in this regard until long after the deeds had passed between the parties. The area of the parcel conveyed was .904 acres less than that of a parcel having the dimensions represented, and its value was and is \$7,468.68 less than the value the parcel would have had if it had been of the size represented. The defendant refusing to convey the deficiency, the plaintiff asks judgment that he be compelled to so convey, or, in default thereof, that plaintiff have judgment for \$7,468.68.

The answer denies making the alleged representations, and denies that plaintiff believed them to be true, or acted or relied upon them. There are other issues raised; but there will be no occasion to refer to any except those which we have just mentioned.

The court made findings, upon which it entered judgment in favor of the defendant. The plaintiff appeals from the judgment, and from an order denying its motion for a new trial.

Among other things, the court found that plaintiff did not believe the alleged representations, that it did not enter into the contract relying upon their truth, and further, that it is not true that plaintiff did not know, until long after the delivery of the deeds, that the lands conveyed by defendant to plaintiff were of the dimensions less than those represented. "On the contrary," it was found "that, before any contract was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

entered into or deeds made, the defendant delivered to plaintiff, or its representatives, a map showing the correct measurements of said property."

[1] These findings, if supported by the evidence, are conclusive in favor of the judgment as rendered, regardless of the disposition of other issues in the case. "To entitle a person to relief or redress because of a false representation, it is well settled that it is not enough to show merely that it was material, that it was known to be false, and that it was made with intent to deceive, but it must also be shown that it actually did mislead and deceive; or, in other words, it was relied upon by the party complaining." 14 A. & E. Enc. L. (2d Ed.) p. 106; 20 Cyc. 39; *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132; *Nounnan v. Sutter Co. L. Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Colton v. Stanford*, 82 Cal. 351, 383, 23 Pac. 16, 16 Am. St. Rep. 137.

[2] The evidence in this case is clearly sufficient to sustain the findings that plaintiff did not believe the representations regarding the dimensions of the land, and that it did not rely upon such representations in entering into the contract. Two witnesses testified that, before any agreement was made, the manager of the plaintiff corporation looked at the property, and that the defendant then handed him a map which showed in plain figures the actual frontages, on Main street and Slauson avenue, of the tract subsequently conveyed to plaintiff. This testimony was contradicted; but the trial court was, of course, authorized to resolve the conflict either way. Accepting the statements of defendant's witnesses, it was justified in drawing the inference that plaintiff's agent examined the map which was thus placed in his hands, and that he learned from the map what the frontages in fact were.

[3] The appellant cites a number of cases, of which *Eichelberger v. Mills Land, etc., Co.*, 9 Cal. App. 628, 100 Pac. 117, is a fair example, to support the contention that the fact that plaintiff had an opportunity to learn the truth regarding the area of the land does not necessarily deprive him of the right to relief. The doctrine thus asserted is well settled. *Pom. Eq. Jur.* § 895. But the authorities referred to go no further than to hold that a party who has actually relied upon a misrepresentation and been deceived by it may claim relief, even though, by prosecuting inquiries on his own behalf, he might have learned the truth. They do not authorize a recovery by a party who has actually learned the truth, and has not relied upon the misrepresentation. This is the situation disclosed by the findings here.

[4] The claims are made by appellant that there are conflicting findings on the question whether the representations were made as alleged, and that such findings on this is-

sue as are in favor of the defendant are contrary to the evidence. But, in view of what we have said on the question heretofore discussed, these points become immaterial. If the court had found according to the allegations of the complaint on the issue regarding the making of representations, the further finding that plaintiff did not rely on the representations would still have required the giving of the judgment here made. The errors last mentioned, if errors were committed, were therefore harmless, and furnish no ground for reversal. *Duryea v. Boucher*, 67 Cal. 141, 7 Pac. 421; *Wheat v. Bank of Cal.*, 119 Cal. 4, 50 Pac. 842, 51 Pac. 47; *Sussman v. Co. of San Luis Obispo*, 126 Cal. 536, 59 Pac. 24; *Butler v. Delafield*, 1 Cal. App. 367, 82 Pac. 260.

The appellant makes no points other than those hereinbefore mentioned.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

SCHOLLE v. FINNELL, Jr., et al.
(Sac. 1915.)

(Supreme Court of California. Dec. 12, 1913.
On Rehearing, Jan. 10, 1914.)

1. LIMITATION OF ACTIONS (§ 37*)—SUIT TO SET ASIDE FRAUDULENT CONVEYANCES.

An action by a judgment creditor, purchasing under execution property conveyed by his debtor in fraud of creditors, to have the conveyance declared void is an action to remove a cloud on his title, and though fraud may be incidental, the three and four year statutes of limitations (Code Civ. Proc. §§ 338, 343), do not apply.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 182-186, 477; Dec. Dig. § 37.*]

2. LIMITATION OF ACTIONS (§ 37*)—SUIT TO SET ASIDE FRAUDULENT CONVEYANCES.

An action by a judgment creditor to set aside as fraudulent a conveyance made by the debtor, and to adjudge that the property is subject to a lien and for an equitable execution to satisfy the judgment, is in effect an action to remove a cloud on the equitable lien of the judgment, and is not within the three and four years statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 182-186, 477; Dec. Dig. § 37.*]

3. FRAUDULENT CONVEYANCES (§ 221*)—JUDGMENT CREDITOR—ALLOWANCE OF CLAIM AGAINST DECEDENT'S ESTATE—EFFECT.

The allowance of a claim against a decedent's estate has the effect of a judgment, and the claimant may, by reason thereof, maintain an action to set aside fraudulent transfers by decedent, and to subject the property to the satisfaction of the judgment.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Dec. Dig. § 221.*]

4. LIMITATION OF ACTIONS (§ 44*)—SUIT TO SET ASIDE FRAUDULENT CONVEYANCES—DEATH OF DEBTOR.

A creditor of a debtor executing fraudulent conveyance may, though he has actual knowledge of the conveyance, wait until the last day

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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of the period for the bringing of an action on his debt, and on procuring a judgment, he may wait until about the expiration of the period within which an execution must issue, and then have execution issued and a sale made as the property of the debtor standing in the name of the fraudulent grantees, and where the creditor becomes the purchaser, he may wait almost five years before suing to set aside the conveyance as a cloud on his title, and this rule applies, notwithstanding the death of the debtor before judgment, where the claim was allowed against his estate.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220-230, 232; Dec. Dig. § 44.*]

Department 2. Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by Albert W. Scholle against John Finnell, Junior, and others. From a judgment for plaintiff, defendants separately appeal. Affirmed.

Charles W. Slack, of San Francisco, and W. P. Johnson, of Red Bluff, for appellants. Morrison, Cope & Brobeck and Morrison & Brobeck, all of San Francisco, John J. Wells, of Red Bluff, and Morrison, Dunne & Brobeck, of San Francisco, for respondent.

LORIGAN, J. This action was brought in Tehama county by the plaintiff as a creditor of John Finnell, deceased, to have set aside several separate conveyances of real property made by him to the four appellants, his sons, all of which, it is claimed, were made by him when insolvent and in fraud of his creditors, particularly the plaintiff; that he be adjudged to have a lien on said property, and for an equitable execution to satisfy it. The plaintiff had judgment, setting aside three of the conveyances as fraudulent and void and granting the relief prayed for, and each of the defendants appeals from that portion of the judgment which affects the conveyance to him. Separate motions for a new trial were made and denied, and each defendant appeals from the order denying his motion. These several appeals, while separately taken, are presented on the same transcript and argued in the same briefs. The same points for a reversal of the judgment and orders are urged, and all of these appeals are considered and disposed of in this opinion.

The complaint, filed March 21, 1907, alleged that the plaintiff loaned to John Finnell at various times between July 5, 1893, and February 10, 1897, divers sums of money, aggregating \$56,163.75, Finnell delivering promissory notes therefor which, from time to time, were renewed; that Finnell died in October, 1905; that the defendant, John Finnell, Jr., qualified as administrator of his estate, and thereafter plaintiff presented to such administrator his claim against the estate of deceased for the amount then owing to him—\$62,178.28—which said claim was allowed January 17, 1906, by the administra-

tor and approved by the judge of the superior court, but no payments have been made thereon; that said John Finnell, deceased, was insolvent from the time of the first loan to him by plaintiff until the time of his death, and that his estate was indebted in excess of \$152,000, and insolvent, that during his lifetime and subsequent to said year 1893, while insolvent and in contemplation of insolvency, said John Finnell, without consideration therefor, and with intent to defraud his creditors, particularly plaintiff, made certain deeds to the defendants, his sons, conveying certain lands in Tehama county and other counties (the complaint setting forth particularly six conveyances with the descriptions of the property therein); that John Finnell up to his death represented to plaintiff that he was solvent, and relying upon said representation, plaintiff did not bring an action to recover the amount owed him, but from time to time accepted renewals of the notes; that at most of the times mentioned plaintiff was absent from the state, and during all the time absent from Tehama county, and had no knowledge of the conveyances or the insolvency of said Finnell, or of his estate or of his intent to defraud his creditors or plaintiff until after his death; that defendants refused to pay this indebtedness to plaintiff, and the administrator refused to bring an action to have said conveyances set aside or to subject the property so fraudulently conveyed to the claims of the creditors of the estate, and denied that the said estate had any title or interest in said real property; that all the defendants had full knowledge when said conveyances were made to them respectively that they were made without consideration and with intent to defraud the creditors of said John Finnell, particularly plaintiff. The defendants each answered, denying all the allegations of the complaint and all set up as a bar to recovery by plaintiff the statute of limitations—section 338, subdivision 4, and section 343 of the Code of Civil Procedure—and the further defense of laches.

The court made findings in accordance with all the allegations of the complaint, except it found that only three of said conveyances were fraudulent. It found adversely to the defendants on their defenses of the statute of limitations and laches. The decree declared a lien upon the lands so found to have been fraudulently conveyed for the amount of the indebtedness to plaintiff, and directed their sale to satisfy such lien.

The only evidence in the case necessary to refer to is that respecting the dates of the recordation of these conveyances declared fraudulent. The complaint alleged that they were executed by John Finnell, September 30, 1900. The evidence shows that they were also recorded in the recorder's office of Tehama county on that date.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

On this appeal appellants urge a reversal on two grounds only. They attack both the sufficiency of the complaint and the findings of the court against their defense of the statute of limitations and of laches.

No demurrer was interposed to the complaint in the court below. It is, however, urged now by appellants that the complaint states no cause of action. Their claim is that this action is for relief on the ground of fraud, and was barred by the sections of the Code pleaded if not brought within three years after the fraud was committed or within that period after its discovery; that it appears from the complaint that the fraud alleged was perpetrated in September, 1900, and the statute therefore ran in September, 1903, and was a bar to the present action, unless its effect be avoided by a statement of facts in the complaint showing that plaintiff had no knowledge of the fraud, and did not discover it until later and within three years of the commencement of the action, and in the exercise of due diligence could not have discovered it sooner; that the complaint is entirely barren of any statement of facts showing why in the exercise of due diligence the discovery was not or could not have been made earlier.

We do not think it necessary to consider specially this attack, on the sufficiency of the complaint, because how far, if at all, a creditor proceeding by action to have set aside a fraudulent conveyance is affected by any knowledge or notice of the fraud prior to that time, or whether the statute of limitations respecting actions based on fraud has any application in such a case, is the point to be determined by us under the attack of the appellants upon the findings of the court against their defenses of the statute of limitations and laches. Their attack on these findings is based on the facts that this action was brought March 21, 1907, and that the deeds which were held by the trial court to be fraudulent and void were recorded on September 30, 1900. From these facts appellants contend (and this is the only point they make) that the recordation of the deeds was notice to the plaintiff of the making of them, of their contents, and of the alleged fraud, and that the plaintiff thus being notified, the statute commenced to run from such recordation, and had created a complete bar twice over when this action was commenced.

[1] Whether we would sustain the position of appellants as to the effect of such recordation in a case where the question was properly involved we need not determine, as we are satisfied that in an action of this kind notice or knowledge by the creditor that the conveyances were in fraud of creditors is a false quantity; in other words, that the statute of limitations relied on, applying to actions on the ground of fraud, has no application whatever to an action of this char-

acter. This we think follows from a consideration of a uniform line of decisions in this state, in which, while exactly the same relief in a court of equity was not sought as here, yet in principle it was the same, and in our judgment, as far as the availability of the statute of limitations by fraudulent grantees is concerned, is controlled by the rule laid down in those cases.

This principle was early announced in *Hager v. Shindler et al.*, 29 Cal. 47. The defendant Shindler, on March 21, 1855, made a conveyance in fraud of his creditors. Under a judgment against him the land was sold on execution; the plaintiff acquiring the title on October 3, 1857. On January 6, 1860, he brought suit to have the deeds made by Shindler declared fraudulent and void. It will be observed that the action was brought by plaintiff nearly five years after the conveyance. The statute of limitations stood then as it does now, requiring an action based upon fraud to be commenced within three years after the commission of the fraud or its discovery. In the case cited there was no pretense that the plaintiff did not know the facts as to the fraudulent transfer when it was made, and the claim was that the cause of action accrued at the date of the deed—March 21, 1855—and was barred three years thereafter. Notwithstanding the knowledge of the fraud, this court held that delay in commencing the action was of no moment; that the statute of limitations relied on did not apply. It was said: "The cause of action does not consist in the detached or isolated fact that the deeds in question were given with the intent charged. The gravamen of the complaint is that the plaintiff, as owner of the land, is liable to be injured by the deeds if they are allowed to remain uncanceled. The particular danger which the plaintiff seeks to avert neither is nor can be older than the title which it threatens. True, the deeds were given more than three years prior to the commencement of the action, but they foreboded no injury to the plaintiff's title when they were given, for at that time he had no title. In short, the plaintiff's right to bring this action does not antedate the facts in which it has its origin. The plaintiff became the owner of the land on the 3d day of October, 1857, when he received the sheriff's deed; and he had then, for the first time, a title to be clouded. The action was brought within three years thereafter."

In *Stewart v. Thompson*, 32 Cal. 260, one Blake recovered judgment on March 19, 1858, on a promissory note of Brown, falling due June 1, 1856. In September, 1857, Brown conveyed the land in fraud of his creditors, the deed being recorded about the time it was given. Blake caused the property to be levied on and sold in April, 1859, as Brown's, purchasing it at such sale. He conveyed to the plaintiff Stewart in September, 1862, who,

in April, 1863, commenced an action claiming that the deed by Brown was a cloud on his title. Defendant, as here, relied on the statute of limitations. The court said (Sanderson, J.): "We consider that the limitation of three years does not apply to an action of this character. * * * We so held in effect in *Hager v. Shindler*, 29 Cal. 60. The gravamen of the action is that the conveyances of which complaint is made are clouds upon the title, and for that reason, and that only, their cancellation is asked. The right of the plaintiff to his relief does not depend altogether upon the question whether they are tainted with fraud, but upon the fact that they are clouds. * * * Hence fraud is a false quantity when we come to assign an action of this character to its proper class under the statute of limitations. If fraud exists, it does so merely as a feature in the case, and not as a test of the true nature of the cause of action within the meaning of the statute"—and as is said in the concurring opinion of Sawyer, J., "I was at first inclined to the opinion that this case fell under the fourth clause of the seventeenth section of the statute of limitations, under which 'an action for relief on the ground of fraud' is barred in three years; but upon further reflection I think it does not. The deeds in question, it is true, had their origin in fraud. The first in order was made with intent to defraud a creditor. The creditor proceeded to obtain his judgment, sell the land, and obtain a sheriff's deed, regardless of the deed made for the purpose of defrauding him. The fraudulent deed was void as to him—an absolute nullity—and for this reason was not in his way. After obtaining his sheriff's deed, he was in a position to recover possession of the land, notwithstanding the fraudulent conveyance, without first procuring its cancellation in equity. * * * The creditor could protect himself against it at law, and there was no necessity for going into equity for a remedy. The only substantial remedy to him, requiring relief in equity, therefore is that, being upon the record, the void deed is a cloud upon the title of the creditor and those claiming under him, and this is the real ground of the relief sought in this action. The object sought is only to remove the cloud which casts its shadow upon the title. For these reasons, I think the case not within the bar of three years." See, also, *Chalmers v. Sheehy*, 132 Cal. 459, 64 Pac. 709, 84 Am. St. Rep. 62.

The principle laid down in all these cases is that an action by a judgment creditor, after he has purchased under execution property conveyed by his debtor in fraud of his creditors, to have such conveyance declared void is an action to remove a cloud from his title; that while the question of fraud may be incidental to the action, still the relief asked is not based upon the fraud but upon the fact that fraudulent deeds constitute a

cloud upon title, and the relief asked is that this cloud be removed, and in such an action the statute of limitations has no application.

[2] We think that the present action brought by the plaintiff is in effect an action to remove a cloud on title. Not as in the cases cited, from the legal title acquired under sale made upon a judgment secured by the creditor against the fraudulent debtor, but as a cloud upon the equitable lien of the judgment of plaintiff, to the satisfaction of which he had the right to have subjected the property fraudulently conveyed.

[3] The allowance of the claim in the estate of Finnell had the same force and effect as a judgment, and on it the plaintiff had a right to maintain an action to set aside the fraudulent transfers made by the debtor, and to subject the property to the satisfaction of his judgment. *Ohm v. Superior Court*, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245. And while the relief asked in the cases we have cited was different to some extent from the relief prayed for and awarded the plaintiff in the present action, we do not perceive that it was of such substantial difference as to affect the principle announced in those cases or render it inapplicable here.

[4] The only fact which put plaintiff in a position whereby appellants would be entitled to rely upon the bar of the statute which they pleaded was the death of Finnell. Had the latter lived, as the indebtedness he owed plaintiff was a valid and subsisting one, the plaintiff, even had he actually known at the time these conveyances were made by Finnell to appellants that they were fraudulent as to him, might have waited until the very last day of the period during which he might bring an action upon these notes, before doing so. After procuring a judgment against Finnell he might likewise have waited until about the expiration of the period within which an execution on his judgment might issue, could then have had it issued, and a sale made of the property as the property of Finnell standing in the name of these appellants. As the conveyances to the appellants were fraudulent, they were not merely voidable, but absolutely void as to the creditors of Finnell (*Civ. Code*, § 3442; *Hager v. Shindler*, supra; *Stewart v. Thompson*, supra; *Chalmers v. Sheehy*, supra; *Judson v. Lyford*, 84 Cal. 505, 24 Pac. 286), and under the sale plaintiff would acquire full legal and equitable title to the property. Plaintiff after securing his deed might then have waited almost five years before bringing an action against appellants to set aside and cancel the deeds made to them as a cloud upon his title; and, while it would appear that the plaintiff had in fact knowledge of the fraud for a period during which, if applicable, the statute of limitations had run time and time again, still, under such a situation of marked delay, it is settled by the authorities we have referred to that the

statute of limitations respecting actions on the ground of fraud relied on by appellants would have no place, and would not be available to the grantees under the fraudulent conveyances.

As this protection would have been afforded plaintiff against the assertion of the bar of the statute of limitations had Finnell lived and the plaintiff had obtained execution and sale of the property, the fact that Finnell died and the law compelled plaintiff to prove his claim in probate ought not to deprive him of the relief he asks in the present action, if it is but the equivalent of what he might have had if Finnell had not died. The death of Finnell did not make his fraudulent conveyances any more effective than they were when he was alive. They were wholly void as against his creditors when they were made, and his death did not impart any vitality to them. There are no equitable considerations disclosed here which would require the court to deny the application of the principles laid down in *Hager v. Shindler* and the other authorities to the case at bar. The trial court found that when these conveyances were made Finnell was insolvent; that they were made without consideration; that appellants knew of such insolvency at the time, and that they were fraudulent and void as to creditors. Appellants do not question the sufficiency of the evidence to sustain these findings; they rely simply on the claim that their technical defenses of the statute of limitations and laches should have been sustained; defenses they would have no right to assert had plaintiff proceeded against Finnell in his lifetime, and which they rely on by reason of his death. As suggested, if this may be done, then the incongruous result follows that while a creditor may treat these deeds as void during the lifetime of his debtor, he is deprived of the right of having their nullity declared after the debtor's death. Such a result should not be permitted unless there are existing principles marking such a radical distinction between the relief sought in the cited cases and that sought here that the rule laid down in the former may not be invoked. While of course statutes of limitation may be successfully interposed, still courts of equity are not disposed to insist upon particular forms of procedure, or to draw nice distinctions between the nature of the relief which should be sought by creditors in order to support grantees in the retention of property fraudulently obtained.

Certainly the plaintiff, after the allowance of his claim in probate—which as pointed out had the force and effect of a judgment—was required in some form of action to proceed to have these deeds judicially declared nullities, as they were in fact, and to subject the property to the equitable lien of his judgment, and it is not suggested that he could have proceeded in any different way than he

has done. Nor do we perceive that in doing so he is asking for relief either radically or substantially different from what he might have been entitled to had Finnell lived and, after resorting to his right at law, had sought a court of equity to have the cloud of these fraudulent deeds removed from his legal title.

Whether a creditor proceeds in equity after judgment, execution, and sale to set aside fraudulent deeds of his debtor, or proceeds upon his allowed claim in probate as a judgment to set aside similar conveyances, there is no substantial difference in the relief sought. In the one case he seeks to have the fraudulent deeds set aside as a cloud upon the title which, by virtue of his judgment and sale thereunder, he acquired. In the other by virtue of his judgment (because an execution and sale is denied him through the circumstance of his debtor's death) he seeks to have the fraudulent deeds declared void and the property subjected to the equitable lien under his judgment. In either case the actions are substantially to obtain the same relief, to have the conveyances declared void as clouds upon title. In the one case as a cloud upon the legal title; in the other as a cloud upon the lien of the judgment of plaintiff. Though fraud may be involved in either case, it is not the gist of the action. To apply the language of the court in *Hager v. Shindler* to this case, the "cause of action does not exist in the detached or isolated facts that the deeds in question were given with the intent charged"—in fraud of creditors—but of the fact that the conveyances were a cloud upon title. The right of the plaintiff to bring his action in the case cited it is there said did "not antedate the facts in which it had its origin." Neither did the right of the plaintiff here. His right originated with the allowance of his claim in probate. When he secured this judgment for the first time, these fraudulent deeds constituted a cloud upon the equitable lien which, under it, he was entitled to enforce against them. This was the character of the relief that the court granted to plaintiff. It declared the conveyances void, impressed the property with a lien in favor of plaintiff under his judgment, and directed its sale for the purpose of satisfying it. In this view the present action must be governed by the principle announced in *Hager v. Shindler*, and the bar of the section of the statute of limitations relied on by appellants has no application. It equally follows that the other defense of laches is governed by the same principle.

We do not discuss the further point made by the appellants that the statute of limitations and the bar of laches could not, in any event, commence to run until a judgment at law has been obtained by the creditor, or what was equivalent to such a judgment, the allowance of his claim in probate proceed-

ings, and that as the action was brought immediately after the allowance of the claim of plaintiff, no bar could occur, respondent citing *Forde v. Exempt Fire Co.*, 50 Cal. 299; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. We are satisfied to dispose of the case upon the broader principle laid down in *Hager v. Shindler*, and the cases following it, which in our judgment effectually dispose of the defenses relied on by the appellants, and under which the findings attacked must be sustained.

The judgment and orders appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

On Rehearing.

PER CURIAM. The statement in the opinion that "it equally follows that the other defense of laches is governed by the same principle" is not to be taken as holding that laches is to be governed by the same rule as applies to limitations, but only that, under the record in this case, no laches is shown.

In re LAND'S ESTATE. (Sac. 2,157.)

(Supreme Court of California. Dec. 11, 1913.
Rehearing Denied Jan. 10, 1914.)

1. WILLS (§ 322*)—CONTESTS—ORDER OF PROOF.

Under Code Civ. Proc. § 1307, providing, relative to the probate of a will, that any person interested may appear and contest the will, and section 1327, providing that when a will has been admitted to probate any person interested may, within one year after such probate, contest the will or its validity, the trial court may require the contestant to establish his interest before proceeding with the trial of the issues involving the validity of the will, and, if the question of interest is determined against the contestant, should dismiss the contest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 762-765; Dec. Dig. § 322.*]

2. JURY (§ 19*)—RIGHT TO TRIAL BY JURY—PROBATE PROCEEDINGS.

The constitutional right to a trial by jury does not apply to proceedings in probate.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

3. JURY (§ 19*)—RIGHT TO TRIAL BY JURY—PROBATE PROCEEDINGS.

Under Code Civ. Proc. § 1330, providing that in all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party a trial by jury must be had, as in cases of the contest of an original petition to admit a will to probate, and section 1312, providing, relative to the probate of a will, that any issue of fact involving the competency of the testator, his freedom from duress, etc., the due execution and attestation of the will, or any other questions substantially affecting its validity must, on request of either party, be tried by a jury, in a proceeding to contest a will after its probate, there is no right to a trial by jury except as to the issues mentioned in section 1312; and hence, where

contestant's interest was put in issue he was not entitled to a jury trial of that question.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 104-133; Dec. Dig. § 19.*]

4. WILLS (§ 221*)—CONTESTS—PERSONS WHO MAY CONTEST WILL—"PERSON INTERESTED."

Under Code Civ. Proc. § 1307, providing, relative to the probate of a will, that any person interested may appear and contest the will, and section 1327, providing that when a will has been admitted to probate any person interested may, at any time within one year, contest the will or its validity, a person given a legacy of \$5,000 by a will which was revoked by a subsequent will, which gave him a legacy of the same amount, had no interest entitling him to contest the subsequent will, where there was nothing to indicate that there was any possibility that he would not receive payment of the legacy in full, or that there was any such difference in the terms of the wills as to make his situation as a legatee more precarious under the subsequent will than under the earlier will, since a "person interested" is a person having such a pecuniary interest in the devolution of the testator's estate as may be impaired or defeated by the probate of the will or benefited by setting it aside.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 539-541; Dec. Dig. § 221.*]

For other definitions, see Words and Phrases, vol. 6, p. 5336.]

5. WILLS (§ 288*)—CONTESTS—BURDEN OF PROOF.

In a proceeding to contest a will, where contestant's interest is put in issue by the pleadings, the burden is on him to show his interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 651, 652, 662, 664; Dec. Dig. § 288.*]

6. WILLS (§ 384*)—HARMLESS ERROR—ERRORS AFFECTING PARTY NOT ENTITLED TO SUCCEED.

In a will contest, the refusal of the trial court to issue a citation for service on legatees and devisees residing without the state, if erroneous, was not prejudicial to contestant, where the trial court properly held that he had no such interest as entitled him to maintain the contest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 855-858; Dec. Dig. § 384.*]

7. WILLS (§ 263*)—CONTESTS—JURISDICTION—SERVICE OF CITATION.

In a will contest, the refusal of the trial court to issue a citation for service on legatees and devisees residing without the state did not deprive the court of jurisdiction to proceed with the trial as to contestant and such defendants as had been served with citation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 608-612, 614; Dec. Dig. § 263.*]

Department 1. Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Proceeding by Alexander W. Morrison to contest an alleged will of William Land, deceased. From a judgment dismissing the contest and an order denying a new trial, contestant appeals. Affirmed.

W. A. Gett, of Sacramento, for appellant. William H. Ashby, Dunn, Cowan & Brand, R. T. McKisick, and White, Miller, Needham & Harber, all of Sacramento, for respondent.

ANGELLOTTI, J. Within a year after a paper dated October 31, 1911, purporting to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be the last will of deceased, William Land, was admitted to probate as the last will of said deceased, one Alexander W. Morrison contested the same upon some of the grounds specified in section 1312, Code of Civil Procedure, filing a petition in writing containing his allegations against the validity of the will, and praying that the probate thereof be revoked. Answers were filed by persons interested in maintaining the will, including the executor and executrix. The superior court, on motion of these persons, determined that Morrison must first establish his interest before it would proceed with the trial of the issues of fact relating to the validity of the will. A trial on the question of interest of Morrison was had before the court, without a jury, and the court found and adjudged that Morrison had no such interest as authorized him to contest the will, and gave judgment of dismissal of his contest. We have here an appeal by Morrison from this judgment and from an order denying his motion for a new trial.

[1] 1. Only a person "interested" may maintain a contest to an alleged will, either before or after probate. Code Civ. Proc., §§ 1307, 1327. It is clear that where the interest of a person seeking to contest an alleged will is not established by the pleadings, the trial court has the power to require the contestant to establish his interest before proceeding with the trial of the issues involving the validity of the asserted will. See *Estate of Edelman*, 148 Cal. 233, 236, 82 Pac. 962, 113 Am. St. Rep. 231; *Estate of Wickersham*, 153 Cal. 603, 612, 96 Pac. 311; *In re Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134. As said in the *Wickersham* Case, "it is within the discretion of the court to control the order of proof and require the contestant first to establish his interest." It is sometimes to the interest of all parties that this question should be determined before proceeding with the trial of the other issues. If the question of interest is determined against the contestant, no further proceedings under the contest are necessary or proper, and, as said in *In re Garcelon*, *supra*, the orderly course of procedure requires that the court should dismiss the contest.

[2, 3] 2. Contestant was not entitled to have the question of his interest determined by a jury. It was definitely decided in *Estate of Dolbeer*, 153 Cal. 652, 657, 96 Pac. 266, 15 Ann. Cas. 207, that the right to a trial by jury secured by the Constitution has no reference to or bearing upon proceedings in probate, and that the right to a trial by jury in probate proceedings exists only where the statute expressly confers such right. No such right, in so far as the question of interest of the contestant is concerned, is conferred by any statute of this state, unless it is conferred by section 1330, Code of Civil Procedure. That section provides that "in all cases of petitions to revoke the probate

of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, *a trial by jury must be had as in cases of the contest of an original petition to admit a will to probate.* * * *

(The italics are ours.) We are thus referred to the statutory provision as to a trial by jury in contests before probate, which is section 1312, Code of Civil Procedure. That section in terms limits the issues of fact that may be tried by a jury upon the request of either party to those substantially affecting the validity of the will, specifying, in four subdivisions, the competency of the decedent to make a will, his freedom from duress, fraud, etc., the due execution of the will, and "any other questions substantially affecting the validity of the will." We are satisfied that section 1330, Code of Civil Procedure, must be construed as giving only such right to a trial by jury as is given by section 1312, Code of Civil Procedure, in so far as the issues to be determined by the jury are concerned, and that consequently the lower court did not err in disallowing appellant's demand for a jury trial upon the question of his interest.

[4, 5] 3. It is contended that appellant's interest was established by the pleadings, and by the evidence introduced by respondents on the hearing, appellant having refused to introduce any evidence on the question in the absence of a jury. Appellant is not an heir at law of the deceased. His alleged interest, as shown by his petition for a revocation of the probate of the will, is that by a will executed by deceased prior to that of October 31st, deceased gave and bequeathed to him the sum of \$50,000, and that, in view of the alleged invalidity of the will of October 31, 1911, such will had never been revoked or modified, and still remains in full force as the last will of deceased. The answer denied that any prior will gave appellant any sum exceeding \$5,000, and the answer of numerous parties, including the executor and executrix of the last will, alleged that the same sum of \$5,000 is given and bequeathed to appellant by the later will of October 31, 1911, which is the will here contested by him. They further deny that the prior will was not revoked, and expressly allege its revocation on October 31, 1911, and that it is no longer of any force or effect.

As we have said, at the trial on the question of interest, contestant expressly refused to introduce any evidence, learned counsel relying upon his demand for a jury, saying to the court, "we decline, your honor, in the absence of the jury to offer any testimony." It cannot be disputed that, if there was any issue on the subject, the burden was on contestant to show his interest. Notwithstanding his refusal to offer any evidence, respondents called as a witness Mr. C. H. Dunn, an attorney at law, and examined him upon the matter. He testified substantially that he

had been attorney for deceased for many years next preceding his death, drew the will of October 31, 1911, and that he had in March, 1909, prepared a prior will which was executed about April 2, 1909, and also a codicil thereto in no wise affecting the will so far as was material to any question here. He had a letter press copy of the prior will, except for dates and signatures, which he produced, and which was received in evidence. In it was the following provision as to contestant, viz.: "Twelfth. I give and bequeath to Alex. W. Morrison, of Sacramento City, California, the sum of Five Thousand Dollars," and this was the only provision in his favor. The trial court found that contestant was given a legacy of \$5,000 by the later will of October 31, 1911, and that this was so is admitted in the brief of learned counsel for appellant. It also found that the only provision in favor of Alexander W. Morrison in the prior will was the legacy of \$5,000 to which we have already referred. There is absolutely nothing to indicate that the circumstances of the estate are such that there is any possibility that contestant will not receive payment in full of his legacy of \$5,000 under the later will, or that there is any such difference in the terms of the wills as to make his situation as a legatee more precarious under the latter will than it would have been under the former.

We are thus brought to the question of what is meant by the words "any person interested," as used in section 1327, Code of Civil Procedure, conferring the right upon any person interested to contest the validity of a will within one year after it has been admitted to probate. It may freely be conceded that if it is made to appear that a person has such an interest as may be impaired or defeated by the probate of the will, or benefited by setting it aside, he is a person interested. This would appear to be the common sense meaning of the term, and no good reason can be made to appear for giving it a broader or different meaning. Surely one whose only interest is a legacy under a prior will giving him \$5,000 from the estate of the deceased person cannot be prejudicially affected by a later will which insures him the same amount, payable at the same time. Our examination of the authorities leads us to the conclusion that this is the meaning generally attributed to such words by the courts. In Illinois it has been held that the term "any person interested" means "those having a direct pecuniary interest affected by the probate of the will." See *Seiden v. Illinois Trust & Sav. Bank*, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180. In a note to the case last cited in the *American State Reports*, this question is exhaustively considered, and many authorities are cited. In one or two cases in other states it appears to be intimated that heirs at law of a deceased are always "persons in-

terested," within the meaning of the term as used in such statutes. While as a rule, the heirs at law have such an interest as would entitle them to contest a will, as is said in the note referred to, "but as the statute contemplates a legal interest and not merely a grievance to the feelings of propriety or sense of justice, it is not in every case that even an heir at law can contest the will of his ancestor." As illustrations of cases where he may not so contest, we have in this state such cases as *Estate of Edelman*, supra, and *Estate of Wickersham*, supra. We have found no better statement as to who come within the term than that contained in *Bloor v. Platt*, 78 Ohio St. 46, 84 N. E. 604, 14 Ann. Cas. 332, viz.: A person having such a "pecuniary interest in the devolution of the testator's estate as would be impaired or defeated by the probate of a will or be benefited by setting aside the will." *Estate of Benton*, 131 Cal. 472, 63 Pac. 775, hardly goes to the extent claimed for it by appellant. The contestant was the widow of deceased. It was claimed by the appellant therein that the petition of the contestant was substantially insufficient in not showing that she was beneficially interested in defeating the probate of the will. The court disposed of this claim very briefly saying: "It is only necessary to say that she shows herself to be an heir at law of decedent, and that fact gives her the right of contest. As bearing upon this right, it is immaterial that the will attacked *possibly* gives her a larger share of the estate than she could take as an heir at law." (The italics are ours.) We have no doubt upon the proposition that ordinarily a petition showing that the contestant is an heir at law of the deceased sufficiently shows the requisite interest to contest a will. As we have seen, however, the heir at law may be without such right by reason of other facts. *Estate of Edelman*, supra; *Estate of Wickersham*, supra. So that the statement in the opinion referred to that the mere fact that one is an heir at law "gives her the right of contest" may not be taken as being true under all circumstances. And surely an heir at law could not be held to be without the requisite interest to contest merely because the will attacked, if sustained, may "possibly" result in giving him a larger share than he would obtain as heir at law, if there were no will. If the interest is one that *may* be impaired or defeated by the will assailed, it is sufficient. We do not think the case cited is controlling. The other California cases cited by appellant are not in point.

We are of the opinion, therefore, that the pleadings did not establish it as an admitted fact that appellant was "a person interested," within the meaning of our statute on contests of wills, and that the answers sufficiently set up the facts showing a want of necessary interest to maintain the

contest. We are further of the opinion that the evidence introduced by respondents, contestant having refused to introduce any evidence, sufficiently showed want of such interest, and that the finding of the trial court on that subject must be accepted as sufficiently supported by evidence actually introduced.

[8, 7] Appellant earnestly claims that the trial court erred in refusing to issue a supplemental citation for service on legatees and devisees residing without the state. In view of the conclusion as to contestant's lack of interest, we deem this matter of no consequence here. As is said in *Estate of Dolbeer*, 153 Cal. 652, 661, 96 Pac. 266, 270 (15 Ann. Cas. 207): "Since contestant has failed in his petition for revocation, it could not advantage him if they (nonresident legatees and devisees) had been served. He has suffered no injury." It is not, as we understand it, and cannot be successfully claimed that the trial court was without jurisdiction to proceed with the trial as to contestant and such defendants as had been served with citation. If any error was committed by the trial court in the matter of the requested supplemental citation, which we do not concede, it was error without prejudice to appellant.

4. A motion to dismiss the appeal on the ground of appellant's lack of interest was made. We have not considered the merits of this motion, as we are satisfied that respondents can in no wise be prejudiced by an affirmance of the judgment instead of a dismissal of the appeal.

5. We are not satisfied that damages should be imposed upon appellant upon the ground that his appeal is frivolous.

No other matter suggested in the briefs requires notice.

The judgment and order appealed from are affirmed.

We concur: SLOSS, J.; SHAW, J.

SHERMAN v. LEWIS. (L. A. 3,219.)

(Supreme Court of California. Dec. 10, 1913.)

APPEAL AND ERROR (§ 113*)—ORDERS APPEALABLE.

Under Code Civ. Proc. § 963, enumerating the orders which are appealable, an order denying a motion to vacate a default is not appealable.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 758-785; Dec. Dig. § 113.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. H. A. Sherman against G. H. Lewis. From an order denying a motion to vacate a default, defendant appeals. Dismissed.

Will H. Holcomb and Chester O. Kempley, both of Los Angeles, for appellant. Stutsman & Stutsman, of Los Angeles, for respondent.

SHAW, J. In the lower court the defendant Lewis moved the court for an order setting aside and vacating a default thereinbefore entered against him by the clerk because of his failure to answer the complaint within the time allowed by a special order of the court. Upon the hearing this motion was denied. No further proceedings have been taken in the case against Lewis. No judgment has been given as to him. Thereupon he filed a notice, stating therein that he "hereby appeals to the Supreme Court" from the order denying his motion to vacate said default. Upon this notice, treating it as an appeal, he has filed in this court a printed transcript of the complaint in the action and a bill of exceptions containing his notice of motion, the affidavits filed in support thereof, and a recital that the motion was denied.

The plaintiff makes the objection that the order denying the motion to vacate the default is not appealable. The objection is well taken. *Rauer's, etc., Co. v. Standly*, 3 Cal. App. 44, 84 Pac. 214. Section 963 of the Code of Civil Procedure enumerates the orders and decisions of the superior court from which an appeal will lie, and an order of this character is not among those mentioned. It is proper to say that the complaint shows that the action was begun against a large number of persons, and that so far as appears it is still pending in the lower court for further proceedings and has not yet reached final judgment. An attempt to appeal from a nonappealable order does not give this court jurisdiction or authority to review it.

It is ordered that the proceedings in this court be dismissed.

We concur: ANGELLOTTI, J.; SLOSS, J.

WILLS v. WILLS et al. (L. A. 3,099.)

(Supreme Court of California. Dec. 10, 1913.)

Rehearing Denied Jan. 9, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION—CONCLUSIVENESS.

A decree of distribution, adjudging that the estate of testator belongs to his widow in fee, rendered on the petition of the executors, praying that the estate may be distributed to the widow, is a conclusive adjudication that the widow takes the fee free from any trust in favor of an executor, claimed to have been created by the will, since the decree supersedes the will and involves a judicial construction of the will.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

2. EXECUTORS AND ADMINISTRATORS (§ 315*)—DECREE OF DISTRIBUTION—CONSTRUCTION.

It is only when, by apt language, a will is incorporated in a decree of distribution that resort may be had to the will to determine the distributees and their rights, and in all other cases the decree alone determines the rights of the parties.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.*]

3. EVIDENCE (§ 80*)—PRESUMPTIONS—LAWS OF OTHER STATES.

It is presumed that the law of a sister state governing the distribution of the property of deceased persons is the same as the law of California on that subject.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101; Dec. Dig. § 80.*]

4. APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

5. TRUSTS (§ 44*)—ESTABLISHMENT—EVIDENCE—SUFFICIENCY.

In a suit to establish a parol trust in favor of plaintiff in property, the legal title to which is in defendant, evidence held to support a finding that there was no trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

6. TRUSTS (§ 283*)—CONVEYANCE TO TRUSTEE—FRAUD.

An owner conveyed his land to a sister in trust for his use. With his consent, she conveyed it to a third person on the same trust. Subsequently the third person agreed to purchase the property for \$50,000, in part by assuming the owner's indebtedness, estimated at not over \$30,000, and the balance in money, of which the third person paid \$1,000 in cash and gave a note for \$19,000. The third person paid a further cash consideration of over \$15,000, and relieved the owner of debts aggregating over \$25,000. Held, that the owner was not defrauded of his property.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 403, 404; Dec. Dig. § 283.*]

7. TRUSTS (§ 44*)—ESTABLISHMENT—EVIDENCE.

A widow to whom the estate of testator was decreed in fee, disclosed by sundry wills a design to treat the son and daughter of the marriage equally, and thereby carry out testator's desires. Subsequently, by her last will, which was admitted to probate, she left all the estate to the daughter. The widow had also declared to the son her intention to treat the children equally. Held that the daughter had the legal title freed from any trust in favor of the son.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 66-68; Dec. Dig. § 44.*]

8. APPEAL AND ERROR (§ 1160*)—DISPOSITION OF CASE ON APPEAL—SETTLEMENT OF PARTIES.

Where, in a suit against two defendants to establish a trust in real estate, the complaint alleged that a defendant was a half owner of the land in controversy, and she answered, admitting ownership, and the issue was only on the question of the trust, the court on appeal from a judgment against plaintiff will not reverse the case merely because of the statement on oral argument that, pending the appeal, a settlement had been made between plaintiff and

codefendant, disposing of the question affecting the property.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4519; Dec. Dig. § 1160.*]

Department 2. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by W. L. Wills against M. F. Wills and another. From a judgment for defendants, and from orders denying motions for new trial and for a vacation of the judgment, plaintiff appeals. Affirmed.

George H. Smith, and McNutt & Hannon, all of Los Angeles (O'Melveny, Stephens & Millikin, of Los Angeles, of counsel), for appellant. J. W. McKinley, John D. Pope, and Flint, Gray & Barker, all of Los Angeles, for respondents.

HENSHAW, J. Plaintiff sued his sister, the defendant Madeline F. Wills, and Louise E. M. Brainerd, personally and as executrix of the last will of his mother, Charlotte L. Wills, deceased, seeking to establish a trust in certain properties, title to which is admittedly in these defendants. The court gave judgment against him, which judgment he moved to vacate. He also moved for a new trial. Both motions were denied, and he has appealed from the judgment and from the orders so denying his motions.

The complaint charged in several counts. The first set up the will of John A. Wills, father of plaintiff and defendant M. F. Wills, and alleged that by the terms of this will an express trust was created in favor of plaintiff in and to one-half of the property left by the father. So far as affects the matters here in controversy, it is sufficient to say that John A. Wills left as heirs at law his widow, Charlotte, and the two children, plaintiff and defendant herein. After certain legacies, he gave and devised to his wife "all the rest and residue of my estate, both real and personal and mixed, in whatever it may consist, and wherever situated at the time of my decease." By succeeding paragraphs he voiced his "desire and request" that his wife "make liberal provision out of the said property during her lifetime for our son William and our daughter Madeline," and further "desired and requested" her to leave "so much of the property as shall remain in her hands unexpended to our said son and daughter." He also "desired and requested" his wife "not to dispose of the undeveloped and unproductive property in Duluth, in the state of Minnesota, so long as there shall be a reasonable prospect of additional increase in the value thereof." And finally, in paragraph 12 he declares as follows: "In making the above requests of my said wife, I desire it to be fully understood that she shall have full power to dispose of the property above bequeathed and devised to her; either for the purposes aforesaid, or for any of them,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or for any other purpose, and for her use and benefit, or otherwise, as she may think proper, it being my intention to vest in her the title and use of the property devised and bequeathed to her, subject to no condition, except that she shall, by will or otherwise, leave whatever may remain of said property in her hands, at the time of her death, to our said children, or their issue. And also, that she shall during her lifetime make a reasonable provision for our said children or their issue, as aforesaid." Upon this language appellant contends that there was created not a mere precatory trust, but an express and definite testamentary trust. But we are believed from the necessity of and, indeed, denied the power to consider this question by force of the following facts: Testamentary proceedings were had in the matter of the will and estate of John A. Wills, deceased. His son, plaintiff herein, was an executor of that will.

[1, 2] Under these proceedings decrees of distribution were entered in the probate courts both of California and Minnesota. These decrees covered all of the property of John A. Wills, deceased. The attorneys representing plaintiff, executor in these proceedings, were the same attorneys who drew the will. The plaintiff executor and his coexecutor in their petition for distribution prayed that "the estate remaining in the hands of your petitioners as aforesaid may be distributed to the said party entitled thereto as aforesaid, to wit, the whole thereof, to the said Charlotte L. Wills." The decree of distribution "adjudged and decreed that the residue of the said estate hereinafter particularly described, and other property not now known or discovered, which may belong to the said estate or in which the said estate may have an interest, be and the same is hereby distributed as follows: The whole thereof to Charlotte L. Wills." In the probate court of the county of St. Louis, state of Minnesota, the decree of distribution there found and declared: "That said John A. Wills left a last will and testament, by the terms of which said will all of said real estate is devised to Charlotte L. Wills, widow of said deceased, in fee. Wherefore it is ordered and adjudged that the real estate aforesaid be and the same is hereby assigned to said Charlotte L. Wills, widow of said deceased, in fee simple." These decrees stand unassailed, and they are conclusive determinations against the existence of any trust in favor of plaintiff under the will of his father. *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323; *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; *Estate of Trescony*, 119 Cal. 568, 51 Pac. 951; *Williams v. Marx*, 124 Cal. 22, 56 Pac. 603; *More v. More*, 133 Cal. 494, 65 Pac. 1044; 66 Pac. 76; *Martinovich v. Marsicano*, 137 Cal. 354, 70 Pac. 459; *Keating v. Smith*, 154 Cal. 188, 97 Pac. 300.

It will not do to argue, as is here done, that because the property must have been distributed to the widow in any and in all events, resort may be had to the will, from which it will be discovered that it was distributed to her as trustee under a trust. Only where by apt language the will is incorporated into the decree, as in *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50, may this be done. *Goad v. Montgomery*, supra. In all other cases the decree speaks for itself alone, and without the aid of the evidence upon which it was based, and the will itself is only such evidence. "The decree supersedes the will and prevails over any provision therein which may be thought inconsistent with the decree." *Goad v. Montgomery*, supra. "Where a trust has been created by will, the validity of the trust is necessarily involved in the question of distribution; for if invalid, the bequest fails. *Estate of Walkerly*, 108 Cal. 660 [41 Pac. 772, 49 Am. St. Rep. 97]. Hence, as necessary to distribution, 'it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate, derived from the will.'" *More v. More*, supra. "The decree was necessarily a judicial construction of the will and of the several interests of the distributees, and cannot be assailed collaterally. There is no doubt or uncertainty in the decree itself as to plaintiff's title, and to that alone we are permitted to look." *Williams v. Marx*, supra.

[3] It is, of course, a legal presumption that the law of Minnesota in this respect is the same as our own. But it is not necessary even to rest upon this legal presumption, for in fact such is the Minnesota law. *Greenwood v. Murray*, 28 Minn. 259, 2 N. W. 945; *Bengtsson v. Johnson*, 75 Minn. 321, 78 N. W. 3; *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99, 69 L. R. A. 785.

[4] The next contention of appellant embraced in the second count of his complaint amounts to a twofold charge against the defendant, his sister. The charge is this: That the sister played upon the mother's fears, inducing her to believe that through business incompetence and extravagance the son would wreck the family fortune, and, by force of these fears and the exertion of undue influence, induced the mother to deed to the daughter different parcels of real estate of great value. But the daughter represented that she would hold these lands under a trust to devote one-half of the income and in-time convey one-half of the fee to the son and brother; that under these representations and with this understanding the mother so conveyed the property and the daughter since the death of the mother has repudiated the trust.

[5] These conveyances were made by the mother to the daughter at different times and under differing circumstances. But before taking up the consideration of the titles to

the separate parcels, a word may be said of the family relationship. John A. Wills died in November, 1891. The son and the daughter continued to live with their mother for some 13 years, when the son married and left the maternal home. During that time he engaged in certain business ventures which were not prosperous, and because of which the women of the household feared action upon the part of his creditors which might prove disastrous to their financial interests. The first of these parcels was known as the Spring street lot. In 1895 Mrs. Wills conveyed the lot to her daughter. Miss Wills held possession of the property, paid all taxes upon it continuously ever since, and the court found that she had a good prescriptive title to it. The notary who took Mrs. Wills' acknowledgment to the deed testified that at the time of executing it she declared that she was conveying the property to her daughter for the purpose of insuring the daughter an income. Mrs. Wade, sister of Mrs. Wills, testified in reference to one of the wills Mrs. Wills had made (she made a number during the years of her widowhood, which were admitted in evidence) that she said to her sister, "You don't say anything at all about the Spring street property in your will," to which the sister replied, "No, because I have had nothing to do with it for a number of years. It belongs to Fannie" (Fannie being Madeline F. Wills, defendant herein). In February, 1904, plaintiff, wrote to his mother that, "fully realizing that the Spring street lot was your own property and that you had a right to deed it to my sister, I hereby relinquish all right in that property and freely unite with you in the gift, so that she may always be provided for." The finding of title in Miss Wills without any trust is thus fully supported.

The second parcel consists of what is known as the home place, which was conveyed by Mrs. Wills to her daughter on April 30, 1895, "to be held in trust by the said Madeline Frances Wills for my children, William Le Moyne Wills and said Madeline Frances Wills, in equal undivided ownership and interest." In 1903 the son and daughter united in conveying the property back to Mrs. Wills, and on the same day Mrs. Wills again conveyed the property, to her daughter. This reconveyance seems to have been made in view of the financial difficulties in which plaintiff had become involved, plaintiff testifying that there was "some talk about my being sued for a deficiency judgment, and my mother wanted to put the house out of the way, my interest in the house out of the way of a suit against me so that my sister and I, on Mr. Winder's advice, conveyed the home place back to my mother." There was a sharp conflict in evidence about the continuation of the trust under the reconveyance back to the sister, the sister denying that

the home place was redeeded to her upon any trust, the plaintiff asserting that it was upon the same trust, resting in parol. Under this conflict the court found that the mother "gave said property absolutely and in fee simple to defendant Madeline F. Wills, and said Madeline F. Wills is the owner thereof in her own right, free from any trust in favor of plaintiff." This finding, under the evidence, cannot here be disturbed.

The third parcel of land is real estate in the city of Los Angeles, title to which is in defendant Miss Wills and defendant Mrs. Brainerd, as tenants in common. Previous to the acquisition by Miss Wills of this Los Angeles property her mother had conveyed to her certain real estate in Duluth, Minn. Some of this Duluth property consisted of lots, title to which was derived by Mrs. Wills through the decree of distribution in her husband's estate, but far the more valuable portion of which she had herself owned since 1875. Miss Wills sold all of this property, receiving therefrom the sum of \$47,000, \$20,000 of which she invested with Mrs. Brainerd in the Los Angeles property; their interests being equal. Plaintiff's contention is, that all of the Duluth property belonged to his father's estate, came to his mother charged with the testamentary trust which we have before considered, and was conveyed by his mother to his sister upon a like trust in his favor. Miss Wills' testimony is in direct opposition to this, and one of the wills of Mrs. Wills, dated shortly after the sale of the Duluth property and the acquisition by her daughter of the Los Angeles property, declares as to the latter "the one-half of said property, held in the name of my said daughter is her sole and separate property, and I hereby confirm the title thereto in her." The court found that no trust in favor of the plaintiff attached to this property, and again it is to be repeated that under the condition of the evidence this finding may not here be disturbed.

[8] The fourth parcel of real estate consists of a number of lots in the city of Los Angeles, which for convenience may be called the "Montana tract." These lots were owned by the plaintiff in January, 1904, when he conveyed them to his sister, to be held in trust for his use and benefit. In March, 1904, with his consent, she conveyed the property to the defendant Brainerd "to be held upon the same uses and trust." Mrs. Brainerd held the property, paying street assessments and taxes upon it, until December, 1905, at which time she agreed to purchase the lots from plaintiff "for the sum of \$50,000, to be paid in part by her satisfying or assuming the indebtedness of the plaintiff, estimated not to exceed \$30,000, and the balance in money, of which she paid \$1,000 to plaintiff in cash, and executed her note to him for the sum of \$19,000, to be paid without interest in monthly installments of \$300."

Plaintiff alleged that this deed to Mrs. Brainerd was made without any consideration, and he alleges that it was taken by Mrs. Brainerd, though without his knowledge, as "partner of the firm of Brainerd & Wills" (Wills being his sister). Elsewhere, however, he makes the inconsistent allegation that "to induce the acceptance of this proposition the defendant Brainerd represented to plaintiff that she proposed to associate defendant Wills with her in the ownership of the property, so that the same would then become the property of the Wills-Brainerd partnership. * * * In this transaction the dealings of the plaintiff were with the defendant Brainerd, but in fact the plaintiff is informed and believes, and upon such information and belief alleges, that defendant Brainerd acted in the transaction for herself and the defendant Wills, partners as aforesaid, and that defendant Wills authorized her action in said transaction and the representations made by her, and inducements held out by her to enter into the same." To this the joint answer of defendant Wills and Brainerd asserted that the defendant Wills, at the request of defendant Brainerd, agreed with her, "when she purchased said property that she would on request of defendant Brainerd take a half interest therein, and she has since been requested by defendant Brainerd to take such interest, and has done so." Plaintiff further alleges as the foundation for his grievance in this transaction that the estimate of the indebtedness was largely in excess of the fact; that no more than \$8,000 or \$7,000 of his indebtedness has in fact been paid by the defendants, and that the defendant Brainerd further represented to him that his sister, in taking the one-half interest in the property, would hold a moiety of that interest in trust for him. And while these representations were made by defendant Brainerd and not by his sister, he alleges, upon information and belief, that they were authorized by his sister so to be made.

The evidence discloses that the list of debts was furnished to Mrs. Brainerd by the plaintiff, and the debts so declared by plaintiff aggregated \$25,750. Plaintiff was paid \$1,000 in cash, and received Mrs. Brainerd's note for \$19,000, and he has received still further of the cash consideration over \$15,000, and up to the time of the judgment he had demanded and received 20 monthly installments of the purchase money under his contract, and he has been relieved of his debts. It is not readily to be perceived the grounds upon which, under this state of facts so found by the court, the plaintiff can contend, as he does, that he was defrauded, or that a trust in his favor arose from his sister's acquisition of one-half of the title. The contention of fraud is discredited by the findings, as is also the trust. It would appear, however, that the trust contended for is that

which runs throughout the case as appellant argues it, namely, that all of the property which the mother conveyed to the daughter was under the trust, and that the daughter in paying some of his debts, as she did, was but giving him what was his own, and that in buying an interest in this property, as she did, she was buying equally for his use and benefit. But the court finds against the existence of such a trust, and without this foundation all of the superstructure of appellant's argument falls to the ground.

[7] It would be vain to follow in detail appellant's argument and analysis of the evidence bearing upon this trust. Eliminating, as must be eliminated, the asserted trust in the will of the husband, it amounts to this: That Mrs. Wills was a kind and loving mother, equally devoted to the welfare of both children; that she was greatly and properly impressed by the charges and injunctions in her husband's will; that it is certain that such a mother would treat both children equally; that in the earlier wills which she made were dispositions of her property, showing that she designed to treat them equally. There are the declarations of the plaintiff that his mother so told him, and from these and like facts and circumstances it is declared that an "irresistible presumption arises that the daughter took and held all these properties upon this trust." The answering evidence and the findings of the court have been mentioned. It would seem plain that whatever was the original intention of the mother, she had changed her mind about an equal division of the property, and in view perhaps of the fact her son was a physician in good practice, or for some other reason to her mind sufficient, she made these gifts and conveyances to her daughter, as she had the legal right to do. Mrs. Wills died in 1908. By her last will, which was admitted to probate, which will was dated in 1904, she left the property of her estate to her daughter, requiring her to pay to the plaintiff the monthly sum of \$100 during his lifetime, provided he did not contest the will. It appears in evidence that plaintiff's business ventures were unwise, extravagant, and unprofitable. While he testifies that he always had a good practice and a fair income, he apparently did not confine his activities to his profession of medicine. Without means other than such as he could secure from his mother, he was constantly in debt, and she and his sister constantly were called upon to pay his debts. During all his business career the mother had witnessed a succession of business extravagances and failures. She so writes to him in 1902. His debts at that time, or his liabilities, apparently amounted to at least \$50,000. The conduct of the mother, therefore, under the circumstances, was not unnatural, and certainly was within her legal right.

[8] It was stated upon oral argument that

subsequent to the taking of this appeal a settlement had been made between the plaintiff and the defendant Brainerd disposing of all questions affecting the Montana tract, and upon this statement this court was asked to reverse the case so far as the findings and judgment affected the Montana tract. This motion, thus informally made, was based upon the statement of a settlement the nature of which was not disclosed to the court, and upon the assertion that the defendant Wills was not a party interested in or affected by the findings and judgment relating to the Montana tract. But the allegation of plaintiff's complaint charged her with being a half owner in the tract; the answer of defendant Wills admitted this ownership; there was no issue over that phase of the case, the issues therein being that she held this ownership in trust, and we can perceive no reason why the motion, thus made at oral argument, should be granted, and it is therefore denied.

What has heretofore been said concerning the asserted trust applies with equal force to other minor gifts made by the mother to the daughter. It would be unprofitable to pursue the discussion further.

For the foregoing reasons the judgment and orders appealed from are affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

JAUMAN v. McCUSICK. (L. A. 3,237.)

(Supreme Court of California. Dec. 9, 1913.)

1. BROKERS (§ 60*)—RIGHT TO COMMISSION—PERFORMANCE OF CONTRACT.

Under a contract providing that real estate brokers should be paid a commission for their services in securing an agreement for the exchange of property, they were entitled to their commission when the particular agreement, after being secured by them, was entered into, although it was subsequently abandoned by the parties without the brokers' fault.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 91; Dec. Dig. § 60.*]

2. BROKERS (§ 49*)—RIGHT TO COMMISSION—PERFORMANCE OF CONTRACT.

A broker authorized to sell real estate is not ordinarily entitled to the agreed commission unless he has, pursuant to his contract and within the time limit therein, found a purchaser ready and willing to purchase on the terms specified.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.*]

3. ASSIGNMENTS (§ 32*)—VALIDITY—PARTNERSHIP CLAIM—BROKERS' COMMISSION.

Where two partners assigned to a third the contract under which the three were entitled to a commission as brokers, the assignment was valid and vested ownership of the entire claim in the third partner, though it did not purport to be made in the partnership name.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 62, 63; Dec. Dig. § 32.*]

4. ASSIGNMENTS (§ 41*)—DESCRIPTION OF SUBJECT-MATTER—SUFFICIENCY.

An assignment of "the within contract," when indorsed on the contract assigned, was

sufficient in its description of the subject-matter to transfer to the assignee all rights of the assignors under the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76, 77; Dec. Dig. § 41.*]

5. BROKERS (§ 67*)—EMPLOYMENT CONTRACT—VALIDITY—DUAL CAPACITY.

An agreement to pay a commission to a firm of real estate brokers was not invalid because they were also to be paid a commission by the other parties to the transaction, where such fact and the dual capacity in which the brokers were acting appeared on the face of the agreement.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 52-54; Dec. Dig. § 67.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by R. E. Jauman against Flora McCusick. From a judgment for plaintiff, defendant appeals. Affirmed.

J. Wiseman Macdonald, of Los Angeles, for appellant. Haas & Dunnigan, of Los Angeles, for respondent.

SLOSS, J. The plaintiff sued, as assignee of a firm of real estate brokers, to recover \$1,850, claimed to be due said firm for services in securing an agreement for the exchange of certain property in Imperial county, owned by defendant, for other property situated in Los Angeles county. The judgment went in favor of the plaintiff for the amount demanded. The defendant appeals from the judgment and from an order denying her motion for a new trial.

W. E. Stockwell, V. E. Stockwell, and R. E. Jauman, the plaintiff, were partners in the business of real estate brokers under the firm name of V. E. Stockwell & Co. Following certain negotiations between said firm, Mrs. McCusick, and the owners of the Los Angeles property, the latter, George C. Miller and Thomas M. Dicken, on the 7th day of April, 1908, signed and delivered to V. E. Stockwell & Co., a paper reading, in its material parts, as follows:

"Agreement for Exchange.

"This agreement witnesseth: That I have placed with V. E. Stockwell & Company * * * the following described property belonging to me, situate, lying and being in the city of Los Angeles, county of Los Angeles, and state of California, and particularly described as follows: One house and lot, situate at No. 1668 Lenox Ave., taken at consideration of \$6,500, said property being subject to an incumbrance of \$3,200. * * * Insurance on said property to be assigned to said party of the second part, together with \$4,000 cash to be paid on the date of transfer of papers, \$3,000 on June 15th, 1908, \$3,000 April 1st, 1909, \$4,000 April 1st, 1910, \$16,700 April 1st, 1911, with interest at seven per cent. per annum, on all deferred payments. All bills on both properties to be adjusted on

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

date of transfer of papers, which I desire to exchange for property situate in county of Imperial, state of California, described as follows, to wit: [Here follows a description of real and personal property, the ownership of which was claimed by the defendant.]

The above-described property and stock are free and clear of all incumbrances. * * *

And I hereby authorize said V. E. Stockwell & Company to act as my agents in negotiating such exchange, and agree that if they shall secure an acceptance of the proposition to exchange the above-described property on the above terms, that I will within thirty days furnish a certificate of title or abstract from a reputable and reliable abstract company and to furnish bargain and sale deed conveying a good and sufficient title to the property first above described. And I further agree with said V. E. Stockwell & Company that I have examined the above-described property to my entire satisfaction, and that when they have secured an acceptance of the proposition to exchange the above-described property on the above terms I will then pay the sum of regular commission dollars as commission for such services. And I will allow a reasonable time for the furnishing of an assignment conveying the second of the above-described properties. [Signed] Geo. C. Miller. Thos. M. Dicken. Dated at Los Angeles this 7th day of April, 1908."

Two days later, on the 9th day of April, 1908, the defendant, Flora McCusick, executed the following agreement, written upon the same piece of paper that contained the foregoing writing signed by Miller and Dicken:

"This agreement witnesseth: That I, Flora McCusick, of Heber, Imperial County Cal., owner of the second piece of property described within, hereby certify that I have examined the above first described piece of property to my entire satisfaction and accept the proposition of exchange made therein, and upon the terms therein stated and agree to furnish an assignment within thirty days, showing said property vested in me, and to then furnish an assignment conveying title to said property to parties of the first part or their assigns or representatives. And I further agree to pay V. E. Stockwell & Company \$1,850 commission for their services in securing the agreement for said exchange. Dated at Heber, Cal., this 9th day of April, 1908. [Signed] Flora McCusick."

It appears that some two or three weeks after the signing of said paper by the defendant, she, Miller, and W. E. Stockwell met at the office of a bank in El Centro, Imperial county, for the purpose of completing the transaction by making the first payment and depositing in escrow the necessary papers. On this occasion a controversy arose with regard to the payment of taxes for the fiscal year 1908-09. Mrs. McCusick's property was government land for which a patent had not yet issued. Her possessory right was assessed as personalty, and the tax, not being se-

cured by a lien upon real estate, was, under the revenue system of this state, payable at once, in advance of a levy, on the basis of the rate for the preceding year. Pol. Code, § 3820 et seq. On the other hand, the taxes upon the real property in Los Angeles, to be conveyed by Miller and Dicken, were not yet payable. In this state of affairs, Miller insisted that, under the agreement, Mrs. McCusick was required to pay the taxes for 1908-09 upon her said property, while he and Dicken were not, as he contended, called upon to pay taxes upon their real estate for that year. Mrs. McCusick declined to accede to this view, taking the position that she was bound to pay the taxes for the ensuing year on only one of the properties to be exchanged. The parties being unable to come to any agreement on this point, the negotiations were broken off and the agreement for exchange was never carried into effect. Thereafter this action was brought to recover the commission of \$1,850 agreed to be paid by the defendant.

[1] The principal contention of the appellant is that the brokers were not entitled to recover a commission for the reason that they had not procured a purchaser "ready and willing to purchase the property on the terms specified in the authorization." It may be conceded that the position taken by Miller with reference to the payment of taxes was untenable and that he was not justified in declining to consummate the transaction upon the terms demanded by Mrs. McCusick. But we are unable to see that this concession affords any answer to the demand of the brokers for the payment of their commission.

[2] It is no doubt the general rule that a broker authorized to sell real estate is not entitled to recover the agreed commission unless he shows that he has, in pursuance of his employment, and within the time limited therein, found a purchaser ready and willing to purchase the property on the terms specified. *Phelan v. Gardner*, 43 Cal. 306; *Duffy v. Hobson*, 40 Cal. 244, 6 Am. Rep. 617; *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Phelps v. Prusch*, 83 Cal. 626, 23 Pac. 1111; *Martin v. Ede*, 103 Cal. 157, 37 Pac. 199.

Here, however, the defendant's agreement was not simply to pay a commission to the brokers upon their making a sale or exchange of the property. Her agreement was to pay \$1,850 for their services in securing the particular agreement which was secured. There can be no doubt that the paper signed by Miller and Dicken, when accepted by Mrs. McCusick, constituted a binding agreement between said parties, requiring them to convey the respective parcels upon the terms stated in the writing. When Mrs. McCusick affixed her signature on the 9th day of April, 1908, she as well as Miller and Dicken, had entered into a complete and valid agreement for the contemplated exchange. As a part of the transaction, she agreed specifically "to pay V. E. Stockwell & Company \$1,850 com-

mission for their services *in securing the agreement for said exchange.*" They had then secured such agreement and had performed the exact service for which the defendant undertook to pay them a commission. The performance of their obligation was complete and their rights could not be affected by the subsequent failure of either of the parties to carry out the agreement. She did not, as did the owner in the cases cited by her, agree to pay a commission for the securing of a purchaser ready and willing to purchase the land. She agreed to pay a commission for securing a specific agreement. Such agreement having been secured, she was liable under the precise terms of her contract.

But, beyond all this, if the brokers had been employed by a writing in the ordinary form, agreeing to pay them a commission for negotiating a sale or exchange of defendant's property upon certain terms, their obligation would have been fully performed by procuring "a valid contract to purchase, which could be enforced by the vendor if his title were perfect." *Gunn v. Bank of Cal.*, 99 Cal. 349, 353, 33 Pac. 1105, and cases cited. Such contract was procured here. The payment of commissions is not "contingent upon the consummation of the sale" (*Smith v. Schiele*, 93 Cal. 144, 28 Pac. 857), and the right of the brokers, even in the case supposed, would not have been defeated by the refusal of Miller and Dicken to carry out their valid and enforceable agreement. In her answer the defendant made allegations designed to throw upon the brokers accountability for the failure of Miller and Dicken to consummate the exchange. The findings on this point are, however, in favor of the plaintiff, and they are fully sustained by the evidence.

[3] The appellant makes the contention that the evidence is insufficient to sustain the finding that V. E. Stockwell & Co. sold, assigned, and transferred its claim for the said sum of \$1,850 to the plaintiff, and that the plaintiff is now the holder and owner thereof.

The plaintiff introduced in evidence the following writing, indorsed on the foregoing agreement for exchange: "Los Angeles, Cal., September 12, 1908. For a valuable consideration we hereby sell, assign and transfer the within contract to R. E. Jauman. [Signed] V. E. Stockwell. W. E. Stockwell."

It is claimed that this does not purport to be an assignment by the partnership and that it does not therefore support the finding that the partnership assigned its demand to the plaintiff. It appears, however, that the partnership was composed of V. E. Stockwell, W. E. Stockwell, and the plaintiff. Each partner had the right to transfer his interest in the agreement or in any other partnership property, subject, of course, to the rights of creditors of the firm. Parsons on Part. (4th

Ed.) § 255. No question of creditors' rights is here involved. When two of the partners thus assigned the contract to the third, the interest of all of the partners became merged and vested in such assignee. Retaining his own interest and taking under the assignment the interests of his copartners, he became the owner of every right of the three partners in the contract. The legal effect of such transfer was precisely the same as that of an assignment purporting to transfer the claim in the partnership name.

[4] There is no force in the objection that the description of the subject of the assignment was insufficient. What was transferred was "the within contract." This language was operative to transfer to the assignee every right of the assignors under the contract.

[5] Plaintiff's rights are not affected by the fact that under the agreement commissions were to be paid by both parties to the proposed exchange. The agreement of Miller and Dicken to pay a commission appeared upon the face of the writing before Mrs. McCusick signed, and was presumably known to her. Having agreed to pay a commission with knowledge of the facts, she is not in a position to complain, whatever the situation might be, if she had been ignorant of the broker's relations to Miller and Dicken.

The judgment and the order appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

ERNST v. GANAHL. (L. A. 3233.)

(Supreme Court of California. Dec. 9, 1913.)

1. APPEAL AND ERROR (§ 994*)—REVIEW—CREDIBILITY OF WITNESSES.

The amount of credence to be given to witnesses is exclusively one for the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

2. APPEAL AND ERROR (§ 931*)—REVIEW—CONSIDERATION OF EVIDENCE.

In view of findings in favor of one for whom judgment was rendered, the evidence must, on appeal, be considered in the light most favorable to him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

3. BROKERS (§ 9*)—TERMINATING AGENCY.

A broker's agency, not specifying its duration, may be terminated at will, subject only to the ordinary requirements of good faith.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 10; Dec. Dig. § 9.*]

4. BROKERS (§ 44*)—RIGHT TO COMMISSIONS—TERMINATION OF AGENCY.

A broker having, without any fault of the owner, failed to produce any satisfactory offer from his customer, and the agency having in good faith, and with the acquiescence of the broker, been terminated, the broker is not entitled to commissions, because on new and independent negotiations, through other parties, an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

exchange was afterwards effected with such customer.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 45; Dec. Dig. § 44.*]

5. EVIDENCE (§§ 119, 130*)—RES GESTÆ—OTHER TRANSACTIONS—TERMS OF AGENCY.

For the purpose of showing the terms of the contract of agency given by defendant to plaintiff, a broker, a contract of agency given to plaintiff by another, between whom and defendant plaintiff attempted to negotiate a sale, is inadmissible, there being no connection between them, except that both were prepared by plaintiff about the same time, and it, therefore, being no part of the *res gestæ* of any transaction between plaintiff and defendant.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 303-306, 403; Dec. Dig. §§ 119, 130.*]

6. WITNESSES (§ 257*)—REFRESHING MEMORY—ADMISSIBILITY OF WRITING AS EVIDENCE.

That plaintiff is entitled, as a witness, to use a contract with another to refresh his memory as to the contents of his contract with defendant does make it admissible in evidence, over the objection of defendant.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 892; Dec. Dig. § 257.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frank G. Finlayson, Judge.

Action by H. P. Ernst against Fidel Ganahl. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Tanner, Taft & Odell and Tanner, Odell, Odell & Taft, all of Los Angeles, for appellant. Seward A. Simons, of Los Angeles, for respondent.

ANGELLOTTI, J. This is an action brought by plaintiff to recover \$2,000, alleged to be due him from defendant for services alleged to have been rendered by him in connection with an exchange of certain real properties by defendant and one C. C. Kohlmeier. The complaint alleged a written contract on the part of defendant, given on or about June 18, 1908, authorizing plaintiff to sell certain of his real property for \$150,000, "or to exchange the same for other property which would be accepted by defendant," and in which defendant agreed that if the property was sold by or through the efforts of plaintiff, or to any one whom plaintiff should produce who should purchase the same or should make an exchange therefor he would pay plaintiff a commission of \$2,000. It was further alleged that plaintiff produced said Kohlmeier, and negotiated an exchange of properties between the latter and defendant, which was consummated on or about September 10, 1908. By his answer defendant denied the contract alleged; alleged that the agreement between them was one by which he agreed to pay plaintiff \$2,000 commission in case he furnished him a customer for the premises referred to for the sum of \$150,000, the agency not being an exclusive one; denied that plaintiff produced Kohlmeier as a

purchaser, or one who would exchange, and denied that plaintiff negotiated an exchange with Kohlmeier. He further alleged that plaintiff failed to procure any purchaser for his premises, or to effect any exchange thereof, and that on or about August 29, 1908, he notified defendant of his inability to so do, and that by mutual consent the agency was terminated. The trial court found that the agreement between plaintiff and defendant was one executed July 6, 1908, and that the same was as follows: "Los Angeles, Cal., July 6, 1908. I hereby agree to pay H. P. Ernst two thousand (2,000) dollars commission in case he furnishes me a customer for my property number 936 and 940 So. Hill st. being 75x153 for the sum of one hundred and fifty thousand dollars. It is understood that this is not an exclusive agency. F. Ganahl." It further found that on August 26, 1908, defendant revoked and withdrew the authority conferred by said contract, and, at said time, on the demand of the defendant, plaintiff surrendered and returned said contract to defendant, and plaintiff abandoned the same. It further found that plaintiff never furnished defendant a customer for the property, and never negotiated an exchange with Kohlmeier, and that while defendant on or about September 10, 1908, did make an exchange of his said property with Kohlmeier, said exchange was not negotiated or effected by plaintiff. Upon these findings judgment was given that plaintiff take nothing. This is an appeal by plaintiff from such judgment, and from an order denying his motion for a new trial.

The suggestion that the findings do not support the judgment is not well based. It is distinctly found that plaintiff never furnished defendant a customer for his premises, and never negotiated an exchange of the property with Kohlmeier. The contract found was one to furnish a customer, which the court found was never done by plaintiff. The findings further completely negated the allegation of the complaint in so far as any services in connection with an exchange with said properties are concerned. They further show a termination of the authority of plaintiff, and a surrender and abandonment of the contract by him. We do not see how the effect of these findings is at all impaired by the finding that plaintiff did not conduct any negotiations with Kohlmeier for an exchange after August 25, 1908. Even if we assume that it must be implied from this that he did conduct negotiations with Kohlmeier prior to August 25, 1908, that fact alone would not impair the effect of the other findings. And the same is true of the fact found that an exchange was effected between defendant and Kohlmeier on or about September 10, 1908, which exchange was not negotiated or effected by plaintiff.

[1] Upon the question as to the contract in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—17

fact entered into, plaintiff contended that it was one made and dated June 20, 1908, by which defendant appointed plaintiff his agent to sell his Hill street property in Los Angeles for \$150,000, and that such contract contained the following provision, viz.: "And in case said Ernst produces a buyer for cash or exchange, that I may accept a sale of, I agree to pay him a commission of \$2,000.00." According to plaintiff, there was no provision in this contract to the effect that the agency was not an exclusive one. Defendant's claim was that the contract was the one found by the trial court. It cannot be doubted that there was sufficient evidence to support the conclusion of the trial court in this regard. It is, of course, needless to say that the amount of credence to be given to witnesses is exclusively a question for the trial court.

It cannot be claimed, in view of the evidence, that plaintiff ever furnished a customer for defendant's property who offered the sum of \$150,000 therefor, or any other sum of money. The agreement found by the court was on its face, of course, one contemplating simply a sale of the property for \$150,000; nothing being stated therein looking to a possible exchange. Nor can it be questioned that there was evidence sufficient to support a conclusion that on August 26, 1908, no arrangement for a sale or exchange having been negotiated or agreed upon, plaintiff and defendant had an interview in which defendant declared their relations in the matter at an end, and demanded the return of his authorizations, two in number, the second being an authorization for an exchange with Kohlmeier upon certain specified conditions, given subsequent to July 6, 1908, for a specified term, which had expired. Plaintiff then gave defendant an envelope, which he subsequently found contained only the authorization for the exchange. On August 29, 1908, according to his testimony, defendant again saw plaintiff and insisted upon the return of the authorization of July 6, 1908, and the same was delivered to him. Plaintiff did nothing in the way of attempting to dispose of defendant's property after August 26, 1908, apparently entirely acquiescing in defendant's revocation of authority. The finding of the trial court as to revocation of authority by defendant and abandonment of the matter by the plaintiff is sufficiently supported by evidence.

[2] Unless, then, by reason of the facts in relation to the Kohlmeier exchange, plaintiff was entitled to a commission under his contract, it is clear that all the findings essential to support the judgment in favor of defendant are sufficiently sustained by the evidence. In view of the findings the evidence must be considered in the light most favorable to defendant. The evidence being so considered, it must be concluded that there was no proposition on the part of defendant for negotiations looking for an exchange of his property for Kohlmeier's, until after July

6, 1908. Kohlmeier's property consisted of a ranch in Orange county, with certain personal property which he was willing to sell for \$100,000. Defendant's Hill street property in Los Angeles was valued at \$150,000 by defendant, and was subject to a mortgage for \$35,000. According to the evidence of defendant, nothing was said about a possible exchange with Kohlmeier until after July 6, 1908. On July 7, 1908, plaintiff introduced Kohlmeier to defendant. A possible exchange of properties was suggested, and defendant examined the Kohlmeier property. Certain propositions for an exchange were made by defendant through plaintiff. The first proposition was that an exchange be made upon a basis of \$150,000 for defendant's property, and \$100,000 for Kohlmeier's property, Kohlmeier to convey his property to defendant and to pay defendant \$15,000, and to receive in return a deed of defendant's property subject to the \$35,000 mortgage. Kohlmeier absolutely declined to consider the proposition. Another proposition was made by defendant, under which he was to receive from Kohlmeier only \$5,000 in cash, and the Kohlmeier property, in return for his property, subject to the mortgage. A written agreement was given to plaintiff by defendant authorizing such an exchange; a time limit of five days being specified therein. This was subsequently extended at plaintiff's request for three days, expiring August 25, 1908. This proposition was also declined by Kohlmeier, and on August 26th plaintiff so informed defendant. He further informed him that Kohlmeier would not make the trade, and that he found the mortgage "too big." Thereupon followed the termination of all relations between plaintiff and defendant in the matter, to which we have already referred. Defendant acted in good faith in this regard, believing that no exchange satisfactory to him could be made with Kohlmeier. There was evidence to the effect that Kohlmeier never made any proposition to accept for his ranch defendant's property subject to the \$35,000 mortgage. Subsequent to August 26th, the firm of Meyer & Johnson, which had had business transactions with defendant, sought authority from him to take up the matter of a proposed exchange with Kohlmeier, and they were authorized to see what they could do in the matter. They enlisted the aid of one Waterman, a friend of Mr. and Mrs. Kohlmeier. The proposition of a trade of the Hill street property, subject to the \$35,000 mortgage, for Kohlmeier's property and \$5,000 cash was again made through Waterman, and declined; Kohlmeier especially objecting on account of the mortgage which was to soon fall due, which he feared he might not be able to take care of. After this Waterman induced Kohlmeier to accept a proposition for an even exchange of the Hill street property subject to the \$35,000 mortgage, for the Kohlmeier property, with the understanding expressed in the agree-

ment that if Kohlmeier was unable to renew the mortgage for the whole \$35,000 when it fell due, defendant would loan him \$15,000 thereof to assist him in taking care of it. Upon this basis the exchange was effected, and such exchange was wholly due to the efforts of Meyer & Johnson and Waterman. There was no bad faith on the part of defendant. Of course, there was evidence opposed to the statements we have made. We repeat that we must take the evidence in the light most favorable to defendant. So taking it, we must assume the facts as to the Kohlmeier matter to be as above stated, for there is substantial evidence to that effect.

[3, 4] Upon these facts we can see no warrant for the claim that plaintiff was entitled to a commission under his contract, on the theory that he furnished a customer, even if we assume that the contract would include the case of an exchange of properties. The contract not specifying its duration, either party was at liberty to terminate it at will, subject only to the ordinary requirements of good faith. See *Sibbald v. Bethlehem, etc., Co.*, 83 N. Y. 378, 384, 385, 88 Am. Rep. 441. We have seen that there was enough in the evidence to support a conclusion that there was no bad faith in the matter. It was essential to plaintiff's success, under his contract and his right to any commission thereunder, that he should furnish, during the life of the contract, a customer ready, able, and willing to take defendant's property upon terms satisfactory to the latter. We do not understand that there is any dissent in the authorities in this state on this proposition, where the contract is substantially like the one here involved. This question is fully discussed and the authorities reviewed in the opinion of Mr. Justice Melvin in *Brown v. Mason*, 155 Cal. 155, 99 Pac. 867, 12 L. R. A. (N. S.) 328. See, also, *Roper v. Rosenfeld*, 145 Cal. 677, 678, 79 Pac. 354; *Sibbald v. Bethlehem, etc., Co.*, supra. What we have already said shows that it cannot be held by an appellate court, in the face of the findings in the trial court, that plaintiff fulfilled these requirements. We must take the case as one where the broker, without any fault on the part of the owner, failed to produce any satisfactory proposition, or even any proposition, from another during the life of the contract, and where the owner acting in entire good faith terminated all relations between himself and the broker; the broker acquiescing therein. That subsequently, upon new and independent negotiations through other parties, an exchange between the same parties was effected cannot affect the question. See *Brown v. Mason*, supra; *Sibbald v. Bethlehem, etc., Co.*, supra. Plaintiff's contention in this behalf is necessarily based upon an assumption

of bad faith on the part of defendant in the matter of the termination of the relations between himself and plaintiff, an assumption that, as we have seen, we cannot make, in view of the evidence and findings.

[5, 8] Complaint is made that the trial court erred in refusing to admit in evidence a written authorization from Kohlmeier to plaintiff dated June 20, 1908, for the sale of his ranch property for \$100,000, and providing that in case that plaintiff furnished him a buyer, "either for cash or for exchange, that I may accept a sale of," Kohlmeier would pay a specified commission to plaintiff. Plaintiff claimed on the trial that this authorization was substantially similar in terms to the one testified to have been given him by defendant on or about June 20, 1908, which had been returned to defendant in August, 1908. He further claimed that the two forms were prepared by him at the same time, for the purpose of obtaining the necessary authorizations from both defendant and Kohlmeier for negotiations for an exchange. The real effort of plaintiff in this connection was to show that the authorization in fact given to plaintiff was the one testified by him to have been given, rather than the one testified to by defendant as having been given. We are of the opinion that it was not admissible for any such purpose. According to plaintiff's testimony, it was a separate and a distinct matter from the alleged contract of defendant, having no connection therewith except that plaintiff prepared the two at about the same time, with a view in his own mind of obtaining authorizations from both defendant and Kohlmeier. They were not signed at the same time, and there was nothing to indicate that defendant had any knowledge of the Kohlmeier authorization. In no proper sense of the term can it be said to be a part of the *res gestæ* in so far as any transaction between plaintiff and defendant is concerned. It was simply another distinct paper prepared by plaintiff himself, in what was really another distinct matter, and was entirely collateral and extrinsic to the matter under investigation. It was correctly conceded by the learned trial judge that the paper might be used by plaintiff if necessary to refresh his memory as to the contents of the Ganahl contract. But this would not entitle him to put it in evidence over the objection of the adverse party. Plaintiff did testify positively and absolutely as to the contents of the contract between himself and defendant.

No other matter suggested in the briefs requires notice.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.

MYERS v. BERVEN. (S. F. 6,190.)

(Supreme Court of California. Dec. 8, 1913.)

1. VENDOR AND PURCHASER (§ 231*)—NOTICE—BONA FIDE PURCHASERS—EASEMENTS.

Where plaintiff's predecessor in title reserved a right of way across plaintiff's land, plaintiff is charged with knowledge of the reservation, even though his deed, which was not directly from the original source of title, contained no mention of the reservation; the reservation being in an instrument in plaintiff's chain of title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513-539; Dec. Dig. § 231.*]

2. EASEMENTS (§ 3*)—RESERVATION OF EASEMENTS—EASEMENTS IN GROSS.

Where plaintiff's predecessor in title agreed with defendant that the latter should have a right of way over his land, and, upon conveying the property, reserved the right of way agreed upon, the reservation was not merely the reservation of an easement in gross, but was the reservation of an easement appurtenant to defendant's land, and a conveyance to defendant passes title, even though plaintiff's predecessor reserved no interest in the land he conveyed, except a right of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8-12; Dec. Dig. § 3.*]

3. EASEMENTS (§ 51*)—RIGHTS OF WAY—RESERVATION.

A private way granted or reserved to one person, for use in connection with, and as appurtenant to, specified land, cannot be used as of right for the benefit of another parcel.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 109-112; Dec. Dig. § 51.*]

4. EASEMENTS (§ 17*)—RIGHTS OF WAY—EQUITABLE TITLE.

Where defendant and others purchased a tract of land, and defendant paid more than his share because he desired a right of way over the land of the other purchasers, defendant has an equitable title to the right of way, where he used it without objection by the other owners, and it was generally recognized as his.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 45-49; Dec. Dig. § 17.*]

5. VENDOR AND PURCHASER (§ 239*)—BONA FIDE PURCHASER.

A bona fide purchaser without notice takes the property free from the equities of others, and his land is not burdened by an easement of which he had no notice, and of which the owner had only an equitable title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 583-600; Dec. Dig. § 239.*]

6. EASEMENTS (§ 5*)—ADVERSE POSSESSION—WHAT CONSTITUTES.

Where defendant paid a valuable consideration for a way, his use, pursuant to the agreement between himself and other landowners, under claim of right and adverse to the owners of the land over which it extended, and for the prescriptive period, ripened into an easement by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 13, 20-22, 26; Dec. Dig. § 5.*]

7. EASEMENTS (§ 7*)—PRESCRIPTION—CONTINUOUS POSSESSION.

The adverse use of a right of way must be uninterrupted to constitute the basis of title by prescription, but it is not necessary that the right of way be used every day; it being sufficient if the adverse occupant use it whenever

it is needed, and his use be not hostilely obstructed.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 16-19, 27, 33; Dec. Dig. § 7.*]

8. EASEMENTS (§ 61*)—PLEADING—ANSWER—SUFFICIENCY.

In view of Civ. Code, § 1007, declaring that occupancy, for the period prescribed as a bar to action for recovery of the property, confers title thereto which is sufficient against all, a cross-complaint, in an action to enjoin trespass on plaintiff's land, which alleged that defendant was the owner of a right of way over the land, is sufficient to authorize proof of an easement by prescription, though not averring that the title was prescriptive.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

9. EASEMENTS (§ 61*)—ADVERSE POSSESSION—EVIDENCE—ADMISSIBILITY.

In an action where the existence of a way over plaintiff's property was in issue, evidence of defendant's agreement with plaintiff's predecessors in title as to the way and his use under the agreement is admissible to establish an adverse title.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 102, 130-144, 148; Dec. Dig. § 61.*]

Department 1. Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Jonah Myers against John Berven. From a judgment for defendant on his cross-complaint, plaintiff appeals. Affirmed.

T. J. Butts, of Santa Rosa, for appellant. L. G. Scott, of Sebastapol, for respondent.

SHAW, J. The controversy in this case relates to the existence of an easement for a private roadway leading from defendant's land, over the land of plaintiff, to a public road. The plaintiff appeals from the judgment in favor of the defendant upon his cross-complaint.

The tract of land belonging to Myers, over which the easement is claimed, contains a little over five acres. It is 14.67 chains long from north to south and 3.62 chains in width. The complaint of Myers alleges that he is the owner of the tract; that Berven threatens to and will, unless enjoined, enter thereon and pass over the same on foot and in vehicles, and prays for an injunction to prevent the same. Berven, by cross-complaint, alleges that he is the owner of an easement over said land, consisting of a private roadway 12 feet in width extending from the southwest corner of the tract along the west line northerly about 160 feet, thence easterly across the tract to the east line, and thence north along the east line to a connection with the public road at the northeast corner. The main question is, Does the evidence support the finding that Berven is the owner of the roadway as described in his cross-complaint?

The land of both parties is embraced in a tract of 20 acres known as lot 3 of Thompson's subdivision. Prior to June 11, 1904, this lot was owned by one George P. Baxter, except

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a strip extending from the southeasterly corner diagonally through the lot and intersecting the west line about 300 feet south of the northwest corner, which strip Baxter had conveyed to the Petaluma and Santa Rosa Railway Company for its railroad, and also excepting an acre in the southeast corner easterly of the strip conveyed to the railroad. This one-acre tract Baxter had conveyed to one George W. Johnson on April 13, 1904, also granting to Johnson a 12-foot private roadway along the east line of the lot from the said acre to the public road aforesaid at the northeast corner of the 20-acre lot, being a part of the line of the roadway here in controversy. Across the strip given to the railroad, Baxter had reserved a right of way for a crossing from the land now owned by Berven to connect with the roadway herein claimed by him. Louis Johnson, John Froynes, and John Berven, the defendant, agreed with Baxter to buy of him the said lot, except the strip granted to the railroad and the 1-acre tract conveyed to George W. Johnson. After the agreement to purchase had been made, and before Baxter executed a deed pursuant thereto, the parties agreed upon a partition of the lot between them, and that the partition should be effected by having Baxter make separate deeds conveying to each the part allotted to him. Berven was to have the triangular part lying westerly of the railroad, containing 7.42 acres, Froynes was to have the westerly part of the remainder, about six chains in width, and containing 5.50 acres, situated in the northwest corner of the 20-acre tract. Johnson was to have the eastern part of this remainder containing 6.03 acres. It was a part of this agreement that Berven should have a private roadway along the west side of the Froynes' allotment to the public road, a way not in issue here, and that he should also have a roadway across and over the part allotted to Johnson, upon the line which he now claims and leading to the public road at the northeast corner. This way was laid out along this line before the deeds were executed. In consideration of these ways, Berven paid a larger price per acre for his allotment than the others paid for theirs. The purchase money was then paid in a lump sum to Baxter, and, at their request, he conveyed to each the part so allotted to him by the agreement of partition. The deeds were executed on June 11, 1904. In conveying to Berven he granted to him also the right of way agreed on along the west line of the Froynes' tract, and in conveying to Froynes this way was reserved. The deed to Berven, however, did not mention the way agreed on over the Louis Johnson tract. In the deed to Johnson a way 15 feet wide along the east line, and extending from the one acre sold to George W. Johnson north to the public road, was reserved, but no mention was made of the way from the railroad crossing across the Louis Johnson tract to the east line thereof, nor was any way

whatever reserved for the benefit of Berven in either of the deeds from Baxter, except that across the Froynes' tract.

Louis Johnson recognized the right of Berven to a way across and over his land to the public road by the route here claimed, and Berven freely used such way, while Johnson held the title, without objection or interruption by Johnson. On May 10, 1905, Louis Johnson sold his tract to B. F. Emery. The deed contained the following reservation: "Reserving and excepting also a right of way not to exceed 12 feet in width described as follows"—and then giving a description of that part of the way in question extending from the railroad crossing to the east line of the Johnson lot, where it connected with the way aforesaid granted to George W. Johnson. The remainder of the way in controversy leading from the said connection north to the public road was not referred to. The clause closed with the words: "The said private way to be of the width not to exceed 12 feet, only the right of private way and not the soil is hereby reserved and excepted." On September 27, 1907, Emery conveyed the Louis Johnson tract to one Sanborn who, in September 6, 1910, conveyed it to one Lindley. Lindley on November 7, 1910, conveyed it to plaintiff Myers. None of the deeds after the one made to Emery by Johnson contained any reference to the way in question. Emery and Sanborn, however, both knew of and recognized Berven's right to the entire way extending from his land to the public road, and Berven continued to use it at will and as often as he desired without objection from either of them during the entire time of their respective ownerships. No objection was made to such use by Berven until Lindley obtained his title in September, 1910. The railroad company had fenced its land, and had put in a gate across this way at the point where it crossed the railroad from the Johnson tract. A gate was also put in at the north end of the way where it led into the public road. These gates and another one called the "middle gate," the location of which is not definitely shown, were in position before and at the time Lindley and Myers bought the land. There were at that time no marks of travel along the route of the way to indicate that it had been used, nor anything to show its existence except the gates. On November 5, 1910, Louis Johnson executed a deed purporting to convey to Berven the entire way in controversy. This was on the same day upon which Lindley conveyed to Myers.

The court found that from June 11, 1904, until September 6, 1910, Berven had used and occupied the way in question as a road, continuously and as a matter of right. It also found that he was the owner of the way, describing it in detail.

[1,2] The legal title to that part of the way leading from the railroad crossing through the Louis Johnson tract as far as the

east line thereof was conveyed to Berven by the deed of Louis Johnson to him executed on November 5, 1910. Johnson had reserved this part of the way in his conveyance to Emery, hence he had not parted with the title to the easement, and his conveyance to Berven transferred that title to the latter. Myers is charged with knowledge of the reservation in the deed to Emery, it being one of the deeds in his own chain of title. Consequently, with respect to this part of the way, the evidence shows that Berven had acquired title thereto by this conveyance and the finding of ownership is fully sustained thereby.

It is claimed that the reservation in the deed from Johnson to Emery was not a reservation of a right of way appurtenant to any land, but merely of an easement in gross, personal to Johnson, and that it was not capable of assignment nor transfer to Berven. We do not think this can be maintained. The reservation was distinctly of an easement over the soil upon a defined route. It withheld from the conveyance that much of the estate otherwise conveyed. Johnson retained no other interest in the land, and Emery did not receive title to the portion of the estate reserved. As we shall presently see, however, Berven had also acquired title to this easement by prescription.

[3] The title to the part of the roadway leading along the east line of the tract passed to Emery by virtue of the deed from Johnson to him, and through Emery to Sanborn and Lindley and Myers, subject to any equitable right vested in Berven and to any claim of Berven to title by prescription. The parties seem to have acted upon the belief that the reservation in the deed to George W. Johnson of a right of way along the east line of the tract would inure to the use of Berven, or to any person who desired to use it. If so, it was an erroneous belief. A private way granted or reserved to one person for use in connection, and as an appurtenance to specified land, cannot be used as of right for the benefit of another parcel.

[4-7] That Berven had full equitable title to the entire way, including this part, up to the time Lindley purchased is clear. He had fully paid for the easement, had used it at his pleasure, and the previous owners were aware of his right. Myers, however, was a purchaser for value. He had notice of the right of way along the east line appurtenant to George W. Johnson's land and of Johnson's right thereto, but he had no actual notice, so far as appears, of the right over this way in favor of the Berven land. There being no record evidence of Berven's right over this part, and no visible signs of use thereof by Berven sufficient to charge Myers with notice, the equitable title of Berven to the use of the way on the east line was not good as against Myers. As to this part, Berven's case rests solely on the claim that, prior to the sale to Myers or

Lindley, he had acquired a legal title by prescription, as the court, in effect, found. As Berven had paid a valuable consideration for the entire way and his use thereof was in pursuance of the agreement between himself and the other parties at the time of the purchase from Baxter, it is obvious that the use by Berven was under claim of right and adverse to the owner of the land over which the way extended. It was used by Berven openly, without leave from the owners, and this use was known to them, as was also the right by which he claimed it. It continued for more than five years before Lindley or Myers bought the land. There was no interruption of this use within the meaning of the rule that an adverse use must be uninterrupted in order to constitute the basis of a title by prescription.

"If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it to make his use of the way continuous. * * * If, whenever the claimant needs it from time to time, he makes use of it, this is a continuous use. An omission to use it when not needed does not disprove a continuity of use, shown by using it when needed. Neither such intermission nor omission breaks the continuity." *Hesperia v. Rogers*, 83 Cal. 11, 23 Pac. 196, 17 Am. St. Rep. 209. "Continuous use" does not necessarily mean constant use. * * * How frequently is immaterial, provided it occurred as often as the claimant had occasion or chose to pass." *Bodfish v. Bodfish*, 105 Mass. 319. See, also, *Webber v. Clarke*, 74 Cal. 17, 15 Pac. 431; *Montgomery v. Quimby*, 164 Cal. 253, 128 Pac. 402. There was no hostile interruption or obstruction on the part of the owners of the servient tenement. This is the character of the interruption referred to in the rule as sufficient to destroy the continuity of adverse possession. The first interruption of that kind occurred when Lindley purchased the land in September, 1910, after five years' use was completed. The finding of a title in defendant is therefore sustained by his proof of title by prescription.

[8] Appellant insists that the cross-complaint does not allege title by prescription, and hence that it is not in issue. Such particularity of pleading is not required in actions of this character. The allegation is that Berven is the owner of the way described. This is sufficient. *Heeser v. Miller*, 77 Cal. 193, 19 Pac. 375. This allegation may be sustained by proof of title acquired in any legal mode. A title by prescription is a legal title. Civ. Code, § 1007; *Wutchumna W. Co. v. Ragle*, 148 Cal. 764, 84 Pac. 162.

[9] The objections to the evidence of the agreement between Johnson, Berven, and Froynes that Berven should have the road-

way in question were not well taken. The evidence was competent to show the origin and nature of Berven's title, and to prove that his subsequent use was under claim of right, and adversely to the others, and not by mere permission.

No other points are made that require notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

REHER v. REED. (L. A. 3,225.)

(Supreme Court of California. Dec. 10, 1913.
Rehearing Denied Jan. 9, 1914.)

1. JUDGMENT (§ 158*)—SETTING ASIDE DEFAULT—AFFIDAVIT OF MERITS—NECESSITY.

On an application to set aside a default and the judgment entered thereon, no affidavit of merits was necessary where a duly verified answer, stating a good defense, was on file.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 311; Dec. Dig. § 158.*]

2. JUDGMENT (§ 155*)—SETTING ASIDE DEFAULT—NOTICE OF MOTION—SPECIFICATION OF ERRORS.

Where cross-defendants' time to answer the cross-complaint expired on October 21st, they filed their answer on October 31st, and thereafter, on cross-complainant's application, the clerk entered the default of the cross-defendants and a judgment thereon, a notice of a motion to set aside such judgment, stating that it would be based upon the records and papers on file in the county clerk's office, which records showed that the default and judgment were entered after the answer had been served and filed, and upon affidavits, copies of which were attached to the notice, and which affidavits showed that the delay in filing the answer was due to the mistaken belief that the time did not expire until October 31st, sufficiently showed the grounds of the motion, even if treated as an application under Code Civ. Proc. § 473, which provides that the court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.*]

3. JUDGMENT (§ 106*)—DEFAULT—WAIVER OF DEFAULT.

Under Code Civ. Proc. § 585, providing that in actions on contract for the recovery of money or damages only, if no answer has been filed with the clerk within the time specified in the summons or such further time as may have been granted, the clerk, upon application of plaintiff, must enter defendant's default and immediately thereafter enter judgment, where cross-defendants did not answer the cross-complaint within the time allowed by a stipulation of the parties extending the time to answer, but thereafter filed their answer before the cross-complainant applied for the entry of default and judgment, the cross-complainant thereby granted the additional time to answer, the cross-defendants were not in default, and the clerk had no authority to enter their default or the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. § 106.*]

4. JUDGMENT (§ 155*)—SETTING ASIDE DEFAULT—NOTICE OF MOTION—SPECIFICATION OF ERRORS.

Where cross-defendants' default and a judgment for cross-complainant were entered by

the clerk without authority, which want of authority appeared on the face of the record, the court might set the judgment aside of its own motion at any time, and it was immaterial how the invalidity of the judgment was called to its attention; and hence whether the notice of the motion to set aside the default sufficiently specified the grounds was immaterial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 306, 307; Dec. Dig. § 155.*]

Department 1. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by C. C. Reher against George H. Reed, in which defendant filed a cross-complaint against the plaintiff and others. From an order setting aside the default of the cross-defendants and a judgment for defendant on his cross-complaint entered thereon, defendant appeals. Affirmed.

Shaw, Ross & Dyke, of El Centro, for appellant. H. W. Brewer and F. C. Farr, both of Imperial, for respondent.

SHAW, J. This is an appeal from an order setting aside a judgment and default entered by the clerk. The defendant filed a cross-complaint against the plaintiff and also against George C. Reher and C. M. Reher, who were not parties to the action, asking that they be brought in, and for judgment against them for \$7,285. A summons on the cross-complaint was served on said parties defendant thereto in May, 1911, and by a stipulation filed in the cause their time to plead to the cross-complaint was extended to October 21, 1911. No answer or demurrer was filed within that time. On October 31, 1911, no default having been entered or demanded, the said cross-defendants duly served and filed their answer to the cross-complaint. Thereafter, on November 8, 1911, upon application of said Reed, an entry was made by the county clerk declaring the default of said cross-defendants for failure to answer the cross-complaint within the time stipulated, and upon said supposed default the clerk then entered judgment against them for the sum demanded in the cross-complaint.

On December 13, 1911, the said parties gave a written notice that they would move the court to set aside said judgment, stating therein "that said motion will be based upon the records and papers on file in the office of the county clerk and upon the affidavits of H. W. Brewer and F. C. Farr, copies of which are hereto attached," but not otherwise stating the grounds upon which the motion would be made. Objection to the hearing of the motion was made by the appellant, Reed, because the notice did not set forth the grounds of the motion and because no affidavit of merits was filed or presented. The court overruled the objections, granted the motion, and ordered that the judgment be set aside. In support of this appeal the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

appellant renews the objection made at the hearing.

[1] The objection that there is no affidavit of merits is fully met by the fact that the answer was already on file; that it was duly verified; and that it states a good defense to the cause of action set forth in the cross-complaint. *Fulweiler v. Hog's Back, etc., Co.*, 83 Cal. 129, 23 Pac. 65; *Merchants' Co., v. Los Angeles, etc., Co.*, 128 Cal. 622, 61 Pac. 277; *Melde v. Reynolds*, 129 Cal. 314, 61 Pac. 932. The filing of a verified answer is a practice to be preferred to that of filing the ordinary so-called "affidavit of merits." *Bailey v. Taaffe*, 29 Cal. 426.

[2] The notice of motion stated that it would be made upon the records and papers on file and upon the affidavits served with the notice. The records referred to showed that the entry of the default and judgment was made by the clerk after the answer had been served and filed. The affidavits stated facts tending to show that the delay of ten days in filing the answer was because, by a mistake on the part of the attorneys for said parties, they believed the time fixed was October 31st instead of October 21st. If we consider this motion as an application under section 473 of the Code of Civil Procedure, it seems obvious that these defects in the proceedings were called to the attention of the cross-complainant with sufficient clearness to enable him to know the grounds upon which the application would be made.

[3, 4] But it was not necessary to resort to section 473 or to determine whether or not, as an application under that section, the grounds were well stated. The clerk is not authorized to enter a default, unless no answer has been filed "within the time specified in the summons or such further time as may have been granted." Code Civ. Proc. § 585. When a party, after the time expressly granted for filing a pleading against him has expired, suffers further time to elapse without taking any action thereon, and in the meantime the pleading is served and filed, he, by such conduct, in effect grants the additional time and the party is not strictly in default. The clerk is not authorized to enter a default for failure to file an answer when such answer is on file at the time such default is attempted to be entered. This was expressly decided in *Tregambo v. Comanche Co.*, 57 Cal. 501. There the time to answer expired on April 21, 1879. A demurrer was mailed to the clerk on April 20th but did not reach him until April 29th. The default was entered by the clerk on May 2d. It was held that the default was not authorized and should have been set aside by the lower court. There is abundance of authority to the same effect in the decisions of other states. 6 Ency. of Plead. & Prac. 85; *Rhodes v. McFarland*, 43 Ala. 101; *Hurlock v. Reinhardt*, 41 Tex. 580; *Pett v. Clark*, 5 Wis.

198; *Castle v. Judson*, 17 Ill. 384; *Cook v. Forest*, 18 Ill. 581; *Walker v. Tiffin, etc., Co.*, 2 Colo. 92; *Redfield v. Miller*, 59 Iowa, 393, 13 N. W. 334. It follows that on the face of the record it appeared that the clerk was without authority to enter the default, and consequently without authority to enter the judgment. In such a case the court may set aside the judgment of its own motion at any time, and it is immaterial how the invalidity is called to its attention. *Wharton v. Harlan*, 68 Cal. 422, 425, 9 Pac. 727; *Kelly v. Van Austin*, 17 Cal. 564; *People v. Greene*, 74 Cal. 404, 16 Pac. 197, 5 Am. St. Rep. 448.

The order appealed from is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

JACOBY v. PECK et al. (Civ. 1181.)

(District Court of Appeal, Third District, California. Nov. 7, 1913.)

LANDLORD AND TENANT (§ 192*)—LIABILITY FOR RENT—DESTRUCTION OF PREMISES.

Plaintiff, who was the owner of an unexpired term of years, agreed with defendant and his sureties that, in consideration of monthly payments during the unexpired term, he should assign his term to the lessors, who would transfer and assign the lease to defendant. Before the expiration of the term of years the property was destroyed by fire. Held that, notwithstanding the fact that plaintiff did not directly assign his lease to defendants, but it was assigned by the lessors, the destruction of the premises relieved defendants from further monthly payments to plaintiff; Civ. Code, § 1933, declaring that the hiring of a thing terminates upon its destruction, applying to plaintiff.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 777, 778, 781, 784-786; Dec. Dig. § 192.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by O. D. Jacoby against W. S. Peck and others. From the judgment, plaintiff appeals. Affirmed.

Chickering & Gregory, of San Francisco, for appellant. Henry G. W. Dinkelspiel, of San Francisco, for respondent Peck. Daniel A. Ryan, of San Francisco, for respondent Pritchard.

BURNETT, J. The appeal is upon the judgment roll from a judgment of the superior court of the city and county of San Francisco, in favor of plaintiff, for the sum of \$1,200, with interest, and costs. The contention of appellant is that the conclusion of law from the findings of fact should be for a larger sum in his favor. The following facts are found by the court:

On and prior to July 13, 1904, plaintiff's assignor, M. J. Keller Company, a corporation, was in the occupation of the premises known as 1028-1030 Market street, San Fran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cisco, under a lease from Messrs. Cook & Bruntch, the owners of the property; the lease providing for a monthly rental of \$1.150, and to expire on December 31, 1907. On said July 13, 1904, the M. J. Keller Company and James J. Gildea entered into a written agreement reciting: "That whereas, said party of the first part occupies the premises known as 1028-1030 Market street, San Francisco, California, under a lease made by E. E. Cook and C. M. E. Bruntch to the said party of the first part, said lease calling for the payment of a monthly rental of eleven hundred and fifty (1,150) dollars, and said lease expiring on the first day of January, 1908; and whereas, the said party of the second part desires to secure the said leasehold interest for the unexpired term thereof from and after the 15th day of September, 1904; * * * and whereas, the lessors of said property have agreed to transfer and assign the said lease to said party of the second part in consideration of an additional monthly payment to them of one hundred dollars for the unexpired term of said lease: Now, therefore, it is hereby agreed by the parties hereto as follows, to wit: That said party of the second part shall, on or before the ——— day of ———, 1904, organize a corporation under the laws of the state of California which shall assume and agree to perform the following things: (1) Said party of the second part and said corporation, so to be formed, shall assume the lease of said property for the unexpired term thereof, from and after the fifteenth day of September, 1904, that is, from the fifteenth day of September, 1904, to and including the 31st day of December, 1907, and shall pay the owners of said property a monthly rental thereof at the rate of twelve hundred and fifty dollars per month, payable in advance, for the use of said building, and shall execute a lease containing the ordinary covenants. (2) Said party of the second part and said corporation, so as aforesaid to be formed, shall pay to the said M. J. Keller Co., its successors and assigns, the sum of seventy-five dollars on said 15th day of September, 1904, and thereafter the sum of one hundred and fifty dollars upon the first day of each and every month to and including the first day of December, 1907, as a bonus to said M. J. Keller Co. for causing said lease to be transferred to said party of the second part. Said party of the second part further agrees that said party of the first part, its successors or assigns, shall have the right, whenever any payment of said sum of one hundred and fifty dollars remains unpaid thirty days after the same shall become due, to demand the same of the sureties herein-after agreed to be furnished by said party of the second part, and, if the same is not paid within thirty days after such demand, then, at its option, said party of the first part may declare the full amount of bonus remaining unpaid due and payable at once, and proceed to collect all the unpaid bonus that at the

time shall remain unpaid as rental for the full term of said lease."

The said Gildea furnished an undertaking for the faithful performance of his agreement, and he also formed a corporation known as the J. J. Gildea Company. The said M. J. Keller Company released its said leasehold interest in said property to the owners of said property, and secured for the said J. J. Gildea Company from said owners a lease of the leasehold interest in and to said premises for the term beginning September 15, 1904, and ending December 31, 1907. On the 18th day of April, 1906, said premises were totally destroyed by fire.

The court concluded: "That in and by said destruction of said premises by fire said lease terminated, and said defendant J. J. Gildea Company became and was released and discharged from any liability to said plaintiff or his assignors, or either or any of them, for any and all amounts that would otherwise thereafter become due as and by way of bonus unpaid as rental." The correctness of this conclusion is the question involved on this appeal.

It is not disputed that by the destruction of the buildings the lease was terminated, and the tenant thereby relieved of the obligation to pay any further rent to the owners. Section 1933, Civ. Code. The application of this rule, however, to appellant here is denied by him, and it is insisted that the contract with the Keller Company contained no qualification of the promise to pay \$150 per month up to and including December 31, 1907.

It is the contention of respondents that the contract should be construed as manifesting the intention of the parties that "Gildea be substituted in place of the former lessee in the payment of an increased rental to the former lessor for the enjoyment of the premises." In support of this construction, attention is called to the fact that, in one part of the said contract with the Keller Company, the monthly payment of \$150 is called a rental; that said contract provided that "Gildea was to secure the leasehold interest of Keller Company for the unexpired term thereof"; that Gildea was to pay therefor a certain sum monthly to both Keller Company and the lessor; "the monthly payments by Gildea to the lessor and former lessee are to keep pace and be paid on the same day and for the same term of years, to wit, on the 1st day of each and every month to and including the 1st day of December, 1907;" and "the payment by Gildea to Keller was not a fixed sum in monthly installments as in the case of the fixtures, but the payment of a monthly sum to keep pace with Gildea's enjoyment of the premises given by Keller Company to Gildea." Therefore it is argued that we have a case for the application of the principle of construction embodied in section 1850 of the Civil Code that "particular clauses of a contract are subordinate to its general intent."

We think this view does no violence to the expressed will of the parties, and that it is more just and equitable than the harsh construction insisted upon by appellant.

It appears plain enough, at least, that the consideration moving Gildea to enter into the contract with the Keller Company was the enjoyment of the possession of the premises for the period of time agreed upon. To secure this right, the promise was made to pay, as we have seen, a certain sum monthly to the owner of the property and another sum to the Keller Company. Thereupon the Keller Company yielded its right to the possession, and the owner executed the lease to the Gildea Company. It was therefore by the voluntary act of both the owners and the Keller Company that respondents secured the privilege of occupying and using the premises. Unless the Keller Company had divested itself of its leasehold interest, manifestly respondents could not have taken possession. Respondents, therefore, virtually hired the property of the owners and of Keller Company, but more directly of the latter, for a term ending December 31, 1907. It can make no difference in the substantial effect of the transaction that the Keller Company transferred or surrendered its rights to the owners, and then the owners conveyed to respondents. The result would have been the same if, with the consent of the owners, there had been a direct assignment to the second lessees by the Keller Company of the leasehold right. In either event, the right of possession for the term would be acquired at least partly through the act of the Keller Company. The same statutory provision, therefore, for the determination of the hiring from the owners applies to the hiring from the Keller Company. The obligation to pay further rent to either was at an end when the property, for the use of which the consideration was paid, was entirely destroyed.

We can see no special significance in the fact that, technically speaking, respondents became the tenants of the owners, and not of the Keller Company, since it was by the act of the latter that the tenancy was made possible and available.

Neither do we perceive any reason for holding that this construction would destroy the consideration for the contract. The fact still remains that the Keller Company, at the time the contract was entered into, was occupying the buildings under a lease, and the surrender of the exclusive right to the possession, secured by said lease for the term ending December 31, 1907, was an essential prerequisite to the acquisition by the Gildea Company of said right of possession.

Indeed, we think, appellant has rather failed to appreciate the significance of the real consideration that moved Gildea in the transaction. We repeat—what he was attempting to secure and promised to pay for was the

possession of the buildings for the term ending December 31, 1907. It was sufficient to support the promise; but it was an executory and continuing consideration, and liable to fail or to be defeated before the end of the term. For this reason, it may be assumed, the payments were to be made monthly. As a matter of fact, the consideration did fail before the end of the term by reason of the destruction of the subject-matter of the contract. We think it follows that appellant should be paid only for the time that this consideration was rendered to the said Gildea Company—that is, until April 18, 1906.

If the Keller Company had sublet the buildings to the Gildea Company, or had directly assigned the lease to the latter, on the consideration that the entire rental be paid to the former, it would hardly be contended, we think, that the Gildea Company would be required to continue the payment of the rent to the Keller Company, although the latter was relieved of its obligation to pay anything further to the owners by reason of the destruction of the buildings. But we think the logic of appellant's position would lead to such an injustice.

We are persuaded that the lower court allowed appellant all that he was entitled to, and the judgment is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**GRAYCROFT et al. v. SUPERIOR COURT
IN AND FOR KERN COUNTY**
et al. (Civ. 1,394.)

(District Court of Appeal, Second District, California. Nov. 6, 1913.)

COURTS (§ 89*)—PRECEDENTS—STARE DECISIS.
Where a writ of prohibition had been granted in a previous proceeding in which the facts, except as to some of the parties, were identical with those of the present application, the writ will be granted upon the authority of that decision.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

Application by Frank Craycroft, Jr., and another, for a writ of prohibition to be directed to the Superior Court of Kern County and the Judges thereof. Writ granted.

L. L. Cory and Miles Wallace, both of Fresno, and Lloyd, Cheney & Geibel, of Los Angeles, for petitioners.

SHAW, J. This is an application for a writ of prohibition to be directed to the superior court of Kern county and the judges thereof, prohibiting the said court from proceeding with the trial of a certain action pending therein, wherein Charles Smithwick is plaintiff and petitioners and others are defendants. The subject of the action is the conflicting claims of the respective parties to the right to purchase from the state certain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

school lands described in the petition over which a contest arose in the office of the state surveyor general and register of the state land office, which contest was by order duly made referred for adjudication to said court.

The facts upon which this proceeding is based are, except as to some of the parties and the particular description of the land, identical with those involved in the case of Frank Craycroft, Jr., v. Superior Court of Kern County, decided by this court and reported in 18 Cal. App. 781, 124 Pac. 1042, wherein a writ of prohibition was ordered. Upon the authority of that case and for the reasons set forth in the opinion filed therein, it is clear that a peremptory writ of prohibition should issue in accordance with the prayer of the petition; and it is so ordered.

We concur: CONREY, P. J.; JAMES, J.

MURDOUGH v. MURDOUGH. (Civ. 1292.)
(District Court of Appeal, First District, California. Nov. 6, 1913.)

1. APPEAL AND ERROR (§ 917*)—RECORD—PRESUMPTIONS.

Where the record does not show that the trial court did not rule upon a demurrer to the complaint, the appellate court will presume, to sustain the judgment for plaintiff, that the court did rule thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3708-3709; Dec. Dig. § 917.*]

2. HUSBAND AND WIFE (§ 297*)—ACTION FOR MAINTENANCE—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for separate maintenance, held to show that defendant, after learning that his wife had consumption, resolved not to longer live with her and abandoned her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1090; Dec. Dig. § 297.*]

3. HUSBAND AND WIFE (§ 298*)—SEPARATE MAINTENANCE.

Where it appeared that a husband willfully deserted his wife, who was willing to live with him, and willfully neglected to support her, and that his income was \$200 a month, with board and lodging free, and his expenses did not exceed \$100 a month, an award of \$40 a month to his wife for separate maintenance was proper.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093; Dec. Dig. § 298.*]

4. APPEAL AND ERROR (§ 758*)—BRIEFS.

Alleged error in rulings on evidence will not be reviewed where appellant's brief merely states that an examination of the record will satisfy the court of his position without pointing out any particular ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by Mary M. Murdough against James W. Murdough. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry L. Ford, of Eureka, J. A. Prentice, of San Francisco, and Otto C. Gregor, of Eureka, for appellant. Pierce H. Ryan, of Eureka, for respondent.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action for maintenance taken within 60 days after its entry.

The complaint sets forth in two counts the willful desertion and willful neglect of the plaintiff by the defendant. To the complaint defendant filed a demurrer, and subsequently an answer and cross-complaint. After trial the court found, among other things, that defendant's income is \$200 per month, with board and lodging free, and that his expenses do not exceed \$100 per month; that the plaintiff is without funds or property; that defendant willfully deserted plaintiff; that he willfully neglected to support her; that plaintiff never deserted defendant; that she has been at all times willing to live with defendant, and that \$40 per month is a reasonable and necessary sum to be awarded plaintiff for her support and maintenance. Judgment was entered accordingly.

The defendant in support of his appeal urges that his special demurrer to the complaint should have been sustained; that the court, so far from sustaining it, never even ruled upon it, and he predicates error upon such omission.

The defendant filed his answer and cross-complaint and went to trial without seeking to have the court rule upon the demurrer, and for this reason, perhaps, the special demurrer should be regarded as waived by the defendant. *Reynolds v. Hosmer*, 45 Cal. 616; *Ward v. Clay*, 82 Cal. 502, 23 Pac. 50, 227; *Harney v. McLeran*, 66 Cal. 34, 4 Pac. 884; *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; *Kirsch v. Derby*, 96 Cal. 602, 31 Pac. 567; *De Martin v. Albert*, 68 Cal. 277, 9 Pac. 157; *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658.

[1] But in any event it is sufficient to say that, the record failing, as it does, to show that the court did not rule upon the demurrer, we will, as we are bound to do, presume, in favor of the judgment, that the court did rule thereon. Moreover, an examination of the record shows that the complaint is not demurrable in the particulars set up.

The record is quite voluminous, consisting of approximately 600 pages of typewritten matter, and any extended discussion of the evidence would make this opinion needlessly long and would serve no useful purpose. An examination of the record shows, contrary to defendant's contention, that the findings of the court find ample support in the evidence. The facts may be briefly summarized, in so far as they bear upon this question, as follows: The parties were married in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state of Illinois in the year 1899, and for the reason principally that the defendant was unable to obtain steady employment they did not live together much after their marriage until the beginning of the year 1909. There was, however, during that time no friction between them worthy of mention, and when the plaintiff was not with her husband or at some place for her health she lived with her family in Chicago. In 1908 defendant was employed to manage a hotel in Eureka, Cal., and in April, 1909, he sent for the plaintiff, and she came and resided with him as his wife until the following June, when, her health failing, she, with the consent of her husband, went to a health resort. Later her ailment was diagnosed as consumption, and she did not return to Eureka until August, 1910. Apparently from the time defendant learned that his wife was consumptive he did not want her to return to Eureka. She did, however, return and lived there about a month, when, at his earnest solicitation, she reluctantly went to her brother and sister in Chicago. The plaintiff paid her transportation and later paid on her account for board and lodging the sum of \$75. In March, 1911, he wrote her a letter saying, in part: "My affection for you has faded away and is dead. You are nothing to me and never will be. I am like a prisoner in captivity and confinement. * * * I am determined on a separation and nothing will ever tempt me to live with you again. * * * Your whole system is permeated with disease that has sapped your blood and vitality from your body." In April following he wrote her another letter, reiterating his determination never again to live with her. He wrote her brother a letter in which he stated that he had concluded to separate from the plaintiff, giving her ill health as his reason. In the same month he also wrote a letter to plaintiff's sister, in which he said that he had received a letter from his wife suggesting that she return to him. Commenting on this he said in effect that it was impossible. He was brutally frank in detailing his reasons for this conclusion. He stated in his testimony on cross-examination that it was his unalterable conclusion never to live again with plaintiff.

[2, 3] It is clear from the testimony introduced by the plaintiff that shortly after defendant had been informed that his wife was suffering from consumption, he resolved to live with her no more. Accordingly he persuaded her to return to her folks in the East, and shortly afterwards he wrote her to the effect as just detailed. He is financially able to pay her \$40 per month, and we have not the slightest hesitation in saying that the evidence abundantly supports the findings, and the findings in turn sustain the judgment.

[4] The defendant also asserts in his brief

that the trial court committed numerous errors prejudicial to him in the admission or rejection of evidence. He depends upon no particular ruling of the court and contents himself with stating that an examination of the record will satisfy the court of the correctness of his position. The record, as before stated, is over 500 pages long. Such an assignment of errors is fair neither to opposing counsel nor to the court; and the appellate courts in this state have repeatedly held, as we do now, that points made in this manner will be ignored.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

MOORE v. GILSON. (Civ. 1,280.)

(District Court of Appeal, First District, California. Nov. 5, 1913.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—FINDINGS.

A finding of the jury on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. APPEAL AND ERROR (§ 699*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where the transcript disclosed that the instructions were not embodied in the statement of the case, errors assigned upon the instructions cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2923-2930; Dec. Dig. § 699.*]

3. APPEAL AND ERROR (§ 499*)—STATEMENT OF CASE.

Where the transcript showed that no specification of error for the giving of any instructions was made in the statement of the case, errors assigned upon the instructions cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Sarah E. Moore against Mary E. Gilson, individually and as executrix of the last will and testament of Rufus K. Gilson. From a judgment for plaintiff, defendant appeals. Affirmed.

David C. Clark, of Santa Cruz, and Carl E. Lindsay, of San Francisco, for appellant. Benj. K. Knight, of Santa Cruz, for respondent.

RICHARDS, J. This is an action to quiet title to a lot in the city of Santa Cruz. The complaint is in the usual form. The defendants appeared by answer, denying title in the plaintiff, and also by cross-complaint, setting up title in decedent Rufus K. Gilson at the time of his death.

[1] Upon the trial the plaintiff presented a deed of the lot in question from said Gilson

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to her, executed and claimed by her to have been delivered prior to his death. With respect to the execution of this deed there is no dispute; but with respect to its delivery, and the intention of the defendant, Gilson, at the time he handed it to the plaintiff, as to whether it was to pass from his control, or as to whether it was intended to be merely a mortgage for money due by him to the plaintiff, the evidence is clearly conflicting. The jury resolved these substantial conflicts in the evidence in favor of the plaintiff, and with its discretion in that respect it is not our province to interfere.

[2, 3] The appellants further contend that certain instructions said to have been given by the court to the jury are erroneous in the respects pointed out in the briefs of their counsel. The transcript discloses that the instructions of the court were not embodied in the statement of the case, and further discloses that no specification of error on the part of the court in giving any of its instructions was therein made. For each of these reasons the argument of counsel for the appellants as to said erroneous instructions cannot be considered upon this appeal. *Paris v. Raynor*, 76 Cal. 647, 18 Pac. 788; *Matthews v. Jones*, 92 Cal. 563, 28 Pac. 597; *Braverman v. Fresno C. & I. Co.*, 101 Cal. 644, 36 Pac. 386; *Southern Pacific Co. v. Superior Court*, 105 Cal. 84, 38 Pac. 627; *Kelly v. Ning Yung Ben. Ass'n*, 2 Cal. App. 400, 84 Pac. 321.

No error appearing in the record, the judgment and order denying the defendants' motion for a new trial are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

DYAR v. STONE. (Civ. 1,800.)

(District Court of Appeal, First District, California. Oct. 30, 1913.)

1. BROKERS (§ 54*)—COMPENSATION—RIGHT TO.

A real estate broker employed to effect an exchange of property is not entitled to his commission when he has produced a person who was not able to comply with the principal's offer within the time limited for performance.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

2. BROKERS (§ 84*)—COMPENSATION—BURDEN OF PROOF.

When no exchange is effected, the burden of proof is upon the broker seeking compensation to show that he produced a person ready, able, and willing to effect the exchange upon the terms proposed.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.*]

Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by Guy E. Dyar against James B. Stone. From a judgment for defendant and an order denying his motion for new trial, plaintiff appeals. Affirmed.

Guy E. Dyar of Fresno, in pro. per. Walter J. Desmond, of Los Angeles, and Frank Kauke, of Fresno, for respondent.

RICHARDS, J. This is an action by a real estate broker to recover a commission alleged to be due upon an exchange of a ranch of the respondent, situated in Fresno county, for an apartment house of one Winifred M. Whitney located in Los Angeles. The transaction was never completed by an actual interchange of these properties.

The facts as developed at the trial were substantially these: The plaintiff in the year 1911 was a real estate broker in Fresno. The defendant, also residing in Fresno, was the owner of a large ranch near Raisin City, with respect to which said plaintiff undertook to negotiate an exchange for the Whitney apartment house in Los Angeles. After apparently proceeding some length with this effort he obtained from Stone a writing in the following words: "Fresno, Cal., August 17th, 1911. In the event that an exchange of my ranch of 647 acres near Raisin City for the Whitney apartment house in Los Angeles, Cal., is consummated by me, I agree to pay Guy E. Dyar, as agent, a commission of 3% upon the value of my land in the trade (namely, \$25,000), it being understood that this commission is the total and only commission to be paid by me on said exchange of properties. J. B. Stone." Thereafter, and on or about August 29, 1911, Stone went to Los Angeles, and was taken by a Mr. Boynton, the agent of Mrs. Whitney, to see her property. On September 25th Mrs. Whitney went with Boynton to Fresno to inspect the Stone ranch. On the same day Stone made and signed a proposition for the exchange of properties, which proposition contained a number of conditions to be complied with by Mrs. Whitney, among which was the requirement that the proposition should be accepted within three days, and that within 15 days thereafter the other specified conditions contained in the proposal should be complied with by her. On September 28th Mrs. Whitney indorsed her acceptance of the proposition upon it; and on the following day Stone placed in escrow with the Title Insurance & Trust Company of Los Angeles the money and documents required for the carrying into effect of said proposition on his part, expressly directing that his money and documents were to be returned to him if the escrow was not complied with and the transaction completed within 15 days. The undisputed evidence in the case shows that the full 15 days' time elapsed without any effort being made on the part of Mrs. Whitney to comply with the escrow or conform to the conditions of the proposition of Stone to be by her performed, and that thereupon Stone withdrew from the transaction, and refused to go ahead with the deal. Dyar then demanded payment in full of his commission,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which being refused, he brought this action. The foregoing facts were all presented by the plaintiff at the trial as the basis and foundation of his claim. The defendant offered no evidence on his part. The court gave judgment for the defendant upon the foregoing admitted facts. The plaintiff moved for a new trial, which being denied, he now appeals from the judgment and order denying his motion for a new trial.

From the foregoing facts it will clearly appear that the judgment of the lower court must be affirmed.

[1] Conceding it to be the law that a real estate broker has earned his commission under the ordinary agency contract when he had produced a person ready and able and willing to make the purchase or exchange of the property mentioned in his contract in accordance with its terms, and who enters into a valid and binding agreement for such purchase or exchange, the undisputed evidence in this case shows that the plaintiff did not produce such a person. The evidence nowhere shows, either expressly or by any reasonable adequate implication, either that Mrs. Whitney had such title to the property offered in this exchange as would enable her to make it, or that, even if she had such title, she was able otherwise to comply with the requirements of Stone's proposition. On the contrary, it affirmatively appears from the testimony given by her own agent Boynton that "We offered part performance and made an effort to give complete performance. We did not tender all we were obliged to tender within the time limited, and were unable to comply with it within that time." This testimony is not only uncontradicted, but the record also shows that no offer of full performance of the terms of respondent's proposition was ever made, or that Mrs. Whitney was able or ready at any time to make the same. It further appears that the principals to the proposed exchange of property never met.

[2] This statement of the facts of this case brings it clearly within the rule announced in the case of *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622, that where no exchange is effected, the burden of proof is upon the broker to show that he found one who was ready and willing and able to effect the exchange upon the terms proposed. In that case the court held that the broker had not measured up to this requirement in his proof, and reversed the judgment upon that ground. *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622. There was some discussion in the main opinion in the above case as to the meaning to be given to the word "consummated" in a broker's agreement; but since the meaning to be given to that term was not essential to a determination of that case, and is not essential to a determination of the present case, and since also the judges in

that case were not agreed as to what the meaning of that term should be, the views upon that subject expressed in the main opinion therein are of no aid to appellant in the case at bar.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J

WILLIAM NICOL CO. v. CAMERON.
(Civ. 1,302.)

(District Court of Appeal, First District, California. Oct. 29, 1913.)

PLEADING (§ 433*)—OBJECTIONS RAISED AFTER JUDGMENT—COMPLAINT—SUFFICIENCY.

A complaint on a claim presented to an executrix, based on a note executed by testator, which averred that the note had not been paid and that the executrix had neglected and refused, and still neglected and refused, to approve the claim, sufficiently charged that it had not been paid, when first attacked after judgment for the claimant on a trial on the merits on the issue raised by general denial, without attacking the sufficiency of the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the William Nicol Company against Dorothea Cameron, as executrix of William Ladd, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

D. I. Mahoney, of San Francisco, for appellant. A. G. Lyon, of San Francisco, for respondent.

RICHARDS, J. This is an action upon a claim presented to the appellant, as executrix of the last will of William Ladd, deceased, based upon a promissory note for the sum of \$300, executed by said decedent to plaintiff in his lifetime and unpaid at the time of his decease.

In its second amended complaint the plaintiff sets forth the note in full, with the usual averments of the due execution and delivery of the same, and then avers the death of the decedent, the due appointment of appellant as the executrix of his estate, the proper presentation of the claim, and the averment that the executrix "had neglected and refused, and still neglects and refuses, to approve said claim." To this complaint the executrix answered in the form of a general denial, and thereafter and at the time of the trial the plaintiff was allowed to amend his said complaint by adding the averment "that said note has not been paid." The case was tried upon the issues thus presented; and, plaintiff having recovered judgment for the amount of its claim and for its payment in due course of administration, the executrix prosecutes this appeal upon the judgment roll.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

It is the contention of the appellant that the complaint does not state facts sufficient to constitute a cause of action for the reason that it is not averred therein that "the claim has not been paid." This contention is without merit. The complaint averred that the note had not been paid, and that the executrix had neglected and refused, and still neglects and refuses, to approve the claim. The defendant did not demur to the complaint but answered to the merits, and went to trial and judgment without, so far as the record shows, making any point as to the sufficiency of the complaint in the lower court. At worst we think the complaint was only subject to a special demurrer upon the ground of uncertainty, which not having been presented, the point was waived. Aside from this suggestion, however, it may be said that, in an early and well-considered case differing in no material respect from the case at bar, it was held that a complaint, alleging the nonpayment of the original obligation and its due presentation to and rejection by the administrator, sufficiently stated a cause of action, and that it was not necessary to further aver that the administrator had not paid the claim. *Wise v. Hogan*, 77 Cal. 184, 188, 19 Pac. 278.

The appellant also contends that the findings are insufficient to support the judgment; but, since this objection is wholly based upon the first contention of the appellant as to the sufficiency of the complaint, it must necessarily fall with that contention.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

PEOPLE v. STEIN. (Cr. 230.)

(District Court of Appeal, Third District, California. Oct. 28, 1913.)

1. CRIMINAL LAW (§ 231*)—ARRAIGNMENT—INFORMATION BY MAGISTRATE.

Where accused appeared before the magistrate with counsel, the magistrate was not required to advise him of his right to aid of counsel, as required by Pen. Code, § 858; section 860 providing that the magistrate must, after appearance of counsel, proceed to examine the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 412, 479-481; Dec. Dig. § 231.*]

2. CRIMINAL LAW (§ 231*)—ARRAIGNMENT—INFORMING ACCUSED OF CHARGE.

Under Pen. Code, § 858, requiring the magistrate to "inform" an accused of the charge against him, a mere statement in a general way, by the magistrate, of the nature of the charge is sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 412, 479-481; Dec. Dig. § 231.*]

3. CRIMINAL LAW (§ 1166*)—APPEAL—HARMLESS ERROR—PRELIMINARY EXAMINATION.

Failure of the magistrate to inform accused of the charge against him and of his right to counsel, as required by Pen. Code, §

858, was not reversible if, because accused knew the nature of the charge and already had counsel, he was not injured thereby, so that the record affirmatively shows that there was no miscarriage of justice, as contemplated by Const. art. 6, § 4½, to authorize reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. § 1166.*]

4. HOMICIDE (§ 13*)—IMPLIED MALICE.

Malice will be implied when one deliberately and unnecessarily discharges a gun into a crowd of people with utter disregard of the consequences, though he had no malice against the particular person shot, or any one else in the crowd.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 18; Dec. Dig. § 13.*]

5. HOMICIDE (§ 340*)—HARMLESS ERROR—INSTRUCTIONS—INTENT.

The court instructed that, though accused when he committed the homicide was partially insane, if he still understood the nature of his act and knew that it was wrong, and had sufficient mental power to apply such knowledge, and knew that if he committed the act he would be doing wrong and would be punished, and possessed a will sufficient to restrain any impulse to kill arising from his diseased mind, then such partial insanity would not exempt him from responsibility if the killing were without legal justification or excuse. *Held*, that the instruction was not erroneous, except that it may have been too favorable to accused in implying that, even if capable of appreciating the nature and wrongfulness of his act, he could not be convicted if he was at the time without sufficient will power to restrain his homicidal impulse.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. § 340.*]

6. HOMICIDE (§ 294*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where the sole defense was accused's insanity when he committed the homicide, partly caused by intoxication, and the state claimed that he was not insane, but merely intoxicated, instructions that an act committed by one in a state of voluntary intoxication was not less criminal for that reason, but where a particular intent was a necessary element, evidence of accused's intoxicated condition at the time may be considered in determining intent and motive, were applicable.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. § 294.*]

7. CRIMINAL LAW (§ 773*)—INSTRUCTIONS—COMMENTS ON EVIDENCE.

An instruction in a homicide case, defended on the ground of insanity, that such defense should be carefully examined, "lest an ingenious counterfeit of the malady furnished protection to the guilty," is subject to criticism, but not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821-1828; Dec. Dig. § 773.*]

8. CRIMINAL LAW (§ 1130*)—APPEAL—BURDEN OF SHOWING ERROR.

To have reviewed rulings on instructions, appellant must point out the particular rulings relied on, the appellate court not being required to search the record for prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

9. CRIMINAL LAW (§ 722*)—TRIAL—IMPROPER ARGUMENT.

A statement by the district attorney in argument that, if there was ever a case in his whole experience in which there was shown an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

abandoned and malignant heart by one charged with murder, it was this case was proper, where the evidence showed that accused deliberately shot into a crowd while partially intoxicated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1674; Dec. Dig. § 722.*]

10. CRIMINAL LAW (§ 1037*)—APPEAL—PRESENTATION BELOW—OBJECTION TO ARGUMENT.

To review improper argument by the district attorney, an objection must have been taken thereto in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

11. CRIMINAL LAW (§ 798½*)—VERDICT—FORM.

A form of verdict in a homicide case, which designated the particular state's prison in which accused should be incarcerated upon sentencing him to life imprisonment, was improper; Pen. Code, § 190, not authorizing the jury to designate the special penitentiary in which accused was to be imprisoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1801, 1938; Dec. Dig. § 798½.*]

12. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR.

The quoted part of a verdict in a homicide case, which stated that accused should be imprisoned for life in the state prison "at Folsom," could be rejected as surplusage, so that the submission of a form of verdict to the jury, which contained the name of that particular penitentiary, was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Andrew Stein was convicted of murder in the first degree, and appeals. Affirmed.

John R. Cronin, of Benicia, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted of murder of the first degree; the jury fixing the penalty at imprisonment in the state prison for life. Section 190, Pen. Code. This appeal is by the defendant from the judgment.

The homicide, resulting in the death of one E. G. Piercy from a gunshot wound inflicted by the defendant, occurred at the Hotel Bird, in the town of Benicia, Solano county, on the night of the 20th day of February, 1913. The defendant was, at that time and had been for some months previously, employed by the San Francisco Bridge Company, which was then operating in said town of Benicia. The defendant was the foreman of the drillers who were employed by said company. The deceased was a temporary guest at the hotel, having registered thereat only a few days prior to his death. It is not denied that the defendant fired the shot which produced the death of Piercy. He interposed the defense of insanity, claiming that, when he fired the fatal shot, he was mentally deranged to such an extent that he could not and did not know the nature and

quality and wrongfulness of his act. It appears that a number of the guests of the hotel, including the wife of the proprietor and her sister, after the dinner hour on the day of the homicide, for the purpose of engaging in a social dance, repaired to a room in the hotel customarily used by traveling drummers in which to display samples of their goods and wares. This room is on the first floor of the hotel, and adjoins the barroom. The defendant's sleeping room was situated in the second story of the hotel, and immediately over the sample room, in which the dancing was going on. The defendant had been indulging heavily in intoxicating liquors during the early evening of the night of the homicide, and at the time he fired the fatal shot was considerably under the influence of liquor. He appeared to be generally in a disgruntled mood and, during the evening and while the dancing was in progress, complained in the presence of several persons that the music produced by the electric piano annoyed him. At about 11 o'clock, he entered the sample room and, as one Camp was about to engage in a dance with Mrs. Bird, wife of the landlord, he (defendant) objected, but for what reason no one seemed to know. Camp said that the defendant appeared to object to his dancing with Mrs. Bird, but that he "mumbled" so that he could not understand what he was saying. Camp then took the defendant out of the room into the barroom. Camp then returned to the sample room. The defendant shortly thereafter went to his own room, procured a revolver, stepped to the door leading into the sample room, and from that point, and with the exclamation, "Stop it! stop it! stop it!" or words of similar import, fired five shots in rapid succession into the party, one of them striking and wounding one Chester C. Hoyt; one of the participants in the dancing festivities, and another striking Piercy. The wound received by Hoyt was in the right thigh, and was not fatal. The point of entrance of the shot that struck Piercy was through the fleshy tissue of the right thigh, and about two and a half inches below the crest of the hip bone. The deceased complained of pain in the bowels, and an operation by the surgeons disclosed that the bullet had penetrated the bowels, causing four distinct perforations thereof. The bullet was found lying loose in the abdominal cavity, in the region of the left kidney. Piercy died the night following that of the shooting at about 11:30 o'clock. The attending surgeon testified that the wound was necessarily mortal.

[1] The first point made by the defendant is that the court erred by refusing to grant his motion to set aside the information upon which he was tried and convicted upon the alleged ground that he "had not been legally committed by a magistrate." Section 995, Pen. Code. The specific contention in this respect is that the magistrate before whom

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the defendant was examined failed or omitted, before the examination was proceeded with, or at any time during the progress of the proceedings, to "inform him of the charge against him, and of his right to the aid of counsel in any stage of the proceedings." Pen. Code, § 858. It appears from testimony taken on the motion to set aside the information that the accused, accompanied by his attorney, J. R. Cronin, appeared before the magistrate at the time fixed for the preliminary hearing, and that, before the taking of testimony was begun, the district attorney, addressing the defendant, "asked him if he was familiar with his rights, and he said, 'Yes.'" Thereupon the district attorney, addressing Attorney Cronin, who was then engaged in conversation with the defendant, asked "if he would waive the reading of the complaint," to which question counsel answered in the affirmative. Thereafter the preliminary hearing of the charge against the accused was proceeded with; Mr. Cronin representing the defendant throughout the entire hearing and until its conclusion. Section 860 of the Penal Code provides that "if the defendant requires the aid of counsel, the magistrate must, immediately after the appearance of counsel, or if, after waiting a reasonable time therefor, none appears, proceed to examine the case." In this case counsel did appear for the defendant before the magistrate, and the magistrate was therefore authorized to proceed with the hearing. It was clearly unnecessary for the magistrate to go through the formality of advising the defendant of his right to the aid of counsel when it appeared that the latter had already exercised that right by employing an attorney to represent him at the hearing; the attorney so retained being present with the accused in the magistrate's court when the case was called for examination.

Nor does the fact that the complaint was not read to the defendant constitute, under the circumstances attending the omission to do so, a ground upon which it may justly be held that the accused had not been legally committed by the magistrate. Of course, a person who is brought before a magistrate on a criminal charge—that is, for a felony or other crime which is required to be preliminarily examined as a prerequisite to the filing of an information in the superior court—is entitled to be informed of the nature of the offense with which he is charged before the magistrate may proceed to take testimony or depositions in support of the charge. This information he is entitled to be provided with in order to enable him to prepare to meet the charge against him.

[2] The statute does not in terms declare that the complaint shall be read to the defendant, but the magistrate must *inform* him of the charge, and we apprehend that the mere statement by that official in a general way of the nature of the charge would sat-

isfy the requirement in that regard. However, that the defendant in this case had knowledge of the contents of the complaint or of the nature of the charge therein preferred against him is implied from the fact that the attorney representing him at the hearing waived the reading of the complaint in his presence, and from the further fact that, through his attorney, he announced himself ready to proceed with the examination. Under such circumstances it would be carrying technicality to the extreme limit to hold that the case should be re-examined before a valid information could be based upon the commitment therein issued, merely because the formal reading of the complaint had been omitted by the examining magistrate, assuming that the statute contemplates that the complaint must always be read in such cases.

[3] At any rate, the defendant certainly cannot claim that he suffered actual damage, either at the examination or at the trial, by such omission, and, assuming that the court below, in denying the motion to set aside the information, committed error, it is a mere technical error innocuous in its effect upon the rights of the accused, and of which it cannot consequently be said, after an examination of the entire record, including the evidence, that it "has resulted in a miscarriage of justice." Article 6, § 4½, Const.; *People v. Tomskey*, 130 Pac. 184.

The point is made with apparent seriousness that the evidence does not justify the verdict because it fails to disclose that the act of the defendant in shooting into the crowd of dancers was accompanied by malice. "Murder is the unlawful killing of a human being, with malice aforethought." Section 187, Pen. Code. "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned or malignant heart." Section 188, Id. The evidence, as we have shown, discloses that the defendant seriously resented the noise produced by the electric piano in the room in which the dancing was going on, and expressed himself as being greatly annoyed thereby. He was in a quarrelsome frame of mind during the entire evening, up to the time he fired the shots into the dancing party. He stepped to the door leading to the dancing room, and making the exclamation above referred to, evidently thus referring to the music, deliberately fired into the party, with the result as already described. Even if it may in strictness be said that this evidence does not show express malice, it is certainly sufficient to warrant the implication of malice. There was no provocation for the shooting, and the circumstances clearly disclose, in our judgment, "an abandoned and malignant

heart." It does not follow, merely because the defendant might not perhaps have entertained any personal ill will toward the deceased, that the shooting and killing of the latter was not with the malice essential to the consummation of the crime of murder. The deliberate and unnecessary discharging of a gun into a multitude of people, with an utter disregard of the consequences of the act, whereby human life is destroyed, is murder, and malice will be implied, although the perpetrator of the act had no malice against any particular person of the multitude into which he so fired. Bishop's New Criminal Law, § 314, vol. 1, and section 688, vol. 2.

[4, 5] It is next objected that the court erred to the serious prejudice of the rights of the accused in reading to the jury the instruction that, although the defendant, at the time he committed the act, was laboring under partial insanity, "If he still understood the nature and character of his act and its consequences, and had a knowledge that it was wrong and criminal, and he had mental power at the time sufficient to apply that knowledge, and to know if he committed the act he would be doing wrong, and receive punishment, and that he possessed a will sufficient to restrain the impulse he may have had to kill, arising from his diseased mind, then such partial insanity will not exempt him from responsibility, under the law, for such act, and you should find him guilty, in the degree shown by the evidence," provided the jury were convinced by the evidence beyond a reasonable doubt that the killing of the deceased by the defendant was without legal justification or legal excuse. We perceive nothing erroneous in the general purport of the foregoing instruction. It has never been doubted in this state that a person may be held for a criminal act if, at the time of committing such act, he fully knew the wrongfulness and criminality thereof, notwithstanding that he may at the time be partly insane or a monomaniac upon some subject other than that to which his criminal act related. But the language of the instruction appears to go so far as to imply that, even if the defendant was, at the time of the killing, fully capable of appreciating and knowing the nature and quality and wrongfulness of his act, he would be immune from responsibility if it was made to appear that he was, at the time, without sufficient volitional power to restrain himself from committing the act. If this be the true construction of the language of the instruction, it is to that extent erroneous. *People v. Hoin*, 62 Cal. 120, 45 Am. Rep. 651. Of course, a person having the mental capacity to know the wrongfulness and criminality of a certain act has the capacity equal with such knowledge to restrain himself from committing it, and where, under such circumstances, he does

not so restrain himself, but commits the act, his conduct in that regard will be ascribed by the law to a deliberate purpose or intent to do the wrong. That part of the instruction as so construed, however, was favorable to the defendant, and he cannot therefore justly claim that he suffered any damage therefrom.

[6] The court read to the jury several instructions, based upon and in the language of section 22 of the Penal Code, declaring that "no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition," but that where the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, evidence of the intoxicated condition of the accused at the time of committing the act is admissible and may be considered by the jury in determining the purpose, motive, or intent with which he committed such act. It is here argued that said instructions were without pertinency to any issue in the case, and that thus a factor was improperly injected into the case which "tended to confuse, and did confuse, the jury in arriving at its verdict." The instructions were peculiarly appropriate to the case as made by the evidence, and therefore properly given. As seen, the sole defense was the claimed mental irresponsibility of the defendant at the time he committed the act, and his contention at the trial was that his insanity had been partly superinduced by an excessive use of intoxicating liquors prior to the time of the homicide. The claim of the district attorney was that he was not insane when he fired the fatal shot, but that he was merely in a state of intoxication, in which condition he had voluntarily placed himself. Considerable testimony was addressed to this feature of the case, and the people were entitled, of course, to have the law upon that subject explained to the jury. This the court did fully, clearly, correctly, and, as stated, most pertinently.

[7] The instruction in which the court cautioned the jury to examine with care the defense of insanity interposed by the defendant, "lest an ingenious counterfeited of the malady furnish protection to the guilty," is, to some extent, justly criticised, but we think its effect cannot be held sufficient to justify a reversal of the case. The same instruction has often been given in criminal cases in which the insanity of the accused has been set up as a defense, and has received the approval of the Supreme Court. See *People v. Dennis*, 89 Cal. 625, *People v. Bumberger*, 45 Cal. 650; *People v. Pico*, 62 Cal. 50, and *People v. Larrabee*, 115 Cal. 158, 46 Pac. 922. In the case of the *People v. McCarthy*, 115 Cal. 255, 264, 285, 46 Pac. 1073, however, the Supreme Court took occasion to criticise the instruction, and to suggest that it were bet-

ter never to read it to the jury, and with that suggestion we are in accord, as we regard such a statement by the court in its charge as verging too closely upon the domain of questions of fact—that is, as approaching an instruction upon the effect of the evidence. However, the court in that case held that, the instruction having been theretofore approved in several cases, a reversal could not be justly predicated thereon. See *People v. Methever*, 132 Cal. 326, 330, 64 Pac. 481.

The defendant makes a general objection to the action of the court in giving other instructions, and in refusing to read to the jury a large number of instructions proposed by him. In his brief, the defendant does not point out the alleged errors thus referred to, but in effect suggests that this court will discover such errors by reviewing "all the instructions, given and refused by the trial court, so that more extended remarks in this brief on that subject are unnecessary." But this court is not required to discharge a duty which rests entirely upon an appellant in a criminal case or his counsel.

[8] Where error is claimed in the rulings or instructions of the trial court, it is the duty of the party complaining on appeal to point out the error, otherwise it will not be reviewed, as it is not incumbent on a reviewing court to search through the record for the purpose of discovering for itself wherein the action of the court in the respect complained of involved error prejudicial to the defendant. *People v. Chutnacut*, 141 Cal. 685, 75 Pac. 340; *People v. Pembroke*, 6 Cal. App. 593, 92 Pac. 668; *People v. Balmain*, 16 Cal. App. 33, 116 Pac. 308. We have, however, carefully read the full charge of the court, and, furthermore, have taken the pains to examine those instructions submitted by the defendant but rejected by the court, and thus we have found that the court's charge clearly and correctly covered every essential phase of the case, and that the rejected instructions referred to amounted only to a repetition of a statement of the principles which were declared to the jury in the general charge of the court.

[9] It is urged that the district attorney, in his address to the jury, was guilty of misconduct which seriously militated against the defendant by declaring that, if there ever was a case arising in his experience of six years as district attorney, in which there was disclosed on the part of any man accused of murder "an abandoned and malignant heart— * * * an utter abandonment * * * to regard human life as sacred— * * * it is the case of this defendant, Andrew Stein, on trial here to-day for his life." The foregoing language was, in our opinion, perfectly justified by the evidence. We have said as much in another part of this opinion. We can conceive of no stronger evidence of "an abandoned and ma-

lignant heart" than that which discloses the act of deliberately and recklessly discharging a gun into a crowd of people with a total disregard of the consequences thereof. But if it were to be said that the language was wholly unwarranted by the record and imported into the case matters wholly foreign to the issues, it is to be remarked that the defendant is hardly in a position justly to complain of any damage which might have followed therefrom, since it does not appear in the record that he objected to the remarks complained of when made, or called the attention of the court thereto at the time, so that they could have been ordered stricken out and the jury instructed not to pay heed to them.

[10] Over and over again, the appellate courts of this state have held that objectionable remarks by the district attorney in a criminal case will not be reviewed or considered unless they have been objected to at the time they were made, so that the trial court may be accorded an opportunity to counteract, if it can thus be done, their effect upon the jury. *People v. Kramer*, 117 Cal. 647, 651, 49 Pac. 842; *People v. Brittan*, 118 Cal. 409, 412, 50 Pac. 664; *People v. Shears*, 133 Cal. 154, 159, 65 Pac. 295; *People v. Ruef*, 14 Cal. App. 576, 619, 114 Pac. 48, 54; *People v. Amer*, 8 Cal. App. 137, 143, 96 Pac. 401; *People v. Shem Ah Fook*, 64 Cal. 380, 383, 1 Pac. 347; *People v. Ye Foo*, 4 Cal. App. 730, 740, 89 Pac. 450; *People v. Owens*, 3 Cal. App. 750, 752, 86 Pac. 980; *People v. Beaver*, 83 Cal. 420, 23 Pac. 321; *People v. Frigerio*, 107 Cal. 153, 40 Pac. 107; *People v. Owens*, 132 Cal. 469, 471, 64 Pac. 770; *People v. Salas*, 2 Cal. App. 537, 540, 84 Pac. 295; *Horn v. State*, 12 Wyo. 162, 73 Pac. 705.

[11, 12] Among the several forms of verdict which the court delivered to the jury upon the submission of the case was the following: "We, the jury in this case, find the defendant, Andrew Stein, guilty of murder of the first degree, and further find that as a punishment for the same that the said Andrew Stein be imprisoned in the state's prison, at Folsom, for his natural life." Having, in the exercise of the discretion committed to them in that particular, decided to fix the penalty at imprisonment for life (Pen. Code, § 190), the jury returned their verdict in the foregoing form. It is now contended by the defendant that, inasmuch as the form of the verdict so delivered to the jury expressly named the particular prison in which the defendant should be confined, if the jury concluded to fix the penalty, the action of the court in that respect was erroneous and prejudicial. It is argued that the form of the verdict as thus handed to the jury was "suggestive," and that the fact that the jury returned a verdict to which that form was appropriate shows that the submission to them of a verdict in that form had a prejudi-

cial effect. Obviously, while it is within the discretion of the jury, in cases where they find that a homicide constitutes murder of the first degree, to fix the penalty at imprisonment for life, it is not within their legal province to name or fix the particular prison of the two in this state in which the defendant shall be confined, since the statute confers upon them no such authority. The Legislature evidently intended that that duty should be a function of the court, and it was improper, of course, to have expressly mentioned in the form of verdict the prison in which the accused should be incarcerated in case the jury, upon finding him guilty of murder of the first degree, fixed the penalty at life imprisonment. But the words "at Folsom," as used in the form of verdict, were mere surplusage, and could have exerted no influence on the minds of the jury in the determination of their verdict. We must presume that the members of the jury were possessed of sufficient intelligence to fully comprehend and understand the instructions of the court that they were to be governed entirely, in reaching a conclusion, upon the facts, by the evidence, and that thus they were guided in determining what their verdict should be, and not by the trivial suggestion that a particular prison might be his place of confinement in the event of his conviction of first degree murder and his punishment fixed by the jury in the exercise of the discretion confided to them by section 190 of the Penal Code as to the penalty in such cases.

We have now considered all the points pressed upon us for a reversal, and our conclusion is that the defendant was accorded a fair trial, that his conviction appears to be just, and that the punishment meted out to him is merited.

Accordingly the judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

HOLLAND v. CANTY et al. (Civ. 1,251.)

(District Court of Appeal, First District, California. Oct. 28, 1913.)

APPEAL AND ERROR (§ 302*)—NEW TRIAL (§ 128*)—RECORD—QUESTIONS PRESENTED FOR REVIEW—STATEMENT OF CASE.

Where defendants moved for a new trial on agreed statement of the case which did not specify in what way the evidence was insufficient to support the findings and decision, the lower court could not resort to the statement to determine the question of the sufficiency of the evidence, and it cannot be used on appeal to establish such insufficiency of the evidence on appeal from the judgment or the order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302; * New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by W. G. Holland against D. J. Canty and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Royle A. Carter, E. A. Williams, and C. E. Beaumont, all of Fresno, for appellants. Frank Kauke and Geo. Cosgrave, both of Fresno, for respondent.

LENNON, P. J. In this action to quiet title plaintiff was awarded judgment in keeping with the allegations and prayer of his complaint. The defendants have appealed from the judgment and from an order denying a new trial upon a statement of the case.

The alleged insufficiency of the evidence to justify the trial court's findings of fact is the only point made in support of the appeal. The point cannot be considered. The statement of the case before us contains no specification nor attempted specification of the particulars in which it is claimed that the evidence is insufficient to justify the findings and decision. This being so, the settled statement of the case could not be rightfully resorted to in the court below upon the hearing of the motion for a new trial in so far as the insufficiency of the evidence to support the findings is concerned; nor can this court resort to such statement, either upon the appeal from the judgment or the order denying a new trial, for the purpose of determining the sufficiency of the evidence to support the findings. *Winterburn v. Chambers*, 91 Cal. 170-185, 27 Pac. 658; *Matter of Baker*, 153 Cal. 537, 542, 96 Pac. 12.

The findings, assuming them to be correct, as we must, fully support the judgment.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

PEOPLE v. FRASER. (Cr. 462.)

(District Court of Appeal, First District, California. Oct. 25, 1913.)

1. FORGERY (§ 15*)—STATUTES—"INSTRUMENT."

Pen. Code, § 115, providing that every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded which, if genuine, might be filed is guilty of a felony, shows no intention to change the accepted meaning of the word "instrument;" and hence it must be presumed that the word "instrument" as used is limited in its meaning and application to that class of documents invariably denoted in the statutes by that term.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 50; Dec. Dig. § 15.*]

2. FORGERY (§ 15*)—FALSIFICATION OF INSTRUMENTS—STATUTE—"INSTRUMENT."

Under Pen. Code, § 115, providing that any person who procures or offers a false or forged instrument to be recorded, which is entitled to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

admission to the public records, is guilty of a felony, the word "instrument" imports a written agreement signed and delivered by one person to another, transferring a title to or creating a lien on real property, or giving a right to a debt or duty, and hence the filing of a false and fraudulent birth certificate does not come within the purview of the statute.

[Ed. Note.—For other cases, see *Forgery*, Cent. Dig. § 50; Dec. Dig. § 15.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3665-3668.]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

W. W. Fraser was indicted for violating Pen. Code, § 115, providing that every person who procures or offers any false or forged instrument to be filed, registered, or recorded which, if genuine, might be filed, registered, or recorded is guilty of a felony. From a judgment sustaining a demurrer to the information, the People appeal. Affirmed.

Attorney General Webb and C. M. Fickert, Dist. Atty., and Maxwell McNutt and Louis Ferrari, Asst. Dist. Attys., all of San Francisco, for the People. D. J. Hall and C. A. O'Dell, both of Richmond, for respondent.

LENNON, P. J. The defendant in this case was charged in an information filed in the city and county of San Francisco, with having violated section 115 of the Penal Code, which reads as follows: "Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, or registered, or recorded under any law of this state, or of the United States, is guilty of a felony." The instrument referred to in the charging part of the information was set out in full, and purports to be a duplicate certificate of birth signed by the defendant, wherein he, as the attending physician, certified that on September 10, 1910, he attended the birth of a male child in the city and county of San Francisco, named Charles Eugene Slingsby; that the name of the father of said child was Charles Henry Reynard Slingsby, and that the maiden name of the mother of said child was Dorothy Morgan Cutler. The information further alleged that the defendant unlawfully, willfully, feloniously, and knowingly procured said certificate to be filed, registered, and recorded in the office of the state board of health, in which office said certificate, if genuine, might have been filed, registered, and recorded under the laws of the state of California. It was specifically charged in the information that said certificate was false in the particulars that neither of the parties mentioned therein was respectively the father or mother of the said child; that the real father and mother of the said child were respectively one Peter Colvin and one Lillian Anderson, all of which the informa-

tion alleged, the defendant well knew at the time he procured said certificate to be filed, registered, and recorded. The defendant's demurrer to the information was allowed by the court, and the People have appealed.

[1] It appears from the record before us that the demurrer was allowed solely upon the ground that the information did not state facts sufficient to constitute a public offense. In our opinion the demurrer upon the ground stated was well taken and rightfully allowed. A birth certificate is not an instrument within the meaning of the term as used in section 115 of the Penal Code. The context of that section does not indicate that the term "instrument" as employed therein was intended to mean anything different in form and effect from the "instrument" repeatedly referred to in numerous and various other sections of our code system. Nothing to the contrary appearing (either expressly or impliedly) from the language of the code section under discussion, it is inconceivable that the Legislature intended that the word "instrument" as used in that section should have any different or broader meaning than that uniformly contemplated by every other code section wherein the word is to be found. It must therefore be presumed that the word "instrument," as used in section 115 of the Penal Code, is limited in its meaning and application to that class of instruments invariably referred to throughout our statutes. *Hoag v. Howard*, 55 Cal. 564; *Miller v. Dunn*, 72 Cal. 462, 14 Pac. 27, 1 Am. St. Rep. 67.

[2] Generally the term "instrument" as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term "instrument" as employed in our statutes has been defined to mean an agreement expressed in writing, signed and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty. *Hoag v. Howard*, supra; *Forman v. Wallace*, 75 Cal. 552, 17 Pac. 680. This definition of the term as applied to writings contemplated, created, and controlled by various code provisions has been repeatedly followed and applied in a variety of cases. Thus, for example, it has been held that a notice of lis pendens is not an instrument in the sense contemplated by our statutes (*Warrnack v. Harlow*, 96 Cal. 298, 31 Pac. 186, 31 Am. St. Rep. 209); that a map is not an instrument within the meaning of the recording act (*Colton L. & W. Co. v. Swartz*, 99 Cal. 278, 33 Pac. 878); that neither an attachment nor a judgment is an instrument within the meaning of section 1107 of the Civil Code (*Wolfe v. Langford*, 14 Cal. App. 359, 112 Pac. 203), and that a notice of a claim of water rights, although required to be recorded by section 1415 of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Civil Code, is not an instrument within the accepted definition of statutory instruments. *De Wolfskill v. Smith*, 5 Cal. App. 175, 89 Pac. 1001.

An unbroken line of authorities from other jurisdictions uniformly concur in the definition of a statutory instrument adopted and accepted in this state. Particularly in point is the case of the *State v. Kelsey*, 44 N. J. Law, pp. 1, 32. In that case the Secretary of State sought to recover certain fees for filing in his office every certificate of birth, marriage, and death; and the court was called upon to construe a statute which gave to the Secretary of State, among other fees, 12 cents for "filing every bond or other instrument of writing of a public nature." The court in effect held that the phrase "instrument of writing," in its intrinsic signification and standing alone, did not embrace every possible paper writing, but only paper writings of a particular class, which did not include certificates of birth. The conclusion arrived at in the case last cited was based upon substantially the same reasoning which is the foundation for the definition of "instrument" adopted by the courts of this state.

For the reasons stated we are forced to the conclusion that the birth certificate alleged to have been prepared and procured to be filed by the defendant in the present case contains none of the essentials of a statutory instrument; and therefore the conduct charged against the defendant in the information, however reprehensible it may be from a moral and ethical point of view, is not punishable under the provisions of section 115 of the Penal Code.

The order appealed from is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

PEOPLE v. MANCUSO. (Cr. 449.)

(District Court of Appeal, First District, California. Oct. 31, 1913.)

1. CRIMINAL LAW (§ 678*)—TRIAL—ELECTION BETWEEN ACTS—NECESSITY.

Where a single act of intercourse is charged and a series is proven in a prosecution for rape, the prosecution must make an election.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.*]

2. CRIMINAL LAW (§ 1036*)—APPEAL—OBJECTION BELOW—NECESSITY.

In a prosecution for statutory rape, where a specific act of intercourse was alleged in the information, and proof of that act and a great many others was made without objection, accused, who made no complaint that he was in doubt as to which act was relied on, cannot object on appeal that the state made no election.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.*]

3. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR.

In a criminal prosecution, improper argument by the district attorney that accused had

served a term of imprisonment is harmless, where a statement to the same effect had inadvertently crept into the case before the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3127; Dec. Dig. § 1171.*]

4. CRIMINAL LAW (§ 1037*)—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

Improper argument of the prosecutor cannot be taken advantage of on appeal, where the trial court was not requested to instruct the jury to disregard it, and no assignment of misconduct was made at the time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

5. CRIMINAL LAW (§ 730*)—TRIAL—IMPROPER ARGUMENT.

In a criminal prosecution, improper argument by the prosecutor, to the effect that he could not go fully into defendant's story of the case because of his very meager direct examination, is rendered harmless, where the jury were admonished to disregard it; it being presumed that they obeyed the court's instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Appeal from Superior Court, City and County of San Francisco; William P. Lawlor, Judge.

Antone Mancuso was convicted of rape, and he appeals. Affirmed.

James F. Johnson, of Sacramento, and George S. Barkley, of San Francisco, for appellant. U. S. Webb, Atty. Gen., for the People.

KERRIGAN, J. The defendant was convicted upon a charge of rape upon the person of a child under the age of consent. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

[1, 2] It is true, as asserted by the defendant, that in prosecutions for rape, where a single act is charged and a series of acts of sexual intercourse are proved, the prosecution must select the particular act relied upon. *People v. Castro*, 133 Cal. 11, 65 Pac. 13. But in the present case a specific act was alleged in the information, and that act with a great many others was proved. No objection was made to any of this testimony, nor did the defendant complain at any time during the trial that he was in doubt as to which act of sexual intercourse was the basis of the prosecution. Apparently the district attorney relied particularly on the act alleged; but in any event the defendant, in view of the condition of the record, must be deemed to have waived any right he may have had to a more definite selection of the principal act.

[3, 4] Complaint is also made that the district attorney was guilty of misconduct in two instances. The first arose when the district attorney brought out on the cross-examination of the defendant's wife that the defendant had served a term of imprisonment in the county jail. That error on the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

part of the district attorney could not have injured the defendant for the reason that a statement to the same effect had inadvertently crept into the case prior to the time when the question now complained about was asked. Moreover, no assignment of misconduct was made at the time, nor was the court requested to instruct the jury to disregard the objectionable question. Therefore the possibility of injury resulting to the defendant in consequence of that question cannot now be considered. *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009.

[6] The second act of misconduct to which objection is made occurred during the argument to the jury by the district attorney, when he observed in effect that he could not go fully into defendant's story of the case on cross-examination because of his very meager direct examination. Assuming that the representative of the people in this connection overstepped the strict legal rights of the defendant, the court immediately, upon objection, directed the jury to disregard the comment, which admonition we will presume the jury obeyed (*People v. Overacker*, 15 Cal. App. 620, 115 Pac. 756), and that no injury resulted to the defendant.

The defendant finally asserts that the court committed prejudicial error by modifying a certain instruction to the jury offered by him. The same instruction with the identical modification was given in the case of *People v. Von Perhacs*, 20 Cal. App. 48, 127 Pac. 1048 (decided October 4, 1912); and there it was held, as we hold again in this case, that the action of the court is not subject to any just criticism.

This disposes of all the points raised by the defendant.

The judgment and order are affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

PEOPLE v. GUARAGNA. (Cr. 452.)

(District Court of Appeal, First District, California. Oct. 29, 1913.)

1. INDICTMENT AND INFORMATION (§ 71*)—CERTAINTY—ABORTION.

An information charging that the abortion was committed by the use of "instruments in and about and within the body" of prosecuting witness, without naming the instrument used, was not demurrable for uncertainty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 144, 174, 193, 194; Dec. Dig. § 71.*]

2. ABORTION (§ 5*)—SUFFICIENCY OF EVIDENCE—CHARACTER OF INSTRUMENT.

An information charging abortion, which alleged that the character of the instrument used was unknown, was sufficient.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 8-14; Dec. Dig. § 5.*]

3. ABORTION (§ 5*)—SUFFICIENCY OF ALLEGATIONS—CHARACTER OF INSTRUMENT.

An allegation of the information that the instruments employed were used "in and about

and within the body" of prosecutrix sufficiently indicated the manner in which the offense was committed.

[Ed. Note.—For other cases, see Abortion, Cent. Dig. §§ 8-14; Dec. Dig. § 5.*]

4. CRIMINAL LAW (§ 720*)—ARGUMENT OF DISTRICT ATTORNEY.

The fact that certain evidence was developed on cross-examination of the people's witnesses did not preclude the district attorney from commenting thereon in argument, if such comments were otherwise proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. § 720.*]

5. CRIMINAL LAW (§ 829*)—TRIAL—REQUESTED INSTRUCTIONS.

Requested instructions were properly refused, the subject-matter of which was fully covered by instructions given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 1130*)—APPEAL—BRIEF—SUFFICIENCY.

Where appellant's brief does not discuss any particular point concerning some 18 rulings on evidence assigned as error but merely refers to the pages and folios of the transcript where the rulings and objections are found, the appellate court will not review such alleged error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

Appeal from Superior Court, Alameda County; William H. Donahue, Judge.

Rosy Guaragna was convicted of abortion, and appeals from the judgment and an order denying a motion for a new trial. Affirmed.

H. D. Gill and W. H. O'Brien, both of Oakland, and Frank Sprague, of Sonoma, for appellant. Attorney General U. S. Webb, for the People.

LENNON, P. J. The defendant was convicted of the crime commonly called abortion, and which is defined by section 274 of the Penal Code. She has appealed from the judgment and from an order denying her motion for a new trial.

[1] The charging part of the information was not demurrable upon the ground of uncertainty. Primarily the purpose of precision in pleading the particulars of a crime is to preclude the possibility of a second prosecution for the same act and at the same time to inform the defendant with reasonable certainty of that which he will be called upon to meet and defend against upon the trial.

The information in the present case alleged in the language of the statute the doing of every act essential to the commission of the crime as defined by section 274 of the Penal Code, and specifically charged that such crime was committed by the use of "instruments in and about and within the body" of the person named as the victim of the alleged abortion. This being so, it is obvious that the judgment of conviction in the present case could be readily and successfully plead-

ed as a bar to a second prosecution of the defendant for the acts charged in the present information. True, the information did not by name or description indicate the character of the instruments alleged to have been employed in the commission of the offense, nor did it specify the manner in which such instruments were used. Nevertheless, in its entirety it fairly and with sufficient certainty informed the defendant of all that was reasonably necessary for her to know in order to prepare and present an intelligent and honest defense. It was not absolutely necessary to allege the name of the instrument used to produce the abortion. *State v. Reed*, 45 Ark. 333; *Commonwealth v. Noble*, 165 Mass. 13, 42 N. E. 328; *Commonwealth v. Thompson*, 159 Mass. 58, 33 N. E. 1111; *Commonwealth v. Corkin*, 136 Mass. 429; *Commonwealth v. Jackson*, 15 Gray (Mass.) 187; *People v. Lohman*, 2 Barb. (N. Y.) 216, 220.

[2] The information would have been good beyond cavil if it had alleged that the character of the instrument employed to produce the abortion was unknown. *Baker v. People*, 105 Ill. 452. This must be so; otherwise crimes of the character under discussion would frequently go unpunished. Obviously an allegation that the instruments used were unknown would not have rendered the information more certain or efficacious than it is in its present form; and therefore we cannot conceive of any sound reason why the information would not be equally good without such allegation.

[3] The allegation that the instruments employed to produce the abortion were used "in and about and within the body" of the person who submitted to the operation sufficiently indicated the manner in which the offense was committed. The meaning of this allegation should be clear to every person of ordinary intelligence; and the contention that it might be construed to mean that the instruments were inserted in the nose or the ear cannot be taken seriously.

[4] The district attorney did not transgress the limits of legitimate argument in his presentation of the people's case to the jury. He was well within the record when he declared that the evidence upon the whole case disclosed that the defendant was generally reputed to be a professional abortionist. This declaration was not the result of a mere deduction from the evidence but was based upon positive testimony developed by counsel for the defendant upon cross-examination of two of the people's witnesses, to the effect that the defendant was generally reputed to be engaged in the business of producing abortions. The fact that this testi-

mony was developed upon cross-examination did not detract from its value as evidence nor preclude the district attorney from commenting upon it.

[5] The trial court did not err in refusing to give certain requested instructions, which were to the effect that the jury should acquit the defendant if it found that the abortion charged was produced by means of drugs and not, as alleged in the information, by the use of instruments. The subject-matter of these instructions was clearly, completely, and correctly covered in the charge of the court.

The evidence is sufficient to support the verdict and judgment. The testimony produced upon the trial is too voluminous to be even summarized in this opinion; and therefore it must suffice for us to say that upon a careful reading of the record we are satisfied that the evidence upon the whole case, direct, circumstantial, and opinion, was amply sufficient to justify the finding of the jury implied from the verdict that the defendant, by means of instruments of some kind, committed the crime charged in the information, with the knowledge, intent, and purpose therein alleged.

It was objected at the trial that the hypothetical question put to the prosecution's expert witnesses was not based upon the evidence in the case. When directed by the trial court to point out wherein the question was deficient in its statement of the evidence, counsel for the defendant designated only one particular in support of his objection. The record shows that the question objected to conformed to the evidence in the particular pointed out and in its entirety fully and fairly stated the evidence adduced upon the whole case. The objection, therefore, was not well taken and was rightfully overruled.

[6] Some 18 rulings of the trial court made upon the admission or rejection of evidence are generally assigned as error. No particular point concerning any one of these rulings is discussed in the brief of counsel for the defendant. We are merely referred to the pages and folios of the transcript where the objections and rulings are to be found. This court is not required to examine and pass upon points thus presented. *People v. Woon Tuck*, 120 Cal. 294, 52 Pac. 833; *People v. McLean*, 135 Cal. 306, 87 Pac. 694; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

CITY AND COUNTY OF SAN FRANCISCO
v. MAIN et al. (Civ. 488.)

(District Court of Appeal, First District, California. Oct. 25, 1913.)

1. NAVIGABLE WATERS (§ 16*)—TERMINATION OF NAVIGABILITY — RIGHTS OF ABUTTING OWNERS.

Where a creek ceased to be a navigable stream prior to December 27, 1867, while complainant was still the owner of land which defendant now owns, no rights of way as a navigable stream ever passed to defendant or to her predecessors in interest.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 43-49, 51-53; Dec. Dig. § 16.*]

2. NAVIGABLE WATERS (§ 1*)—NAVIGABILITY —DETERMINATION—"NAVIGABLE."

Whether or not a stream is "navigable" is a question of fact, at least in the absence of a legislative declaration as to its navigability, and is determinable by its practical utility for navigation during ordinary stages of water at any particular time.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

3. EASEMENTS (§ 30*)—NONUSER—EXTINGUISHMENT—ADVERSE POSSESSION.

While mere nonuser of an easement acquired by grant for any period of time will not of itself extinguish it, yet such nonuser, coupled with an actual and physical interference with its exercise and with an adverse possession of the servient tenement for the statutory period, will extinguish the easement by limitations.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 77-79; Dec. Dig. § 30.*]

4. MUNICIPAL CORPORATIONS (§ 663*)—PUBLIC STREETS—VACATION.

A municipal corporation has power to close public streets in the method provided by general laws or by their charters, and by so doing to extinguish the public right of way over the lands thereof; but, under the constitutional provision that private property shall not be taken or damaged for public use without compensation, the exercise of the statutory method for closing streets does not of itself extinguish the right of abutting property owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663.*]

5. LIMITATION OF ACTIONS (§ 58*)—STREETS—VACATION—RIGHTS OF ABUTTING OWNERS—LOSS BY LIMITATIONS.

San Francisco in 1876 both formally and physically closed a certain street and maintained adverse possession of the lands formerly occupied by the street to the exclusion of defendant, an abutting property owner, and her predecessors in interest from the exercise of any right or easement therein, which exclusion continued for at least ten years, during all of which time defendant took no action to assert her easement over the property. During this period the city erected public buildings thereon and constructed valuable and permanent improvements on the land, the destruction or removal of which would be required to afford defendant a right of way over the land. Held, that defendant's right either to an easement over the land or to recover damages for the taking of such easement was barred by limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 824-828, 846, 847; Dec. Dig. § 58.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the City and County of San Francisco against Charles Main and others. Judgment for plaintiff, and defendant Flora B. MacDermot appeals. Affirmed.

Pringle & Pringle, of San Francisco, for appellant. Percy V. Long, City Atty., and Harry G. McKannay, Asst. City Atty., both of San Francisco, for respondent.

RICHARDS, J. This is an action brought by the city and county of San Francisco to quiet title to a tract of land lying in what was formerly the bed of Mission creek, between Tenth and Eleventh streets, and forming a part of the southern boundary of the lands of the appellant herein. The defendant Charles Main permitted judgment to go against him by default; but the defendant Flora B. MacDermot appeared, and filed her answer and cross-complaint, wherein she averred that she was entitled to an easement over the lands in question based upon two distinct claims of right, the first being that Mission creek was and continued to be a navigable stream until a time after the date when her predecessors acquired title to the lands she now owns from the plaintiff herein; and the other claim being that after Mission creek ceased to be navigable it became, and for some years continued to be, a public street known as Channel street; that while thus open as a public street the predecessors in interest of the appellant had the right of ingress and egress to and from the land she now owns along and upon it; and that, the said street having been closed without her consent and without payment of the compensation which the Constitution provides shall be prepaid when private property is taken for public use, she is still entitled to her right of way over said property. The plaintiff's answer to the cross-complaint of said defendant consists of specific denials of its averments, and also of a plea of the statute of limitations.

[1] In so far as the claim of the appellant to an existing right of way over the lands in question is based upon the fact that Mission creek was once a navigable stream, we think it is fairly deducible from the evidence that Mission creek had ceased to be a navigable stream prior to December 27, 1867, the date when the lands now owned by the appellant first passed from the ownership of the city of San Francisco to James Dows, the original grantee thereof.

[2] Whether or not a stream is a navigable stream is a question of fact, at least in the absence of a legislative declaration as to its navigability, and is determinable by its practical utility for navigation during ordinary stages of water at any particular time. *Cardwell v. Sacramento County*, 79 Cal. 347—

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

349, 21 Pac. 763. It appears from the transcript that Mission creek was finally and effectually closed to navigation at least as early as 1864, when the railroad was built across it. This was while the city of San Francisco was still the owner of the land which the appellant now owns. It necessarily follows that no rights of way over Mission creek as a navigable stream ever passed to the predecessors in interest of appellant.

As to the second contention of appellant, the record discloses the undisputed fact to be that on or about the 16th day of October, 1876, the city and county of San Francisco physically closed to public use that portion of Channel street which occupied the bed of Mission creek and bounded on the south the lands now owned by the appellant, and thereby obstructed and prevented all use of the same by the predecessors in interest of the appellant for ingress to and egress from the property now owned by her; and that by so doing whatever right or rights of way appellant or her predecessors in interest may have had in or over the lands in question were and ever since have been obstructed, interfered with and physically taken away.

It is conceded that this continued interference with appellant's right or rights of way was without her consent; but the fact also appears that for a period of more than ten years from and after the date of the closing of Channel street, and obstruction and denial of appellant's right or rights of way therein, no legal or other action of any kind was ever taken by appellant in the way of insisting upon her rights in the premises. During all of this time the city and county of San Francisco put the property in question to uses entirely inconsistent with the recognition, existence, or exercise of appellant's right of way over the same. The respondent now contends that the claim which the appellant here asserts to an existing right or rights of way over said property is barred by the statute of limitations.

In response to this contention, the appellant insists that the act of the city and county of San Francisco in closing Channel street, and thus destroying appellant's use of the same amounted to the taking of her property for a public use; and that since the Constitution of the state forbids the taking of private property for public use without compensation first being made for the property thus sought to be taken, and since no compensation has ever been offered or made in the manner provided by law for her right or rights of way thus obstructed and attempted to be destroyed, she still retains and may now assert the same under the protection of this constitutional guarantee. In support of this view appellant cites the case of *Bigelow v. Ballerino*, 111 Cal. 559, 44 Pac. 307. An examination of that case, however, will show that no question of the application of the statute of limitations was presented by either the plead-

ings or proofs, and that the court was not called upon to decide the question presented in this case. The question here presented is whether, notwithstanding the constitutional right of an owner of private property to insist that his property shall not be taken or damaged for public use without compensation first having been made and paid therefor in the manner provided by law, he may not lose this right of property by permitting the period prescribed by the statute of limitations to run after and during the actual taking of the property and destruction of the easement by physical interference with its exercise, without any effort on his part to assert his right of property or object to its spoliation.

[3] It would seem to be well-settled law that, while the mere nonuser of an easement acquired by grant for any period of time will not of itself operate to extinguish it, yet, when such nonuser is coupled with an actual and physical interference with its exercise and with an adverse possession of the servient tenement for the period prescribed by law, the easement will be extinguished by the bar of the statute of limitations. *Washburn on Easements* (4th Ed.) 717, 719; *Jones on Easements*, § 865, 6; *Currier v. Howes*, 103 Cal. 431, 37 Pac. 521. That this is the rule between the private owners of dominant and servient tenements there can be no question. Does this rule apply in favor of a municipal corporation in cases like the one at bar?

[4] The right of municipal corporations to close public streets in the method provided by general laws or by their charters, and by so doing to extinguish the public right of way over the lands thereof, is no longer open to question; and there are some authorities which go so far as to hold that, when the statutory method for closing streets has been followed, the right of abutting property owners is also extinguished, except in cases where the easement is shown to be essential as a means of using and enjoying the abutting property. *Jones on Easements*, § 542. In view of the express requirement of our Constitution, that private property shall not be taken or damaged for public use without compensation first being made, the rule in this state may not go so far—and the facts of this case do not require it.

[5] The evidence herein clearly shows that in the year 1876 the municipal authorities not only formally, but actually and physically closed Channel street, and have ever since maintained the adverse possession of the lands formerly occupied by such street to the exclusion of appellant and her predecessors in interest from the exercise of any right or easement therein; and that this exclusion and adverse possession on the part of respondent continued for at least ten years, during all of which time appellant took no action of any kind in the way of an assertion of her easement. During this

period also the respondent erected public buildings and constructed valuable and permanent improvements upon the property, the destruction or removal of which would be required if the present tardy assertion of appellant's alleged easement were to be upheld. Under these circumstances, the easement of appellant in and over said lands must be held to have been long since barred by the statute of limitations. This is the rule as between private owners of dominant and servient tenements. That it is also the rule as between the private owner of a dominant tenement claiming an easement in public property, with respect to which its owner, a municipal corporation, has done all of the acts, and claimed and exercised all of the rights essential to establish adverse possession against the assertion of the easement, during the statutory period required in order to support a plea of the statute of limitations, is amply supported by authority. *Dillon on Municipal Corporations* (5th Ed.) § 978 (note), 1125, 1188, 1262, and cases cited.

It follows that the judgment must be affirmed, and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

PEOPLE v. ONG GIT. (Cr. 432.)

(District Court of Appeal, First District, California. Nov. 3, 1913.)

1. CRIMINAL LAW (§ 942*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence, which tends only to contradict and impeach the testimony of witnesses for the prosecution, neither warrants nor requires the granting of a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2316, 2331, 2332; Dec. Dig. § 942.*]

2. CRIMINAL LAW (§ 659*)—TRIAL—EXCLUSION OF PERSONS.

In a criminal prosecution it is not ground for the exclusion of one, whom the defense claimed had been coaching and tampering with witnesses, that he was guilty of improper conduct at the preliminary examination before a magistrate.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1460; Dec. Dig. § 659.*]

3. CRIMINAL LAW (§ 659*)—TRIAL—EXCLUSION OF PERSONS.

Bare assertion by accused's counsel that a certain Chinaman had intimidated other Chinese witnesses who would be called upon to identify accused, and that his mere presence would tend to coerce them into giving false testimony, when vehemently denied by the state is not such a showing as to make the court's refusal to exclude that person an abuse of discretion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1460; Dec. Dig. § 659.*]

4. CRIMINAL LAW (§ 665*)—TRIAL—WITNESSES—STATUTE.

While Code Civ. Proc. § 2043, providing for putting witnesses under the rule, strictly applies only to a witness of the party adverse to the one making the request, it may be liberally

construed so as to apply to a hostile witness who in good faith has been subpoenaed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1549-1566½; Dec. Dig. § 665.*]

5. CRIMINAL LAW (§ 665*)—TRIAL—WITNESSES—DISCRETION OF COURT.

A request to put witnesses under the rule is addressed to the discretion of the trial judge, and it is not an abuse of discretion to refuse to put a witness under the rule where he had apparently been subpoenaed by accused only to bring him within the scope of the exclusion rule.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1549-1566½; Dec. Dig. § 665.*]

6. WITNESSES (§ 230*)—TRIAL—EVIDENCE.

Where accused was a Chinaman, and there were many Chinese witnesses, the question of the accuracy of the interpreter's translation, who was testifying as to their evidence at the preliminary examination for the purpose of impeaching Chinese witnesses, is one of fact for the jury, and evidence of his skill may be elicited, but it is proper for the court to deny an offer of accused's counsel that the interpreter carry on, in the presence of the jury, conversation with the Chinese witnesses so that his skill might be determined.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 811, 812; Dec. Dig. § 230.*]

7. CRIMINAL LAW (§ 547*)—TRIAL—EVIDENCE.

A transcript of the testimony of a Chinese witness, taken at the coroner's inquest, is inadmissible as hearsay, unless the interpreter or some other witness familiar with the language, who heard the testimony, testified as to the accuracy of the transcript.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1237-1246; Dec. Dig. § 547.*]

8. HOMICIDE (§ 309*)—TRIAL—INSTRUCTIONS.

Where the evidence was such that accused could only have been found guilty of murder or acquitted, and the sole defense was mistaken identity, the refusal of requested charges on manslaughter was proper.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.*]

9. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

The refusal of requested instructions covered by the charge given is not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2011; Dec. Dig. § 829.*]

10. HOMICIDE (§ 228*)—CORPUS DELICTI—PROOF.

Evidence that deceased was killed by a gunshot wound is sufficient to establish the corpus delicti; an autopsy upon the body not being necessary.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 471-476; Dec. Dig. § 228.*]

11. CRIMINAL LAW (§ 1144*)—TRIAL—INSTRUCTIONS.

Where the court admonished the jury to disregard improper argument, it will be presumed that the instruction was followed and that the argument was not prejudicial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. § 1144.*]

12. CRIMINAL LAW (§ 730*)—TRIAL—IMPROPER ARGUMENT OF COUNSEL.

Ordinarily it is the better practice to correct an abuse in argument at the moment the incident occurs, but where the court directed accused's counsel to note and assign as misconduct any remark which they deemed objection-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

able at the close of the argument, and then gave an instruction which cured the errors, the change in the ordinary practice was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

18. CRIMINAL LAW (§ 730*)—APPEAL—HARMLESS ERROR.

Where the court charged the jury that arguments of counsel were of no value except in so far as they were based on the testimony, and that any outside matters brought into the case by counsel should have no bearing, erroneous argument by the prosecutor, not based on the evidence, was cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

14. WITNESSES (§ 414*)—PHOTOGRAPHS—ADMISSIBILITY.

Where the defense was mistaken identity, two group photographs, including defendant, were properly admitted in corroboration of a witness whose testimony as to identity was attacked on cross-examination, where the witness on redirect examination testified that shortly after the homicide he was shown the photographs and identified accused as one of the persons who had participated in the killing.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1287, 1288; Dec. Dig. § 414.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Ong Git was convicted of murder in the first degree, and from that judgment and an order denying his motion for a new trial, he appeals. Affirmed.

Daugherty & Lacey, of Salinas, for appellant. U. S. Webb, Atty. Gen., for the People.

LENNON, P. J. The defendant, Ong Git, and three other Chinamen were jointly charged with the murder of one Lee Lung Mai. Upon a separate trial of the defendant, Ong Git, he was found guilty of murder in the first degree, and his punishment was fixed at life imprisonment. This appeal is from the judgment and an order denying a new trial.

[1] The motion for a new trial was grounded, among other things, upon alleged newly discovered evidence which, as shown by affidavits and the testimony of witnesses offered and received in support of the motion, tended to contradict and impeach the evidence of one McKeever, a witness for the people, who testified upon the trial that he had heard the shots which it was claimed resulted in the death of the deceased, and that shortly thereafter he had seen the defendant with a pistol in his hand running away from the scene of the homicide. In short, the newly discovered evidence consisted, as stated in the opening brief of counsel for the defendant, "in part of contradictions of statements by McKeever as to what he had done and in part of direct and affirmative evidence that the witness McKeever was in another place in Salinas at the time when, according to his testimony, he was in Chinatown and saw the defendant."

Aside from the question as to whether or not the affidavits filed in support of the mo-

tion show that the evidence relied upon for a new trial could not with due diligence have been discovered and produced in the first instance, we are satisfied that the showing as made was insufficient to warrant the granting of a new trial upon the ground of newly discovered evidence. Admittedly the only tendency of the newly discovered evidence was to contradict and impeach the testimony of the witness McKeever; and it is well settled that such evidence neither warrants nor requires the granting of a new trial. *People v. Anthony*, 56 Cal. 397; *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161; *People v. Loui Tung*, 90 Cal. 377, 27 Pac. 295; *People v. Freeman*, 92 Cal. 359, 28 Pac. 261; *People v. Holmes*, 126 Cal. 462, 58 Pac. 917.

[2, 3] We are unable to perceive how defendant was prejudiced by the refusal of the lower court to grant the request of counsel for the defendant that a Chinaman named Wong Duck be excluded from the courtroom. The district attorney in effect declared that the assistance of this particular Chinaman was needed for the proper presentation of the prosecution's case. On the other hand, it appears that the defense desired his exclusion from the courtroom, not upon the ground that he was to be a witness in the case, but because, as it was claimed, he had coached some of the witnesses for the prosecution and was caught openly signaling to them during the preliminary examination in the justices' court. It was further claimed by counsel for the defendant that the mere presence of this Chinaman in the courtroom would operate to intimidate certain Chinese witnesses who would be called to identify the defendant as one of the persons who participated in the homicide and tend to coerce them into giving false testimony. These contentions were supported in the lower court only by the vehement assertions of counsel for the defendant and were as vehemently disputed by the district attorney. Conceding, however, that the Chinaman in question had been guilty of the misconduct ascribed to him at the preliminary examination of the defendant, this in itself would not have constituted a valid ground for his exclusion from the trial of the defendant in the superior court. That was a matter which should have been called to the attention of and remedied by the justice of the peace who presided at the preliminary examination. If it were true, as counsel for the defendant claimed, that certain of the witnesses for the prosecution had been coached by the Chinaman in question to give false testimony, that was a fact which might have been developed to the advantage of the defendant upon cross-examination of the suspected witnesses, or by independent proof with such cross-examination as a foundation therefor, but such fact, even if it were established, would not in and of itself be suf-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sufficient to compel the making of the order of exclusion. If counsel for the defendant really believed that the presence in the courtroom of the Chinaman in question would result in the intimidation of certain witnesses, then a showing to that effect should have been made by more effective means than mere assertion. Doubtless if a proper and sufficient showing of the likelihood of such intimidation had been made, the trial court, in the exercise of its discretion, would have made and enforced an order which would have covered the situation.

[4, 5] But, apart from all of this, the purpose of the rule permitting the exclusion of witnesses from the courtroom upon the request of either party to an action, civil or criminal, is to prevent such persons from hearing the testimony of a witness under examination. Strictly construed, the rule has application only to a witness of the party adverse to the party making the request. Code Civ. Proc. 2043. Liberally construed, it doubtless can and should be applied to a hostile witness who, in good faith, has been subpoenaed to testify for either party to the action. The exclusion of a witness, however, is not a matter of absolute right in every case. A request for such exclusion is addressed to the discretion of the trial judge, the exercise of which must be controlled largely by the circumstances of the individual case. *People v. Garnett*, 29 Cal. 622; *People v. Sam Lung*, 70 Cal. 515, 11 Pac. 873. In the present case the Chinaman in question was neither subpoenaed nor called as a witness for the people; and all of the circumstances surrounding the request for his exclusion justify the inference that such exclusion was not desired upon the ground that he was to be a witness in the case on either side but rather because he might be of some assistance to the prosecution in the presentation of its case. In other words, we are satisfied that the trial court was justified in assuming, as evidently it did, from the statements and tacit admissions of counsel for the defense that, although the Chinaman in question was subpoenaed ostensibly as a witness for the defense, he was in fact placed under the process of the court merely for the purpose of laying the foundation for the request that he be excluded from the courtroom. Obviously, therefore, the mere fact that he had been formally subpoenaed as a witness for the defense was not conclusive nor even a matter of any moment in the consideration and determination of the request.

The record before us does not support counsel for the defendant in the claim that they were denied the right to cross-examine Lee Hing, a witness for the people, as to his intimacy and conversations with Wong Duck, the Chinaman whose exclusion from the courtroom was requested. To the contrary, the record shows that counsel for the defense, despite repeated objections and ad-

verse rulings relating to the form and repetition of various questions, persisted in the cross-examination of this witness and eventually succeeded in securing negative answers to every material and relevant question that was asked him.

[8] Robert L. Jones, a Chinese interpreter, was called and sworn as a witness for the defense and testified that he had correctly translated the testimony given by the several witnesses at the preliminary examination from the Chinese into the English language. The purpose of this testimony was not definitely disclosed in the lower court; but apparently it was intended as a foundation for the subsequent introduction in evidence by way of impeachment of contradictory statements appearing in the transcript of the testimony taken at the preliminary examination. However that may be, upon cross-examination of Jones, the interpreter, counsel for the people endeavored to show that the witness did not understand the different dialects of the several Chinese witnesses who had testified at the preliminary examination; and, with the purpose of offsetting any unfavorable inference which may have resulted from such cross-examination, counsel for the defendant requested that two of the Chinese witnesses who had been previously sworn in the case be permitted, in the presence of the jury, to converse in Chinese with the witness under examination and thereby enable the latter to demonstrate his qualifications as an interpreter of the Chinese language. The trial court promptly and properly denied the request.

It may be conceded that the accuracy of an interpreter's translation of testimony is a question of fact which must ultimately be determined by the jury. *Skaggs v. State*, 108 Ind. 53, 8 N. E. 695; *Schnier v. People*, 23 Ill. 17; *U. S. v. Gibert*, 25 Fed. Cas. No. 15,204; *Thon v. Rochester R. R. Co.*, 83 Hun, 443, 30 N. Y. Supp. 621; *Wharton's Crim. Ev.* § 4497. It follows that if the competency of the witness to interpret the Chinese language was assailed, or doubt thrown upon the accuracy of his translation, by cross-examination or otherwise, the defendant undoubtedly had the right to show, if he could, either upon redirect examination or by competent independent evidence that the interpreter was not only not lacking in ability to translate from the Chinese into the English language but that his translation of the testimony given at the preliminary examination was correct. This must be so, because the interpreter was nothing more nor less than a witness to the claimed contradictory statements sought to be introduced in evidence by way of impeachment (*People v. Lem Deo*, 132 Cal. 199, 64 Pac. 265); and obviously the truth of his testimony might have been impaired or wholly impeached by the methods usually employed and sanctioned to discredit the testimony of an ordinary witness. Manifestly the situation could not be met by

the obvious absurdity which would be certain to result from the jabbering jargon of an unbridled oriental tongue endeavoring to demonstrate to an American jury a Caucasian's knowledge of the Chinese language.

[7] The defendant offered in evidence a transcript of the testimony taken at the coroner's inquest, for the purpose of impeaching two of the witnesses for the prosecution. It was claimed that such transcript would show that the assailed witnesses had made previous statements which were contradictory of and wholly irreconcilable with their testimony on the trial, which was to the effect that they were present at the homicide and identified the defendant as one of four Chinamen who participated in the perpetration of the crime. It appears that the testimony taken at the coroner's inquest was given through the medium of an interpreter; and for that reason the prosecution objected to the transcript as containing incompetent evidence, unless it first were shown by the testimony of the interpreter who officiated at the inquest that the statements attributed to the witnesses referred to were correct. Counsel for the defendant were either unwilling or unable to produce the interpreter as a witness; at any rate the interpreter immediately in question was not produced as a witness, and accordingly the objection was sustained upon the ground stated. We see no error in the ruling. In order to lay the foundation for the impeachment of the assailed witnesses it was first necessary to prove that they had made the contradictory statements attributed to them; and this could be done only by "the interpreter or some other witness who had heard and understood the language in which the statements * * * were made." *People v. Ah Yute*, 58 Cal. 119. Without such proof the reception in evidence of the statements attributed to the witness and alleged to have been made at the coroner's inquest would have been a transgression of the rule of evidence which excludes hearsay testimony. *People v. Lee Fat*, 54 Cal. 527; *People v. Ah Yute*, supra; *People v. Jan John*, 137 Cal. 220, 69 Pac. 1063; *People v. Lowandowski*, 143 Cal. 574, 77 Pac. 467; *People v. Jan John*, 144 Cal. 285, 77 Pac. 950.

[8] The defendant's requested instructions dealing with the definition of manslaughter, and in effect calling for a conviction of such offense if the killing was shown to have been "committed without malice and in a sudden quarrel or heat of passion," were rightfully refused by the trial court because they had no possible application to the facts of the case as developed upon the trial. The uncontradicted evidence adduced upon behalf of the people not only tended to but did show the commission of a willful, deliberate, and malicious murder. On the other hand, the defense interposed by the defendant rested entirely upon the theory that the defendant was not the person who fired the fatal shots;

and in support of this theory counsel for the defendant endeavored to show, by cross-examination and otherwise, merely that certain witnesses for the people were either mistaken or willfully false in their identification of the defendant as one of the perpetrators of the crime. It was not claimed by the defendant in the court below, nor is it pretended here, that the circumstances attending the killing as revealed by the evidence upon the whole case contained the slightest suggestion of a sudden quarrel or embodied any of the essentials of manslaughter.

We are satisfied from a careful perusal of the record before us that the evidence on the whole case compelled the jury either to find the defendant guilty of an offense of greater magnitude than manslaughter or else acquit him. This being so, the trial court was not required to charge the jury upon the subject of manslaughter. *People v. Madden*, 76 Cal. 521, 18 Pac. 402; *People v. Barry*, 90 Cal. 41, 27 Pac. 62; *People v. Scott*, 93 Cal. 516, 29 Pac. 123; *People v. McNutt*, 93 Cal. 658, 29 Pac. 243; *People v. Lopez*, 135 Cal. 23, 66 Pac. 965; *People v. Swist*, 136 Cal. 520, 69 Pac. 223; *People v. Keith*, 141 Cal. 686, 75 Pac. 304; *Courteney v. Standard Box Co.*, 16 Cal. App. 600, 117 Pac. 778.

[9] Complaint is made of the trial court's refusal to give certain other instructions requested by the defendant; but we find upon an inspection of the record that in each instance the subject-matter of the requested instruction, in so far as it correctly stated the law was sufficiently and clearly covered in the charge of the court which in its entirety and without conflict stated to the jury the law applicable to the facts of the case.

[10] There is no merit in the contention that the corpus delicti was not established at the trial in the court below. We have neither the time nor the inclination to discuss the hypercritical analysis made of the evidence upon this phase of the case by counsel for the defendant. It will suffice to say that the record reveals competent, complete, and uncontroverted evidence that the victim of the crime was dead, and that he died as the immediate result of a gunshot wound inflicted by the defendant. An autopsy upon the body of the deceased was not necessary to the establishment of the corpus delicti. *People v. Wood*, 145 Cal. 659, 79 Pac. 367.

[11] Counsel for defendant took exception to several remarks made during the argument to the jury by special counsel who was employed to assist the district attorney, and assigns such remarks as prejudicial misconduct. We fail to see how, in any specified instance, the rights of the defendant were impaired by the remarks complained of. In any event, the trial court in each instance admonished the jury to pay no heed to such remarks; and presumably the admonition was observed.

[12, 13] Finally, during the course of the argument the trial court of its own motion

ruled that no further exceptions would be entertained while the argument was in progress, and directed counsel for the defendant to note and assign as misconduct any remark which they deemed objectionable and prejudicial at the close of the argument.

Ordinarily it is better practice, no doubt, to correct an abuse occurring in argument to the jury at the moment the incident occurs. In the present case, however, the procedure followed apparently became necessary because of frequent and, in many cases, unwarranted interruptions of the argument; and such ruling, while expediting the progress of the trial, neither hampered nor harmed the defendant. Counsel for the defendant complied with the ruling of the court, and at the close of the argument specified several instances in which it was claimed that the prosecuting officers had misstated the evidence; but the trial court in its charge to the jury covered the situation, we think, by admonishing the jury that: "The arguments of counsel are of value to you in your deliberations only in so far as they are based upon the testimony that has been given to you by the witnesses upon the stand. * * * Any outside matters that may have been brought into the case by * * * counsel or any of them * * * have no bearing, and should have no weight with you."

[14] Certain exhibits, consisting of two photographs of a group of Chinamen, which included the defendant, were properly admitted in evidence for the purpose stated by the district attorney. The occasion for the offer and admission in evidence of these exhibits arose after counsel for the defendant had endeavored to show upon cross-examination that shortly after the commission of the homicide Lee Hing, a witness for the people, was uncertain in his identification of the defendant as one of the guilty parties. Upon redirect examination the witness testified that shortly after the commission of the homicide he was shown the exhibits in question by the district attorney and thereupon recognized and identified the defendant as one of the persons who had participated in the killing of the deceased. The purpose of this testimony and of the exhibits accompanying it was, as in effect stated by the district attorney, to rebut any unfavorable inference which might have resulted from the cross-examination by showing that the witness, with the aid of such exhibits, could and did with certainty implicate and identify the defendant shortly after the commission of the crime. With that purpose in view, and for that purpose alone, the exhibits in question were properly admitted in evidence. *People v. Ferrara*, 18 Cal. App. 271, 122 Pac. 1089.

There was no prejudicial error in permitting the witness Shannon to testify to all

that was said by the several parties present upon the occasion when the defendant, Ong Git, and his codefendants were arrested. True, Shannon could not testify positively that the defendant in the case at bar was present on the occasion referred to; but this fact was subsequently established by competent evidence.

Having discussed and disposed of all the points presented upon this appeal which are worthy of mention, and it appearing that the defendant was fairly tried and justly convicted, the judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

LENNON, P. J. It is ordered that the following paragraph be added to the opinion of this court heretofore filed:

"It is but fair to add that at the trial the defendant was represented by counsel other than those appearing for him upon the appeal."

PEOPLE v. KAWASAKI. (Cr. 223.)

(District Court of Appeal, Third District, California. Oct. 28, 1913. Rehearing Denied by Supreme Court Dec. 26, 1913.)

1. CRIMINAL LAW (§ 572*)—TRIAL—EVIDENCE—SUFFICIENCY.

In a prosecution for homicide, a finding against accused's claim of alibi held warranted under the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1268, 1289-1291; Dec. Dig. § 572.*]

2. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

Where the court fully charged on the defense of alibi, the refusal of a requested instruction, which added nothing to the one given, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

3. CRIMINAL LAW (§§ 807, 811*)—TRIAL—INSTRUCTIONS.

An instruction to view with care the testimony of those testifying to defendant's identity was properly refused, being argumentative in form and directing special attention to one particular feature of the testimony, thus conveying the implication that the judge was distrustful of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1805, 1959, 1960, 1969-1972; Dec. Dig. §§ 807, 811.*]

4. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS.

Where the court charged the jury over and over again that they should acquit if they had a reasonable doubt of defendant's guilt, and that it was the policy of the law that many guilty persons should escape rather than one innocent person be convicted, the refusal of a special instruction cautioning the jury against evidence of identity was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rev'r Indexes

5. CRIMINAL LAW (§ 670*)—EVIDENCE—ADMISSIBILITY.

Where a witness testified that he was with accused at the theater on the night of the killing, the exclusion of questions as to when the witness heard of the affray and whether it was before going to the theater was proper, where it was not stated that such evidence was sought to be introduced to show that the homicide was committed while accused was at the theater with the witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 757, 1593-1596; Dec. Dig. § 670.*]

6. WITNESSES (§ 288*)—EXAMINATION OF WITNESSES.

Under Code Civ. Proc. § 2045, providing that the direct examination must be completed before the cross-examination begins, unless the court shall otherwise direct, it is not improper, where accused's counsel, though surprised by a witness, did not take advantage of the court's permission to examine him as to statements made before trial, but turned the witness over for cross-examination, to exclude such questions on redirect examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1003; Dec. Dig. § 288.*]

7. CRIMINAL LAW (§ 698*)—RECEPTION OF EVIDENCE—CROSS-EXAMINATION—FAILURE TO OBJECT.

Where accused's counsel, being surprised by a witness, did not examine him as to statements made out of court, accused is bound, the state having been allowed without objection to cross-question the witness as to such statements, by the witness' answers.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1651-1654; Dec. Dig. § 698.*]

8. WITNESSES (§ 380*) — EXAMINATION — SURPRISE.

Where the testimony of a witness called by accused was not unfavorable but simply failed to come up to accused's expectations, accused is not entitled to prove that the witness made contrary statements out of court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210-1219; Dec. Dig. § 380.*]

9. CRIMINAL LAW (§§ 938, 1156*)—NEW TRIAL —DISCRETION OF TRIAL COURT.

Applications for new trial for newly discovered evidence are addressed to the discretion of the trial court, and it will be presumed on appeal that such discretion was properly exercised; the presumption controlling where the affidavits are conflicting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317, 3067-3071; Dec. Dig. §§ 938, 1156.*]

Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

J. Kawasaki was convicted of murder in the first degree, and, from the judgment and an order denying his motion for new trial, he appeals. Affirmed.

Arthur H. McCurdy, of Sacramento, and G. F. Jones, of Oroville, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Defendant, having been convicted of murder in the first degree with life imprisonment as the penalty imposed, appealed from the judgment and the order denying his motion for a new trial.

On the 30th day of August, 1912, in the evening about half past 7 or 8 o'clock, a boy 13 years of age, named Earl M. Cue, was playing at "shadow boxing" on Fourth street, between L and M streets, of Sacramento city, in what is known as the Japanese quarter. While doing so he stepped backward and accidentally "bumped" into a Japanese who was passing, and the latter grabbed the boy about the neck. Two older lads, the deceased, Henry Cordano, and Ernest Capra, who were sitting on a barrel a little distance away, came up and demanded of the Japanese that he release Earl. A fight then ensued between the two older boys and several Japanese who had come upon the scene. While this was in progress one of the Japanese stabbed Henry Cordano from behind; the knife entering near the base of the skull and severing the spinal cord, producing a wound from which death was inevitable. We need not dwell upon the incidents preceding the homicide as it is not disputed that the crime was murder in the first degree. It is, however, earnestly contended that the offense was not committed by the defendant and that therefore we have a case of mistaken identity.

[1] The futility, however, of urging an appellate court to hold as a matter of law that the jury was not justified in finding against defendant on his claim of alibi and in reaching the conclusion that he was the identical person who killed Cordano must be apparent from the following recital of some of the evidence:

Ernest Capra testified that he saw the defendant there that night. "He was there. He had the knife in his hand when he left Henry. He had his hand up towards his neck. He was just leaving him." He also testified that he watched defendant as he ran across the street with a knife in his hand; furthermore that two or three hours afterward he saw the defendant again standing near the scene of the crime and he recognized him. After the arrest the witness observed the defendant at the police station and identified him as the man he saw with the knife. To the question of the district attorney, "Now, Mr. Capra, are you positive that this defendant is the same man that you saw with a knife in his hand standing over the form of Henry Cordano when Cordano was stabbed?" He answered, "Yes, sir."

If the foregoing constituted all the evidence as to identification, it is clear that, under the familiar rule, we should not disturb the verdict of the jury as unsupported. But other witnesses added positive corroboration.

One George W. Davenport testified that he saw the defendant come "from the scene of the stabbing and go down the alley toward Third street."

C. M. Hoffman was in an automobile at the time, near where deceased was killed, and in his testimony declared that his atten-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion was attracted by "a bunch of Japanese crossing the street," and "when they got on the other side of the street I could see they were fighting and I ran across there towards them. * * * I could see they were fighting, one Jap on one side of the boy and one behind him. The one behind him was—it appeared to me at the time that he was hitting him with his hand, but when the boy dropped and he started to run, why I saw him then going through the motions of putting up a knife. * * * Then he ran down the alley, right by me, six or eight feet of me anyway." He testified further that he saw the running man plainly and that he was positive that it was the defendant. Of course it is needless for us to go any further with this branch of the case. Our responsibility as to the identity of the slayer is at an end when we have found in the record such ample support for the verdict of the jury.

[2] There is no merit in appellant's contention that the court erred in refusing a certain proposed instruction on the question of alibi. It is apparent that full and correct instructions were given upon the subject. Indeed, the one refused added nothing to the following which was given at defendant's request: "An alibi means that the defendant, at the time of the homicide, was absent from the place where the crime was committed. If it be established in this case that at the time of the homicide the defendant was in another locality other than where the homicide was committed, then he is entitled to an acquittal; and although the testimony introduced by defendant on this point should not clearly show that he was not there at the time of the homicide, but if it raises a reasonable doubt in your minds as to whether or not the defendant was then in another place, this is adequate under the law, and you should render a verdict of not guilty."

[3] The court was clearly right in refusing to give an instruction containing the admonition "I instruct you, therefore, to view with care those earnestly the testimony of those who testify to defendant's identity." It was open to the two objections pointed out in *Healy v. People*, 177 Ill. 323, 52 N. E. 426. It was argumentative in form and it directed special attention to one particular feature of the testimony, thereby conveying the implication that the judge was distrustful of it.

[4] Besides, if it may be assumed that the jury needed to be reminded of their duty to exercise the greatest care in weighing the evidence, we find sufficient exhortation to that effect in several of the instructions of the court. No intelligent juror could have failed to be impressed thereby with a sense of his deep responsibility in determining the guilt or innocence of the defendant. The jurors were expressly directed to "carefully weigh all the evidence," and they were told over and over again that if they had a reasonable doubt of the defendant's guilt they

must find him not guilty. In the following instruction the court even cautioned the jury as to the danger of convicting an innocent person: "The policy of the law deems it better that many guilty persons should escape rather than that one innocent person should be convicted and punished, so that unless the jury, after a careful and thorough consideration of all the evidence in the case, can say and feel that every material allegation in the information is proved, beyond a reasonable doubt, the jury should find the defendant not guilty." In fact, appellant can find no ground whatever for justly criticizing the action of the court in the matter of the instructions.

[5] M. Shimada, a witness for defendant, was asked these questions: "When did you first hear of the difficulty in which the boy was cut that night?" "Had you heard anything about any cutting before you went to the theater?" The court sustained an objection of the district attorney that the questions called for immaterial and hearsay evidence. The witness had testified that he went to the Pantages theater with defendant and two companions on the evening of August 30, 1912, and was with him from 7:30 p. m. to 9:30 p. m. If true, this would establish a complete alibi. It is claimed by appellant that the said questions were asked for the purpose of showing "that the homicide was committed while they were at the theater and that they first learned of its commission on their return as more definitely to fix the time." In the absence of any explanation on the part of defendant as to the limited purpose for which he sought the evidence, it is apparent that the ruling of the court was justifiable. To show their materiality he should have stated that the purpose of the questions was to fix the particular time in the mind of the witness. Moreover, it is quite manifest that the answers would have added nothing to the certainty or potency of the testimony of the witness. The evidence without conflict shows that the boy was killed in the evening of August 30th. Besides, he had already fixed the date with reference to the night when the boy was killed as follows: "Q. Did you see him (the defendant) on the night that that boy was killed on Fourth street, between L and M, August 30, 1912? Did you see Kawasaki that night? A. Yes; August 30th I saw him in the morning, and in the evening about half past 7 he come to my cigar stand and we went to the theater together." He also stated that the visit to the theater was Friday evening three or four days before defendant was arrested, and it appears from other testimony that this Friday was the fatal 30th of August. It is thus apparent that there was no uncertainty in the mind of the witness as to the synchronism of the two events, and his credibility would not have been affected by his reply to said questions.

[6, 7] One H. Kishi was examined as a wit-

ness for defendant. He testified that at the time of the homicide he was in a jewelry store near where the boy was killed, and in answer to the question, "Did you see any portion of the fight?" he said, "No, I never saw any portion of the fight." After several further questions and answers the following is shown by the record: "Q. You say you did not see any portion of that fight? A. No, I never saw it. Q. You understand what I am asking you, Mr. Kishi? A. Yes. Q. There is no doubt but what you understand me? Mr. Wachhorst: We object to that. The Court: Mr. Jones is evidently taken by surprise by the answer of the witness. You understand the question, do you, Mr. Kishi? A. Yes, sir. Mr. Jones: Q. Mr. Kishi, you were at my office, were you not? A. Yes, sir. Mr. Wachhorst: I object to that. There is no evidence of any surprise. Mr. Jones: I say I am taken by surprise. The Court: Objection overruled." The witness, however, without being asked anything further along that line, was turned over for cross-examination when he was permitted without objection to state that he had related to Mr. Jones the same story he had told on the witness stand and nothing more. On redirect examination he was asked: "And you told me that you did not say to me that you saw that fight and that Kawasaki had nothing to do with it?" An objection was made, and, after argument, the court sustained the objection, stating: "I saw by the answer of the witness that you were taken by surprise, and I overruled the objection of the district attorney to the question which you asked him about being in your office; but you stopped there, and you did not go on and cross-examine him as to whether or not he at that time made statements to you different from what he has made here. You stopped and turned him over to the other side." Whereupon counsel for defendant moved "to strike out all the answers of this witness in answer to the district attorney on cross-examination. He had no right to ask those questions unless I at first had gone into the matter." The motion was denied.

There was no error in either ruling. On direct-examination appellant was accorded the privilege of questioning the witness as to what he had stated to counsel, but advantage was not taken of the opportunity. The rule is that "the direct examination must be completed before the cross-examination begins, unless the court otherwise direct." Section 2045, Code Civ. Proc. After having allowed the questions on cross-examination to be answered without objection, appellant's dissatisfaction with these answers could not, under the familiar rule, avail him anything.

[8] Furthermore, the testimony of the witness was not unfavorable to defendant but simply failed to come up to the latter's expectations. In *People v. Cook*, 148 Cal. 345, 83 Pac. 48, it is said, through Chief Justice

Beatty: "This court has in a number of cases held, and I have no doubt correctly held, that the mere failure of a witness to give favorable testimony for the party producing him does not entitle such party to prove that he has made contrary statements elsewhere." See, also, *Zipperlen v. Southern Pacific Co.*, 7 Cal. App. 215, 93 Pac. 1049. Again, the question proposed by appellant was no more in effect than the inquiry made of the witness by the district attorney. The witness already having been interrogated fully as to what he had stated to counsel, it would seem that nothing could be accomplished by a repetition of the examination.

Indeed, the "surprise" of the appellant must have been made quite apparent to the jury by the testimony and manner of the witness, counsel's own declaration, and the statement of the court that he was "taken by surprise." If anything more were needed and appellant's theory be correct, he should have offered to contradict the witness as to what he stated to counsel. This, however, was not attempted. A motion for a new trial was made upon the ground of newly discovered evidence and denied by the court.

[9] Waiving the question whether the affidavits used on said motion are sufficiently authenticated to entitle them to consideration, it is sufficient to say that they were fully answered by counter affidavits, and the court was amply warranted in resolving the conflict in favor of respondent. "Applications of this kind are addressed to the discretion of the court below, and the presumption is that the discretion was properly exercised. There are many affidavits in the record, some in direct conflict with others. The trial court was in a far better position than this court to pass upon the truth of the matters contained therein." *People v. Rushing*, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

Appellant's counsel seems fully persuaded that his client has been the unfortunate victim of racial prejudice, but we can find nothing in the record to support the contention. All of defendant's legal rights were carefully safeguarded, and there is ample evidence of his guilt.

No error has been discovered, and nothing remains for us but to affirm the judgment and order denying the motion for a new trial, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

PETALUMA ROCK CO. v. SMITH et al.
(Civ. 1177.)

(District Court of Appeal, Third District, California. Oct. 28, 1913.)

MUNICIPAL CORPORATIONS (§ 568*)—LOCAL IMPROVEMENTS—ASSESSMENT—IDENTIFICATION—SIGNATURE.

Under St. 1889, pp. 166-168, §§ 8, 9, 12, providing that the street superintendent shall

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

make an assessment to cover the sum due for work performed; that to the assessment shall be attached a warrant signed by the superintendent and countersigned by the mayor, which warrant, assessment, and diagram of the work shall be recorded, and on suit to enforce the lien of the assessment, the warrant, assessment certificate, and diagram, with affidavit of demand and nonpayment, shall be prima facie evidence of the correctness of the assessment—an assessment not signed by the superintendent of streets, but reciting that the superintendent as such assessed and apportioned the expense of an improvement, is admissible in evidence, and, together with the warrant, which was duly signed makes out a prima facie case to establish the lien of the contractor; the declaration contained in the assessment being sufficient to identify it as the act of the street superintendent.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1282; Dec. Dig. § 568.]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by the Petaluma Rock Company against A. M. Smith and others. From a judgment for defendants, plaintiff appeals. Reversed.

Lippitt & Lippitt, of Petaluma, for appellant. Wm. B. Haskell and F. A. Cromwell, both of Petaluma, for respondents.

CHIPMAN, P. J. This is an action to enforce several separate liens for street work done, under the so-called Vrooman Act, in the city of Petaluma. The sections of the Act brought under examination are found in the amendatory act of 1889. Stats. 1889, p. 157.

The sole question arose upon the testimony of E. S. Shaver, the superintendent of streets of said city. The record is as follows:

"I am superintendent of streets of the city of Petaluma, and was such on the 7th day of November, 1907." A document is shown to witness, and he is asked if that is his signature appended thereto and he answers that it is. Plaintiff thereupon offered in evidence a warrant, assessment, certificate, diagram, affidavit of demand and nonpayment, showing that said warrant, assessment, certificate, and diagram were recorded on the 7th day of November, 1907, by E. S. Shaver, superintendent of streets of the city of Petaluma, in the matter of the assessment for the improvement of Walnut street from the northerly line of Prospect street to the southerly line of Galland street, street assessment No. 83. Defendants objected to the introduction of this paper, for the reason that the assessment was not signed by the superintendent of streets, and there was nothing to show that the same was an authentic or official document. The assessment is an official action, and it must be authenticated by his signature as superintendent of streets in order to authorize the assessment.

"The witness thereupon testified: 'This paper is the original assessment, return, diagram, and warrant in this case, and was re-

corded in my office on the day which it is marked recorded, and while I was superintendent of streets of the city of Petaluma. It is the assessment, warrant, and diagram under which the improvement of Walnut street, involved in this case, was done,'"

The assessment is in due form, and reads:

"Assessment.

"Pursuant to statute, I, E. S. Shaver, as superintendent of streets of the city of Petaluma, county of Sonoma, state of California, do hereby assess and apportion, as shown hereinafter and in the diagram attached hereto, upon certain lots," etc.

Then follows:

"Diagram.

"Exhibiting Walnut street * * * on which work has been done under my official contract as superintendent of streets," etc. Next follows:

"Warrant.

"By virtue hereof, I, E. S. Shaver, of the city of Petaluma, county of Sonoma, and state of California, by virtue of the authority vested in me as said superintendent of streets, do authorize," etc.

"At the city of Petaluma this 8th day of October, A. D. 1907. E. S. Shaver, Superintendent of Streets of the City of Petaluma.

"Countersigned by H. P. Brainerd, President of the Board of Trustees of the City of Petaluma.

"Recorded this 8th day of October, A. D. 1907. E. S. Shaver, Superintendent of Streets."

These documents were identified by witness Shaver as:

"No. 83. City of Petaluma. Recorded the 8th day of October, 1907, Vol. 1, page 472 to 477. Delivered this 8th day of Oct., 1907. Returned this 7th day of November, 1907."

There was some evidence upon other matters which we understand are not now in question. Upon objection of counsel for defendants to the introduction of these papers in evidence, the court reserved its ruling and, upon motion for a nonsuit, sustained the objection, and granted the motion "on the ground that the assessment was defective and omitted the signature of the street superintendent, and was therefore irregular, illegal as an assessment, and rendered the whole proceeding void." Judgment passed for defendants, from which plaintiff appeals. The contractor's return was duly recorded, and the record signed by the superintendent on November 7, 1907.

Section 8 of the statute of 1889 provides:

"After the contractor of any street work has fulfilled his contract to the satisfaction of the street superintendent * * * the street superintendent shall make an assessment to cover the sum due for the work performed and specified in said contract [then

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

follow directions as to what facts shall appear in the assessment] and shall attach thereto a diagram exhibiting each street crossing," etc.

Section 9 provides:

"To said assessment shall be attached a warrant, which shall be signed by the superintendent of streets and countersigned by the mayor of said city. The said warrant shall be substantially in the following form:

"Form of Warrant.

"By virtue hereof, I (name of superintendent of, etc.) by virtue of the authority in me as superintendent of streets (name of contractor) (his or their) agents or assigns to demand and receive the several assessments upon the assessment and diagram hereto attached, and this shall be (his or their) warrant for the same.

"(Date.) _____

"(Name of superintendent of streets).

"Countersigned by (name of mayor).

"Said warrant, assessment and diagram, together with the certificate of the city engineer, shall be recorded in the office of said superintendent of streets. When so recorded the several amounts assessed shall be a lien upon the lands, lots or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged; and from and after the date of said recording, of any warrant, assessment, diagram, and certificate, all persons mentioned in section eleven of this act shall be deemed to have notice of the contents of the record thereof."

After these documents "are recorded the same shall be delivered to the contractor or his agent or assigns on demand * * * and by virtue of said warrant said contractor * * * shall be authorized to demand and receive the amount of the several assessments," etc.

Section 12 provides that when suit is brought to enforce the lien, "the said warrant, assessment, certificate, and diagram, with the affidavit of demand and nonpayment, shall be held prima facie evidence of the regularity and correctness of the assessment and of the prior proceedings and acts of the superintendent of streets and city council upon which said warrant, assessment, and diagram are based and like evidence of the right of the plaintiff to recover in the action."

Respondents rely upon the case of *Dougherty v. Hitchcock*, 35 Cal. 512, which was decided in 1868 under the act of 1862 (Stats. 1862, p. 391), and upon *Himmelman v. Danos*, 35 Cal. 441. In the particulars here involved the statutes of 1862 (Stats. 1862, p. 391) and of 1863 (Stats. 1863, p. 525) do not differ materially from the act of 1889. The provisions relating to the assessment, the diagram and warrant; the recording of the same; the provision that the lien attaches

upon the recordation; that thereafter they are made prima facie evidence of the regularity and correctness of the assessment and acts of the superintendent, and of the right of the plaintiff to recover in the action—are the same in all these acts. The earlier statutes did not, nor does the act of 1889, in terms require the superintendent to sign the several papers constituting the record, except the warrant. In *Himmelman v. Danos* these documents were recorded in a book kept by the superintendent for the purpose indicated, and under the copy appeared the words, "Recorded this 9th day of October, A. D. 1866." This certificate was not signed by the superintendent or by any one for him. In the present case the superintendent did sign the certificate of the record. It was held that the copy of the record, failing to show that it was authenticated, could not be considered as a record. Its insufficiency was also pointed out in other respects. "But," said the court, "independent of the foregoing considerations, we think the copies found in the book cannot be received as a 'record,' for the reason that they were not signed by the proper officer. It is true that it is not, in terms, provided that the record of the assessment, diagram, and warrant, which, according to the plan of the statute, preceded by several days the record of the return or affidavit of demand and nonpayment, shall be separately signed by the superintendent, but it is, in terms, provided that the record, when completed by the addition of the contract and the return, shall be signed by that officer. But if there was no express provision to that effect, the official signature of the superintendent would be none the less material." What follows seems to be an argument to show that the record when made up should be authenticated—that is, signed by the superintendent—that though not essential to the validity of the record, these papers "should be recorded in the order of their coming. Like the summons, complaint, and answer in a judgment roll, they constitute different parts of the same record; and, as in the case of the former, each separate part should bear the date of its making, and the whole, when completed, should bear the official signature of the proper officer. The question whether the record of the assessment should be separately signed is reserved." We do not discover in this case that the precise question was decided. The court did not have occasion to comment on the lack of the superintendent's signature to the assessment. The point emphasized was that the record was not authenticated.

But in *Dougherty v. Hitchcock* the question was distinctly passed upon. It was there claimed by respondent, as is here claimed by appellant, that the assessment, diagram, and warrant were attached together; that the assessment referred to the diagram, which latter was without fault, and the war-

warrant referred to the assessment and diagram, and was duly signed and countersigned; that the three papers constituted together one document, and the signature of one was the signature of all; that the statute requires only that the warrant shall be signed, and the specification of that one is the exclusion of the others from the requirement. The plaintiff here supplements these points by the further fact that the statute expressly makes the record of these documents the sole source of the lien, and that the assessment, as a separate official act, derives its force from its recordation. In certain respects, hereinafter pointed out, the assessment in the present case contains certain statements not found in *Dougherty v. Hitchcock*. The opinion is by Mr. Justice Rhodes. Judge Sprague concurred specially upon the last point discussed, which related to a question entirely apart from the one here. Likewise Chief Justice Sawyer concurred specially on other grounds, stating: "I am compelled to dissent as to the other points discussed in the opinion of my associates." Neither of these judges expressed any opinion in the *Himmelman* Case. Speaking of the assessment, Judge Rhodes said: "This is an official act on the part of the superintendent, and its character and authenticity can be attested in only one manner, and that is the official signature of the superintendent. Its official character must be made to appear on its face." Reference is made to *Himmelman v. Danos* where it was held that the record was inadmissible because not signed. But, as was already shown, the record in the present case was signed, and it was not decided in the *Himmelman* Case that such a record as we have here would not be admissible. Judge Rhodes, in his opinion, proceeds: "But it is contended that it [the assessment] was helped out by the warrant, which was signed by the superintendent, and countersigned by the auditor, and was attached to the assessment. This position might be maintained if the two papers constituted only one official document; but they are distinct, and each must be in truth what it purports to be before they can be attached together for the purposes specified in the act. The position contended for would make a summons without the signature of the clerk valid, if it was attached to the other papers constituting the judgment roll." Answering the point that the statute requires only that the warrant shall be signed, the opinion continues: "There would be great merit in the argument if either of these documents could be regarded as official, in the absence of an official signature"—and the reasoning is that the requirement as to the warrant was unnecessary, "for the issuing of the warrant as necessarily imports and includes its signature as the averment that a summons was issued by the clerk imports that it received his official signature." There

can be no doubt of the meaning of this decision, namely: that an assessment is invalid unless it shows on its face that the superintendent made it. There can be, however, some doubt as to whether the case demanded the decision.

The document read:

"Assessment.

"Assessment for grading Clay street, from Jones to Leavenworth street, as per contract made with M. W. Griffin on the third day of July, 1863."

Then follows a statement of work and its cost, rate of assessment, description of lots, and names of owners, and nothing more.

The warrant is a declaration by the superintendent: "By virtue of the authority vested in me as superintendent, do authorize and empower M. W. Griffin, his agents or assigns, to demand and receive the several assessments upon the assessment and diagram hereto attached."

There is nothing on the face of the assessment to show who made it, and there is nothing in the warrant to show that the assessment was made by the superintendent. The diagram was omitted from the statement of facts, and we do not know what it contained.

In the present case the assessment does show that it was made by the superintendent, unless we must wholly disregard what it declares, namely: "Pursuant to statute, I, E. S. Shaver, as superintendent of streets * * * do hereby assess and appraise as shown hereinafter and in the diagram attached hereto." The warrant refers to the assessment and diagram as made by the superintendent and as attached thereto. No such relationship of the three documents appeared in the cases cited. In the *Himmelman* Case the only papers before the court were what purported to be copies of a record, which latter was not authenticated in any way. In the *Dougherty* Case the assessment failed to show either by signature or by anything on its face indicating by whom it was made, and the absence of such evidence or any evidence of its authenticity, it seems to us, presents a different question from the one here. We have in this case a group of documents which, attached together and duly recorded, becomes the basis of the liens. The statute requires that but one of these three papers (the warrant) shall be signed by the superintendent. It is quite true that the superintendent cannot make up a record having validity from papers which do not in some way show their authenticity; i. e., that they were his work or that of some one authorized to do it. But here not only the face of the assessment so shows, but the superintendent testified, apparently without objection, that he made the assessment offered in evidence; that the papers offered in evidence were the original assessment, return, diagram, and warrant which were recorded in his office,

and under which the improvement of Walnut street was done.

In *Williams v. McDonald*, 58 Cal. 527, in the resolution of intention the signature was printed, whereas the act required that it should be "signed by the clerk." He testified that he used a printed form, and the court held that there was no objection to his adopting the printed signature.

In *Auzerais v. Naglee*, 74 Cal. 60, 69, 15 Pac. 371, 374, the court, in speaking of the acknowledgment necessary to take a contract out of the operation of section 360 of the Code of Civil Procedure, said: "The statute does not require the party to *subscribe* his name, and it is sufficient if it be evident from any part of the instrument of acknowledgment that the debtor named in it has given to it his assent, and as was said in *Rowe v. Thompson*, 15 Abb. Prac. [N. Y.] 377, as the legal definition of the word 'signed' is the act whereby a person gives or declares assent by name, sign, or mark, it follows that it is enough if it appears in the body or upon the margin, or elsewhere of the instrument, that such assent has been given. If the attestation appears anywhere upon the face of the writing, it is sufficient, and the party thus attesting is bound as effectually as if he had subscribed his name at the foot."

In a holographic will the following was held sufficient without being subscribed by the testator: "I, George W. Johnson, do make," etc. In *re Johnson Estate*, Myr. Prob. 5.

The statute requires that the summons issued in an action shall be signed by the clerk. In *Ligare v. California S. R. R. Co.*, 76 Cal. 610, 18 Pac. 777, it was held that the printed name of the clerk was sufficient where the seal was affixed. The lithographic signature of the secretary of an irrigation district was held sufficient, when adopted by him, in *Hewel v. Hogin*, 3 Cal. App. 248, 84 Pac. 1002. *Pennington v. Baehr*, 48 Cal. 565.

Respondents cite *Ede v. Cuneo*, 126 Cal. 167, 171, 58 Pac. 538, 540, where the court, speaking of the assessment, diagram, and warrant, said: "Each of those documents essential to the creation of a lien is separate and distinct, and is to be complete in itself." This is undoubtedly true, but the question remains: When—i. e., in what condition—must the assessment be to entitle it to be treated as "complete"? Here the only objection made was that it was not signed by the superintendent. We think it sufficiently appears on the face of it that it was his official act. He treated it as such, attached it to the other documents, and recorded it and certified to the record.

Under the more liberal rules in recent cases given to the requirements of the statute, we think we are authorized in holding that the objection now made is not such as to

deprive the contractor of the lien to which it would otherwise be entitled. *O'Dea v. Mitchell*, 144 Cal. 374, 77 Pac. 1020; *Haughawout v. Raymond*, 148 Cal. 311, 83 Pac. 53; *Burns v. Casey*, 18 Cal. App. 154, 109 Pac. 94. The judgment is reversed.

We concur: HART, J.; BURNETT, J.

REED v. WITCHER et al. (Civ. 1170.)

(District Court of Appeal, Third District, California. Oct. 30, 1913. Rehearing Denied by Supreme Court Dec. 29, 1913.)

1. VENDOR AND PURCHASER (§ 339*)—RIGHT TO RECOVER DEPOSIT—TENDER OF BALANCE.

The contract for sale and purchase of land providing that, if title was found imperfect, and could not be perfected within 90 days, the contract should be terminated, and the deposit returned, the purchaser, to recover his deposit, need not make tender of the balance; the vendor being unable to make good title, if at all, till long after such time, and after the purchaser had declared the contract at end, and demanded return of the deposit.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.*]

2. VENDOR AND PURCHASER (§ 339*)—RIGHT TO RECOVER DEPOSIT—POINTING OUT DEFECTS IN TITLE.

To entitle the purchaser to declare the contract at an end, and recover his deposit for failure to make good title in the specified time, it was not necessary for him, in pointing out defects, to point out those well known by the vendors, and of such a character as to make it impossible, till removed, to pass a good title.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 994-1002; Dec. Dig. § 339.*]

3. VENDOR AND PURCHASER (§ 119*)—RIGHT TO RECOVER DEPOSIT—TIME FOR DEMAND.

Under a contract for purchase and sale of land providing, if title was found imperfect, and could not be perfected within 90 days, the contract should be terminated, and the deposit returned, right to recover the deposit was not lost by the purchaser not declaring the contract at an end, and demanding the return till a few days after the expiration of the 90 days.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 212-214; Dec. Dig. § 119.*]

Appeal from Superior Court, Alameda County; Henry C. Gesford, Judge.

Action by W. I. Reed against W. V. Witcher and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Mastick & Partridge and J. M. Mannon, Jr., all of San Francisco, for appellants. F. E. Whitney and C. L. Colvin, both of Oakland, for respondent.

CHIPMAN, P. J. Plaintiff commenced this action to recover a deposit of \$2,500 paid on account of the purchase price of certain real property situated in the city of Oakland. Plaintiff had judgment, and defendants' motion for a new trial was denied. Appeals have been taken from the judgment,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and from the order denying the motion for a new trial.

The nature of the contract and the issues presented in the pleadings sufficiently appear from the findings of the trial court.

After the contract was executed, which is dated November 14, 1906, defendant Alice S. Blake died, and defendant William Vincent Witcher, Jr., was appointed executor of her will and estate. Plaintiff presented a claim to said executor for the amount in this action mentioned which was rejected. No point arises as to the sufficiency of the steps thus taken by plaintiff. At the close of the evidence plaintiff, by leave of the court, made certain amendments to his complaint to conform to the evidence.

The court found:

(1) That the foregoing contract was entered into by plaintiff and the other signers of the contract, "wherein and whereby plaintiff agreed to buy, and said defendants agreed to sell to plaintiff, an undivided one-half interest in and to the land in said contract described."

(2) That at the time of the execution of said contract an undivided two twenty-fourths interest in said property was vested in Beach Carter Soule, Jr., and Everett Pomeroy Soule, both minors, and at said time and prior thereto an action was pending in the superior court of Alameda county to determine what interest said minors had in said property, and defendants Alice S. Blake, trustee, and Alice S. Blake, as an individual, and said Helen T. Witcher, were parties to said action. That at said time "the undivided one-half of said property owned by defendants Witcher and Alice S. Blake was subject to a deed of trust to secure a loan of \$40,000." That at the same time there were four leases of record covering portions of the property, which had not expired, "and were purported to have been signed by defendants through their agent, and the lessees named in said leases were in possession, * * * and the said defendants were then, and have been since the execution of said leases, collecting and receiving rent from said tenants." That said defendants, at the time said contract was executed, "denied that the said minors aforesaid had any interest in the property," and the action was "to determine whether or not the said minors had acquired any interest therein under the will of Francis M. Blake, deceased." That "all the foregoing facts were well known to said defendants, and to each of them, at the time of the execution of the contract aforesaid." That by the terms of the contract it was agreed that plaintiff should have 30 days from its date in which to examine the title, and, if found imperfect, "and could not be perfected within 90 days from and after the date thereof, the said agreement should be terminated, and said deposit of \$2,500 returned to plaintiff."

(3) That plaintiff paid to defendants

Blake, Witcher, and Witcher, a deposit of \$2,500 on the purchase price of said property.

(4) That plaintiff, within the said 30 days, examined the title to said property, "partly from abstracts furnished him by the defendants above named," and found the title thereto imperfect in the particulars hereinabove mentioned, and on the 11th day of December, 1906, made and served upon the said defendants, and on the owners of the other undivided one-half of said property, a notice that within the 30 days specified in the contract he "will have completed the examination of the title to said property, and will be prepared to consummate by paying for said property the remainder of the purchase price * * * on the execution and delivery to me of a good and sufficient grant, bargain, and sale deed conveying the said property with good and sufficient title free and clear of all incumbrances. Kindly advise me as soon as practicable when and where we can meet to consummate said contract and arrange for transfer of the aforesaid property." That "said notice was given by plaintiff to said defendants and each of them by mail, and the said plaintiff received no reply whatever thereto." That thereafter, to wit, on February 13, 1907, plaintiff served upon defendants and the owners of the other undivided one-half of said property a notice in writing that the title to said property is defective in the following particulars: "(1) I find that the conveyance from the executor of the last will of James Moffitt, deceased, taken in connection with the deeds of Alice S. Blake, as an individual and as trustee, W. V. Witcher, and Helen F. Witcher, would not convey the whole title to the property. There would still be an interest outstanding, and, as far as I have been able to ascertain, no steps have been taken to secure a conveyance of this interest. (2) The property is incumbered by leases which have not been released. This latter objection I think may be adjusted, providing the other outstanding interest can be obtained." Attention is called to the contract giving defendants 90 days in which to perfect the title, if it can be done within that time. That their attention has been called to it before, and they have done nothing "to straighten the matter out so that full ownership of the property may be conveyed to me as contemplated by my contract." "As soon," the letter continues, "as the whole title can be passed I am ready to comply with the agreement on my part. Kindly give this matter your attention, and notify me promptly when you are ready." A description of the property is then set out in the letter. Still quoting from the findings, the court found "that said last-mentioned notice was served by plaintiff on said defendants and each of them by mail, and said plaintiff received no reply whatever thereto."

"(5) That 90 days elapsed from and after

the date of said agreement without the title to said property being perfected, and the said defendants were not able during that time, or otherwise, or at all, to perfect the title to said property, or to deliver to plaintiff a good and sufficient deed to said property conveying the same to him free and clear of all incumbrances, and never at any time proffered or tendered to plaintiff a good and sufficient deed conveying to him the said described property free and clear of incumbrances. That during all of said times none of the leases above referred to was released, and the interest and property covered by the deed of trust above referred to was not reconveyed." That during all said time the action to determine the interest of said Soule minors was pending in the superior court, and was not finally determined until the decision of the Supreme Court on March 28, 1910. That during all the time from November 14, 1906, up to March 28, 1910, the said defendants "could not convey to said plaintiff an undivided one-half interest in and to said property described in said written agreement free and clear of incumbrances, and that all of said facts mentioned in this paragraph were well known to the said defendants during all of said time."

(6) That on May 31, 1907, plaintiff delivered to defendants a notice in writing stating that, as they had failed to comply with the said agreement "within the time specified or at all, said agreement is ended and terminated, and demand is hereby made upon you and each of you for the return of the money deposited by me with you on account of said agreement, to wit, the sum of twenty-five hundred dollars." That "said plaintiff did not, prior to the service of said notice, or otherwise, or at all, tender to defendants the balance of the purchase price * * * except as shown by the notice made and served by him on the 11th day of December, 1906, as hereinafter set forth." That at no time between the date of said contract and the serving of the notice on May 31, 1907, "did plaintiff have cash on hand, or subject to his call in any bank * * * a sum in excess of the sum of \$100,000, but had other property sufficient in value to enable him to raise the balance on said contract, and during all said times plaintiff was able, ready, and willing to perform the terms and conditions of the contract to be performed by him. That plaintiff duly performed all the terms * * * to be performed by him."

(7) That "defendants failed, refused, and neglected to comply with said demand, and have ever since failed, refused, and neglected to comply therewith, or to return to plaintiff the said deposit of \$2,500, or any part thereof, and neither the whole nor any part of said sum of \$2,500 has been paid or returned to plaintiff."

As conclusions of law the court found that

plaintiff is entitled to recover from defendants the sum of \$2,500, with interest from May 31, 1907, and costs.

Plaintiff alleges two causes of action—one on the contract, and the other for money received by defendants to the use of plaintiff, which they agreed to pay plaintiff on demand. The court, in addition to the foregoing findings, found the averments in the second cause of action to be true.

The sufficiency of the evidence to support the findings is not challenged, nor is any question raised in the briefs on the rulings of the court in admitting or rejecting evidence.

[1-3] Appellants make but two points—first, that "one who has contracted to purchase realty, and has paid a deposit thereon, cannot recover his deposit without tendering payment of the balance of the purchase money; second, that defendants' defective title did not excuse plaintiff's failure to tender the purchase money."

Upon the first proposition, appellants rely on *Englander v. Rodgers*, 41 Cal. 420, 422. The principle there enunciated is that, "to entitle the plaintiff to maintain the action on the contract set out in the complaint, he should have averred tender of the unpaid portion of the purchase money, or some sufficient excuse for the omission to tender it." The case went off on demurrer to the complaint, and, as the complaint failed to allege either tender or any excuse for the omission, the demurrer was sustained. In *Merrill v. Merrill*, 95 Cal. 334, 30 Pac. 542, the court is careful to point out by the use of italics the qualification which certain facts may impose upon the rule in the *Englander Case*—for example—"neither could put the other in default, except by tendering a performance on his own part, * * * or by his conduct rendered it unnecessary;" and, again, "he should have averred a tender of the unpaid portion of the purchase money, or *some excuse* for the omission to tender it." In the *Merrill Case* the court was of the opinion that sufficient facts were alleged to "show that a tender of the balance of the purchase money and a demand for the deed would have been of no avail." *Wood v. McDonald*, 66 Cal. 547, 6 Pac. 453, is cited, where the court said: "Proof of any circumstance which would satisfy a jury that a demand would be unavailing * * * will be sufficient to excuse proof of a demand." *Crim v. Umbsen*, 155 Cal. 697, 103 Pac. 178, 132 Am. St. Rep. 127, was a case where the great fire in San Francisco occurred shortly after the contract of purchase and sale was made, thus rendering it impossible, within the time designated in the contract, to exhibit a good title. It was held that the purchaser was entitled to rescind the contract, and recover back part of the purchase money paid previous to the fire. *Allen v. Globe Mining & Milling Co.*, 156 Cal. 236, 104

Pac. 305; *Cabrera v. Payne*, 10 Cal. App. 675, 103 Pac. 176; *Carter v. Fox*, 11 Cal. App. 67, 103 Pac. 910. See, also, *Phelps v. Brown*, 95 Cal. 572, 30 Pac. 774, where the cases are reviewed. It is unnecessary to pursue the cases further to show that the rule stated in *Englander v. Rodgers*, supra, is applicable only where neither the pleadings nor the evidence present an excuse for not making tender of the full purchase price.

The contract expressly provided that, "if the title is found imperfect, and cannot be perfected within 90 days from this date, this agreement shall be terminated, and the deposit on it hereinafter mentioned returned." Defendants' right to retain the deposit was made to depend upon the vendee's failing to make payment "upon the execution and delivery to him of a good and sufficient grant, bargain, and sale deed conveying the undivided one-half of said property, with a good title free and clear of all incumbrances."

The undisputed evidence was, and the court so found, that defendants were not only unable within the 90 days to make such title but were not able to do so, if at all, until long after plaintiff had declared the contract at an end, and had demanded payment of his deposit. And the court found that defendants could not, at any time between November 14, 1906, and March 28, 1910, convey a good title for reasons shown in the findings, and that defendants knew all the facts relating to the defects in the title. It is true that, in his letter of February 13, 1907, plaintiff did not point out all of these defects; but the defects not pointed out were well known by defendants to exist, and to be of a character making it impossible until removed to pass a good title. Under these circumstances it would have been an idle act to notify defendants of these known defects, existing when the contract was made, and which they undertook to remove within 90 days or return the deposit. We do not think that plaintiff lost his right to recover by not demanding the return of his money, and declaring the contract at end until a few days after the expiration of the 90 days. Under the circumstances he would have been justified in so declaring even within that period, since it was impossible to have made a good title within that time. *Cabrera v. Payne*, 10 Cal. App. 675, 103 Pac. 176.

Respondent contends that his letter of February 13, 1907, was a sufficient tender. Citing section 2074, Code of Civil Procedure, in *Peckham v. Stewart*, 97 Cal. 147, 31 Pac. 928, the court pointed out the change made by the Civil Code, section 1496, in the common-law rule as stated in *Englander v. Rodgers*, supra, which required the production and offer of the money.

We do not think any tender other than

was made was necessary, and whether it was in fact sufficient need not be decided.

From any just view we can take of the case, the judgment and order should be affirmed, and it is so ordered.

We concur: HART, J.; BURNETT, J.

HASTARAN et al. v. MARCHAND.

(Civ. 1,197.)

(District Court of Appeal, First District, California. Oct. 30, 1913.)

1. APPEAL AND ERROR (§ 694*)—STATEMENT OF CASE—SPECIFICATION OF ERRORS—INSUFFICIENCY OF EVIDENCE.

Code Civ. Proc. § 659, provides that, when the notice of motion for new trial designates as a ground the insufficiency of the evidence to justify the decision, the statement shall specify the particulars of the insufficiency and, if no specifications be made, the statement shall be disregarded on the hearing. Section 950 requires one appealing from a final judgment to furnish the court with a copy of any bill of exceptions or statement of the case on which he relies, and section 648 provides that, when the exception is upon the ground of the insufficiency of the evidence, the objection must specify the particulars of the insufficiency. *Held* that, where a statement of the case did not specify the particulars in which the evidence was claimed to be insufficient to support the findings, such insufficiency cannot be considered either on appeal from the judgment or from the order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.*]

2. EXCEPTIONS, BILL OF (§ 20*)—FORM AND SUFFICIENCY.

Documents entitled "Bill of Exceptions" which contain several specifications of the insufficiency of the evidence, intermingled with argument, and authorities, and certain errors of law, but not setting out the evidence, and not authenticated by the trial judge, or referred to in the authenticated statement of the case, cannot be considered as a bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 21-28; Dec. Dig. § 20.*]

3. APPEAL AND ERROR (§ 694*)—STATEMENT OF CASE—SPECIFICATIONS OF ERROR—INSUFFICIENCY OF EVIDENCE.

Specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are intended primarily for the information of the adverse party and trial court, so as to advise them upon settlement of the statement or bill as to what matters of evidence should be included therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.*]

4. APPEAL AND ERROR (§ 634*)—RECORD—DESIGNATION.

As a rule the legal effect of a document which is a part of the record must be determined from its subject-matter rather than the name by which it is designated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2775, 2829; Dec. Dig. § 634.*]

5. APPEAL AND ERROR (§ 563*)—STATEMENT OF CASE.

A statement of the case on motion for a new trial and bill of exceptions may be incor-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

porated in one paper without invalidating either.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2500; Dec. Dig. § 563.*]

6. APPEAL AND ERROR (§ 758*)—BRIEFS—DISCUSSION OF POINTS.

The appellate court will not consider points merely referred to in appellant's brief by stating that it is for the appellate court to determine whether the testimony was properly excluded, or other testimony was properly admitted, and referring to unauthenticated documents, designated a bill of exceptions, for the errors of law and authority supporting the points.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093; Dec. Dig. § 758.*]

7. APPEAL AND ERROR (§ 864*)—APPEAL FROM JUDGMENT—ERRORS REVIEWABLE.

Errors of law appearing in a proper statement of the case on bill of exceptions may be reviewed upon appeal from the judgment, though there is no appeal from the order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1765-1767, 3456-3461; Dec. Dig. § 864.*]

8. APPEAL AND ERROR (§ 553*)—STATEMENT OF CASE—ERRORS REVIEWABLE.

A statement of the case which is not also a bill of exceptions cannot be resorted to for the purpose of reviewing alleged errors of law, under Code Civ. Proc. § 659, subd. 3, providing that, when the notice designates as ground for a new trial errors in law occurring at trial, the statements shall specify the particular errors relied on.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.*]

9. APPEAL AND ERROR (§ 553*)—STATEMENT OF CASE—BILL OF EXCEPTIONS.

If a statement of the case be considered as a bill of exceptions, which may be done, specifications of error would not be necessary to review alleged errors of law appearing therein, under Code Civ. Proc. § 650, relating to the settling of bills of exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2461, 2462, 2465-2471; Dec. Dig. § 553.*]

10. APPEAL AND ERROR (§ 204*)—OBJECTION BELOW—NECESSITY—RULINGS ON EVIDENCE.

Where evidence was offered and received wholly without objection, no error therein is available on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1258-1272, 1274-1278, 1280, 1569; Dec. Dig. § 204.*]

11. APPEAL AND ERROR (§ 907*)—PRESUMPTION—SUFFICIENCY OF EVIDENCE.

In the absence of a sufficient statement of facts or bill of exceptions, it will be presumed on appeal that the evidence fully supported the findings, and justified the refusal of a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Smith, Judge.

Action by John Hastaran and another against Carrie B. Marchand. From a judgment for plaintiffs, and an order denying a motion for new trial, defendant appeals. Affirmed.

A. Heynemann and C. F. Adams, both of San Francisco, for appellant. J. K. Ross, of San Francisco, for respondents.

LENNON, P. J. This is an appeal from a judgment rendered in favor of the plaintiffs, and also from an order denying the defendant a new trial. The action was one to rescind a contract of purchase and sale of personal property, and for the recovery of the purchase price thereof, upon the ground of fraud. The case was tried by the court, without a jury, and findings were made in favor of the plaintiffs in substantial accord with the allegations of the complaint. Judgment was entered upon the findings on September 7, 1911, and on the following day defendant served and filed her notice of intention to move for a new trial, upon the grounds of errors of law occurring during the trial, and the insufficiency of the evidence to justify the findings. The notice of intention stated that the motion would be made upon affidavits to be thereafter filed, a statement of the case, and also a bill of exceptions to be thereafter prepared. On March 25, 1912, an engrossed "statement of the case on motion for a new trial" was allowed and authenticated by the certificate of the trial judge. The motion for a new trial was heard and denied on April 8, 1912.

In support of the appeal it is urged that in certain particulars the evidence is insufficient to support the findings of fact as made by the trial court.

[1] This point cannot be considered, either upon the appeal from the judgment or from the order denying the new trial, for the reason that the statement of the case appearing in the record before us does not specify nor attempt to specify the particulars in which the evidence is claimed to be insufficient to justify the findings. Sather Banking Co. v. Briggs, 138 Cal. 724, 72 Pac. 352. Section 659, Code of Civil Procedure, provides that: "When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. * * *

If no such specification be made, the statement shall be disregarded on the hearing of the motion." Inasmuch as the statement of the case before us does not even attempt to specify the particulars in which it is claimed that the evidence is insufficient to support the findings, it must be assumed in support of the order appealed from that the lower court, in passing upon the motion for a new trial, ignored, as was its duty, the statement of the case prepared and presented by the defendant. This being so, it follows that the motion for a new trial, in so far as it was grounded upon the insufficiency of the evidence, was in effect made without a state-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment of the case to support it, and, the defendant having elected to move upon such a statement, his failure to prepare and perfect it in the particulars required by the Code precluded the lower court from passing upon the sufficiency of the evidence, and therefore, in so far as that question was concerned, the motion for a new trial was properly denied.

The reasoning which requires us to reject the defendant's statement of the case when considering the appeal from the order denying a new trial likewise precludes us from considering that statement upon the appeal from the judgment in so far as the sufficiency of the evidence to support the findings is concerned. Section 950, Code of Civil Procedure, provides that on an appeal from a final judgment the appellant must furnish the court with (1) a copy of the notice of appeal, (2) the judgment roll, and (3) of any bill of exceptions or (4) statement of the case on which the appellant relies. For the purpose of an appeal from the judgment, there is little difference between a bill of exceptions and a statement of the case. "Their form is the same, the proceeding to settle them is the same, they perform the same office, and may be used interchangeably." 2 Spelling's New Trial, § 629. Accordingly any statement of the case which has been settled and authenticated as required by law, and which was used or which was prepared, settled, and authenticated for use upon a motion for a new trial, may be resorted to by this court upon an appeal from a judgment which involves errors of law claimed to have been committed upon the trial, or the alleged insufficiency of the evidence to support the findings. 2 Hayne on New Trial (Revised Ed.) § 250.

This, however, presupposes that upon an appeal from the judgment grounded upon the insufficiency of the evidence the "bill of exceptions" or "statement of the case" accompanying the judgment roll was prepared and perfected in accordance with the provisions of section 648, Code of Civil Procedure, which requires that: "When the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient." The purpose of this requirement is practically the same as that of section 659 of the same Code, relating to the necessity of specifications of insufficiency in a statement of the case on a motion for a new trial. Therefore upon the appeal from the judgment in the present case the sufficiency of the evidence to support the findings cannot be reviewed upon the statement of the case before us. 2 Hayne on New Trial, § 259.

[2] The defendant insists that the neglect of the statement to specify the particulars in which it is claimed the evidence was insufficient was covered, and therefore cured,

in two separate documents entitled "Bill of Exceptions," which are printed elsewhere in the transcript, and purport to have been filed in the action some five months previous to the allowance and authentication of the defendant's "Engrossed Statement of the Case on Motion for a New Trial."

The first of these documents contains several specifications of the insufficiency of the evidence, intermingled with argument and the citation of authorities. The second is made up of specifications of errors in law alleged to have occurred during the trial. Neither document, however, purports to set out in narrative form or otherwise the evidence and rulings had and made at the trial. Moreover, neither document was authenticated by the judge of the trial court, and therefore neither can be said to be a bill of exceptions in form or in fact. Neither document was included in nor referred to in the authenticated statement of the case which was finally settled and allowed by the trial court. Obviously they cannot be considered for any purpose upon this appeal.

This case was heard once before by this court, and upon the point just stated was decided adversely to appellant. In the petition for a rehearing our attention was called to the fact that prior to the filing of briefs, and before the oral argument upon the first hearing, a diminution of the record upon motion of the appellant was ordered, so as to show that the trial judge had indorsed upon each of the two unsettled and unauthenticated documents entitled "Bill of Exceptions" the following certificate: "I hereby certify that the foregoing specifications were used before me on the argument on motion for a new trial. Frank H. Smith, Judge. September 20, 1912." Although permission was granted counsel for the appellant at the time the diminution was suggested and ordered to amend the record before us by inscribing thereon with pen and ink the above-mentioned certificate, such amendment was not made until after our opinion in the first instance affirming the judgment had been filed, and, although permission had been granted previous to the filing of appellant's brief to amend the record in the particulars and manner stated, no mention or point was made, either in the briefs of counsel for the appellant or upon the oral argument, of the fact that the trial judge had used the disputed documents upon the hearing of the motion for a new trial. We were justified, therefore, in assuming, as we did, upon the first hearing that the suggested diminution of the record was not considered by counsel for the appellant as a matter of sufficient moment to be considered by us upon the determination of the appeal. A rehearing, however, was granted largely because of the earnest insistence of counsel for the appellant that such certificate obviated the objections which resulted in the

affirmance of the judgment in the first instance.

Upon further consideration, we are satisfied that even as finally amended the record before us will not sustain the appeal upon the ground of the insufficiency of the evidence to support the findings.

The case of *Dawson v. Schloss*, 93 Cal. 195, 201, 29 Pac. 31, 32, hurts rather than helps appellant, for there it is declared that the primary purpose of the rule requiring specifications of evidence "in statements on motion for a new trial and in bills of exceptions is to abbreviate the statement of evidence by restricting it to such as is relevant or material to prove or disprove the specified fact. By the specifications required, the opposing party and the judge are notified of the exact points of contest, and thereby enabled to determine what evidence should be brought into the statement, and what should be excluded therefrom. Without such specifications, the judge could not perform the duty enjoined upon him 'to strike out of it [the statement or bill of exceptions] all redundant and useless matter,' and to make the statement truly represent the case (Code Civ. Proc. §§ 650, 659), nor would the opposing party have any means of distinguishing what portions of the evidence would be redundant from that which tends to prove the issue on his part, and the consequence would generally be that all the evidence would be brought into the statement or bill of exceptions, though nine-tenths of it were irrelevant and useless. So important were the required specifications in a statement on a motion for a new trial regarded by the Legislature that it enacted: 'If no such specifications be made, the statement shall be disregarded on the hearing of the motion.' Code Civ. Proc. § 659. And this penalty has been enforced by this court in so many cases that there seems to be no excuse for failure to comply with the Code rule. * * *

[3] It will thus be seen that the specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are not required merely for use upon the hearing of the motion for a new trial, but are intended primarily, if not entirely, for the information of the adverse party and the trial court, to the end that they may be fully advised upon the settlement of the statement or bill of exceptions as to what matters of evidence covering the points in controversy should be included therein. *Cortelyou v. Imperial Land Co.* (Sup.) 134 Pac. 981.

In the present case the statement, which was settled for use and subsequently used upon the motion for a new trial, is, as has been previously pointed out, utterly devoid of specifications or attempted specifications of the insufficiency of the evidence to sustain the findings made by the trial court, and therefore neither the trial court nor the adverse party was required upon the settle-

ment of the statement to ascertain whether or not all of the evidence adduced upon the trial, and upon which the findings were made, was incorporated in the statement as originally prepared and presented for settlement. Perchance, if the insufficiency of the evidence to sustain all or any one of the findings made by the trial court had been specified in the statement as submitted for settlement, amendments would have been proposed and allowed which would have covered the points in controversy.

It is contended, however, upon behalf of the appellant that the certificate of the trial judge which has been added to the record shows that he had before him at the time of the settlement of the statement the specifications of insufficiency contained in one of the two unsettled and unauthenticated documents entitled "Bill of Exceptions," and we are therefore requested to consider those specifications as part and parcel of the settled and authenticated statement of the case which was used upon the motion for a new trial.

[4] This contention is not supported by the record before us, and the request following it must be ignored. It may be conceded that generally the legal effect of a document must be determined by a consideration of its subject-matter rather than by the name given to it, and, when its real character is thus ascertained, its scope and effect cannot be ignored because of a mere misnomer.

[5] It may also be conceded that a statement on motion for a new trial and a bill of exceptions may be incorporated in one paper without invalidating either (*Spottiswood v. Weir*, 66 Cal. 525, 6 Pac. 381; *Martin v. Southern Pacific Co.*, 150 Cal. 124, 83 Pac. 701), and we have no doubt that, if in the present case the two unsettled and unauthenticated documents entitled "Bill of Exceptions"—one of which specified the insufficiency of the evidence, and the other the errors of law—had been, by reference or otherwise, made a part of the proposed statement on motion for a new trial, they would have constituted sufficient specifications of the insufficiency of the evidence and the errors of law relied upon for a new trial.

No such situation, however, confronts us here. In the first place, both of the documents in the present case entitled "Bill of Exceptions" plainly purported only to set forth disconnected fragments of the evidence adduced upon the trial of the case, and neither of such documents was, directly or by reference, authenticated by the certificate of the trial judge. Clearly, therefore, they lack the essentials of an efficient bill of exceptions. In the second place, the record before us, as originally prepared, and as subsequently amended, shows unequivocally that the two documents in question were neither directly nor by reference made a part of the proposed statement on motion

for a new trial. The record shows further that the "Engrossed Statement on Motion for a New Trial" was filed, settled, and authenticated some five months subsequent to the filing of the two unsettled and unauthenticated documents entitled "Bill of Exceptions," and it does not show that either of such documents was called to the attention of the trial judge nor considered by him before the time of the hearing of the motion for a new trial, which, of course, must have been subsequent to the settlement and authentication of the statement of the case upon which the motion for a new trial was made and determined.

This being so, there is no escape from the conclusion that the two unsettled and unauthenticated documents entitled "Bill of Exceptions" were not a part of the proposed statement on motion for a new trial, nor considered by the trial court upon the settlement of such statement. Standing alone, as it must, the settled and authenticated statement did not contain the required specifications of insufficiency, and therefore it must be held, in compliance with the rule annunciated in the authorities hereinbefore cited and quoted, that such statement could not be used upon the hearing of the motion for a new trial, nor resorted to upon this appeal, in so far as the sufficiency of the evidence to support the findings is concerned.

[8] The opening brief of counsel for the appellant consisted solely of a discussion of the sufficiency of the evidence to support the findings; but in the closing brief alleged errors of law relating to the reception and rejection of testimony are adverted to in a general way. For instance, without pointing out the particular errors relied upon for a reversal, we are advised and admonished that "it is for the appellate court to determine whether or not this testimony was properly excluded, or whether the testimony given was properly admitted," and we are then referred to the two unsettled and unauthenticated documents already described, where, we are told, will be found "the errors of law * * * and the authorities supporting the points. * * *"

Neither this court nor counsel for the respondent is required to examine and answer points and authorities presented in such manner. *People v. Woon Tuck Wo*, 120 Cal. 294, 52 Pac. 833; *People v. McLean*, 135 Cal. 306, 67 Pac. 770; *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *People v. Chutnact*, 141 Cal. 682, 75 Pac. 340; *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661; *Bell v. Southern Pacific Co.*, 144 Cal. 560, 77 Pac. 1124; *Pigeon v. Fuller*, 156 Cal. 691, 105 Pac. 978; *Perry v. Ayers*, 159 Cal. 414, 114 Pac. 46. In fairness to this court and to counsel for respondents, every point relied upon for a reversal should have been stated and argued in the opening brief of

counsel for the appellant, and therefore points not so stated and argued may be deemed to be waived. *Hihn v. Courtis*, 31 Cal. 399; *Webber v. Clarke*, 74 Cal. 11, 15 Pac. 431; *Wheelock v. Godfrey*, 100 Cal. 578, 35 Pac. 317; *Odell v. Buttrick*, 128 Cal. 551, 159 Pac. 133.

[7-10] It is true that one of the documents referred to consists mainly of argument and the citation of authorities directed to alleged errors of law specified therein; but we do not understand, nor can it be successfully contended, that the irregular interpolation of points and authorities in a bill of exceptions, or a document purporting to be such, will suffice as an opening brief upon appeal, and thereby require this court and counsel for the respondent to investigate and answer the points so made. However, having in mind the rule that errors of law appearing either in a proper statement of the case or bill of exceptions may be reviewed upon an appeal from the judgment, regardless of whether or not an appeal has been perfected from an order denying a new trial, we have out of an abundance of caution, not unmingled with some curiosity, examined the authenticated statement of the case which was used upon the motion for a new trial, and find that it does not, either by reference to the notice of intention, or otherwise, or at all, specify any error of law occurring at the trial. Such statement, therefore, considered merely as a statement, and not as a bill of exceptions, cannot be resorted to for the purpose of disposing of alleged errors of law. Code Civ. Proc. § 659, subd. 3; *Shadburne v. Daly*, 76 Cal. 355, 18 Pac. 403. Of course, if such statement be considered a bill of exceptions (as may be done), specifications of error would not be necessary to review any alleged errors of law appearing therein. Code Civ. Proc. § 650; *Martin v. S. P. Co.*, 150 Cal. 125, 88 Pac. 701. But, treating the statement as a bill of exceptions, we find upon a careful review thereof that all of the evidence set forth therein was offered and received without the interposition of a single objection. This being so, it is obvious that the errors of law, if any, occurring at the trial are not in any event available to appellant upon this appeal.

[11] Upon the first hearing of this case appellant, in an endeavor to have us consider everything which is to be found between the covers of the transcript, asserted that the appeal was taken under the new or alternative method provided by sections 941a et seq. of the Code of Civil Procedure. This position, however, was finally and expressly abandoned upon rehearing, and therefore need not be further discussed. No error appears on the face of the record before us, and, in the absence of an efficient statement of the case or bill of exceptions, we must assume that the evidence adduced

at the trial fully supports the findings, and justified the denial of a new trial.

The judgment and order appealed from are affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

STATE ex rel. PACIFIC POWER & LIGHT CO. v. PUBLIC SERVICE COMMISSION.

(Supreme Court of Washington. Dec. 18, 1913.)

CERTIORARI (§ 70*)—QUESTIONS REVIEWABLE—JURISDICTION OF INFERIOR COURT.

An appeal from an order of the superior court of a county, affirming orders of the Public Service Commission rendered on a writ of review to the superior court of the county, will not be dismissed on the motion of the commission, on the ground that the superior court of another county had the exclusive jurisdiction to review the orders of the commission, but the question of jurisdiction is reviewable on appeal on the merits only.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 195-208; Dec. Dig. § 70.*]

Department 2. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Writ of review by the State of Washington, on the relation of the Pacific Power & Light Company, against the Public Service Commission, to review orders of the commission. From an order affirming the orders, the relator appealed, and the commission moved to dismiss the appeal for want of jurisdiction of the superior court. Denied.

Englehart & Rigg, of No. Yakima, and John A. Laing, of Portland, Or., for appellant. W. V. Tanner and Stephen V. Carey, both of Olympia, and Guy O. Shumate, of No. Yakima, for respondent.

PARKER, J. This cause is before us upon the motion of the Public Service Commission to dismiss the appeal taken by the Pacific Power & Light Company, the relator, from a decision of the superior court for Yakima county, affirming certain orders made by the Public Service Commission touching certain things to be done by the relator as a public service corporation. Upon the making of the orders by the commission, following a hearing in Yakima county, the relator caused the proceedings had before the commission to be removed, by writ of review, to the superior court of that county. A hearing had therein upon the return of the writ resulted in a decision affirming the orders of the commission, from

which decision the relator has appealed to this court.

The Public Service Commission now moves this court to dismiss the appeal, insisting that the superior court for Yakima county did not have jurisdiction to review the orders of the Public Service Commission; that its decision upon the reviewing of such orders is a nullity because of want of jurisdiction, and that therefore there is nothing to appeal from to this court.

Attention is called to our recent decision in State ex rel. Russell v. Public Service Commission, 135 Pac. 244, and section 86, p. 596, Laws of 1911, relating to review in the superior court of orders made by the Public Service Commission. Upon this decision and this law is rested respondent's contention that the superior court for Yakima county did not have jurisdiction, and that the superior court for Thurston county only had jurisdiction to review the orders made by the commission. This presents an interesting and important question; but we are of the opinion that it cannot be considered here upon a motion to dismiss the relator's appeal. Whether or not the superior court for Yakima county had jurisdiction is a question which is reviewable upon appeal. It seems clear to us that this court, by virtue of the appeal, has jurisdiction of the question of the jurisdiction of the superior court for Yakima county in this particular controversy. A motion to dismiss an appeal in this court may, of course, be rested upon the ground that this court has no jurisdiction; but we cannot agree with the view that the jurisdiction of this court is dependent upon the view it finally takes as to the jurisdiction of the superior court. The jurisdiction of a superior court upon appeal therefrom is always a pertinent question in this court. No decision has come to our notice holding that such a question is proper to be considered upon a motion to dismiss an appeal. Cases, probably by the hundreds, may be found where appellate courts have reversed decisions of lower courts because of want of jurisdiction in such courts; but it seems to us that the very deciding of such a question is the assuming of jurisdiction by the appellate court so deciding it. The fact that the question of the superior court's jurisdiction is involved, and we are called upon to decide that question, is sufficient, we think, to invoke the jurisdiction of this court.

The motion to dismiss is denied.

CROW, C. J., and MOUNT, FULLERTON, and MORRIS, JJ., concur.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

In re WEST WHEELER ST. IN CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 19, 1913.)

MUNICIPAL CORPORATIONS (§ 437*)—ESTABLISHMENT AND IMPROVEMENT OF STREETS—ASSESSMENT OF BENEFITS.

An ordinance for the acquisition of property for an elevated road and for the construction of the road and for the establishment of a street on the surface provides for two separate improvements, where the elevated road and street have nothing in common except they adjoin each other at their connection with an existing street, and the cost of one improvement cannot be assessed against property not benefited thereby but benefited only by the other improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1051; Dec. Dig. § 437.*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

In the matter of the petition of the City of Seattle to acquire property for laying off, widening, extending, and establishing streets and changing and establishing their grades. From an order approving a special assessment roll as prepared and filed by the eminent domain commission of the city, land-owners appeal. Reversed and remanded, with directions.

Geo. E. de Steiguer, R. E. Thompson, Jr., Raymond D. Ogden, and Peters & Powell, all of Seattle, for appellant. Jas. E. Bradford and C. B. White, both of Seattle, for respondent.

MOUNT, J. This is an appeal from an order of the superior court of King county approving a special assessment roll as prepared and filed by the eminent domain commission of the city of Seattle, to which objections have been filed by various property owners. The property owners have appealed.

It appears that in the year 1911 the city of Seattle, by ordinance, authorized the condemnation of certain real property for the purpose of constructing certain overhead bridges and connecting what is commonly known as Magnolia Bluff with Queen Anne Hill, in the city of Seattle. Magnolia Bluff is a headland lying in the northwestern part of the city of Seattle, immediately west of what is commonly known as Smith's Cove. This bluff rises abruptly to a maximum elevation of about 300 feet. To the eastward from Magnolia Bluff lies Queen Anne Hill, which rises abruptly to a maximum height of about 300 feet. Between these two hills is a valley from a half to three-quarters of a mile wide. In this valley is Smith's Cove waterway. Numerous railroads extend north and south lengthwise of this valley. Fifteenth avenue west runs in a northerly and southerly direction along the western slope of Queen Anne Hill. This is the only avenue for traffic between Magnolia Bluff and the lowlands lying

between Magnolia Bluff and Queen Anne Hill to the business portion of the city of Seattle. The object of this improvement was to build overhead roadways, extending from Fifteenth avenue west, westward, across the valley between Magnolia Bluff and Queen Anne Hill, so that the residents of Magnolia Bluff might reach the city of Seattle in a more direct and available route than theretofore existed. The roadway leading to Magnolia Bluff, or Twentieth avenue west, and Thorndyke avenue, which is on the eastern slope of Magnolia Bluff, is proposed to be an overhead roadway from 20 to 70 feet high, extending from Fifteenth avenue west on Queen Anne Hill to Twentieth avenue west and Thorndyke avenue on Magnolia Bluff. As a part of the plan it became necessary to condemn a roadway across the lowlands heretofore mentioned. This roadway is 75 feet in width. In order to accommodate the residents living in the lowlands, it was proposed to condemn a roadway from Fifteenth avenue west, 150 feet wide, down the side of the hill a distance of about two blocks, to Seventeenth avenue west, lying in the lowlands. The roadways were thus condemned. Seventy-five feet of the roadway from Fifteenth avenue west to Seventeenth avenue west was designed for the overhead roadway extending to Magnolia Bluff, while the northeasterly half of the roadway, 75 feet in width, was to be constructed upon the ground for the purpose of serving the people living in the valley or lowlands. It is apparently conceded in the record that this strip of roadway 150 feet wide from Fifteenth avenue west to Seventeenth avenue west was condemned at a cost of \$69,123. That \$3,588.75 of this cost was assessed to the lowlands, while the balance thereof was assessed to the highlands lying upon Magnolia Bluff.

The evidence shows conclusively that the roadway 75 feet wide leading from Fifteenth avenue west to Seventeenth avenue west, located in the lowlands, will be of no use or benefit to the property lying upon Magnolia Bluff or to the west of the waterway. And that the overhead roadway extending from Fifteenth avenue west, northwesterly across the lowlands, will be of no possible use or benefit to the property lying in the lowlands. The testimony was all to this effect, and the trial court so found. But, by reason of the fact that the improvement was provided for by one ordinance, the trial court was of the opinion that the improvement was one unified improvement not capable of separation, and that, because the evidence showed that all of the property assessed within the whole district comprising Magnolia Bluff and the lowlands would receive the benefit for which it was assessed, the trial court approved the assessment roll.

It seems clear to us, in fact there is no dispute upon the record, that, while these improvements were provided for by one

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ordinance, they are in fact two separate and distinct improvements. There is nothing in common between the two. There is no common use, by the people living in the lowlands, of the overhead structure leading to the highlands. There is nothing in common between the improvement of the way to the lowlands and the overhead way to the highlands, except the mere fact that these two streets, one 75 feet in width on an elevated roadway and the other a street constructed upon the ground, of the same width, adjoin each other at their connection with Fifteenth avenue west. Otherwise there is no connection between the improvements.

The testimony shows that the improvement of the street 75 feet in width leading from Fifteenth avenue west to Seventeenth avenue west in the lowlands is of no benefit to the property of the highlands any more than it is to any distant part of the city of Seattle. It is plain, therefore, that while the two improvements were passed by one ordinance, they are in fact separate and independent of each other.

In the case of *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121, where this question was raised, we said: "The question is put: 'Can it be said, for instance, that the lots on Tenth avenue in said assessment district are benefited by the paving and curbing and sidewalk of Fifth avenue' (a parallel avenue five blocks away)? If a correct decision rests upon this premise, we would feel bound to hold with appellants, but it is shown that, in the interest of economy, the city can, by creating a district including several streets, make more favorable contracts and thus reduce the cost to the property owner; and that neither the cost nor benefit to a lot on Fifth avenue is considered when estimating the cost or benefit to a lot on Tenth avenue. By a system of bookkeeping, the cost to each lot or parcel of land and of each street is kept separate, so that no injury comes to the property owner; but, on the contrary, there is, theoretically if not actually, a positive benefit."

But that cannot be said in this case, for here it is conceded that about \$30,000, being the cost of the roadway leading from Fifteenth avenue west to Seventeenth avenue west, entirely for the benefit of the lowlands, is assessed to the highlands on Magnolia Bluff, which are not benefited in any way, either theoretically or otherwise. And it is not shown, nor is there any contention in the case, that a more favorable contract or price for the condemnation of this 150-foot strip was made by reason of the fact that it was condemned as a part of the same improvement. We are clear, therefore, that it was the duty of the board of eminent domain commissioners to assess to the lands benefited thereby the cost of the roadway 75 feet in width from Fifteenth avenue west to Seventeenth avenue west, leading to the lowlands,

and not to assess such cost, as was done in this case, to the lands concededly not benefited thereby.

The judgment of the lower court is therefore reversed, and the cause remanded, with instruction to revise the assessment so that the cost of the street, which is solely for the benefit of the lowlands, shall be assessed thereto and deducted from the assessment upon the highlands and lands not benefited thereby.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

FORTSON SHINGLE CO. v. SKAGLAND et ux.

(Supreme Court of Washington. Dec. 19, 1913.)

1. VENUE (§ 61*)—CHANGE OF VENUE—TIME OF MOTION.

A motion and affidavit for a change of judges comes too late where it was not made until after the court had granted a rule requiring defendants to show cause why an injunction should not be granted and had issued a temporary restraining order.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 94-99; Dec. Dig. § 61.*]

2. JUDGES (§ 39*)—DISQUALIFICATION—COUNSEL.

A judge is not disqualified to sit because some years previously his firm had represented plaintiff in other litigation; Rem. & Bal. Code, § 209, disqualifying a judge only if he had been of counsel in the instant proceeding.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 184, 186; Dec. Dig. § 39.*]

3. NAVIGABLE WATERS (§ 1*)—NAVIGABLE STREAMS—WHAT CONSTITUTES—"FLOATABLE STREAM."

Where a creek has, during recurring freshets, sufficient water to float shingles and other forest products, it is a floatable stream and may be used as such; the fact that artificial obstructions had to be removed not affecting its navigability.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5-16; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 3, p. 2850.]

4. APPEAL AND ERROR (§ 265*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

Where no exceptions were taken to the findings of act, an assignment complaining that the findings and judgment are contrary to the evidence cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1461, 1536-1551; Dec. Dig. § 265.*]

Department 1. Appeal from Superior Court, Snohomish County; W. P. Bell, Judge.

Action by the Fortson Shingle Company against Daniel Skagland and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

A. M. Wendall and E. C. Dailey, both of Everett, for appellants. Coleman, Fogarty & Anderson, of Everett, for respondent.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

GOSE, J. This is an action to enjoin the defendants from interfering with the plaintiff in floating shingle bolts and other forest products in Segelson creek, a tributary of the Stillaguamish river. Segelson creek flows through land owned by the defendants. The complaint alleges that it is a floatable and navigable stream for shingle bolts and other forest products, and that the defendants had forbidden plaintiff to use the stream for floating its shingle bolts and other forest products in that part of the stream which flowed over their land. A decree was entered in harmony with the prayer of the bill. The defendants have appealed.

The appeal presents two questions: (1) A denial of two challenges to the qualification of the trial judge; and (2) do the findings of fact support the decree?

[1, 2] When the case was called for trial, the appellants filed a motion and affidavit for a change of judges in pursuance of Laws 1911, p. 617. Prior to this application a show cause order had been issued against the appellants. Thereafter a hearing was had upon the respondent's application for a temporary injunction. The appellants appeared and resisted the application. After the hearing, and prior to the filing of the motion and affidavit in question, the court granted a temporary injunction. Upon this state of the record the motion was not timely. *State ex rel. Le Febvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

After the respondent had rested its case, appellants called the president of the respondent, who testified that the law firm, of which Judge Bell, the trial judge, was a member, had represented the respondent in two lawsuits. He further testified that Judge Bell had not represented the respondent professionally subsequent to his election as Attorney General in 1908, about four years before the trial. There was no attempt to show that Judge Bell's services even remotely touched the subject-matter of the litigation, or that he or the firm of which he was a member had been under a general retainer. The case then proceeded. On the following day counsel for the appellants formally challenged Judge Bell because he had formerly represented the respondent professionally. The trial judge, in denying the challenge, said that, had the challenge been made at or before the commencement of the trial upon that ground, he would have declined to try the case. He also said that the public had an interest in the trial of lawsuits; that he had practiced law in Snohomish county for 25 years; and that since going upon the bench he had heard many cases where he or the firm of which he was formerly a member had represented some one of the parties to the action professionally prior to the time he entered upon the performance of his judicial duties. This ruling is assigned as error.

Judge Bell had not "been counsel for either party in the action or proceeding," hence was not disqualified. Rem. & Bal. Code, § 209; 40 Cyc. 132. The challenge, while embarrassing to the judge, was utterly wanting in merit. The respondent had rested its case when the challenge was made. The judge very properly said that the public had an interest in the dispatch of litigation. The respondent also had a right to demand that the trial proceed, in the absence of some statutory disqualification of the judge. Orderly procedure, the rights of the respondent, and the public interest alike demanded that the challenge be denied.

[3] Upon the merits of the case, the court found:

"(5) That said Segelson creek is a floatable and navigable stream for shingle bolts and other forest products during freshets regularly recurring for a period of between 3 and 4 months in the spring and summer, and during a period of from 2 to 3 months during the fall of each year; that during said recurring freshets said Segelson creek for periods of several days together contains water varying from 18 inches deep to 3 or 4 feet; that said quantity of water is ample and sufficient to float shingle bolts and other forest products through said creek into the Stillaguamish river; and that said shingle bolts and other forest products can be so floated in said Segelson creek to the Stillaguamish river without using the banks of said stream.

"(6) That all the timber has been logged off from said premises of defendants, and that, when said premises were logged, certain windfalls, brush, treetops, and some logs were left in said Segelson creek; that both the plaintiff and the defendant have removed said brush, logs, and windfalls from said stream; that said stream would float shingle bolts before the removal of said brush, logs, windfalls, and other forest debris from said stream, but the same could not be driven to the Stillaguamish river without the removal of said forest debris."

The findings support the decree. The test of the navigability of a stream is: Was it navigable in its natural state? If it was, neither accidental nor intentional obstructions which were not there in its natural state will impair or destroy its legal navigability. *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 70 L. R. A. 272, 102 Am. St. Rep. 905; *State ex rel. United, etc., Timber Co. v. Superior Court*, 60 Wash. 193, 110 Pac. 1017; *Olson v. Merrill*, 42 Wis. 203; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; 25 Cyc. 1566. The windfalls and other obstructions referred to in the findings created an artificial condition. The removal of these obstructions merely restored the stream to its natural state.

[4] There is a further assignment that the findings and judgment are contrary "to the

law and the evidence." No exceptions were taken to the findings of fact, and this precludes a review of the evidence. *Berens v. Cox*, 70 Wash. 627, 127 Pac. 189.

The decree is affirmed.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

NORTHERN PAC. RY. CO. v. UNION LUMBER CO.

(Supreme Court of Washington. Dec. 5, 1913.)

1. EMINENT DOMAIN (§ 220*)—PROCEEDINGS TO ASSESS COMPENSATION—VIEW.

Where, in a condemnation proceeding, after the jury by consent of the court and counsel was permitted to examine the premises, one of the jurors by consent was excused and another juror selected, the court did not err in refusing to permit the new juror to view the premises, especially where the evidence seemed plain and it did not appear that he did not understand the evidence, since it is within the discretion of the court whether a view shall be permitted, and the jury is not permitted to view the premises for the purpose of gathering evidence but for the purpose of better understanding the evidence produced before it.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 558, 559; Dec. Dig. § 220.*]

2. EMINENT DOMAIN (§ 205*)—PROCEEDINGS TO ASSESS COMPENSATION—SUFFICIENCY OF EVIDENCE.

Where, in a proceeding to condemn an easement for a railway across a logging road, though no witness for the petitioner testified what the amount of damages would be, the whole plan of the improvement was stated to the jury, maps and drawings were introduced in evidence and explained by the witnesses, showing exactly what the petitioner desired to take, the jury were authorized to determine the amount of damages, and the court, properly refused to dismiss the proceeding for lack of evidence to show the amount of the damages.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 544; Dec. Dig. § 205.*]

3. EMINENT DOMAIN (§ 219*)—PROCEEDINGS TO ASSESS COMPENSATION—EVIDENCE.

Where, in a proceeding to condemn an easement for a railway across a logging railroad, though a plan of the contemplated improvement was admitted in evidence without being reduced to the form of a stipulation and offer showing what the petitioner desired to do, a stipulation conforming to such plan was subsequently made, the admission of the plan was not error, since error could not be based upon the order of proof.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 556, 557; Dec. Dig. § 219.*]

4. EMINENT DOMAIN (§ 203*)—COMPENSATION—REMOTE AND SPECULATIVE DAMAGES.

In a proceeding to condemn an easement for a railway across a logging railroad which was a part of a sawmill plant, evidence that the fair market value of the sawmill and plant would be decreased on account of the hazard of the operation of the logging road across the railway was properly excluded as such damages were too remote and speculative.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. § 203.*]

5. EMINENT DOMAIN (§ 128*)—COMPENSATION—RAILROAD CROSSINGS.

Where a railroad company appropriates the right of way of another railroad, the measure of damages is the loss and inconvenience necessarily incidental to the reconstruction and keeping in repair of that part of the first road occupied by the second, excluding the loss resulting from mere competition, and the first company is entitled to damages for all actual or direct injuries resulting from the new and additional use of its right of way but not for inconvenience to or interruption of its business, such as the stopping of trains at the crossing, nor for the increased liability to accident by reason of the crossing, though it is entitled to the cost of erecting signals and maintaining a crossing signal, as well as the cost of a watchman.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 349-351; Dec. Dig. § 128.*]

6. EMINENT DOMAIN (§ 222*)—PROCEEDINGS TO ASSESS COMPENSATION—INSTRUCTIONS.

In a proceeding to condemn an easement for a railroad across a logging road, it was decreed that the railroad company might have such easement by constructing an overhead crossing for the use of the logging company so long as it should see fit to operate its logging road. On the assessment of damages the court charged that if the property was depreciated in value by rendering it less useful for the purpose to which it was devoted, or if its capacity to transact its business was reduced, or if the expense of transacting its business was increased, the owners of the road were entitled to compensation therefor; that if the logging road would be diminished in value, taking into consideration its purpose and connection with the owner's sawmill plant and property, to allow such sum as would be a fair and just compensation, to take into consideration any additional expense the owner would be put to, to insure safety in the operation of its logging road and trains, having reference to the lives and property of its own and any other factor that it must reasonably take notice of in operating its trains, just as the situation would be, including any change in structural conditions or distance, not as an element of specific damages but as a burden cast upon the property affecting its market value, but not to take into consideration any damages or liability on account of accidents that might happen at the crossing; that the measure of damages was to be determined as of the present time and was the difference in the fair cash market value of the property, consisting of the sawmill, shingle mill plants, land and timber holdings and rights, the logging railroad and the right of way as they were used, needed, and operated, together with the changes proposed, including a temporary track proposed and to be used while permanent changes were in course of construction, and its present fair cash market value as it was without such changes; and that such amount was to be ascertained without regard to any benefit resulting from the construction of the railroad. *Held*, that the instructions covered the law of the case fully and fairly and were as favorable to the landowner as it could reasonably ask.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

Department 2. Appeal from Superior Court, Thurston County; John R. Mitchell, Judge.

Condemnation proceeding by the Northern Pacific Railway Company against the Union Lumber Company. From a judgment award-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing an insufficient amount of damages, defendant appeals. Affirmed.

See, also, 70 Wash. 540, 127 Pac. 109.

Thos. M. Vance and Harry L. Parr, both of Olympia (John M. Cleary, of Olympia, of counsel), for appellant. Geo. T. Reid, L. B. da Ponte, and J. W. Quick, all of Tacoma (P. M. Troy, of Olympia, of counsel), for respondent.

MOUNT, J. This appeal is from an award of damages in a condemnation proceeding.

The Northern Pacific Railway Company brought the action to condemn a portion of an easement for its line of railway across the logging road of the Union Lumber Company, in Thurston county. After the action was brought, the trial court upon a hearing adjudged the public use and necessity for the taking of a portion of the easement by the railway company. The Union Lumber Company thereupon by certiorari in this court reviewed the decree of necessity and public use, and we held that the Northern Pacific Railway Company might, by condemnation, proceed to take a portion of the easement of the lumber company by constructing an overhead crossing for the use of the lumber company so long as the latter company should see fit to operate its logging road. Thereafter the question of the amount of damages to the lumber company was tried to the court and a jury. A verdict was returned in favor of the lumber company for \$8,000, and that company prosecutes this appeal.

A large number of errors are assigned in the appellant's brief, several of which it will not be necessary to notice by reason of the conclusion reached in the certiorari proceeding, which is found reported in 70 Wash. 540, 127 Pac. 109. We shall notice the alleged errors which were not therein considered.

[1] After the jury had been selected to determine the award in damages, by consent of the court and counsel for the respective parties, the jury was permitted to examine the premises. Thereafter, by consent of the court and counsel for the respective parties, one of the jurors was excused from further consideration of the case. Another juror was thereupon selected. The appellant requested that this juror be permitted to view the premises also. The court denied this request. It is now alleged that the court erred in not permitting this juror to view the premises. There is no prejudicial error in this ruling. It is within the discretion of the court whether a view of the premises shall be permitted. *Bellingham B. & B. C. R. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144.

In *Re East Spring Street*, 41 Wash. 366, 83 Pac. 242, we said: "The jury is not permitted to view the premises for the purpose of gathering evidence, but for the purpose of better understanding the evidence which has been adduced before it regarding said premises."

The fact that one juror was not allowed to view the premises cannot be held to be prejudicial error in view of the rule that it is discretionary with the trial court to grant a view, and also in view of the rule that a view of the premises is merely for the purpose of understanding the evidence. It may be true that this juror might have understood the evidence more perfectly had he been conversant with the premises. But it certainly cannot be held reversible error because he was not permitted to do so. The evidence seems plain upon its face, and we are not satisfied that this juror did not understand the evidence as well as those who actually viewed the premises.

[2] The appellant next contends that the court erred in denying a motion for dismissal of the action at the close of petitioner's case, and also at the close of all the evidence, for the reason that it is claimed by the appellant that no evidence was introduced upon the question of damages to the property taken or damaged by the railway company. It may be true that no specific items of damages were enumerated by the witnesses for the condemning party; but it is plain from the record that the whole plan of the improvement was stated to the jury. Maps and drawings were introduced in evidence and explained by the witnesses, which showed exactly what the petitioning railway company desired to take. It seems too plain for argument that the jury was authorized upon these facts to determine what the amount of damages was, if any, even though no witness testified what the damages would amount to.

[3] It is also urged by the appellant that the court erred in receiving in evidence a plan of the contemplated improvement without the same being reduced to the form of a stipulation and offer showing what the condemning party desired to do. Even if this might be considered as error, a stipulation was subsequently made in the case which conformed to the plan as shown by the exhibit referred to. There was therefore no error committed, because it is plain upon the face of the record that the exhibit, whether introduced before the stipulation or afterwards, became a part of it and explained the stipulation. No error can be based upon the order of proof.

[4, 5] The appellant argues that the court erred in refusing to permit the respondent to show that the operation of the logging road over the four-track system of the Northern Pacific Railway Company would decrease the fair market value of the appellant's sawmill and plant on account of the hazard of the operation of the logging road across the Northern Pacific Railway Company's system. It is apparent, we think, that this item of damage is remote and speculative. While it is true that the logging railway was a part of the sawmill plant, which was operated at a distance of a mile or so from the crossing

and was a plant facility merely, it does not necessarily follow that the sawmill plant itself was affected by the taking of a part of the easement of the logging road. If, after the part of the easement was taken by the Northern Pacific Railway Company, the operation of the logging road or plant facility was as convenient, economical, and efficient as it was before the taking, there could be no possible injury to the plant as such. The rule is stated in 15 Cyc. 698, as follows: "Where one railroad company appropriates the right of way of another railroad, the measure of damages is the loss and inconvenience necessarily incidental to the reconstruction and keeping in repair of that part of the first road which is occupied by the second, excluding the loss resulting from mere competition. The first company is likewise entitled to damages for all actual or direct injuries resulting from a new and additional use to be made of its right of way. However, the inconvenience to or interruption of a company's business, such as the stopping of trains at the crossing, is not an element to be considered in estimating damages; nor is the increased liability to accident by reason of the crossing a proper element of damage. However, the cost of erecting signals and maintaining a crossing system, as well as the cost of a watchman, is a proper element to be considered in awarding damages to the company, whose right of way is sought to be crossed by another railroad." This was the rule adopted by this court in *State ex rel. North Coast R. Co. v. Northern Pacific Railway Co.*, 49 Wash. 78, 94 Pac. 907. The mere fact that this logging railroad was a plant facility did not change the measure of damages in the respect stated. We are satisfied that the damages which were attempted to be proved with relation to the mill and manufacturing plant of the Union Lumber Company were too remote and speculative to be considered by the jury, and that the court therefore properly excluded such testimony.

[6] The appellant argues at length that the court erred in refusing to give certain requested instructions and in giving certain instructions. The instructions that were given, we think, fully covered the law of the case and were as favorable to the appellant as it could reasonably demand.

The court instructed the jury: "If the property is depreciated in value by rendering the same less useful for the purpose to which it is devoted, or if its capacity to transact its business is reduced, or if the expense of transacting its business is increased by the crossing, the owners of such road are entitled to compensation therefor. Therefore, if the jury finds from the evidence that the respondent's logging road will be diminished in value, as above explained, taking into

consideration the purpose of the logging road and its connection with respondent's plant and property, you will allow the respondents such sum as will be fair and just compensation." And again: "You have the right, and it is your duty, to take into consideration whatever, if any, additional expense respondent will be put to in order to reasonably insure safety in the operation of its logging road and trains, having reference to the lives and property of its own and any other factor that it must reasonably take notice of in operating its trains just as the situation will be, including whatever change there may be in structural conditions or distance, not as an element of specific damages, but as a burden cast upon respondent's property affecting the market value thereof. You may not, however, take into consideration any damages or liability therefor on account of accidents that may or may not happen at the crossing." And again the court instructed the jury: "You are instructed that the measure of damages in such case as this is to be determined as of the present time and is the difference, if any, in the fair, cash, market value of respondent's property (consisting of its sawmill and shingle mill plants, its land and timber holdings and rights, its logging railroad and right of way as they are used, needed, and operated together), with the changes proposed and as proposed by the petitioner, including the temporary track proposed and to be used by respondent while permanent changes are in course of construction, and its present fair cash market value as it is now and without any changes, which amount is to be ascertained and determined without regard to any benefit that may result from the construction of petitioner's railroad." These instructions were as favorable to the appellant as it could reasonably ask. They covered the law of the case fully and fairly.

A reading of the evidence in the case convinces us that the award of \$8,000 damages given by the jury to the appellant was ample to cover all character of damages that have been or will be sustained. The cause, we think, upon the whole was fairly tried. No good reason for reversal is shown.

The judgment is therefore affirmed.

CROW, C. J., and MORRIS, J., concur.

PARKER, J. I concur in the foregoing opinion but, so far as the court denying view of the premises by the new juror is concerned, I desire to be understood as concurring upon the sole ground that he was brought into the case by consent of all parties after the jury had viewed the premises. I doubt the right of the court to let the jurors view the premises other than in a body though this may be waived, as it was in effect here.

INGALLS v. ANGELL et al.

(Supreme Court of Washington. Dec. 18, 1913.)

1. LIMITATION OF ACTIONS (§ 28*)—CONTRACTS—WRITTEN AND PAROL CONTRACTS.

An action for breach of warranty in the sale of goods evidenced by a written order, silent as to the price, fixed by parol, is an action on a contract partly in writing and partly in parol and is within Rem. & Bal. Code, § 159, limiting actions on contracts not in writing to three years, and not within section 157, limiting actions on a contract in writing to six years.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 135, 142; Dec. Dig. § 28.*]

2. LIMITATION OF ACTIONS (§ 47*)—ACCRUAL OF CAUSE OF ACTION—BREACH OF WARRANTY.

A warranty as to the kind or quality of goods sold, if breached at all, is generally breached when made, and limitations run from the date of sale.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 254-258; Dec. Dig. § 47.*]

3. LIMITATION OF ACTIONS (§ 47*)—ACCRUAL OF CAUSE OF ACTION—BREACH OF WARRANTY.

Where a warranty of goods sold relates to a future event by which it will be ascertained whether the warranty will be breached or not, the warranty is not breached until the happening of the future event, and limitations run only from that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 254-258; Dec. Dig. § 47.*]

4. LIMITATION OF ACTIONS (§ 47*)—ACCRUAL OF CAUSE OF ACTION—BREACH OF WARRANTY.

A contract of sale of fruit trees warranted to contain Carman peach trees, made by the seller with knowledge that the buyer bought for resale, provides for a sale of trees which will produce Carman peaches, and the warranty is breached when it is demonstrated that the trees do not bear such peaches, and limitations run from that time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 254-258; Dec. Dig. § 47.*]

Department 2. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by W. D. Ingalls against H. E. Angell and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Thos. H. Wilson, of North Yakima, for appellant. Englehart & Rigg, of North Yakima, for respondents.

MAIN, J. The purpose of this action was to recover damages for breach of warranty in the sale of fruit trees.

The allegations of the third amended complaint, so far as material upon this appeal, are in substance as follows: That at all the times mentioned in the complaint the plaintiff was engaged as a nurseryman in the sale of fruit trees in Yakima county, Wash. That at the time of the sale hereinafter mentioned the defendants knew that the plaintiff was buying trees for the purpose of selling them

again. That on or about April 7, 1908, the defendants sold and delivered to the plaintiff more than 500 peach trees, the contract for the sale and delivery of which was as follows: The plaintiff sent W. A. Berg to the defendants with a written order, signed by the plaintiff, requesting them to sell to plaintiff and deliver to Berg certain fruit trees, among which were more than 500 Carman peach trees. That, in compliance with the written order which Berg delivered to them, the defendants delivered to Berg, as the agent of the plaintiff, 500 peach trees, tied up in bundles, each containing 25 trees. That fastened to each bundle was a tag labeled "Carman," the defendants thereby representing to the plaintiff in writing that the trees were Carman peach trees. That the written order was the whole and only contract, and the defendants accepted the order by delivering the trees to Berg as the agent of the plaintiff. That on April 8, 1908, the plaintiff, relying upon the representations of the defendants that Carman peach trees had been delivered, resold and delivered to one Bert Fletcher for planting 420 of the trees, representing them to be Carman peach trees. That on October 3, 1911, Fletcher and wife commenced an action in the superior court for Yakima county against the plaintiff and wife to recover damages in the sum of \$5,000, alleging that the trees which had been sold to them were not Carman peach trees, as represented, but were worthless and of no value. That when the trees were sold and delivered to the plaintiff he had no way of knowing whether or not they were Carman peach trees and had no knowledge or notice that they were not such until the commencement of the action by Fletcher. That when that action was begun this plaintiff immediately notified the defendants herein in writing of the nature and purpose thereof and to defend the same and to furnish evidence on the trial thereof that the trees so sold and delivered were Carman peach trees, failing in which, and in event of judgment being recovered against the plaintiffs for the reason that the trees were not Carman peach trees, that then this plaintiff would hold the defendants responsible for any damages for which judgment might be recovered. That the defendants not only failed to defend and to furnish evidence in accordance with the notice given, but the defendant H. E. Angell testified as a witness for Fletcher that the trees were not Carman peach trees. That the plaintiff defended the action in the best manner possible, but judgment was entered therein in favor of Fletcher and wife against the plaintiff and wife for the sum of \$1,880, and costs amounting to \$93.25. That the plaintiff expended, in defending the action, for clerk's fees, \$2, for witness fees, \$66.20, for stenographer's fees in taking the testimony, \$15; and for attorney's fees \$250, all of which expenditures were necessary and rea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sonable. That the plaintiff has paid out the total sum of \$2,306.45 on account of the judgment, costs, and other expenditures in the Fletcher Case, all accruing on account of the 420 trees sold to him as aforesaid not being Carman peach trees as represented. That the defendants at the time they sold the trees to the plaintiff knew that they did not know that they were Carman peach trees. That there is due and owing to the plaintiff the sum of \$2,306.45, which the defendants have failed and refused to pay, and for which the plaintiff prays judgment, together with interest from April 1, 1912, and costs.

To this amended complaint the defendants interposed a demurrer upon the grounds: First, that it does not state facts sufficient to constitute a cause of action against the defendants, or either of them; and, second, that the action was not commenced within the time limited by law. Thereafter the demurrer was argued, and the court sustained the same. The plaintiff, electing to stand upon his complaint, refused to plead further, and on January 20, 1913, the court entered a judgment dismissing the action and for costs in favor of the defendants. The plaintiff has appealed.

[1] The first question to be determined is whether the six-year or the three-year statute of limitation applies to the contract as pleaded. An action upon a contract in writing, or liability, express or implied, arising out of a written contract, may be begun within a period of six years after the cause of action accrued. Rem. & Bal. Code, § 157. An action upon a contract, express or implied, which is not in writing, and does not arise out of a written instrument, may be begun within a period of three years. Rem. & Bal. Code, § 159.

The written order upon which an attempt was made to state a cause of action did not contain anything as to the price of the trees. This was an essential element of the contract. It would appear, then, that one of the necessary terms not being set out in the writing, in order to establish the price, resort must be had to oral testimony. The contract would be in part oral and in part written. The rule is that a contract partly in writing and partly oral is an oral contract.

In Bishop on Contracts, § 164, it is said: "A contract partly in writing and partly oral is, in legal effect, an oral contract. It occurs where an incomplete writing, or one expressing only a part of what is meant, is by oral words rounded into the full contract, or where there is first a written contract, and afterward it is changed orally."

In Board of Commissioners, etc., v. Shipley, 77 Ind. 553, it is said: "A contract cannot be said to be in writing within the meaning of section 211, above noticed, so as to run 20 years, unless the parties thereto, as well as its entire terms and stipulations, can be gathered from the instrument itself, or from some other written instrument referred

to therein, without the aid of parol evidence to ascertain either. If parol evidence has to be resorted to in order to ascertain the parties to a contract or its terms, the reason for extending the period of limitation to 20 years fails; and, though the contract may be partly in writing, yet, as it rests partly in parol, the six-year period of limitation applies as well as if the contract had rested entirely in parol."

The conclusion must be that, in order to maintain an action upon the contract in question, it was necessary that the same be instituted within three years after the cause of action accrued. From the facts stated it appears that the order for the trees was given on or about April 7, 1908. The present action was instituted on the 27th day of August, 1912. If, therefore, the cause of action arose at the time the order for the trees was given, the suit was not commenced in time.

[2-4] The next question is: When did the cause of action accrue? If the warranty pleaded was intended only to warrant that the trees sold were Carman, the action was not instituted within the three-year period. On the other hand, if it were intended to warrant that the trees sold would produce Carman peaches, then the action was begun in time. In the latter case the warranty would relate to a future event by which it could be determined from the fruit grown the character thereof. The general rule is that a warranty as to kind or quality is broken when made, and the statutory period is computed from the date of the sale. But if the warranty related to a future event by which its truth could be ascertained, the warranty would not be broken until the happening of such future event. In 25 Cyc. pp. 1091, 1092, after stating the general rule that a warranty as to kind or quality is broken at the date of the sale, it is said: "It seems to be conceded, however, that the rule would be otherwise if the warranty related to a future event by which its truth could be ascertained, as that fruit trees would bear a certain kind of fruit, or that a carpet when laid would not develop grease spots. Thus, where machinery is sold with warranty and accepted on condition that it complies therewith, a cause of action for breach of the warranty does not accrue, and the statute does not begin to run until a reasonable time has elapsed for making the necessary tests; and the time taken by the parties in trying to make the machinery fulfill the stipulated conditions is the proper criterion of what is reasonable."

It must, then, be determined whether by the warranty here pleaded, which is that the trees sold were Carman peach trees, it was intended to warrant that if they should produce peaches they would be of that variety. The purpose of the purchaser, unquestionably, was to buy trees which would produce Carman peaches. A construction of the language to the effect that the trees were to be Car-

man, and yet that there was no warranty that if they produced fruit it would be of that particular variety, would be to magnify form and minimize substance. The modern trend of authority is to look to the substance rather than to the form. When this is done it would seem plain that the purpose intended was that the peaches, if any, which grew upon the trees which were the subject of the sale would be of the Carman variety. It must be admitted that this view is not in harmony with the case of *Allen v. Todd*, 6 Lans. (N. Y.) 223, and the conclusion reached by a majority of the court in *Battley v. Faulkner*, 3 Barn & Ald. 288. We think, however, that, in so far as these cases are out of harmony with the views herein expressed, they are unsound, and we decline to adopt them.

The judgment will be reversed, and the cause remanded, with directions to the superior court to overrule the demurrer to the third amended complaint.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

STATE ex rel. DE SOUCY et al. v. SUPERIOR COURT OF SNOHOMISH COUNTY et al.

STATE ex rel. LEE et ux. v. SAME.

(Supreme Court of Washington. Dec. 19, 1913.)

EMINENT DOMAIN (§ 56*) — DELEGATION OF POWER TO PRIVATE CORPORATIONS — TELEPHONE AND TELEGRAPH COMPANIES.

Const. art. 12, § 19, provides that corporations organized for the purpose may construct telegraph and telephone lines; that railroad corporations shall allow such corporations to maintain their lines on and along the railroad right of way; that the right of eminent domain is extended to such companies; and that the Legislature shall by general law provide reasonable regulations for that purpose. Rem. & Bal. Code, §§ 9300, 9302, contain similar provisions, and section 9304 provides such companies may appropriate land actually necessary for their lines, and may enter upon and appropriate such portion of the right of way of any railroad company as may be necessary therefor, provided that such appropriation shall not obstruct the railroad or interfere with its operation. *Held*, that a telephone and telegraph company could condemn a right of way for a telephone line, though the lands sought to be appropriated were adjacent to a railroad right of way, and though there was space available within such right of way sufficient for the use of the telephone company without substantial injury to the operation, either of the railroad or the telephone system, since the Constitution and statutes give the right generally to appropriate lands necessary for telegraph and telephone lines, and in addition the specific right subject to certain conditions of using portions of railroad rights of way.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. § 56.*]

Department 1. Two condemnation proceedings by the Pacific Telephone & Telegraph Company against Petrine De Soucy and husband and John Lee and wife, respectively. To review adjudications of pub-

lic use and necessity and orders for the assessment of damages; the State in the names of defendants in each case brings certiorari against the Superior Court of Snohomish County and Guy C. Alston, Judge thereof. *Affirmed*.

Vince H. Faben, of Seattle, for relators. Hughes, McMicken, Dovell & Ramsey and Otto B. Rupp, all of Seattle, for respondents.

MAIN, J. The purpose of these actions was to condemn a right of way through private property to be used for the erection of a telephone line. The Pacific Telephone & Telegraph Company instituted proceedings for the purpose of condemning a strip of land ten feet wide through the lands of the relators John Lee and Lillian Lee, his wife, in the one case, and a strip of the same width through the lands of the relators Petrine De Soucy and J. A. De Soucy, her husband, in the other case. The strips sought to be condemned are, in each case, adjacent to the right of way of the Great Northern Railway Company. To the petitions filed by the telephone company in the superior court, demurrers were interposed upon the ground that the petitions did not state facts sufficient to constitute a cause of action. These demurrers were overruled. Thereafter hearings were had and adjudications of public use and necessity entered in both cases. And in each case it was ordered that a jury should be impaneled to assess the damages accruing to the owners and to all others interested in the lands described for the taking or injuriously affecting the same. For the purpose of reviewing these adjudications and orders, the causes were brought to this court by writs of certiorari and were here heard together. The relators claim that the telephone company has no right to condemn a right of way for a telephone line through private property alongside of a railroad right of way where there is space available within the right of way of the railroad sufficient for the use of the telephone company without substantial injury to the operation of either the railroad or the telephone system. In support of this contention, reliance is placed upon section 19 of article 12 of the Constitution of the state of Washington, and sections 9302, 9304, and 9314 of Rem. & Bal. Code.

Section 19 of article 12 of the Constitution provides: "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph and telephone within this state, and said companies shall receive and transmit each other's messages without delay or discrimination, and all of such companies are hereby declared to be common carriers and subject to legislative control. Railroad corporations organized or doing business in this state shall allow telegraph and tele-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

phone corporations and companies to construct and maintain telegraph lines on and along the rights of way of such railroads and railroad companies, and no railroad corporation organized or doing business in this state shall allow any telegraph corporation or company any facilities, privileges, or rates for transportation of men or material or for repairing their lines not allowed to all telegraph companies. The right of eminent domain is hereby extended to all telegraph and telephone companies. The Legislature shall, by general law of uniform operation, provide reasonable regulations to give effect to this section." By this section of the Constitution telegraph and telephone companies are given the right to construct and maintain telegraph and telephone lines within this state; they are also given the privilege of constructing and maintaining telegraph lines upon the rights of way of railroad corporations organized or doing business in this state; and the right of eminent domain is extended to them.

For the purpose of making effective this section of the Constitution, the Legislature enacted, among others, the sections of the statute above mentioned. With respect to the exercise of the right of eminent domain by telegraph and telephone companies, the statutes (Rem. & Bal. Code, § 9300) provide: "The right of eminent domain is hereby extended to all telegraph and telephone corporations and companies organized or doing business in the state." The section of the statutes which requires railroad companies to allow telephone and telegraph companies to construct and maintain telegraph and telephone lines upon their rights of way (Rem. & Bal. Code, § 9302) is in the following language: "Every railroad operated in this state, and carrying freight and passengers for hire, or doing business in this state, is and shall be designated a 'postroad,' and the corporation or company owning the same shall allow telegraph and telephone companies to construct and maintain telegraph and telephone lines on and along the right of way of such railroad." The extent of the right of telegraph and telephone companies to appropriate lands and property for the purpose of constructing telephone and telegraph lines is provided for by section 9304, which is as follows: "Such telegraph or telephone company may appropriate so much land as may be actually necessary for its line of telegraph or telephone, with the right to enter upon lands immediately adjacent thereto, for the purpose of constructing, maintaining, and operating its line and making all necessary repair. Such telegraph or telephone company may also, for the purpose aforesaid, enter upon and appropriate such portion of the right of way of any railroad company as may be necessary for the construction, maintenance, and operation of its telegraph or tele-

phone line: Provided, however, that such appropriation shall not obstruct such railroad or the travel thereupon, nor interfere with the operation of such railroad."

It will be noted that the section last quoted gives to telephone and telegraph companies the right to appropriate so much land as may be actually necessary for its telegraph or telephone lines. They are not limited to any particular lands, nor to lands in any particular locality. In addition to the right to appropriate lands generally that are actually necessary for the construction and maintenance of their lines, they are given the additional privilege, if they shall not obstruct or interfere with the operation of railroads or the travel thereon, of entering upon and appropriating a portion of the right of way of any railroad company for such uses. It seems plain that it was not the intention, either by the Constitution or the statutes, to limit telegraph and telephone companies to the use of rights of way of railroad companies for these purposes, either absolutely or if it should be reasonably convenient for them to do so, but rather it was the intention to make absolute the right to so use the rights of way of railroads should they desire to avail themselves of it. In other words, they are given the right generally to appropriate any lands actually necessary for their lines, and, in addition, the specific right, subject to certain conditions, of using portions of the rights of way of railroad companies for such uses. This being true, the respondent had the right to condemn lands actually necessary for a right of way for its proposed telephone line, even though the lands sought to be appropriated lie adjacent to the right of way of a railroad company.

The judgments and orders of the superior court in both causes are therefore affirmed.

CROW, C. J., and ELLIS, GOSE, and CHADWICK, JJ., concur.

GEHLEN et al. v. GEHLEN.

(Supreme Court of Washington. Dec. 19, 1913.)
WILLS (§ 535*)—CONSTRUCTION — PRETERMITTED CHILDREN.

Rem. & Bal. Code, § 1326, providing that if any person shall make his last will and die leaving a child or children or descendants not named or provided for in the will, although born after the making of the will or the death of the testator, every such child or descendant shall be entitled to take such proportion of the estate as if the testator had died intestate, is intended merely to prevent pretermission and not to compel a testamentary provision for any child; and hence the mention of the children of the testator as a class, when coupled with words showing that the class in the testator's mind included not only all children in esse but children thereafter to be born, is a sufficient naming of the children for the purpose of disinheritance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1157-1160; Dec. Dig. § 535.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Joseph Gehlen and others against Mary P. Gehlen. From a judgment dismissing the complaint, plaintiffs appeal. Affirmed.

John H. McDaniels, of Ellensburg, for appellants. J. N. Streff, of Ellensburg, for respondent.

ELLIS, J. This is an action for partition of real estate, in which the plaintiffs claim title to an undivided one-half as children and heirs at law of Nicholas W. Gehlen, deceased, and the defendant, who is the widow of the decedent and mother of the plaintiffs, claims the full ownership as sole devisee under the will of the decedent. Nicholas W. Gehlen died February 5, 1909, leaving a will dated August 28, 1903, the material part of which is as follows:

"(1) Subject to the payment of all my just debts and funeral expenses, I will, devise and bequeath to my beloved wife, Mary P. Gehlen, all the estate of which I may die seised and possessed, both real and personal, absolutely, to do and dispose of as she may deem fit; and I make no provision for my children after my death, or any child which may hereafter be born, knowing that my said wife, who is their mother, will deal justly with them.

"(2) I hereby appoint my said wife executrix of this my last will and testament, and exonerate her from giving bonds, and authorize her, without an order of court, to sell and dispose of such property as she may deem fit, and to execute conveyance thereof."

The youngest child, Walter Gehlen, was born in the year 1905, subsequent to the date of the will. The realty in question was the community property of the decedent and the defendant. The plaintiffs, each asserting title to an undivided one-twelfth of the property, prayed for partition. The defendant, denying any title in the plaintiffs, set out the will and prayed that her title thereunder be quieted. The plaintiffs moved for judgment on the pleadings. That motion being denied, they declined to plead further. Judgment was entered dismissing the complaint and quieting title in the defendant. The plaintiffs appeal.

[1] The sole question presented by this appeal is this: Can the children of a testator be disinherited by naming them as a class, or must they be named specifically by each of their individual names, or by terms of individual identification? Our statute (Rem. & Bal. Code, § 1326) reads as follows: "If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so

far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part." The appellants contend that under this statute there can be no sufficient naming of children by designation as a class unless that designation be accompanied by some substantial provision for each of the class, and of which each can legally avail himself, and that, failing such provision, the will, to be valid, must tell off the children by actual name or by words of individual identification. It is claimed that each of the following decisions of this court sustains that contention: *Bower v. Bower*, 5 Wash. 225, 31 Pac. 598; *Barnes v. Barker*, 5 Wash. 390, 31 Pac. 976; *Hill v. Hill*, 7 Wash. 409, 35 Pac. 360; *Purdy v. Davis*, 13 Wash. 164, 42 Pac. 520.

An examination of the first three of these cases, however, discloses the fact that in none of them was there any mention of the children of the testator either by name as individuals or by designation as a class. In *Bower v. Bower* it is said of the will: "By the terms thereof all of the property of the testator was devised to his wife, and to her heirs forever, and she was named as sole executrix." In *Barnes v. Barker* it is said: "By the terms of said will the testator gave and bequeathed all her property to her well-beloved husband, to the exclusion of every one else who may or might be entitled to the same, and to him and his heirs and assigns forever." In *Hill v. Hill* it is said: "The deceased left a will in which all of his property was devised to the appellant; no mention being made therein of any of his children." Whatever was said, therefore, in either of the three cases first above mentioned must be construed as applying to a will in which there was no mention whatever of the children. The language of these cases relied upon by the appellants is that found in *Barnes v. Barker* as follows: "This court has lately considered this question and has come to the conclusion that under our statute (§ 1465, Gen. Stat.) there must be some substantial provision for the children of which they can legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children. See *Bower v. Bower*, ante, 5 Wash. p. 225 [31 Pac. 598]." This language is not adopted in *Hill v. Hill*, though the decision is cited with approval. The language, however, is quoted in the still later case of *Purdy v. Davis*, supra, with apparent approval. While the language quoted is broad enough to sustain the appellants' contention in the case before us, it

was, as we have seen, unnecessarily broad as applied to the language of the wills under consideration in the first three cases mentioned. An examination of the decision in *Purdy v. Davis* also shows that the language quoted was unnecessarily broad as applied to the language of the will there under consideration. In that case the testatrix devised and bequeathed all of her property to her husband, subject to the following proviso: "If the said Percival A. Purdy (appellant) should marry again after my demise all my property, both real and personal is to belong to any one or more children that may be born to me before my demise." It is manifest that this proviso makes no mention of children by name, nor of children as a class, but the class mentioned was only future-born children, which would not include the child already born, who, as there held, was not disinherited by the language used. That holding was, in any view of the statute, clearly correct, since that child was not mentioned either by name or by inclusion in any class. Matter unnecessary to a decision should never be held to establish a rule as *stare decisis*.

As pointed out in *Bower v. Bower*, *supra*, the purpose of this and similar statutes is not to declare as a policy of law that a testator shall not disinherit any of his children, nor to compel him to make some provision, whether substantial or otherwise, for any of them. Its purpose was merely to provide against any child being disinherited through inadvertence of the testator when making his will. Any construction of the statute which would have the necessary effect of compelling such a provision for any possible child would seem to be unwarranted as broader than the purpose of the statute and should not be adopted unless the real purpose of the statute, namely, to prevent pretermission of any child, can only be accomplished by such a construction. The construction contended for, and which would be sustained by the language above quoted from *Barnes v. Barker*, had that language been necessary to the decision in that case, would lead to the very result which we have pointed out. It would compel the testator to either make some substantial provision for any child born after the will was made or pronounce him intestate as to such child. In the nature of the case, he could not name by name an after-born child. He could, of course, describe it as an after-born child, but that would only be a naming by class, just as the designation of living children as "my children" would be a naming by class. If, therefore, it be held that the designation of an after-born child merely in those terms is sufficient to disinherit that child where no provision is made for such a child, which is the only alternative to a compulsory provision for such child, then, with equal reason, the designation of living children by the

terms "my children" must be held a sufficient naming for disinheritance when coupled with language showing that intention. Since the purpose of the statute was merely to prevent pretermission and not to compel a testamentary provision for any child, we are forced to the conclusion that the mention of the children of the testator as a class, when coupled with words sufficient to show that the class then in the testator's mind included not only all children in esse but children thereafter to be born, is a sufficient naming of the children for the purpose of disinheritance within the meaning of the statute. To adopt the contrary view would force us back to what Blackstone characterizes as "that groundless, vulgar error of the necessity of leaving the heir a shilling or some other express legacy in order to disinherit him effectually." 1 Cooley's Blackstone (4th Ed.) p. 829.

The statutes of Missouri and Oregon are, in all material particulars, identical with our own. *Hill v. Hill*, *supra*; *Boman v. Boman*, 49 Fed. 329, 1 C. C. A. 274. The Supreme Court of Oregon, in applying this statute, has held that the provision of a will which, by reference to another will and adopting its terms, devised and bequeathed "all that may remain of my real and personal property to each of my living children and the children of my deceased daughter alike, to be divided as a majority of them shall say, by sale or otherwise," was a sufficient naming of the children to meet the statute. *Gerrish v. Gerrish*, 8 Or. 351, 34 Am. Rep. 585.

The Supreme Court of Missouri, touching a will which provided: "Also, I give and bequeath to my beloved wife, Bridget, the sole and entire possession and disposal and management of all my real and personal estate, also the sole and entire management and education of my children; and that she shall have the management, distribution and disposal of everything as completely, according to law, as I myself now have, during her widowhood. But in case she should change her mind and marry, my will is that the estate in her possession at the time shall be disposed of according to law among my surviving heirs." The children were not otherwise mentioned in the will. The widow never married. A daughter brought an action to recover a part of the estate, claiming intestacy as to her. The court said: "It is plain that she must have been in his mind. There are two allusions by the testator to his children, one in giving to his widow their management and education, and one in giving a remainder to his heirs, contingent upon her marriage. They were all remembered or were all forgotten; and, while he remembered them collectively, can it be said that he had forgotten them all individually? The object of the statute was to guard the testator against the effect of a mistake in providing for some of his children to the exclu-

sion of others, through forgetfulness of their existence, or in otherwise disposing of his property in such forgetfulness, and the failure to allude to them is made evidence that they were so forgotten. In speaking of his children or heirs, had the testator named some of them, with no allusion to the plaintiff, we might then assume that she was forgotten; but where all were remembered collectively and equally provided for, with nothing to indicate that one was more in his memory than another, we must assume that each one was remembered and provided for." *McCourtney v. Mathes*, 47 Mo. 533.

The same court, construing a will devising property to the testator's wife, Mary C., for her life, with remainder to her children begotten by him, after quoting the will, said: "The children of the testator by his wife, Mary C., though not expressly mentioned, were named and provided for, within the meaning of this section, for the naming of children as a class, without further description, includes all who answer that description at the time the will took effect." *Thomas v. Black*, 113 Mo. 66, 20 S. W. 657.

And again the same court, construing the same statute in another case, said: "This provision of the statute has been several times before this court for judicial construction, and it may now be considered as settled that the object of it is to produce an intestacy only when the child or the descendant of such child is unknown or forgotten, and thus unintentionally omitted; and the presumption that the omission is unintentional may be rebutted when the tenor of the will or any part of it indicates that the child or grandchild was not forgotten." *Hockensmith v. Slusher*, 26 Mo. 237, 240.

In *Beck v. Metz*, 25 Mo. 70, the testator devised and bequeathed all of his property to his wife "free from all claims and to the exclusion of all persons whatsoever." The fourth clause of the will provided: "In every other respect I leave it entirely to the will and judgment of my said wife, Catherine, how and in what manner she thinks proper to dispose of the estate, as well with reference to our own child, or children, as with reference to the said Joseph Frederick Beck." The court said: "We think here the fourth clause mentions his child in sufficient manner to take this will without the eleventh section of our statute of wills. R. C. 1845. The testator expressly mentions his child, 'as well with reference to our child.' They had but one, the daughter. The wife had one by a former husband; even he is named. Now this mentioning his child, and the giving the power to his wife to provide for this child by disposing of the estate according to her own judgment, must be considered, within the spirit of our statute, as a naming or providing for his child."

After all, in applying this statute as in other connections, the intention of the testa-

tor, when made clearly apparent on the face of the will, must prevail. For example: In *Guitar v. Gordon*, 17 Mo. 408, the testator named his daughter, who was then dead, but did not name her children. The provision for the daughter was held to have been intended as a gift for her children as a class. In *Hockensmith v. Slusher*, supra, a bequest was made to a son-in-law without naming his relation. It was held that, though his wife, the testator's daughter, was not named or provided for, she could not have been forgotten. See, also, *Woods v. Drake*, 135 Mo. 393, 37 S. W. 109.

The Supreme Court of Arkansas, under a statute somewhat similar to ours, has adopted the view contended for by the appellants here. *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563; *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373. We have been cited to no decisions of any other court so holding, and, in view of the foregoing considerations, we cannot adopt that view.

It seems to us more consonant with the obvious purpose of the statute to hold that the naming of the children as a class, whether for the purpose of providing for them or for the purpose of disinheritance, when coupled with language conveying either intention, is such naming as to show that no child has been unintentionally overlooked, to avoid which contingency was the sole purpose of the statute. So far as any of our former decisions may be construed as holding the contrary, they are hereby overruled.

A will, in the absence of an expressed contrary intention, reads as of the date of the death of the testator; hence what is said in this opinion has no application to posthumous children.

The judgment is affirmed.

CROW, C. J., and MAIN, GOSE, and CHADWICK, JJ., concur.

DAHL v. PUGET SOUND IRON & STEEL WORKS.

(Supreme Court of Washington. Dec. 27, 1913.)

1. MASTER AND SERVANT (§ 204*)—ASSUMPTION OF RISK.

Defendant could rely upon the defense of assumed risk in an employe's action brought under the general statutes and not under the factory act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

2. MASTER AND SERVANT (§ 217*) — ASSUMPTION OF RISK.

Where an employe used a ladder daily for more than a year and a half before the accident, so that he was acquainted with all of the defects therein, he would assume any risk of injury from a rung in the ladder being out.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. MASTER AND SERVANT (§ 278*)—INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for injuries to an employé while climbing a ladder leading to a traveling crane by falling from the ladder, the evidence held not to show that a rung in the ladder was removed between the time plaintiff had last climbed it and the time he was injured.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 217*)—ASSUMED RISK—KNOWLEDGE OF DANGER.

If an employé injured by falling from a ladder discovered that a step was absent, or by ordinary observation could have done so, and used it without informing his employer that the step was missing, he assumed the risk of injury therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 124*)—NEGLIGENCE—KNOWLEDGE OF DANGER.

An employé was not required in the exercise of ordinary care to have discovered the absence of a rung in a ladder, if it was removed between the time the employé last safely climbed the ladder on the day of the accident and the time when he fell therefrom.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

Department 2. Appeal from Superior Court, Pierce County; E. M. Card, Judge.

Action by Oscar F. Dahl against the Puget Sound Iron & Steel Works. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

Peters & Powell, of Seattle, for appellant. Dovell & Dovell, of Tacoma, for respondent.

FULLERTON, J. The appellant owns and operates an iron foundry, located at the city of Tacoma. The respondent was employed by the appellant to operate a traveling crane running lengthwise through the foundry building, used to carry heavy material from one part of the building to another. The crane was operated by electricity, and ran upon tracks constructed some distance above the foundry floor. To enable the operator to get upon the crane, a ladder was constructed at one end of the building by nailing crosspieces on the studding of the framework of the building, at suitable distances apart to make proper steps. The respondent began working for the appellant on January 10, 1910, and worked until 2:15 p. m. August 24, 1911, when he fell from the ladder while mounting it for the purpose of getting upon the crane. He received injuries from the fall which incapacitated him for work for the time being, and he laid off until November 6, 1911. On that day he resumed the work of operating the crane, and worked continuously thereat until the 1st of June, 1912. He began the present action on June 19, 1912, to recover damages for injuries received from the fall from the ladder on August 24, 1911. In his complaint, after

alleging certain preliminary matters, and the fact that he was obligated to ascend and descend the ladder in the performance of the duties for which he was employed, he stated his cause of action in the following language: "(4) That on the 24th day of August, 1911, while plaintiff was engaged in the usual course of his employment and was climbing said ladder, without any knowledge of or the reasonable means of ascertaining any defect therein, and believing that said ladder was safe for the use to which it was applied, and because of the negligent manner in which said defendant had constructed and was maintaining said ladder, which facts were well known to the defendant, plaintiff fell from the twenty-third step of said ladder to the ground with great force and violence, and was thereby severely injured, as is hereinafter more fully set out. (5) That the defendant was knowingly negligent in that it failed to provide and maintain a reasonably safe place for plaintiff to work; that defendant was further negligent, and knowingly so, in that it had negligently constructed said ladder by nailing crosspieces, as steps, onto two of the adjacent studding of said foundry, at spaces of about 15 inches apart, and had so constructed said ladder in a corner of said foundry where no light reflected thereon from any window or door; that it had built said ladder perpendicular to the ground, thereby throwing great weight on the hands in climbing same; that it had knowingly and negligently removed the twenty-third step of said ladder, and had allowed same to continue so defective, and had so constructed said ladder that plaintiff after climbing same had to turn completely around from his position on said ladder before he could step onto the platform at which said crane was stationed; that defendant was further knowingly negligent in that it allowed a portion of the framework of said foundry to remain in the position on the said ladder at which the said twenty-third step had been nailed, and which said piece, or portion of the framework, was by this plaintiff believed to be a step of said ladder, but was in fact not said step and was much too large and thick to be grasped by the hands in climbing said ladder—all of which said facts were well known to the defendant, and were unknown to this plaintiff, and beyond his means of ascertaining, and which said negligent acts on the part of the defendant caused the injury to this plaintiff as aforesaid." An answer to the complaint was filed, denying its material allegations, and pleading affirmatively contributory negligence and assumption of risk. On the issues made, a trial was had resulting in a verdict and judgment for the respondent in the sum of \$1,000. The assignments of error made by the appellant suggest but a single question, namely, the suffi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ciency of the evidence to justify the verdict and judgment.

[1, 2] The evidence of the respondent, save in the particular hereafter commented upon, in the main reflected the allegations of the complaint. It is at once apparent, however, that he has no cause of action based upon the allegations to the effect that the ladder was improperly constructed, that there was a want of sufficient light, or that the ladder was perpendicular, "thereby throwing great weight on the hands in climbing the same." His action was brought under the general statutes, not under the factory act, and the defense of assumption of risk was open to the appellant. Clearly, the daily use of the ladder by the respondent for the more than a year and a half preceding the accident made him acquainted with all of the defects of which he here complains, and he must be held to have assumed all risk of injury arising therefrom.

The only allegations of negligence in the complaint upon which a recovery can rest, therefore, are the allegations to the effect that the appellant had knowingly and negligently removed, or suffered to be removed, the twenty-third step or rung of the ladder, and had allowed the same to remain in its thus defective condition, and knowingly and negligently allowed a portion of the framework of the building to remain in a "position on the said ladder at which the said twenty-third step had been nailed," which piece was believed by the respondent to be a step in the ladder, and which was too large to grasp by the hands in climbing the ladder.

[3] The evidence, however, falls far short of establishing these allegations. Bearing upon the question, the respondent testified that the ladder was in perfect condition when he began work on January 10, 1910, and that he did not discover the absence of the rung until after he fell from the ladder on the afternoon of August 24, 1912, when he "naturally looked up" and saw that it was missing, although he climbed up and down the ladder many times each day he worked thereon, sometimes as many as 15 or 16 times, and on the day of the accident as many as 6 or 7 times. He saw no one go up the ladder on the day of the accident, nor did he see any one working at that part of the building during that day who would be likely to remove the step, although he was at his place of work during all of the working hours preceding his injury. Nor is there elsewhere in the record anything from which it could be inferred that the rung or step of the ladder was removed between the times the respondent had last climbed it and the time he received his injury. The positive evidence in the record is to the contrary; the evidence of the appellant being to the effect that it had not

been removed, but was there at the time the respondent fell.

[4, 5] There is therefore no ground upon which the judgment can rest. If it be a fact that the respondent discovered the absence of the step, or by ordinary observation could have discovered its absence, and used the ladder without making the fact known to his employer, he is estopped from claiming damages for any injury arising therefrom on the doctrine of assumption of risk. Or if the absence of the rung was of such minor importance that the respondent could not have reasonably discovered it after climbing over it from 6 to 15 times each working day, it is not to be supposed that any reasonable inspection on the part of the appellant would have discovered it. If, on the other hand, it is to be supposed that the rung was removed between the time the respondent last safely climbed the ladder on the day of the accident and the time he attempted to climb it and fell therefrom, the time is too short to warrant the jury in finding, in the absence of evidence of special circumstances, that the appellant by the exercise of reasonable diligence ought to have discovered its absence.

It is unnecessary to pursue the inquiry. The judgment must be reversed and remanded, with instructions to enter a judgment to the effect that the respondent, plaintiff below, take nothing by his action. It is so ordered.

CROW, C. J., and MOUNT, PARKER, and MORRIS, JJ., concur.

SCHWARTZ v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Washington. Dec. 20, 1913.)

1. RAILROADS (§ 350*)—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether one, who, at a double-track crossing, just after a train going south had passed on the track nearest to him, started to drive over and was struck, after the horses had got over, by a train coming on the other track from the south at a speed of at least ten miles an hour, when an ordinance limited it to six miles an hour, was guilty of contributory negligence, is a question for the jury, the gong at the crossing being to his knowledge out of order, so that it rang all the time, he from where he was waiting for the first train to pass having a view along the tracks to the south for 700 feet, except as obstructed by such train and a water tank, 322 feet distant, and, though looking and listening, not having seen or heard the second train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.*]

2. DAMAGES (§ 132*)—PERSONAL INJURY—EXCESSIVE VERDICT.

A verdict for \$3,000 is not so excessive as to warrant reduction; plaintiff's wrist having been broken and the bones thereof crushed, and his shoulder badly injured, and there being ev-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

idence that the injury to the wrist will be permanent.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by G. L. Schwartz against the Northern Pacific Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

J. W. Quick, Geo. T. Reid, and L. B. Da Ponte, all of Tacoma, for appellants. C. A. Studebaker and Forney & Ponder, all of Chehalis, for respondent.

MOUNT, J. The plaintiff recovered a judgment of \$3,000 for personal injuries received by him on the 14th day of March, 1912, when he was struck by a passenger train of the defendant Northern Pacific Railway Company at the Prindle street crossing in Chehalis, Wash. The defendants have appealed from that judgment.

[1] The assignments of error are that the court refused to instruct the jury to return a verdict in favor of the appellants, in overruling the motion of the appellants for judgment notwithstanding the verdict, and in overruling the appellants' motion for a new trial. These assignments of error are all based upon the same ground, namely, that the evidence was insufficient to sustain the verdict, and that it shows that the respondent was guilty of contributory negligence.

The facts are, in substance, as follows: The appellant Northern Pacific Railway Company maintains and operates a double-track railroad through the city of Chehalis. These tracks as they pass through the city of Chehalis run nearly north and south. Trains going south use the west track; those going north use the east track. These tracks are crossed at right angles by certain streets; the one where the accident occurred being called Prindle street, which is two blocks south of the depot. This street is one of the principal streets of the city which crosses the railway tracks. To the south of Prindle street a distance of about 322 feet, a water tank is located on the right of way of the railway company. At the Prindle street crossing the railway company maintained an electric bell which, when in repair, would be set ringing by a north-bound train when it was 2,734 feet south of the crossing. The respondent at the time of the accident and for more than two years prior thereto had lived on the corner of State and Prindle streets, which is about a block west of the railroad tracks. He had crossed the tracks at this crossing two or three times daily, and sometimes more. On the day of the accident and for a period of about two weeks prior to that time, this crossing bell was out of repair and it rang constantly. The respondent had observed this fact.

On the day of the accident, the respondent, who was a teamster by occupation, hitched his team to his wagon about half past 1 o'clock and started to drive up town to haul a load of coal. As he approached the crossing on Prindle street from the west, a freight train consisting entirely of box cars was moving south across Prindle street. He stopped his team about 40 or 50 feet from the track upon which the freight train was moving and about on the west line of the right of way of the railway company. He testified that the engine of the freight train was about to the water tank. There were three or four cars yet to cross the street. He noticed that the gong or crossing bell was ringing, and he looked down the track toward the south to see if there was any train on the east track. He testified that he could see beyond the water tank down to Main street, a distance of about 698 feet; but there was no train in sight. The freight train obstructed his view of any other train that would be coming north behind the freight train. He also testified that at the point where he looked he had a better view than at any other point. About the time the last car of the freight train was crossing Prindle street, he started his team to drive over the crossing of the railway. As he emerged from behind the freight train and as his team was upon the east track, he looked south and saw a passenger train coming. It was then too late for him to back his team off the track. He urged it forward and was struck by the engine of the passenger train and severely injured. The horses escaped injury. The wagon was demolished. He himself was rendered unconscious.

An ordinance of the city of Chehalis makes it unlawful for a railway train to pass over this street at a faster rate of speed than 6 miles per hour. It is apparently conceded that the train at that point was running at least 10 miles per hour. There is evidence to the effect that it was running between 25 and 40 miles per hour at the time it struck the respondent. It was a regular passenger train and was due at the station at 1 o'clock and 32 minutes. It was about 8 minutes late upon this occasion. There was also evidence to the effect that the whistle was not blown nor the bell rung upon the engine of the passenger train. At any rate, the respondent testified that he did not hear the bell or the whistle.

The appellants strenuously argue that the respondent was guilty of contributory negligence in attempting to make the crossing over Prindle street immediately after the freight train had passed. A number of cases are cited to the effect that "where a highway crosses a double-track railway, over which trains are liable to run frequently in opposite directions, it is contributory negligence for a traveler thereon, whose view of the sec-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and track is obstructed by the presence of a passing train on the track nearest to him, to pass immediately upon the crossing as soon as the way is clear, without waiting to look or listen for the approach of a train in the opposite direction on the second track." *Marty v. Chicago, St. P., M. & O. Ry. Co.*, 38 Minn. 108, 35 N. W. 670, and other cases to the same effect. The appellants seek to distinguish this case from the case of *Merwin v. Northern Pacific Railway Company*, 68 Wash. 617, 123 Pac. 1019, by reason of the fact that in the case just cited *Merwin*, at the time he reached the crossing, saw the Carbonado train approaching, which in no manner obstructed his view toward the north, the direction from which the train came which struck him, and when *Merwin* stopped, just before the Carbonado train passed over the crossing, he looked to the east along the track and could see for a distance of from 1,500 to 2,000 feet, and would have been able to see a train approaching from the east upon any of the tracks if a train had been within that distance of him. While in this case the freight train obstructed the respondent's view of the train upon the north-bound track which might have come from behind the freight train at any time before he went upon the tracks. But as we read the evidence of the respondent and of some of the other witnesses, it is to the effect that at the place where the respondent stopped he had a view of the approach of the north-bound train for a distance of nearly 700 feet; that he looked to see if any train was approaching from that direction while he had stopped, and immediately prior to passing upon the tracks, and saw and heard no train.

It is true that the gong was ringing which, if it had been in repair, would have notified the respondent that a train was approaching upon that track. But this gong, according to the evidence, had been out of repair for two weeks, and upon the day of the accident and for two weeks prior thereto had been constantly ringing, and the respondent knew of this fact. This bell therefore meant nothing to the respondent, because it is conceded that when the bell was out of repair it rang constantly, for, as appellants say, it erred on the side of safety. This no doubt would have been true if the respondent had not known that the bell was out of repair and continued to ring whether a train was approaching or not. Before he started to cross the tracks, he stopped, looked, and listened, at a point which the evidence shows was the most advantageous point at which he might do so. He saw and heard no train approaching, though he had a view of about 700 feet to the south. It is true this view was obstructed somewhat by a water tank and by the freight train which had just passed south. We are satisfied that under these

facts the question of contributory negligence was one for the jury and not a question of law for the court. This case, we think, falls within the rule of the *Merwin* Case, supra, and is controlled by it. It was therefore not error for the trial court to submit to the jury the question whether or not the respondent was guilty of contributory negligence.

[2] The appellants contend that the verdict is excessive. The respondent was badly injured. He was rendered unconscious at the time of the accident; his wrist was broken and the bones of his wrist were crushed; his shoulder was badly injured. Evidence was introduced at the trial to show that the injury to the wrist would be permanent. We think, under the circumstances, that a verdict for \$3,000 is not so excessive as to warrant a reduction thereof.

The judgment is therefore affirmed.

CROW, C. J., and PARKER and FULLERTON, JJ., concur.

GRANDALL v. PUGET SOUND TRACTION, LIGHT & POWER CO. et al.

(Supreme Court of Washington. Dec. 20, 1913.)

1. JURY (§ 135*)—PEREMPTORY CHALLENGES—STATUTORY RIGHT.

The right of peremptory challenge of jurors is wholly statutory, and the Legislature may withhold the right entirely, or it may grant it with restrictions.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 599-606; Dec. Dig. § 135.*]

2. JURY (§ 136*)—PEREMPTORY CHALLENGES—STATUTORY RIGHT.

Under Rem. & Bal. Code, § 324, authorizing either party to challenge jurors, but, when there are several parties on either side, they shall join in a challenge before it can be made, defendants in tort, who not only resist the right of plaintiff to recover, but who seek to shift any recovery from one to the other, are not entitled to separate peremptory challenges, though they are unable to agree on a peremptory challenge.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 607-618; Dec. Dig. § 136.*]

3. APPEAL AND ERROR (§ 882*)—INSTRUCTIONS—REPETITIONS—RIGHT TO COMPLAIN.

A party may not complain of instructions on the ground that they unnecessarily repeat the legal proposition involved where his requested instructions are to a considerable extent subject to the same criticism.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

4. APPEAL AND ERROR (§ 1064*) — INSTRUCTIONS—MEASURE OF DAMAGES.

The error in fixing the limit of the recovery of plaintiff suing for a personal injury in excess of the amount recoverable in any event necessitates a new trial, unless plaintiff remits from the award the amount of the excess, though the verdict is for less than half of what might have been awarded, since the jury may have allowed the improper item allowed by the instruction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by W. W. Crandall against the Puget Sound Traction, Light & Power Company and others. From a judgment for plaintiff, defendants appeal. Conditionally affirmed.

Trefethen & Grinstead, Jas. B. Howe, and A. J. Falknor, all of Seattle, for appellants. Vanderveer & Cummings and H. McC. Billingsley, all of Seattle, for respondent.

PARKER, J. This is an action to recover damages which the plaintiff claims resulted to him from the concurring negligence of the defendants. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff against the defendants, from which they have appealed separately.

The appellant Puget Sound Traction, Light & Power Company, hereinafter called "the company," owns and operates a cable street railway on James street in Seattle. Appellant Scott P. Woodin is a physician practicing his profession in Seattle, concededly for the benefit of the community composed of himself and wife, and, in aid of his practice, he drives an automobile belonging to the community. On September 23, 1912, Dr. Woodin was driving southerly along Fourth avenue in Seattle, approaching the intersection of that avenue and James street. As he neared James street, one of the defendant company's cable street cars was proceeding easterly along James street, nearing Fourth avenue. A collision occurred between the automobile and the car at the intersection of the avenue and street. The forward right wheel of the automobile first came in contact with the left running board of the cable car near its forward end, while both were in motion. At the time, respondent was a passenger on the cable car, standing on the left running board just back of the point of first contact. The car was crowded, so that respondent was compelled to ride in this position. The momentum of the auto and cable car was such that the right side of the auto was thrown with great force around against the left side of the cable car, where respondent was standing, resulting in serious injury to him, for which he seeks recovery, claiming that the injuries thus received were the result of the concurring negligence of both appellants. Respondent sought recovery from them jointly, alleging damages in the sum of \$7,639.20. The jury found in his favor by a general verdict in the sum of \$3,000.

[1, 2] During the impaneling of the jury, after the appellants had agreed jointly upon, and exercised, two peremptory challenges, they were unable to agree upon the exercise of a third peremptory challenge, and each then claimed the right to an additional peremptory challenge to be exercised separately. This the court denied, and the ruling thereon

is assigned as error calling for a new trial. The court rested its ruling upon section 324, Rem. & Bal. Code, providing as follows: "Either party may challenge the jurors, but when they are several parties on either side, they shall join in a challenge before it can be made. The challenge shall be to individual jurors, and be peremptory or for cause. Each party shall be entitled to three peremptory challenges." The effect of this limitation upon the right of peremptory challenge was so thoroughly reviewed by Justice Rudkin, speaking for this court, in *Colfax National Bank v. Davis*, 50 Wash. 92, 96 Pac. 823, 16 Ann. Cas. 264, as to leave little to be said in answer to appellants' contention, which, in this case, as evidently in that, was rested upon the fact that the interests of the defendants in the result of the trial are, in substance, antagonistic to each other, and that therefore they should be regarded as separate parties for the purpose of exercising peremptory challenge. It seems plain to us, as pointed out in the *Colfax National Bank Case*, that the answer to this contention is that the right of peremptory challenge is wholly a creature of statute, and not of common law. This being true, we are unable to see that this restriction which the Legislature may place upon such right, in the granting of it, is any more an infringement of the rights of a party than if the Legislature had withheld the right entirely, which, of course, could be done. Some contention seems to be made that the interests of the defendants in this case are of a more pronounced antagonistic nature than in the *Colfax National Bank Case*. The only difference we can see between the two cases is that the right to recover in this case is rested upon tort, while in that it was rested upon contract. We fail to recognize this as a difference in the principle involved. It seems plain to us that in this case, as in that, each defendant, while, of course, resisting the right of the plaintiff to recover in any event, was seeking to shift whatever recovery might be had upon the other defendant. In this way only were their interests antagonistic. We think it was not error to deny the right of a separate peremptory challenge to the defendants. The extent of the right of exercising, separately, challenge for cause by several defendants, we express no opinion upon. That question is not here, nor was it in the *Colfax National Bank Case*. We are dealing only with a right existing solely because given by statute. *Manhattan Building Co. v. Seattle*, 52 Wash. 226-231, 100 Pac. 330.

[3] Counsel for appellant company requested three separate instructions to be given by the court to the jury touching the relative rights and duties of a street car and an automobile upon a street intersection; both arriving there at nearly the same time. The substance of all these instructions is found in one reading as follows: "I further instruct

you that, if a driver of an automobile and a street car both desire to pass a given point at the same time, it is the duty of the driver of the automobile to yield the right of way to the street car, since in the very nature of the case it is impossible for the street car to pass over other portions of the street, while it is possible for the automobile to do so." The court gave each of these three instructions as requested, adding, however, at the conclusion of each, the following, or words of similar import: "Providing that at all times the defendant company used the highest degree of care for the protection of its passengers that was practically consistent with the reasonable operation of its car."

We do not gather from the briefs of appellants that any contention is made against these instructions as correct statements of the law; but the contention seems to be that the court unnecessarily repeated to the jury the concluding portion of each instruction touching the high degree of care required of the company in the protection of respondent as one of its passengers. In one or two places in the instructions given by the court this same thought is repeated. The rule of the high degree of care required of the company was unnecessarily repeated by the court; but the same criticism, at least in a considerable measure, may be made against the three instructions requested to be given by counsel for appellant company. It seems to us that in both respects there was unnecessary repetition. The repetitions, we think, were substantially as favorable to one side as to the other, and do not call for a new trial.

[4] The instruction of the court touching the question of the highest amount which the jury might find in the respondent's favor, in the event they concluded he was entitled to damages, was as follows: "I instruct you that, if you find for the plaintiff in this case, you will award him damages in such amount as will compensate him for all pain and suffering, if any, which he has undergone in the past, or will probably undergo in the future, and for any impairment, if any, of his physical health or functions not exceeding together the sum of \$7,500, and for any expense which he may have incurred or must incur in the future, for medicine or medical attendance, not exceeding the further sum of \$189.20, making a total of \$7,689.20, which is the limit of your verdict."

This instruction, it is claimed, was erroneous, in that it permitted the jury to find in respondent's favor at least \$100 more than the highest amount he would have been entitled to under any circumstances. Looking to the allegations of the items of damages in the complaint, we find that respondent there claimed \$7,500 for pain, and suffering, and disability incurred, \$39.20 for hospital fees, drugs, and medicine, \$50 for doctors' bills incurred before the suit was commenced, and \$50 for prospective doctors'

bills, which he would be required to incur in the future because of his injuries. This, it will be noticed, totals only \$7,639.20. It is thus manifest that the instructions of the court fixed the limit of respondent's recovery at \$50 more than the amount alleged in the complaint. Besides this excess, there was no evidence whatever touching the amount of doctors' bills incurred, or to be incurred, except it was stipulated by counsel upon the trial that respondent had incurred \$50 for doctors' bills. It is apparent, therefore, that the total amount which the jury could have awarded respondent in any event was \$100 less than that which the court fixed as the limit of his recovery. We think that this was error, which will entitle appellants to a new trial, unless respondent remits from the award made to him by the verdict and judgment the sum of \$100. This case, in this regard, is exactly like that of *Olson v. Erickson*, 53 Wash. 458. Some contention is made that, because the jury found in the sum of \$3,000 only, which is less than one-half of what they might have found under the allegations of the complaint, no prejudice resulted from this instruction. The same situation appeared in the *Olson Case*. In that case respondent recovered only \$2,000 when the allegations of the complaint would have supported a recovery of \$10,000, and \$194 additional for medical attendance and hospital fees. In that case, there being no proof as to the latter items, the court held it was error for the court to instruct fixing the limit of the recovery so as to include those items. Manifestly, we have no way to determine what influence this instruction had upon the jury as to the item of doctors' fees. The jury may or may not have allowed such items in their verdict of \$3,000. Therefore we cannot say that the instruction was without prejudice.

Contentions are made against the sufficiency of the evidence to sustain the verdict and judgment in addition to the contention last above noticed. This question was raised by motion for nonsuit, motion for directed verdict, and motion for judgment notwithstanding the verdict, and involves the question of negligence of the respective appellants and the contributory negligence of respondent. We have read all of the evidence set forth in the abstract, and deem it sufficient to say that we are convinced that there is ample room for difference of opinion upon these questions. The same may be said as to the contention made against the verdict as being excessive. We are quite clear that we would not be justified in disturbing the verdict for want of support in the evidence, except in so far as doctors' fees may be included therein.

Because of error of the trial court in instructing the jury as to the limit of the respondent's recovery, we are of the opinion

that appellants must be granted a new trial, unless respondent will remit from the judgment the sum of \$100 within 20 days after the case is remanded to the trial court. In the event respondent does so remit, the judgment will be affirmed; otherwise, the trial court is directed to grant appellants a new trial.

In view of this disposition of the cause, we conclude that costs incurred by appellants in presenting the question here decided in their favor are fairly offset by costs incurred by the respondent in resisting contentions made by appellants and decided in respondent's favor. Therefore neither party will recover costs in this court.

CROW, C. J., and FULLERTON and MOUNT, JJ., concur. MORRIS, J., takes no part.

HUNT v. ALLISON.

(Supreme Court of Washington. Dec. 23, 1913.)

1. FRAUD (§ 59*)—MEASURE OF DAMAGES.

The measure of damages, in an action by a purchaser of realty for damages from fraudulent representations as to the thickness of the walls, etc., is the difference between the value of the property at the time of sale and its value had it been as represented.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. § 59.*]

2. APPEAL AND ERROR (§ 231*)—RECEPTION OF EVIDENCE—GENERAL OBJECTIONS.

If evidence offered on the question of damages did not tend to prove damages which could be recovered under the measure of damages applicable, a general objection that the evidence was incompetent, irrelevant, and immaterial was sufficient to raise for review the admissibility of such evidence and the right to recover such damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Keenan, Judge.

Action by Laura S. Hunt against G. S. Allison. From a judgment for defendant, plaintiff appeals. Affirmed.

Graves, Kizer & Graves, of Spokane, for appellant. Danson, Williams & Danson and Cannon, Ferris & Swan, all of Spokane, for respondent.

MAIN, J. The purpose of this action was to recover damages alleged to be due on account of fraudulent representations.

On July 24, 1907, the Spokane International Railway Company leased to the defendant lot 15, situated in its terminal grounds in the city of Spokane. The lease provided that the defendant was to erect a building upon the premises to be used as a warehouse, salesroom, and for cold storage and mercantile purposes. Shortly thereafter the defendant caused to be organized under

the laws of the state of Washington a corporation, bearing the name of the International Storage Company. After the organization of this company, the lease was assigned to it, with the consent of the lessor. The corporation erected upon the premises a two-story brick building equipped as a cold storage plant, in accordance with the terms of the lease. On or about the 1st day of July, 1911, the plaintiff contracted to purchase the lease and building for the sum of \$18,000. The railway company refused to consent to an assignment of the lease by the corporation to the plaintiff. The corporation owned no other property, and its capital stock was all owned by the defendant. When the railway company refused to consent to the assignment of the lease, the defendant sold and transferred to the plaintiff the entire capital stock of the corporation, thereby investing her with the ownership of the building and the lease.

The plaintiff claims that she was induced to make this purchase by the representation of the defendant that the walls of the building were of sufficient strength to sustain two additional stories, if at any time it were thought advisable to so erect them. The charge of fraud is the misrepresentation as to the strength of the existing walls; they not having sufficient strength to sustain the additional stories.

There are other allegations of damages sustained by reason of misrepresentations of the defendant with regard to the cold storage equipment and machinery. It is unnecessary however, to further mention these, as the only error assigned is predicated upon the court's action in granting the defendant's motion for a new trial upon the ground that error had been committed, in that the jury were incorrectly instructed as to the measure of damages.

During the trial the plaintiff offered evidence tending to show what it would cost to reconstruct the walls and make them of the strength which she claimed they were represented to be. This evidence was objected to by the defendant on the ground that it was incompetent, irrelevant, and immaterial. The defendant offered no evidence on the question of damages. At the conclusion of the plaintiff's evidence, and also at the conclusion of the case, the defendant moved the court to withdraw the case from the jury on the ground, among others, that there was a failure and absence of proof. These motions were denied. The jury returned a verdict in favor of the plaintiff upon the two causes of action. Motion for new trial being made, the court sustained it as to the first cause of action, because, as it believed, it had improperly instructed the jury as to the measure of damages, and overruled the motion as to the second cause of action. The plaintiff appeals.

The trial court, in submitting the cause to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the jury, gave the following instruction upon the measure of damages relative to the walls of the building not being as it was claimed they had been represented: "I charge you that, if the defendant or his agent, George W. Paine, stated to the plaintiff as a fact, and the plaintiff relied upon it, that the walls of the building in question were built so as to carry two additional stories, and that said statement was untrue, and that plaintiff did not know the same was untrue, then I charge you that the plaintiff is entitled to recover such sum as was necessary to be expended at the time of the sale in order to make said walls carry said two additional stories, together with interest thereon from the date of the purchase of said stock at the rate of 6 per cent. per annum."

This instruction, in substance, tells the jury that the measure of damages is the sum which it would have been necessary to expend at the time of the sale in order to make the walls sufficiently strong to carry two additional stories.

The respondent, on the same question, requested an instruction as follows: "The jury are instructed that on the measure of recovery, if any, for the alleged misrepresentation as to the strength or thickness of the walls of the building if you find that such misrepresentations were made, that the plaintiff is entitled to recover the difference between what the building was actually worth at the time of such sale and what it would have been worth if the walls had been of the strength and thickness as represented."

[1] The substance of this instruction is that the correct measure of damages was the difference between what the building was actually worth at the time of the sale and what it would have been worth if the walls had been of the strength represented. The instruction given does not contain a correct statement of the law. The instruction requested and refused states the rule correctly. Where property is sold, and the purchaser subsequently brings an action charging fraudulent representations, the measure of damages is the difference between the value of the property transferred at the time of the sale and what its value would have been if it had been as represented. *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938; *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496, 135 Am. St. Rep. 971; 4 *Sutherland on Damages* (3d Ed.) § 1171; *Hannah-Breckinridge Co. v. Holley-Matthews Mfg. Co.*, 160 Mo. App. 437, 140 S. W. 923; *Mair v. Williams*, 29 S. D. 322, 136 N. W. 1086.

It is claimed, however, that the respondent acquiesced in the rule of damages as stated in the instruction given, and therefore the court was in error in granting the motion for new trial. We find no merit in this contention.

[2] When the appellant's evidence as to the measure of damages was offered, the respondent objected, it is true, only on the grounds that it was irrelevant, incompetent, and immaterial. If the evidence offered did not tend to prove damages which could be recovered, obviously it would be immaterial, and would have no place in the case. Though the objection made did not as fully advise the court of the reasons for it as might have been done, it shows at least that the respondent did not acquiesce in the introduction of the evidence. In addition to this, the respondent seasonably interposed a motion that the case be taken from the jury, and subsequently requested an instruction which correctly defined the measure of damages.

The judgment will be affirmed.

OROW, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

LAUTENSCHLAGER et al. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. Dec. 19, 1913.)

1. JUDGMENT (§ 199*) — INJURIES FROM DEFECTS IN STREETS—ACTIONS—QUESTIONS FOR JURY.

In an action for injuries to a person who fell in stepping from a cement sidewalk to a plank walk six inches lower on a street which was being paved, where there was evidence that the public were traveling the plank walk with the knowledge and approval of the city, that an offset of six inches at sidewalk connections is unusual, that the offset was obscured in consequence of the location and strength of the street light, and that plaintiff was exercising reasonable care, the court erred in entering judgment for the city non obstante veredicto, since the city's negligence and plaintiff's contributory negligence were for the jury.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.*]

2. MUNICIPAL CORPORATIONS (§ 763*)—INJURIES FROM DEFECTS IN STREETS—LIABILITY OF CITY.

Where the public use a street upon the invitation of the city, either express or clearly implied, it is the city's duty to use reasonable care to keep it in a reasonably safe condition for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1612-1615; Dec. Dig. § 763.*]

3. MUNICIPAL CORPORATIONS (§ 807*) — INJURIES FROM DEFECTS IN STREETS—CONTRIBUTORY NEGLIGENCE.

A traveler may use any street which the city leaves open for travel, and is not required to avoid a particular street because there is another and safer one that he may take.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1679-1681; Dec. Dig. § 807.*]

4. MUNICIPAL CORPORATIONS (§ 799*) — INJURIES FROM DEFECTS IN STREETS—LIABILITY OF CITY.

A city, undertaking to improve a street, is required to use reasonable precautions to guard the public from injury, and in doing so may, if

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

necessary, temporarily close the street from public travel.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1659; Dec. Dig. § 799.*]

5. MUNICIPAL CORPORATIONS (§ 798*) — INJURIES FROM DEFECTS IN STREETS—LIABILITY OF CITY.

Where a plank sidewalk in common use, at its connection with a cement sidewalk, was dangerous, because it was six inches lower than the cement walk, and was insufficiently lighted, the city, which knew or in the exercise of reasonable care could have known its condition, was bound to provide signals or warnings.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1657, 1658; Dec. Dig. § 798.*]

6. MUNICIPAL CORPORATIONS (§ 809*) — INJURIES FROM DEFECTS IN STREETS—LIABILITY OF CONTRACTOR.

One who contracted with a city to do the concrete work in a street which was being paved, but who, though he had worked at other places had neither touched nor taken control of the sidewalk space at the point where a person fell in stepping from a cement walk to a plank walk six inches lower, and who was not shown to have laid such plank walk, was not liable for the injury.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1688-1694; Dec. Dig. § 809.*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Mary E. Lautenschlager and husband against the City of Seattle and others. From a judgment for defendants, notwithstanding a verdict for plaintiffs, plaintiffs appeal. Reversed as to the city, and affirmed as to the other defendants.

Willett & Oleson, of Seattle, for appellants. Jas. E. Bradford, Howard M. Findley, John W. Roberts, and Peters & Powell, all of Seattle, for respondents.

GOSE, J. This is an action to recover for personal injuries sustained by the plaintiff in consequence of the alleged negligence of the defendants.

The facts in brief are these: On the evening of the 28th day of February, 1912, the plaintiff, in attempting to step from the cement walk to a temporary sidewalk at the southeast corner of Fifth avenue and Cherry street, fell and was injured. Her testimony shows that a two-plank walk had been laid on the east side of Fifth avenue in the sidewalk area from Cherry street south one block to James street. One of her witnesses said that it extended south two blocks to Jefferson street. There was a cement sidewalk on the south side of Cherry street, which extended east at least one block. There was an abrupt drop of about six inches from the cement walk to the planks. The plaintiff lived on Fifth avenue some distance north of Cherry street. On the evening in question she left her home with a view to attending church at Fifth avenue and Jefferson street. She traveled south along a planked

roadway about 18 feet in width in the center of the avenue to the south side of Cherry street, thence east over a single plank connecting the roadway with the cement walk at the southeast corner of Fifth avenue and Cherry street. She then started south, falling at the offset at the connection between the cement walk and the two planks. She testified that she had theretofore continued south on the planked way in the center of the street; that she had seen the plankway on the east side of Fifth avenue, but that she did not know of the existence of the offset. Her testimony shows that the street light was so situated that it cast a shadow over the offset. Her testimony also tends to show that the two-plank walk had been in common use by the public for two or three months preceding the date of her injury. At and for a considerable period of time before the plaintiff sustained her injury, the city was engaged in paving Fifth avenue from Madison street south to Jefferson street. The avenues run approximately north and south. The streets run approximately east and west. At the time of the accident a cement walk had been laid on the west side of Fifth avenue. There was a barrier at Madison and Jefferson streets on the east side of Fifth avenue, to prevent travel over the unpaved portion of the street, but there was no barrier, signal light, or other warning, over any part of the sidewalk area except as hereafter noticed. The record shows that there were tar cookers, a steam roller, and other paving equipment at or upon the southwest corner of Fifth avenue and Cherry street, upon which red lanterns were placed in the nighttime. The cement walk on the west side of Fifth avenue between Cherry and James streets had a further obstruction caused by a slide. Some of the witnesses say that the earth from this slide occupied only a small part of the sidewalk area, leaving an opening of sufficient width to accommodate travel. The charge of negligence is twofold: (a) The offset without a light or barrier to indicate its presence; and (b) that the street lights were so located as to throw a shadow on the offset. The jury returned a verdict in favor of the plaintiff. All the parties to the action filed motions for a new trial, and each of the defendants filed a motion for a judgment non obstante veredicto. The plaintiff's motion for a new trial was denied. The motion of the defendants for a judgment non obstante was granted, and a judgment was entered in their favor. From this judgment the plaintiff appeals.

Both respondents contend that the appellant was guilty of contributory negligence which, as a matter of law, precludes a recovery in her behalf. The respondent McLellan also contends that there is no evidence tending to show any negligence on his part.

[1] We think the court erred in entering a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judgment non obstante in favor of the city. Whether the appellant was guilty of contributory negligence is a question of mixed law and fact. There is abundant evidence in the record which justified the jury in finding that the public were traveling the two-plank way, where the appellant fell, with the knowledge and approval of the city. An offset of six inches at sidewalk connections is shown by the testimony to be unusual. Whether the offset was obscured in consequence of the location and strength of the street light, and whether the appellant was exercising reasonable care at the time she met her injury, were questions for the jury.

[2] Interlocked with the latter question was another, viz., whether the walk on the opposite side of the street was a safer one, and whether a reasonably prudent person would have taken it rather than the one which the appellant chose to follow. These are but side lights to the principal question; i. e., Was the appellant exercising reasonable care in view of all the attending circumstances? The jury upon competent testimony resolved this question in her favor. Where the public use a street upon the invitation of the city, either express or clearly implied, the duty devolves upon the city to use reasonable care to keep it in a reasonably safe condition for travel. *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220; *Cady v. Seattle*, 42 Wash. 402, 85 Pac. 19.

[3] A traveler is not required to avoid a particular street because there is another and safer one that he may take. He has a right to travel upon any street which the city leaves open for travel. *Cady v. Seattle*, supra.

[4] Where a city undertakes to improve a street it is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street from public travel. *Peterson v. Seattle*, 40 Wash. 33, 82 Pac. 141, 5 Ann. Cas. 735.

[5] It was incumbent upon the city to provide signals or warnings if the walk was in common use and dangerous, and it knew, or in the exercise of reasonable care ought to have known, its condition. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847. If the light was so placed as to throw a shadow over the offset, the questions of the negligence of the city and the contributory negligence of the appellant were for the jury. *Stone v. Seattle*, 30 Wash. 65, 70 Pac. 249, 67 L. R. A. 258; *Drake v. Seattle*, 30 Wash. 81, 70 Pac. 231, 94 Am. St. Rep. 844.

The respondents have cited *Hunter v. Montesano*, 60 Wash. 489, 111 Pac. 571, Ann. Cas. 1912B, 955, and *Shannon v. Tacoma*, 41 Wash. 220, 83 Pac. 186. In the *Hunter* case the plaintiff was injured while crossing a street which he knew to be dangerous and

closed to travel, upon a dark, rainy night. In the *Shannon* case the rule was recognized that in most cases it is a question of mixed law and fact whether the injured party used care commensurate with the conditions surrounding him.

[6] This brings us to the second question, viz., Is there any evidence tending to connect the respondent McLellan with the negligence charged? We find none. He had a contract with the city to do the concrete work. Other contractors had graded the avenue, including the sidewalk area. Preparatory to laying the sidewalks, the respondent was required to make a subsurface grade of about four inches. He had neither touched nor taken control of the sidewalk area where the appellant fell. He had worked at other places. The jury, in response to an interrogatory, answered that the evidence did not show who laid the plank walk where the appellant fell.

The appellant has in this court expressly waived her claim of error in the denial of her motion for a new trial.

The judgment is reversed as to the respondent the City of Seattle, and affirmed as to the respondent McLellan.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

SCHOENNAUER v. SCHOENNAUER.

(Supreme Court of Washington. Dec. 29, 1913.)

1. DIVORCE (§ 323*)—CONCLUSIVENESS—MATTERS CONCLUDED.

Under Rem. & Bal. Code, § 989, providing that, in granting a divorce, the court shall also make such disposition of the property as shall be equitable, having regard to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, support, and education of the minor children of such marriage, a decree of divorce obtained upon constructive service by publication, where the wife, who had been left by defendant in a foreign state when he removed to the state of the forum, did not appear and defend, is not a conclusive adjudication as to the nonliability of defendant to contribute to the support of his minor child, for, while the court might have adjudicated the question of the custody and support of a minor child, its jurisdiction as to that matter was not drawn in question; the complaint not mentioning the child, and neither the wife nor the child being within its jurisdictional limits.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 826; Dec. Dig. § 323.*]

2. DIVORCE (§ 323*)—EFFECT—LIABILITY OF PARENT TO SUPPORT CHILDREN.

The natural duty of a father imposes upon him the legal obligation of supporting his minor children, and he cannot escape such duty by obtaining a decree of divorce from his nonresident and absent wife, upon constructive service, where he in effect has abandoned her and the child.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 826; Dec. Dig. § 323.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Fanny Schoennauer against Arthur C. J. Schoennauer. From a judgment for plaintiff, defendant appeals. Affirmed.

M. J. McGuinness, of Snohomish, and Robt. McMurchie, of Everett, for appellant. McClure & McClure and Howard Waterman, all of Seattle, for respondent.

CROW, C. J. Plaintiff and defendant were formerly husband and wife, and are the parents of a minor son now about ten years of age. They lived in Chicago, Ill., until December 17, 1906, at which time the husband moved to Seattle; his wife and child remaining in Chicago. On January 30, 1908, the husband commenced an action for a divorce in the superior court of Snohomish county. Service was made by publication. The wife defaulted, and on April 20, 1908, a decree was entered granting a divorce on the ground of abandonment. The complaint made no mention of the minor child or of any property rights, nor did the final decree contain any reference thereto. The child remained with, and has since been supported by, the mother, who, on March 4, 1911, commenced this action in the superior court of King county against her former husband, the defendant herein, to recover \$1,200 expended by her in supporting the child, and to obtain an order requiring defendant to make monthly payments for future support of the child. From a judgment in plaintiff's favor for \$400, and for the further sum of \$10 per month to be hereafter paid, defendant has appealed.

Appellant contends that the decree, which is not assailed, constitutes an adjudication to the effect that he was in fact abandoned by his former wife, and that she was in the wrong. He alleges that after he came to this state he requested his wife to join him; that he provided her with means for so doing but that she at all times refused. Respondent alleges that she did not abandon appellant, but that he abandoned her; that she had no actual knowledge of the divorce action until long after the final decree had been entered; and that the appellant has remarried, for which reason she has refrained from attacking the validity of the decree. At the trial the record in the action for divorce was, upon stipulation, admitted in evidence. The trial judge thereafter refused to admit any other evidence further than such as would show what disbursements respondent had made in supporting the child, and what such support would hereafter cost. Respondent offered to show that about three years after her marriage to appellant she instituted an action for divorce in the courts of Illinois; that her action was prosecuted to a final judgment for separate maintenance, which judgment also awarded her custody of the child and alimony payable monthly; that

shortly thereafter, learning that appellant had sold his real estate and was about to leave for Seattle, she caused his arrest; that, by reason of his persuasion, she and appellant then resumed their relations as husband and wife; that immediately thereafter he, without warning, abandoned her and came to Seattle; that she wrote him repeatedly during the succeeding year; that he sent her railroad transportation to bring her to Seattle, but that she was too ill to travel; that her illness continued for several months; that she wrote appellant, advising him that she would come to Seattle as soon as she was able to undertake the journey; that she did not hear from him thereafter; that she wrote him repeatedly; and that she had no knowledge of the divorce proceedings until after entry of the decree. This and other offers made by respondent were excluded upon appellant's objection. Evidence was admitted showing that the appellant had remarried, and disclosing his present income.

[1] The record before us is devoid of any suggestion that in the action for divorce, at any time subsequent thereto, or in this proceeding, after respondent had subjected herself to the jurisdiction of the courts of this state, appellant attempted to obtain the custody of the child, offered to provide the child with a home, or contributed to its support. Appellant's sole contention is that, because the decree of divorce, which has not been assailed, was rendered on the ground that he had been abandoned by his wife, she was in fault; that she must be so considered for all purposes; that she has wrongfully retained the custody of the child; and that she is not entitled to any recovery herein. This contention is without merit, and cannot be sustained. Whether it be assumed that appellant abandoned his wife, or that she abandoned him, the rights of their child would not be affected, nor would the appellant be relieved of the duties or obligations imposed upon him to contribute to its support. Conceding that the abandonment of appellant by respondent has been adjudicated by the superior court of Snohomish county, it would not follow that the minor child could not have been awarded to respondent, nor that suitable provision for its support at appellant's expense could not have been made had the superior court of Snohomish county obtained the necessary jurisdiction to make proper orders for such custody and support. In his complaint for the divorce, appellant made no allegation whatever with reference to the child. He now insists that it was not necessary to do so, for the reason that respondent could only be served by publication, and that the courts of this state would not have personal jurisdiction of respondent, but would only have jurisdiction of the marriage status. The purpose of service by publication is to give notice to a defendant, and it must be assumed that a defendant, upon re-

ceiving such notice, may voluntarily appear and defend. Appellant could not assume, when preparing his complaint, that the respondent might not appear and subject herself and child to the jurisdiction of the court. The omission of any reference to the child in his complaint was not respondent's fault. We fail to understand any principle upon which it can be held that respondent's right to obtain compensation for supporting the child, or to obtain a decree for its future support, has been foreclosed by the decree of divorce upon which appellant now relies. Section 989, Rem. & Bal. Code, provides that: "In granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the respective merits of the parties, and to the condition in which they will be left by such divorce, and to the party through whom the property was acquired, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, and support and education of the minor children of such marriage."

Where a divorce has been granted upon constructive service in a foreign jurisdiction, and without any adjudication of property rights, the courts of this state, upon obtaining jurisdiction of the subject-matter and the parties, may grant relief relative to property rights. In *Adams v. Abbott*, 21 Wash. 29, 56 Pac. 931, it appeared that the defendant had deserted his wife in the state of Wyoming, that she obtained a decree of divorce in that state upon constructive service, and that the decree made no disposition of their property rights. The parties owned real estate in this state, and thereafter the former wife brought an action in the courts of this state for a division of the property and for alimony. In passing upon the issues thus raised, we said: "The question of importance discussed here is whether the plaintiff can maintain this action. It is apparent that the district court of Wyoming only had jurisdiction to decree a divorce, and there was no adjudication of the property rights of the plaintiff and defendant in the case before that court. The disposition of the property between plaintiff and defendant in this state must depend upon the law here. It is true, as stated by counsel for defendant, that a decree of divorce between the parties here puts the property matters at rest, as determined in *King v. Miller*, 10 Wash. 274, 38 Pac. 1020; but in that case the property rights were in issue, and the court had jurisdiction to determine the same. The parties and the subject-matter of the litigation were before the court. In the decree made by the Wyoming court, neither the defendant nor the property was within the jurisdiction of the court. The Wyoming court had jurisdiction over the status of the plaintiff only, the defendant not being personally

served with process, and not having submitted to the jurisdiction of the court; and it seems that in such cases the wife may afterward obtain from the court of the domicile of the husband further relief as to the property and alimony." Commenting on section 5723, Ballinger's Code (section 989, supra), we further said: "It is true a decree for the disposition of the property of the parties, upon the dissolution of the marriage, such as shall appear just and equitable, and having regard to the respective merits of the parties and to the condition in which they will be left, provided for in section 5723, Bal. Code, is incidental to divorce; but it is not identical with it, or a necessary part of it, and there should be sufficient reason shown why such disposition of the property was not made pending the action when the divorce was granted. The cause for such disposition of the property of married persons, and the authority of the court to make such decree upon the respective property rights, arise from the divorce—the dissolution of the marriage status—and we think it was appropriately done here, and that the court had jurisdiction to try the cause."

While the case cited adjudicates property rights only, it will be noted that section 989, to which it refers, also provides that the court shall make provision for the guardianship, custody, and support, and education of minor children. There seems to be no sound reason why the principle announced by this court relative to property rights should not be applied in this case.

In *Gibson v. Gibson*, 18 Wash. 489, 51 Pac. 1041, 40 L. R. A. 587, this court said: "The pertinent question and the one question that really affects appellant is the right of the court to enter a judgment against him for the support of the minor child, and the question resolves itself into this: Can a divorced wife bring an action against her former husband for maintenance for a minor child whose custody has been awarded to her? * * * It is a well-established rule of law, and, we think, uncontradicted, that the maintenance of children is a matter which the court can adjudicate at different times during the minority of the child."

Again, in *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. Rep. 817, where it appeared that a divorced wife had sued her former husband for expenses incurred by her in the support of their minor children, and also for their future maintenance and education, we sustained a judgment against the father for one-half the amount expended by the mother, and for the payment of a monthly sum in the future, saying: "Clearly, the wife has every right, moral and equitable, to be reimbursed to the amount of a just proportion of the expense she has been put to in the performance of a duty which equally belonged to both, and the technical legal reason

on which the contrary doctrine is based ought not to be permitted to outweigh the evident justice of her claim. On principle we believe the doctrine of the case from this court (*Gibson v. Gibson*, supra) to be right, and, though strongly urged so to do, we must decline to either overrule or modify it."

[2] Appellant insists that neither the *Gibson* nor the *Ditmar* Case is pertinent, as in each of these legal custody of the children had been awarded to the wife in a previous divorce decree. That circumstance does not preclude an application of the principle of those cases to the facts here shown. It is elementary law that the natural duty of a father imposes upon him a legal obligation to provide support for his minor children, and he cannot escape such duty by obtaining a decree of divorce from his nonresident and absent wife, upon constructive service, in an action in which he ignores the existence of his children, for whom he has made no provision, and whom he in effect abandons. The contention of appellant, if followed to its legitimate conclusion, would require us to hold that respondent is without remedy, although appellant has permitted her to retain the custody of the child, has not contributed to its support, and has ignored all parental obligation which the law has imposed upon him. This we cannot do.

The judgment is affirmed.

PARKER, GOSE, CHADWICK, and MOUNT, JJ., concur.

MATSUDA v. HAMMOND et al.

(Supreme Court of Washington. Dec. 27, 1913.)

1. EVIDENCE (§ 123*)—RES GESTÆ.

In an action for assault and battery, the exclusion of evidence that after the assault, and after defendant had started away, plaintiff picked up a paper rack, when he was seized by some one standing near, was not error, since matters pertaining to admission of the *res gestæ*, where not closely related to the principal fact, are within the court's discretion, and their exclusion is not error unless it operates to the prejudice of the complaining party.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

2. NEW TRIAL (§ 162*)—REMISSION OR REDUCTION OF EXCESSIVE RECOVERY.

While a trial court might have set aside a verdict which it believed to be the result of passion and prejudice and granted a new trial, where such belief was based on the size of the verdict and the court found no fault with the jury's conclusion that defendants were liable, it was not error to refuse a new trial on condition that plaintiff accept a judgment in such sum as the court believed the jury were warranted in awarding.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 324-329; Dec. Dig. § 162.*]

3. MASTER AND SERVANT (§ 302*)—LIABILITY FOR SERVANT'S TORTS—SCOPE OF EMPLOYMENT.

The manager of defendant's place of business, believing that a customer had carried

away goods for which he had not paid, went to the customer's place of business, demanded payment, threatening to arrest him for larceny, unless he paid therefor, became abusive, and, upon being told to go away by the customer, assaulted the customer. *Held*, that the assault was not within the scope of his authority, and defendant was not liable, since an employer is liable for the unlawful and criminal acts of his employé only when he directly authorizes them, or ratifies them when committed, or, perhaps, continues the employé in his employment with knowledge that he has committed, or is liable to commit, unlawful acts in the pursuit of his business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217-1221, 1225, 1229; Dec. Dig. § 302.*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Manza Matsuda against Jennie H. Hammond, doing business as Hammond & Company, and another. From a judgment for plaintiff, defendants appeal. Affirmed in part, and reversed and remanded in part with instructions.

Frank H. Kelley and Ralph Woods, both of Tacoma, for appellants. Edwin F. Masterson and John E. Owen, both of Tacoma, for respondent.

FULLERTON, J. This action was brought by the respondent against the appellants to recover damages for personal injuries received in an assault and battery committed upon the respondent's person by the appellant John Bell. For some time prior to the assault, the appellant Hammond conducted a produce commission business in the city of Tacoma. The appellant Bell was her manager, and at the time of the assault had full charge of her business; Mrs. Hammond then being away from Tacoma on a visit to the eastern states. The respondent conducted a fruit and vegetable stall in the Tacoma public market. He traded somewhat extensively at Mrs. Hammond's place of business, always paying cash for the produce purchased. He was at her place of business on the evening preceding the day of the assault making certain purchases, and when he left the appellant Bell conceived the idea that he had carried away a crate of strawberries for which he had not paid. Bell told one of the deliverymen to call upon the respondent on his return that evening and demand payment for the crate. The deliveryman on his return reported that he was not able to collect the amount demanded, as the respondent denied taking the berries. The appellant Bell on the next day went himself to the respondent's place of business and demanded that the respondent pay for the berries, telling him that if he did not pay for them at once he would have him arrested for larceny. The respondent again denied taking the berries, and during the altercation which followed Bell became abusive, whereupon the respondent told him to go away. Bell then struck him in

the face with his fist, breaking his nose, and causing it to bleed somewhat freely. After striking the blow, Bell immediately left the place, going back to his employer's place of business. The injury caused the respondent some suffering, kept him away from his place of business for some three weeks, and left his nose deformed. On the trial of the action the jury returned a verdict in the respondent's favor for the sum of \$556. A motion for a new trial was filed, on the hearing of which the court held the verdict excessive, and gave the respondent an option to take a judgment for \$400 or submit to a new trial, reciting in its order that the verdict "appeared to have been given under the influence of passion and prejudice." The respondent accepted the first alternative, and judgment was entered in his favor for \$400 against both appellants.

[1] The appellants first assign that the court erred in the exclusion of evidence. A witness on behalf of the appellants testified that, after Bell had struck the respondent, the respondent picked up a paper rack on which there was a small roll of wrapping paper, when he was seized by some one standing near. On motion of the respondent, this evidence was withdrawn from the jury on the ground of immateriality. The appellants argue that it was a part of the res gestæ, and hence its exclusion is error under all circumstances. But the rule is not thus broad. While matters pertaining to the res gestæ are usually admissible, they must bear some material relation to the principal fact in question before it is error to exclude them. When they are not closely related, the court may exercise a discretion in their admission or exclusion, and its ruling will be reviewed for error only when it is evident that its ruling has operated to the prejudice of the complaining party. Under the facts disclosed by the record, we are unable to say that the court did not properly exercise its discretion in this instance. Prior to the commission of the act attempted to be shown, the assault and battery had been completed, and the appellant had started away from the scene. The respondent's subsequent conduct could hardly be so closely related to the principal question in issue as to make its exclusion reversible error.

[2] It is next assigned that the court erred in refusing to set aside the verdict after it found that the verdict appeared to have been entered under the influence of passion and prejudice. Unquestionably, the court could without committing reversible error have set the verdict aside and granted a new trial for the reason assigned, but under our practice it was not compulsory upon it to do so. From the order as a whole it is evident that the judge was led to the belief expressed in the order solely because of the size of the verdict, as he found no fault with the conclusion of the jury that the respondent was entitled under the evidence to some recovery.

It was therefore within his province either to grant a new trial unconditionally, or to grant it on the condition that the respondent refused to accept a judgment in such sum as he conceived the jury were warranted in finding as compensation for the injury. In so far therefore as the judgment affects the appellant Bell, we find no reversible error in the record.

[3] On behalf of the appellant Hammond, the additional contention is made that the appellant Bell, when he assaulted and beat the respondent, was not acting within the scope of his authority. This contention we think is well founded. The authority of Bell as shown in the record was to act as general manager of Mrs. Hammond's business. This grant of authority would unquestionably authorize Bell to make collections for goods sold from her place of business, and to exact settlements for goods wrongfully taken therefrom, but it would not, without something more, render her liable for unlawful acts of Bell committed while making such collections or settlements. An employer is liable for the unlawful and criminal acts of his employé only when he directly authorizes them, or ratifies them when committed, or, perhaps, continues an employé in his employment after he has knowledge that the employé has committed, or is liable to commit, unlawful acts while in the pursuit of his employer's business. The liability does not arise from a mere contract of employment to do a legitimate and lawful act.

In *Johanson v. Pioneer Fuel Co.*, 72 Minn. 406, 75 N. W. 719, the corporation owned a coal dock in the city of Duluth, where it stored, cared for, and handled coal, which, in the course of its business, it sold to its customers. It employed a person to attend to its business at the dock, and the employé sold a ton of coal to a purchaser, who took a part of it away at two different times. When the purchaser returned for the remainder, the employé charged him with having procured larger sacks than he had at first used, and of wrongfully attempting thereby to obtain more coal than he was entitled to. This the purchaser denied, whereupon the employé became enraged and assaulted and beat the purchaser. The assault and beating was held to be an independent tort on the part of the employé, not within the scope of his employment, and one for which the employer was not liable. In the course of the opinion the court said: "The time and place of the transaction in this case do not constitute the test of the master's liability. In order to hold the master liable, the act causing the injury must pertain to the duties which the servant was employed to perform. When the relation of master and servant ceases, all liability for the act of the persons employed ceases also. *Wood, Mast. & Serv.* 538. And the test of liability of the master depends upon the question whether the injury was committed

by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it. *Id.* 535. We hold that the assault by McKee upon plaintiff was an independent tort, for which the Pioneer Fuel Company was in no way liable; that the bald statement in the complaint that it was done by the servant while in the course of his employment is not, taken in connection with the other facts stated in the complaint, sufficient to charge the master. *Campbell v. Northern Pac. R. Co.*, 51 Minn. 488, 53 N. W. 768."

In *Collette v. Rebori*, 107 Mo. App. 711, 82 S. W. 552, Rebori employed one Sansone as his agent for collecting bills. An account against Collette which Collette disputed was given him to collect. In endeavoring to make the collection, the agent got into an altercation with the debtor, during the course of which he assaulted and beat him. It was held that the employer was not liable; the court saying: "The best considered cases hold that the master is liable to third persons for the negligent, fraudulent, or tortious acts of his agent or servant when it is shown that the agent or servant was acting within the scope of his employment and that the act complained of was done as a means or for the purpose of doing the work assigned him by the master. To assault and beat a creditor is not a recognized or usual means resorted to for the collection of a debt, nor is it one likely to bring about a settlement of a disputed account. The evidence shows that, when the plaintiff returned to the store for the purpose (as he says) of amicably settling the disputed account and made known to Sansone his purpose, Sansone did not take up the settlement of the account with him, but without the least provocation assaulted and beat him, not for the purpose of settling or collecting the account, but to gratify his private malice against the plaintiff. He was not therefore about his master's business nor acting within the scope of any authority delegated to him by defendant. For these reasons the rule of respondeat superior does not apply." To the same effect are the cases of *Meehan v. Morewood*, 52 Hun, 566, 5 N. Y. Supp. 710; *Lytle v. Crescent News & Hotel Co.*, 27 Tex. Civ. App. 530, 66 S. W. 240; *Murphy v. Buckley Newhall Co.*, 151 App. Div. 520, 136 N. Y. Supp. 309; *Brown v. Boston Ice Co.*, 178 Mass. 108, 59 N. E. 644, 86 Am. St. Rep. 469. See, also, from this court, *Thorburn v. Smith*, 10 Wash. 482, 39 Pac. 124; *Linck v. Matheson*, 63 Wash. 593, 116 Pac. 282.

Cases cited from this and other courts holding common carriers liable for assaults committed upon the persons of passengers by the carrier's employes while in the course of transportation rest on a different principle and are not in point. Carriers owe to their passengers the nondelegable duty of protecting them not only from assaults by their own

employes, but from the assaults of persons generally. The rule rests upon principles of public policy, not on the relation of employer and employe. On the same principle, our own case of *Chase v. Knabel*, 46 Wash. 488, 90 Pac. 642, 12 L. R. A. (N. S.) 1155, is distinguished from the case at bar.

The cases cited holding an employer liable for the acts of an agent employed to retake articles sold on conditional bills of sale, which have not been paid for according to the contract of sale, are not so easily distinguished on principle. The liability seems to be made to rest on the peculiar character of the employment, which from its nature is liable to create disputes and consequent breaches of the peace. But without specially reviewing the cases, we think they may be regarded as exceptions to the general rule announced, rather than as establishing a contrary rule.

The judgment is affirmed as to the appellant Bell, and reversed and remanded, with instructions to dismiss as to the appellant Hammond.

CROW, C. J., and MOUNT, PARKER, and MORRIS, JJ., concur.

THORP v. METZGER, Sheriff, et al.
(Supreme Court of Washington. Dec. 26, 1913.)

1. EXTRADITION (§ 32*)—INTERSTATE—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. U. S. art. 4, § 2, and Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), providing for the return of fugitives from justice, the fugitive must be demanded as such by the executive of the state from which he fled, and the demand must be accompanied by a copy of the indictment, or affidavit made before a magistrate, charging such fugitive with committing a crime in the demanding state, and a copy of the indictment, or affidavit, must be certified to by the executive of the demanding state.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 36-38; Dec. Dig. § 32.*]

2. HABEAS CORPUS (§ 56*)—RETURN—DEMUR-
RER—EFFECT.

A petitioner for a writ of habeas corpus, who elects to stand on his demurrer to the return, thereby admits all the allegations thereof.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 50; Dec. Dig. § 56.*]

3. EXTRADITION (§ 36*)—INTERSTATE—WAR-
RANT—SUFFICIENCY.

An extradition warrant, which alleges that accused was charged in the demanding state with the crime of buying and receiving stolen goods; that he was a fugitive from the justice of such state; that a demand had been made by the Governor thereof that accused be arrested and delivered to an agent authorized to receive him; that the demand of the demanding state was accompanied by a copy of the complaint, information, or indictment whereby accused was charged with the crime stated, and that the indictment, complaint, or information was certified by the Governor of the demanding state to be authentic, was sufficient as against the objection that it did not recite that accused was charged with the crime of receiving stolen

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property knowingly, and he could not obtain his release on habeas corpus.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 40-43; Dec. Dig. § 38.*]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Habeas corpus by Willis O. Thorp against Joseph Metzger, Sheriff of Yakima County, and another. From a judgment dismissing the petition, and remanding petitioner to the custody of respondents, petitioner appeals. Affirmed.

H. J. Snively, of North Yakima, for appellant. W. V. Tanner and John M. Wilson, both of Olympia, for respondents.

MAIN, J. The appellant, William O. Thorp, was arrested in Yakima county, this state, by virtue of an executive warrant issued by the Governor of the state of Washington upon a requisition from the Governor of the state of Oregon. Omitting the formal parts, this warrant was as follows: "Whereas, It has been represented to me by His Excellency, Oswald West, Governor of the state of Oregon, that Coleman Calhoun and William Thorp stand charged in said state with the crime of buying and receiving stolen property committed in the county of Crook, in said state and have taken refuge in the state of Washington; and whereas, the said Governor of the state of Oregon has, pursuant to the Constitution and laws of the United States, demanded of me that I cause the said Coleman Calhoun and William Thorp to be arrested and delivered to W. E. Van Allen, agent authorized to receive them into his custody and convey them back to said state of Oregon; and whereas, said representation and demand are accompanied by affidavits, complaint, information, indictment and warrant whereby the said Coleman Calhoun and William Thorp are charged with the said crime, and being a fugitive from the justice of said state, and having taken refuge in the state of Washington, which are certified by said Governor of Oregon to be duly authenticated: Now therefore, I, Ernest Lister, Governor of the state of Washington, do hereby authorize and empower W. E. Van Allen, the agent named in said demand, to take the said Coleman Calhoun and William Thorp wherever they may be found in this state, and transfer them to the line thereof at the expense of the state of Oregon, and I hereby command all civil officers within the said state of Washington to afford all needful assistance for the execution of this warrant. In testimony whereof, I have hereunto set my hand and caused the seal of said state to be affixed at Olympia, this seventh day of May, A. D. 1913." After the appellant was taken into custody, he petitioned the superior court for a writ of habeas corpus. The

writ was issued, requiring the respondents to produce the body of the appellant in court at a time stated, and make return to the writ. The return set out a copy of the executive warrant, by virtue of which the appellant had been arrested. To this return a demurrer was interposed, which was overruled. The appellant elected to stand on the demurrer, and refused to plead further. The court thereupon entered a judgment dismissing the petition and remanding the appellant to the custody of the respondents. From this judgment the appeal is prosecuted.

The only question here presented is whether the return of the respondents is sufficient to justify the extradition of the appellant.

[1] The power and authority to extradite is found in section 2 of article 4 of the Constitution of the United States, which provides: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The procedure necessary to exercise the power conferred by the Constitution is found in section 5278 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3597), which provides: "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory, to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory." By this constitutional provision and congressional enactment, three things are necessary in order to authorize the executive of one state to order the return of a fugitive from justice to the state in which the crime was committed: First, the accused must be demanded as a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fugitive from justice by the executive of the state from which he fled; second, the demand must be accompanied by a copy of the indictment, or an affidavit made before a magistrate, charging the fugitive with having committed a crime in the demanding state; and, third, a copy of the indictment or affidavit must be certified to by the executive of the demanding state.

In *Re Foye*, 21 Wash. 250, 57 Pac. 825, speaking of the above-mentioned constitutional provision and the act of Congress, it was said: "It will be observed that there are three things requisite in order to authorize the executive authority of a state to extradite a fugitive from justice, and they are these: First, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, such demand must be accompanied by a copy of an indictment found, or an affidavit made, before a magistrate charging the fugitive with having committed a crime in the demanding state; and, third, such copy of the indictment or affidavit must be certified by the executive of the demanding state to be authentic. An extradition warrant, in order to be valid, should show upon its face a compliance with these requisites and necessary conditions."

[2, 3] In the present case the executive warrant, which was made a part of the return, recited: First, that the appellant was charged in the state of Oregon with the crime of buying and receiving stolen property; second, that he was a fugitive from justice from the state in which the crime is alleged to have been committed; third, that a demand had been made by the Governor of the state of Oregon that the appellant be arrested and delivered to one W. E. Van Allen, the agent authorized to receive him; fourth, that the representation and demand of the state of Oregon was accompanied by a copy of the complaint, information, or indictment whereby the appellant was charged with the crime stated; and, fifth, that the indictment, complaint, or information accompanying the demand were certified by the Governor of Oregon to be authentic. The appellant, by electing to stand on his demurrer to the return, thereby admitted all the allegations thereof.

It is argued that since the warrant only recites that the appellant is charged with the crime of receiving stolen property, and not with "knowingly" receiving such property, the superior court erroneously dismissed the proceeding. This argument is based on the assumption that, a copy of the indictment or information not being made a part of the return, it was necessary that the executive warrant define the crime with which the appellant was charged. With this contention we cannot agree. No such requirement can be found in either the section

of the Constitution or the act of Congress above quoted. The warrant recited that the appellant was charged with a crime. The demurrer admitted this fact. The warrant is sufficient when it recites the requirements of the law. In *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, speaking of the requirements of an executive warrant in an extradition proceeding, it was said: "It is enough that the warrant recites what the law requires. We cannot add to it new conditions. The argument founded upon the characteristics of ordinary criminal warrants for the apprehension of persons accused, and of indictments for specific crimes, has no application to the executive warrant in cases of extradition. * * * Nothing in its inherent nature or the purpose which it sub-serves requires that it should do more than show by an explicit statement that the person arrested is charged with a crime committed in the demanding state."

The judgment will be affirmed.

CROW, C. J., and ELLIS, CHADWICK, and GOSE, JJ., concur.

CALHOUN v. METZGER, Sheriff, et al.
(Supreme Court of Washington. Dec. 26, 1913.)

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge. Habeas corpus by W. C. Calhoun against Joseph Metzger, Sheriff of Yakima County, and another. From a judgment dismissing the petition, and remanding accused to the custody of respondents, he appeals. Affirmed.

H. J. Snively, of North Yakima, for appellant. W. V. Tanner and John M. Wilson, both of Olympia, for respondents.

PER CURIAM. This case is controlled by the decision in the case of *Thorp v. Metzger*, 137 Pac. 330, just decided. In fact, the executive warrant which was there considered provided for the arrest and extradition of the appellant herein as well as the appellant in that case.

The judgment will be affirmed.

MICHAELSON v. OVERMEYER.
(Supreme Court of Washington. Dec. 27, 1913.)

1. **APPEAL AND ERROR (§§ 345, 564*)—STATEMENT OF FACTS—TIME FOR FILING.**

The time within which to take an appeal and to file a statement of facts begins to run from the date of the denial of the motion for a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1895, 1896, 2501-2506, 2555-2559; Dec. Dig. §§ 345, 564.*]

2. **APPEAL AND ERROR (§ 564*)—STATEMENT OF FACTS—EXTENSION OF TIME FOR FILING.**

Under Rem. & Bal. Code, § 393, providing that the statement of facts must be filed and served within 30 days after the time begins to run within which an appeal may be taken, and that the time may be extended for 60 days on notice to the adverse party, a statement of facts not filed until September 4th must be stricken,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

where the motion for new trial was denied July 11th, and an order extending the time was made without notice to the appellee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

3. APPEAL AND ERROR (§ 564*)—STATEMENT OF FACTS—DUTY OF APPELLANT.

Though the court stenographer obtained an order extending the time for filing a statement of facts, that does not relieve the appellant from complying with the statute by giving notice and showing cause for the extension.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

4. APPEAL AND ERROR (§ 564*)—STATEMENT OF FACTS—DILIGENCE.

A failure to file a statement of facts within the time fixed by statute will not be excused because of the appellant's diligence in otherwise perfecting his appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

5. APPEAL AND ERROR (§ 557*)—STATEMENT OF FACTS—NECESSITY.

Acts 1913, c. 116, § 2, relating to abstracts of statements of facts, does not obviate the necessity for a statement of facts; section 2 expressly declaring that nothing therein contained shall alter the present manner of settling statements of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2480-2482; Dec. Dig. § 557.*]

6. APPEAL AND ERROR (§ 227*)—STATEMENT OF FACTS—OBJECTIONS—TIME OF MAKING.

Where the time for filing a statement of facts was extended by a void order, the validity of the order and the statement of facts filed pursuant thereto may be attacked for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 227.*]

Department 2. Appeal from Superior Court, Pacific County; Edward H. Wright, Judge.

Action by Alexander Michaelson against George W. Overmeyer. From a judgment for plaintiff, defendant appeals. On motion to strike the statement of facts and affirm the judgment. Motion granted.

John W. Roberts, of Seattle, for appellant. John T. Welsh and Robert G. Chambers, both of Raymond, for respondent.

MOUNT, J. The respondent moves to strike the statement of facts in this case upon the ground that it was not filed and served within time, and to affirm the judgment, upon the ground that without the statement of facts there are no questions which can be passed upon by this court. The cause was originally tried in the superior court to a jury. A verdict was returned on June 25, 1913. On June 27th motions for new trial and for judgment non obstante veredicto were filed by the appellant. On the same day a judgment was entered in favor of the plaintiff. The motions for new trial and for judgment non obstante veredicto were denied by the court on July 11, 1913. On July 28, 1913,

the court, upon an ex parte application and without notice to the respondent entered an order extending the time for serving and filing a statement of facts until September 10th. On September 4, 1913, the statement of facts was served and filed. Thereafter, no amendments being proposed, it was certified by the court.

[1, 2] The time within which to take an appeal and to file a statement of facts begins to run from the date of the denial of the motion for a new trial. *Chilcott v. Globe Navigation Co.*, 49 Wash. 302, 95 Pac. 264.

The statute at section 393, Rem. & Bal. Code, provides that the "statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause. * * * Provided, that the time herein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, * * * by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. * * *"

No notice was given to the adverse party, but an ex parte application was made, and the court, without notice having been given to the adverse party, made an order extending the time. This order was clearly void under numerous decisions of this court.

In *McQuesten v. Morrill*, 12 Wash. 335, at page 339, 41 Pac. 56, at page 58, we said: "The intention of the law is evidently, under this statute, that parties shall diligently prosecute their appeals, and there should be no extension of the time for a settlement of the facts upon which the appeal is to be based, in whole or in part, unless good cause is shown therefor; and this showing should not be made upon an ex parte application or hearing if notice can reasonably be given." See, also, *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561; *Harpel v. Harpel*, 31 Wash. 295, 71 Pac. 1010; *State v. Aschenbrenner*, 45 Wash. 125, 87 Pac. 1118; *Williams v. Spokane*, 67 Wash. 368, 121 Pac. 836; *Russell v. Mitchell*, 61 Wash. 178, 112 Pac. 250. Under the rule announced in these cases it is plain that the motion to strike the statement of facts must be sustained.

[3-5] The appellant resists the motion upon the ground that the order for the extension of time was obtained by the official stenographer of the court; that the appeal has been diligently prosecuted; that the act of 1913 relating to abstracts of the statement of facts obviates the necessity for a statement of facts; and also upon the ground that the order extending the time should have been attacked in the superior court. The fact that the stenographer obtained the order did not relieve the appellant from complying with the statute and giving notice and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

showing cause before the court was authorized to make the order. It is true that the appellant has been diligent in prosecuting the appeal except in the matter of filing and serving the statement of facts. The act of 1913, p. 350, § 2, expressly provides that nothing therein contained shall alter the present manner of settling statements of facts.

[§] It has not heretofore been the practice to require these void orders to be attacked in the superior court. We have in the cases above cited, where such orders have been made, treated them as void, which they no doubt are. The statement of facts must therefore be stricken.

Inasmuch as no questions are raised upon the pleadings, or can be considered by the court without the statement of facts, the judgment must be affirmed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

BEST v. FELGER et al.

(Supreme Court of Washington. Dec. 27, 1913.)

1. CHATTEL MORTGAGES (§ 154*)—RECORDATION—PURCHASE IN GOOD FAITH.

A subsequent purchaser or mortgagee who takes for value is one in good faith within Rem. & Bal. Code, § 3862, declaring that every mortgage filed shall be considered sufficient notice but shall cease to be notice, as against creditors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years the mortgagee, his agent or attorney, shall file an affidavit setting forth the amount due.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 263, 269; Dec. Dig. § 154.*]

2. CHATTEL MORTGAGES (§ 154*)—RECORDATION—NOTICE—AFFIDAVIT.

Under Rem. & Bal. Code, § 3862, providing that mortgages filed shall cease to be notice, as against creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, after the expiration of the time the mortgage becomes due, unless the mortgagee, his agent or attorney, shall make and file within two years thereafter an affidavit setting forth the amount due on the mortgage, a subsequent chattel mortgagee, who purchased in good faith, will take in priority over the original mortgagee, where no such affidavit was filed within the two years provided, even though the second mortgagee took within the period in which the constructive notice might have been extended by the filing of the affidavit.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 263, 269; Dec. Dig. § 154.*]

Department 2. Appeal from Superior Court, King County; Thos. E. Grady, Judge.

Action by O. S. Best, as executor of Caroline Merryman, deceased, against W. W. Felger and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Van Dyke & Thomas, of Seattle, for appellant. Reynolds, Ballinger & Hutson, of Seattle, for respondents.

PARKER, J. The plaintiff, as executor, seeks foreclosure of a chattel mortgage given to Caroline Merryman during her lifetime as against the claims of the defendant W. W. Felger, who is the holder of a chattel mortgage upon the same property subsequently executed by the same grantor. A trial in the superior court resulted in a decree denying a foreclosure as against the defendant Felger upon the ground that no affidavit setting forth the amount due upon the Merryman mortgage was filed in the office of the county auditor within two years after the maturity of the debt secured thereby, nor at any time, as required by section 3862, Rem. & Bal. Code. From this disposition of the cause touching the rights of the defendant Felger, the plaintiff has appealed to this court. In so far as the decree and judgment deals with rights of the plaintiff as against other defendants, it is not drawn in question upon this appeal.

The controlling facts are not in dispute. On July 1, 1909, Andrew J. Reed, the owner of the property here involved, executed and delivered to Caroline Merryman a chattel mortgage to secure an indebtedness evidenced by three promissory notes maturing on and prior to May 1, 1910; the indebtedness and the dates of its maturity being plainly so shown upon the face of the mortgage. On August 15, 1910, after the maturity of the whole of the indebtedness secured by the Merryman mortgage, Andrew J. Reed executed and delivered to respondent Felger another mortgage upon the same property to secure an indebtedness evidenced by a promissory note for the sum of \$1,100 then loaned by respondent Felger to Reed. Both of these mortgages were duly and timely filed for record in the office of the county auditor. On May 27th, more than two years after the maturity of all of the indebtedness secured by the mortgage given to Caroline Merryman, she having died in the meantime, appellant, as her executor, commenced this action to foreclose the same as against respondent Felger, as well as others claiming interest in the property.

[1, 2] There has never been filed in the office of the county auditor any affidavit setting forth the amount due upon that mortgage, as provided in section 3862, Rem. & Bal. Code, which reads as follows: "Every mortgage filed and indexed in pursuance of this act shall be held and considered to be full and sufficient notice to all the world, of existence and conditions thereof, but shall cease to be notice, as against creditors of the mortgagors and subsequent purchasers and mortgagees in good faith, after the expiration of the time such mortgage becomes due, unless before the expiration of two years after the time such mortgage becomes due, the mortgagee, his agent or attorney, shall make and file as aforesaid an affidavit setting forth the amount due upon the mort-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gage, which affidavit shall be annexed to the instrument to which it relates and the auditor shall indorse on said affidavit the time it was filed."

Counsel for appellant contend in substance that, since Reed's indebtedness to respondent was incurred, and the mortgage securing the same given, before the expiration of two years following the maturity of the Merryman mortgage, respondent does not belong to the class of persons specified in section 3662 above quoted, who may claim rights superior to the Merryman mortgage, notwithstanding the Merryman mortgage has not been renewed by affidavit as required by that section. Counsel invoke the general rule as stated in the text of 6 Cyc. p. 1095, as follows: "It is usually held that a person who purchases mortgaged property within the period when the mortgage is valid without refiling cannot later object that the instrument was not properly filed at the time when renewal should have been made, for the term 'subsequent purchaser' in a renewal statute means purchasers subsequent to the time of the refiling of the mortgage." A number of decisions of the courts are cited and relied upon by counsel, from which this general rule is deduced. They all, however, deal with the rights of parties under statutes in words or in substance as follows: "Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within 30 days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent or attorney, shall make an affidavit," etc. This language is quoted from the opinion in *Howard v. National Bank*, 44 Kan. 549, 552, 24 Pac. 983, 984 (10 L. R. A. 537). The substance of the holding in that decision is stated in the syllabus as follows: "The words 'subsequent purchasers' and 'subsequent mortgagees in good faith,' in section 3905, mean only purchasers and mortgagees who purchased or took their mortgages after the expiration of the year from the filing of the mortgage."

The holding of all the other decisions to which our attention has been called are in harmony with this view, but all of them deal with statutes either identical or in substance the same as the Kansas statute. No decision has come to our notice dealing with the rights of parties arising subsequent to a first mortgage under a statute like ours. Under the Kansas statute, the mortgage expires as to those subsequently acquiring rights, upon the "expiration of one year after the filing thereof," in the absence of the filing of the renewal affidavit 30 days preceding such expiration, while under our statute the mortgage expires as to those subsequently acquiring rights upon the "ex-

piration of the time such mortgage becomes due," in the absence of the filing of the renewal affidavit within two years thereafter. In the case before us, respondent Felger acquired his rights under the second mortgage, when he made the loan to Reed, several months after the expiration of the time the first mortgage became due, which mortgage, we have noticed, has never been renewed by affidavit as required by statute, though over two years elapsed after its maturity before it was sought to be foreclosed by this action. This situation, it seems to us, answers the question of the superiority of the rights of the respective mortgagees in favor of respondent, unless the fact that the Merryman mortgage was of record and subject to renewal at the time the second one was given to respondent continued the Merryman mortgage in force as against him. But here we are met with this distinction between the Kansas statute and our own: By the provisions of the Kansas statute, under no circumstances can a subsequent mortgagee's rights intervene or supersede the rights of the first mortgagee before the time specified as the limit of the first mortgagee's rights, because the renewal affidavit, under that statute, must be filed 30 days before the expiration of the mortgage, which, as we have noticed, is one year after its filing. While under our statute the mortgagee has two years after its maturity during which period his mortgage will remain in force if renewed by filing the affidavit within that period, our statute recognizes the possible good faith of those acquiring rights after maturity of the prior mortgage and before the expiration of two years thereafter. It seems to us that, in view of these provisions, a subsequent purchaser or mortgagee for value, and that, we think, is as far as his good faith need extend, may acquire rights subsequent to the maturity of a prior mortgage, subject only to the possibility of such prior mortgage being thereafter renewed by affidavit within two years after its maturity. We are of the opinion that our statute is in substance a statute of limitation in so far as the rights of purchasers and mortgagees who acquire rights in the property after the maturity of the first mortgage is concerned, and that as to such there can be no renewal of the prior mortgage after the expiration of two years following its maturity.

The judgment is affirmed.

CROW, C. J., and FULLERTON, MOUNT, and MORRIS, JJ., concur.

STATE v. PETTIT et al.

(Supreme Court of Washington. Dec. 26, 1913.)
1. CRIMINAL LAW (§ 364*)—RES GESTE—LARCENY.

In a prosecution for larceny, evidence that, after the prosecuting witness had deposited money with accused, accused made purchases

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of valuable personal property is admissible as part of the *res gestæ*; the actions, conduct, and conversation of accused being competent to show her motives and intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

2. CRIMINAL LAW (§ 423*)—CONSPIRATORS.

One who enters into a conspiracy to commit larceny is deemed a party to every act done by the others in the furtherance of the common design, whether before or after the property is actually asported.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 989-1001; Dec. Dig. § 423.*]

3. CRIMINAL LAW (§ 351*)—EVIDENCE—FLIGHT.

The attempt of a party immediately following the commission of a crime to leave the jurisdiction is competent to show a guilty knowledge, and is received as a qualified admission of guilt; its weight being for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.*]

4. CRIMINAL LAW (§ 351*)—FLIGHT—WHAT CONSTITUTES.

A departure from the place of a crime, induced by fear of arrest, is a flight, and may be shown as an implied admission, there being no nice distinctions as to manner or method of flight; hence an instruction on flight need not require the jury to find the idea of escape and concealment for the purpose of avoiding arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 776, 778-785, 930-932; Dec. Dig. § 351.*]

5. CRIMINAL LAW (§ 829*)—INSTRUCTIONS.

The refusal of a special requested instruction covered by the instructions given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Department 1. Appeal from Superior Court, Snohomish County; John A. Kellogg, Judge.

C. M. Pettit and Florence Pettit were indicted for larceny, and the last-named defendant, after a separate trial, was convicted, and she appeals. Affirmed.

Morris & Shipley, of Seattle, and Hulbert & Husted, of Everett, for appellant. R. J. Faussett and Joseph H. Smith, both of Everett, for the State.

CHADWICK, J. Appellant was jointly indicted with her husband upon a charge of grand larceny. After a separate trial and a judgment of conviction, she has appealed to this court.

The evidence is substantially the same as that given at the trial of her husband, and we will not undertake to restate the facts, but content ourselves by referring to the case of *State v. Pettit*, 133 Pac. 1014. All of the questions raised in this case were settled in our former opinion except the following:

[1] The sum of money originally possessed by Mrs. Martin, the prosecuting witness, was \$3,197. The amount deposited and first accounted for by Mrs. Pettit was \$3,000. The

court allowed the prosecuting witness to testify that after the time of the deposit and the time when the note was given, Mrs. Pettit had made purchases of valuable personal property. We think that this evidence was properly received as a part of the *res gestæ*. The actions and conduct and conversation of the parties from the time the money first came into the possession of the appellant was competent to show the motive and intent of appellant, and no error can be predicated on the ruling of the court.

[2] It is also contended that the court erred in admitting the acts and conduct of C. M. Pettit, the codefendant, after the time of the larceny. We think this evidence was properly admitted. The evidence is ample to sustain the theory of conspiracy, and under the authority of the husband's case, *supra*, it may be laid down as a rule that where there is a concert of action and a common criminal design, every act done in furtherance thereof, whether before or after the time the property was actually asported, is competent and relevant.

[3, 4] It is contended that the court misdirected the jury in that it submitted the question of the flight of the appellant after the crime is alleged to have been committed. Counsel insists that the instruction tells the jury that flight is no more than a departure from the locality of the commission of the crime and from the place of residence of the accused, when induced or caused in any degree by fear of arrest or consciousness of guilt; that this definition leaves out of consideration the idea of escape and concealment for the purpose of avoiding the arrest, which is the essential characteristic of the term "flight" as used in criminal law. We had not hitherto understood that the word "flight" had any such restricted meaning, but, if so, we think a departure from the place of the crime induced by fear of arrest is sufficient to satisfy the law. So far as we have been able to find, the books make no nice or refined distinction as to the manner or method of a flight. It may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. The conduct of the party charged immediately following the commission of a crime is competent to show a guilty knowledge, and is received as a qualified admission of guilt. Its evidentiary weight is a question for the jury. Jones on Evidence (2d Ed.) § 287; 12 Cyc. 395. The court's definition is broad enough to cover the objections made by counsel. In such cases the verdict cannot be measured by what any one witness says. Nor is the jury bound to accept a defendant's explanation as to his motive, but they may consider all the facts and circumstances, and from them draw their own conclusions. When so considered, we have no doubt of the fact that appellant did flee the jurisdiction of the courts of this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state, and that her purpose was to avoid arrest. It would be carrying the law too far to say that in such cases a jury would have to go further and find that there was an added purpose of escape and concealment for the purpose of avoiding arrest.

Objections are also made to certain instructions given by the court. We have read the instructions with care, and are satisfied that, when considered as a whole, they fairly state the law of the case, and that appellant has not been prejudiced thereby.

[5] Error is predicated on the refusal of the court to give an instruction requested by the appellant and designed to present to the jury the theory of contract; that is, that if the jury should find from the evidence that the money was borrowed, that appellant should be acquitted. While the court refused the instruction requested by the appellant, an instruction fully covering defendant's theory of the case was given by the court. The trial court is not bound to give instructions in the form requested. Its duty is to state the law of the case, and this it did.

Finding no error, the judgment is affirmed.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

REVILLA FISH PRODUCTS CO. v. AMERICAN-HAWAIIAN S. S. CO.

(Supreme Court of Washington. Dec. 20, 1913.)

1. CARRIERS (§§ 120, 121*)—CONTRACTS—ACTION FOR BREACH—DEFENSES—CONTRIBUTORY NEGLIGENCE.

A shipper suing a carrier for breach of contract of carriage, resulting in a loss of the freight, cannot recover where the loss was occasioned by reason of shipping the freight in improper packages, or because of the inherent qualities or defects in the freight, not on the theory of contributory negligence, but because these exceptions abrogate the common-law liability of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 486, 531-536; Dec. Dig. §§ 120, 121.*]

2. TRIAL (§ 242*)—INSTRUCTIONS—MISLEADING AND CONFUSING INSTRUCTIONS.

Instructions, in an action for breach of contract of carriage of freight, held confusing and misleading because contradictory, and because the court withdrew an instruction, and refused to state with respect to another instruction that it was the law, or that it was not the law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.*]

3. TRIAL (§ 263*)—INSTRUCTIONS—REQUESTS.

It is bad practice for the court to read to the jury requested instructions, and not determine until thereafter whether they should be given or not, for, when such course is followed, it is difficult for the jury to determine what instructions are given and what rejected.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 662, 663; Dec. Dig. § 263.*]

4. CARRIERS (§ 121*)—LOSS OF FREIGHT—LIABILITY—EVIDENCE.

A shipper is entitled to recover for loss of freight during transportation where he establishes the loss, unless the carrier is excused from liability by reason that the freight was not shipped in proper containers, which caused the loss, or unless the bill of lading exempted it from liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 531-536; Dec. Dig. § 121.*]

5. CARRIERS (§ 137*)—LOSS OF FREIGHT—EVIDENCE—INSTRUCTIONS.

Where freight was placed on board a vessel for transportation before the bill of lading was issued, but there was evidence justifying the inference that the contract of shipment was made prior thereto by correspondence between the parties, an instruction, in an action for loss of the freight during transportation, that, to defeat a recovery, the jury must find that the bill of lading was received by the shipper at the time of the delivery of the freight, unless it was to be sent to him, was erroneous, for the jury must determine whether under the facts the shipper's request for a bill of lading and his general knowledge of the stipulations contained therein made the bill evidence of the contract, or whether the prior correspondence between the parties evidenced the contract, in which case the stipulations in the bill of lading, not in conformity with the prior contract, could not be relied on by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 594, 595; Dec. Dig. § 137.*]

6. CARRIERS (§ 53*)—CONTRACTS OF CARRIAGE—MODIFICATIONS.

A contract of carriage made before the freight was loaded may be modified by the parties as evidenced by a bill of lading issued thereafter; but the bill of lading, to have that effect, must have been assented to by the shipper as the contract under which the freight was to be carried.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 131, 165-167; Dec. Dig. § 53.*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by the Revilla Fish Products Company against the American-Hawaiian Steamship Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

Arctander, Halls & Jacobsen, of Seattle, for appellant. Hughes, McMicken, Dorell & Ramsey and Otto B. Rupp, all of Seattle, for respondent.

MORRIS, J. Appeal from a judgment entered upon verdict, in an action brought to recover damages for breach of contract of carriage of 155 barrels of fish oil from Seattle to New York. The respondent was located at Ketchikan, Alaska, and between October 21, 1911, and November 15, 1911, several cablegrams and letters passed between the parties relative to the terms and conditions of the shipment between Seattle and New York, in which the amount of the shipment, the size, weight, and measurement of the barrels in which it was to be contained, and the rate to be charged were arranged. These matters being determined, the oil was shipped on the steamer Bertha at Ketchikan,

and arrived at Seattle on November 15th. On arrival at Seattle some of the barrels were found to be leaking. These were re-coopered, and the oil was then loaded on the steamer Virginian, which sailed on November 30th. On December 2d respondent mailed a bill of lading to appellant at Ketchikan, which was received on December 11th. The shipment was in a bad condition on its arrival at New York, and this action was brought seeking to charge respondent with the loss. Respondent sought to show in defense (1) that the loss was due to improper and insufficient containers, and (2) that it was exempt from liability by reason of the exceptions contained in the bill of lading. To these defenses, appellant replied, and the cause went to trial, resulting in a verdict for respondent.

[1-3] A great many errors are charged against the lower court. We will, however, in view of the conclusions we have reached, consider only a few of them. The record discloses the following as a part of and occurring during the reading of the instructions:

"If you find from the evidence that plaintiff was guilty of negligence in shipping the oil in containers such as the evidence shows were used, this does *not* prevent plaintiff's recovery in this case, if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss. I will read that over: If you find from the evidence that plaintiff was guilty of negligence in shipping the oil in containers such as the evidence shows were used, this does prevent plaintiff's recovery in this case, if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss.

"Mr. Arctander: I suppose your honor means there, if you change it in that way, that it should be that—

"The Court (interrupting): That, if you are guilty of negligence, and they are guilty of negligence, and you both contributed to it, and by that means the oil was lost, you cannot recover.

"Mr. Arctander: But your honor means to read instead of 'if' the word 'unless'—'in this case, unless you also find from the evidence that defendant's way of—don't you?

"The Court: Where?

"Mr. Arctander: In the fourth line; 'in this case unless you also find from the evidence'—you say that it does prevent plaintiff's recovery unless—

"The Court (interrupting): 'If you find from the evidence that plaintiff was guilty of negligence in shipping the oil in containers such as the evidence shows were used, this does prevent plaintiff's recovery in this case, if you also find from the evidence that defendant's way of stowing and carrying the

barrels on end, provided you find that to be the case, contributed in a material degree to the loss.'

"Mr. Arctander: Well, that should be 'unless' instead of 'if' then; otherwise there is no sense in it.

"The Court: How is that? Where is the 'if' do you think?

"Mr. Arctander: In the fourth line, your honor—it does prevent his recovery, unless the defendant, by stowing them on end, materially contributed to the loss.' That is the way it should read, shouldn't it?

"The Court: No; I guess that reads all right.

"Mr. Arctander: All right.

"The Court (continuing): 'This does prevent plaintiff's recovery in this case, if you also find from the evidence that defendant's way of stowing and carrying the barrels on end, provided you find that to be the case, contributed in a material degree to the loss.' That is what I wanted to say. If you are both guilty of negligence in the manner of handling this cargo, you cannot recover. If you find from the evidence that the oil was delivered to defendant in Seattle in good order and condition, that on its arrival in New York City there was a loss of 2,694 gallons of oil, then and in that case the presumption arises that the loss was caused by the negligence of the defendant. I denied that instruction, and give you an exception.

"Mr. Rupp: In other words, that the jury may understand it, you say that is not the law.

"The Court: Well, I refuse that instruction.

"Mr. Rupp: Yes; but you read it to them, and they might get it—

"The Court (interrupting): I withdraw that from the jury. I will read it so that you can see what I have withdrawn: 'If you find from the evidence that the oil was delivered to defendant in Seattle in good order and condition, that on its arrival in New York City there was a loss of 2,694 gallons of oil, then and in that case the presumption arises that the loss was caused by the negligence of the defendant.' Now, I have withdrawn that instruction from the jury.

"Mr. Rupp: They understand that that is not given by you as the law?

"The Court: It is marked 'denied,' not given by me as the law. If you find from the evidence that the 155 barrels of oil were delivered to defendant in Seattle in good order and condition, and that on arrival in New York one barrel was missing entirely, one was broken to pieces, a great number of barrels entirely or partially empty, while a considerable number of them was in the exact condition as to weight as when received in Seattle, provided that, in your judgment, such facts are established by the evidence, then and in that case such facts, if they be facts, raise the presumption that the loss of

the oil was caused by the negligence of the defendant. I don't think so; I will deny that also.

"Mr. Rupp: In other words, if I may interrupt you, you want to instruct the jury that that is not the law?

"The Court: I do not instruct them that that is the law. You can argue that when you come to argue the case.

"Mr. Rupp: Well, I wanted to make it plain to the jury that you did not tell them that was the law.

"The Court: Yes; I do not tell the jury that is the law. I am not permitted to comment on these matters.

"Mr. Rupp: I recognize that.

"The Court: I can't stop to explain why."

[4] This, it seems to us, was so confusing and misleading to the jury that it may safely be assumed that the average juror would, at the conclusion of the court's charge, have at best a very vague conception and understanding of the law that was to govern him in his determination. The trial judge first says, if the evidence discloses that appellant was negligent in shipping the oil in the containers used, "this does not prevent" recovery, if it is also found that respondent improperly stowed and carried the barrels, and thus contributed to the loss. This instruction is then re-read, leaving out the word "not," thus giving a contrary meaning to the instruction from that first read, and leaving it confusing and unintelligible, unless the jury could comprehend that the court was endeavoring to charge them upon the law of contributory negligence, which rule, as this was an action upon a contract, and not upon tort, had no place in the case except in so far as it is the law that, in cases of this kind, the shipper cannot recover where the loss is occasioned by reason of shipping goods in improper containers or packages or of inherent qualities or defects in the goods themselves, not because of any theory of contributory negligence, but because these exceptions abrogate the common-law liability of the carrier. The court then proceeds to read instructions, and enters into a colloquy with counsel as to whether such instruction as read is a correct statement of the law. The first of these instructions is then withdrawn; the court evidently concluding that it is not the law. The second, however, is not withdrawn; the court contenting himself with saying that he does not tell the jury it is the law, neither does he tell them it is not the law. It is bad practice—sufficient, it seems to us, to endanger any verdict—for the trial judge to read instructions to the jury, and not determine until after they are read whether they should be given or not, and, when this course is followed throughout the charge, it must be difficult for the jury to say what must be accepted and what must be rejected, especially in view of what was said to the jury in other instructions, in which

they were told that, in the absence of exempting stipulations, the respondent would be liable for the loss, unless the loss was due *solely* to the negligence of the shipper. Again, an instruction is given that, in order to defeat recovery, it must appear that the oil was shipped in improper containers, and that this *alone* was the cause of the loss, which must be shown by a preponderance of the evidence. In another instance the jury is told that, if the containers were unsuitable or insufficient by reason of the route or changes of climate, the appellant could not recover. Under this instruction the mere fact is sufficient to defeat recovery. Under another this would not defeat recovery, unless it was the *sole* cause of the loss. Under a third instruction it would defeat recovery if it *contributed to*, or was *one of*, the facts occasioning the loss. It seems to us that nothing more need be said to establish the confusing and contradictory features of these instructions. The issues in this case were simple, and a few well chosen instructions could have submitted to the jury all that they were called upon to decide. The appellant was entitled to recover, having established its loss, unless the respondent was excused from liability by reason of the fact that the oil was not shipped in proper containers, which caused the loss, or it had, by reason of the bill of lading, exempted itself from the cause of the damage.

[5, 6] And this brings us to another question necessary to be discussed. It is claimed that the court erred in admitting the bill of lading in evidence; it being appellant's contention that the bill of lading was no part of the contract nor any evidence thereof. This claim is based upon the fact that the bill of lading was not issued until after the oil was loaded upon the Virginian, and the voyage begun. We think, however, because of what will hereafter be referred to, this fact is not alone determinative of the question, and that issue has presented a question of fact which must determine the effect to be given the bill of lading. The appellant, in one of its letters, requested: "Please have bill of lading made out, sending us one original and two first copies." In another it said: "We are as yet without bills of lading from you which we requested you to send us." The president and manager of appellant testified that he received the bill of lading, and that he requested the same because, the oil having been sold "cash against document," it was necessary to attach a bill of lading to the draft in order to obtain the purchase price of the oil; that he did not read the stipulations on the back of the bill of lading, but that he had been in the habit of shipping goods under bills of lading, and in a general way was familiar with the stipulations made use of by shipping companies in the effort to exempt or lessen their liability. This evidence, it seems to us, presents some questions of fact as well

as law, and that the court could not under the circumstances determine the effect to be given this bill of lading. The court charged the jury that, in giving effect to the bill of lading, they were to be governed by four considerations, three of which are immaterial to this feature of our discussion. The fourth was that, in order to defeat appellant's recovery, the jury must be satisfied that the bill of lading was received by appellant at the time of the delivery of the oil to the respondent, and not after the control had passed from appellant to respondent, nor after the transportation had begun, "unless the bill of lading was to be sent to plaintiff." This last clause, we think, made this instruction bad. It is clear that the oil was shipped and on board the Virginian before the bill of lading was sent to appellant. From this it can be argued that both parties understood and agreed that the terms of the shipment were as determined by the correspondence between the parties, and that, when appellant requested a bill of lading, it had a right to assume that no stipulations other than those agreed upon should be incorporated in it, and that no attempt would be made by respondent to change the terms of the contract from those mentioned in the correspondence, and that, with this understanding, and for the purpose indicated by the testimony of its president, it requested the bill of lading. If this should be found to be the fact, then it was error to charge the jury that, if the bill of lading was to be sent to the appellant, it was bound by its terms, as this would make the mere mailing of the bill of lading sufficient to bind appellant to all its stipulations. We do not think this is the law. On the other hand, conceding that the terms of shipment had been agreed upon, it was nevertheless competent for the parties to modify those terms by additional ones or by a substitution of the contract as contained in the bill of lading. It was therefore, under this phase of the case, a question of fact for the jury to determine whether, under all the circumstances as testified to by the president of appellant, his request for a bill of lading, his general knowledge of the stipulations contained therein, it was his understanding that the contract, in so far as it had been determined by the cablegrams and letters, was to be merged in and the oil carried subject to conditions and exceptions named in the bill of lading. We think something more than the sending of the bill of lading or its receipt was necessary to subject appellant to its terms, and that it must be found that there was an actual assent to the conditions in the bill of lading, and that, in addition to its receipt, the bill of lading was received and accepted by the appellant as a contract under which the oil was to be shipped. *Scrutton, Charter Parties and Bills of Lading*, pp. 9, 40; *Carver's Carriage by Sea*, §§

56, 57, 58; 4 Cyc. 407; 4 Am. & Eng. Ency. Law, 517.

The case of *The Arctic Bird* (D. C.) 109 Fed. 167, is very similar to that before us, and in it will be found a clear exposition of the law as we have attempted to declare it. This rule is also recognized in *The Caledonia* (C. C.) 43 Fed. 681. The error of this instruction is clear by reference to our own holding in *Allen & Gilbert-Ramaker Co. v. Canadian Pacific Ry. Co.*, 42 Wash. 64, 84 Pac. 620, 7 Ann. Cas. 468, where, in discussing the effect of a bill of lading handed the shipper after the shipment of the goods, it was said, citing 6 Am. & Eng. Ency. Law, 642: "It is therefore of no effect where it is brought to the knowledge of the shipper after the goods have been shipped, and it is too late for him to recede."

We therefore conclude that the judgment ought not to stand, and it is reversed, and a new trial ordered.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

In re MARTENSON.

MARTENSON v. GARDNER et al.

(Supreme Court of Washington. Dec. 20, 1913.)

INSANE PERSONS (§ 34*)—GUARDIANS—APPOINTMENT—DISCRETION.

There is no abuse of discretion in appointing, as guardian of an insane person, a stranger, rather than a brother; the evidence showing a probable misappropriation of his estate, and that it was not likely the property would be returned if the brother was appointed.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 49; Dec. Dig. § 34.*]

Department 2. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

In the matter of the guardianship of Nels Martenson, an insane person. Petition of Everel R. Vaughn for appointment of George R. Gardner as guardian was granted over the contest and counter petition of Andrew Martenson, and contestant appeals. Affirmed.

H. W. Lueders, of Tacoma, for appellant. Everel R. Vaughn and F. W. Greenman, both of Tacoma, for respondent.

FULLERTON, J. On September 23, 1912, one Everel R. Vaughn petitioned the superior court of Pierce county to appoint a guardian for the estate of Nels Martenson, alleging in the petition that Martenson was an insane person, incarcerated in the state insane asylum at Stellacoom, Wash.; that he had personal and real property situated in Pierce county which needed the care and attention of some proper person as guardian. The petition further alleged that one George R. Gardner was a suitable and proper person to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be appointed as such guardian. On the filing of the petition the court fixed a time and place for hearing the same of which due notice was given as required by statute. At the time fixed for the hearing Andrew Martenson, a brother of the insane person, appeared and contested the proceeding, averring in his pleadings that no necessity existed for appointing a guardian over his brother's estate, but that, if the court deemed such an appointment necessary, he himself was a suitable and proper person to be appointed such guardian, and prayed for his own appointment. A hearing was had on the issues thus made, resulting in the appointment of the person named in the original petition. From the order of appointment made, the contestant appeals.

The evidence introduced at the hearing was brief, but, brief as it is, it does not require a special review. Enough appears to show that there had been a probable misappropriation of the insane person's estate, and that it was not likely that the property misappropriated would be returned if the contestant was appointed guardian. Conceding that, under normal conditions, a brother has a preference right, over a person not so related, to be appointed guardian of his insane brother's estate, we find in the appointment here made no abuse of discretion on the part of the court.

The order appealed from is affirmed.

CROW, C. J., and MOUNT, MORRIS, and PARKER, JJ., concur.

LEWIS v. DEAN.

(Supreme Court of Washington. Dec. 12, 1913.)
JOINT ADVENTURES (§ 5*)—CONTRACTS—EVIDENCE.

Evidence held not to show that defendant agreed to assume half the losses occurring in the speculation, for which plaintiff advanced the funds.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. § 5.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by C. D. Lewis against W. S. Dean. From the judgment rendered, both parties appeal. Reversed and remanded, with instructions to dismiss.

Peters & Powell, of Seattle, for plaintiff. Ira Bronson and J. S. Robinson, both of Seattle, for defendant.

GOSE, J. This is a suit upon an alleged oral contract. The case was tried to the court, and both parties have appealed.

The statute (Rem. & Bal. Code, § 1736) puts the burden upon us of trying the case upon the facts de novo. It provides that: " * * * In actions legal or equitable, tried by the court below without a jury,

wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the Supreme Court de novo, * * * and the cause shall be determined by the record on appeal. * * * " The burden of proof is upon the plaintiff to establish his case by a preponderance of the evidence. This we think he has failed to do. In most respects there is a direct conflict in the testimony. The material facts, which are few and simple, are these: The plaintiff was a man of business experience, engaged in buying and selling timber lands. The defendant, while not a broker, bought and sold stocks on margin. The two were intimate acquaintances, occupying the same office room. The plaintiff became interested in the defendant's speculations, and, in November, 1908, gave him \$250 to "use as he did his own." Plaintiff says they agreed to share the profits, and "my understanding was he was to assume one-half of the losses." This the defendant denies. His testimony is that, if losses should occur, there would be no division of the profits until the losses were recouped. From the \$250 large profits were reaped, and in June the plaintiff advanced \$1,500, and in August \$250 more, which the defendant placed in stocks upon margin. Some small profits were realized from these sums. In December, 1909, the price of stocks declined, and serious losses were threatened. The plaintiff says that he then asked defendant if he was going to bear any losses, and that the defendant said he was not; that he—the plaintiff—then "repeatedly" told the defendant that, if he was not going to share the losses, "I would have him immediately dispose of the stock, and save what I could out of the investment." But he later says, "I don't know that I did" tell him that. The defendant says the plaintiff neither asked him to close the account, nor complained because he declined to bear a part of the losses. Plaintiff further says that defendant then promised him that, if he would leave him alone, he thought stocks had reached the bottom, and he would return the money, with interest. This the defendant flatly denies. He says, however, that he told the plaintiff that from past experience he believed that stocks had reached the bottom and would advance, and that they would "get out all right," and that he did not make a guaranty or promise. This constitutes the agreement upon which the plaintiff relies.

The testimony taken as a whole fairly shows that, at the time the plaintiff claims the defendant made this promise, stocks had materially declined. The plaintiff says that the defendant represented that they had then dropped about five points, which would be \$1,000. Following the conversation the defendant continued to handle the stocks.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

They failed to advance, and by June, 1910, the defendant testifies that the money was lost, and that he had advanced about \$160 to protect the plaintiff's margins. The defendant asserts that in January, 1910, he advised the plaintiff that his account was about exhausted. This the plaintiff denies. The plaintiff made no demand for a return of his money until December, 1910, when he brought suit for \$2,000. The court gave judgment for this amount, less \$357.75, profits which had theretofore been paid to the plaintiff.

The defendant at all times kept plaintiff's accounts separate from his own, and the books were in the office, and at all times accessible to the plaintiff. The plaintiff admits that, after the alleged agreement to purchase the stock, the defendant frequently reported to him the condition of the stock market, and says that he on several occasions asked him to advance more money to protect the account. The defendant admits that he continued to report the condition of the stock market to the plaintiff, but denies that he ever asked him to advance money. The plaintiff says that, after the stock declined in December, 1909, the defendant called upon him three times to advance additional money; that he answered that he would not put up any more; that "I was content to let the money be returned to me." He was then asked, "What did you say to him?" and answered, "I refused. I simply refused to put up any more money." "Q. What reason did you give? A. I don't know that I expressed any reason. Q. You never referred to the fact, then, did you, that you didn't have to because he was to pay you back the money? A. I don't recall referring to that; no, sir. Q. Why would he ask you to put up money if he had made that agreement with you that you just referred to? A. I don't know, unless the stock market went down, kept going down, and I didn't know his object in doing that, but he asked me on two or three occasions to put up additional money." From what has preceded it will be observed that the plaintiff first says that he repeatedly told the defendant that, if he did not take his stock, he would require it to be sold, and later says that he did not tell him. He first asserts that, when called upon to advance money after the alleged sale, he told the defendant that he was content to let the money be returned to him, and again he says that he did not tell him anything about it. As opposed to these inconsistencies the defendant's testimony seems to ring true. A careful reading of the record has convinced us that the defendant, in December, 1909, when the alleged promise was made, while realizing that stocks had materially declined, was optimistic as to the future, and that he merely said to the plaintiff that he believed stocks had reached the

bottom, and that they would recover, without any promise to return the plaintiff's money. The query is, If stocks had materially declined, and the stock market was in bad condition, why should the defendant have promised the plaintiff to return his money, which would be in effect to take his stock at a price materially in excess of its value?

We have not overlooked the fact that the trial court found that, at the time of the alleged sale, the price of the stocks had not declined. We are persuaded that the trial court attached too much importance to the paper value of the stocks as shown upon the defendant's books. They were carried on his books at their purchase price, and do not show the daily market fluctuations. We think the plaintiff has failed to sustain the burden which the law puts upon him; that is, that he has failed to prove the contract which he alleged, by a preponderance of the evidence.

The judgment is reversed, and the cause remanded, with instructions to dismiss.

CROW, C. J., and ELLIS, CHADWICK, and MAIN, JJ., concur.

BAKER et al. v. YAKIMA VALLEY CANAL CO.

(Supreme Court of Washington. Dec. 26, 1913.)

1. MECHANICS' LIENS (§ 72*)—STATUTES—CONSTRUCTION.

Under Rem. & Bal. Code, § 1129, declaring that every person making or furnishing material to be used in the construction or repairing of any ditch or flume has a lien for the labor performed or the material furnished, whether performed at the instance of the owner or his agent, and that every contractor, subcontractor, agent, builder, or person having charge of the work shall be held an agent of the owner, a materialman, who engaged plaintiffs to prepare the material, cannot be held an agent of the owner for the purpose of giving them a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 86; Dec. Dig. § 72.*]

2. MECHANICS' LIENS (§ 72*)—STATUTES—CONSTRUCTION—"SUBCONTRACTOR"—"MATERIALMAN."

Where a contractor engaged in reconstructing a canal entered into a contract with plaintiffs' employer for the latter to furnish sand and gravel to be used in constructing the canal, plaintiffs' employer was a "materialman," and not a contractor, "subcontractor," architect, builder, or a person in charge of the construction of the work, within Rem. & Bal. Code, § 1129, declaring that every contractor, subcontractor, architect, builder or person having charge shall be held to be the agent of the owner for the purposes of the establishment of a lien in favor of a person performing labor at the instance of the owner's agent, and hence such laborers are not entitled to a lien, even though the sand and gravel prepared by them went into the construction of the canal.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 86; Dec. Dig. § 72.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 8704, 8705; vol. 8, p. 7806; vol. 5, p. 4409; vol. 8, p. 7718.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. MECHANICS' LIENS (§ 99*)—RIGHT TO LIEN—SUBROGATION.

Where a materialman did not, within five days after the first delivery of the materials, notify the owner in writing in accordance with Laws 1911, c. 77, p. 378, that he was furnishing the materials, laborers engaged by him, even if entitled to subrogation to his lien because the products of their labor went into the materials, are not entitled to a lien on the structure.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.*]

4. APPEAL AND ERROR (§ 842*)—QUESTIONS REVIEWABLE—QUESTIONS OF LAW.

Where the facts were undisputed, the question whether plaintiffs were entitled to a mechanic's lien is one of law, and hence the determination of the trial court on that issue may be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

5. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDINGS.

In an equity case the finding of the trial court, though entitled to weight, is not binding on the Supreme Court; the case being triable de novo on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

6. MECHANICS' LIENS (§ 5*)—STATUTES—CONSTRUCTION.

While mechanics' lien laws should receive liberal construction, the construction may not be unfair, even in the interests of laborers and materialmen.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 3, 5; Dec. Dig. § 5.*]

Department 1. Appeal from Superior Court, Yakima County; Thos. E. Grady, Judge.

Action by George Baker and others against the Yakima Valley Canal Company, a corporation, and another. From a judgment for plaintiffs, the defendant named appeals. Reversed and remanded for dismissal.

Englehart & Rigg and H. J. Snively, all of North Yakima, for appellant. Roberts & Udell, of North Yakima, for respondents.

ELLIS, J. The plaintiffs in this action seek to establish liens upon the irrigating canal of the defendant Yakima Valley Canal Company for labor performed by them for the defendant Betts in screening sand and gravel used by defendant Powell in reconstructing the canal. The facts are simple and practically undisputed. The defendant W. F. Powell entered into a written contract with the defendant canal company to reconstruct approximately 11,000 feet of its canal, according to certain plans and specifications, and at its own cost and expense to perform all the work and furnish all the materials called for in the specifications, excepting the reinforcing steel. The work called for in the specifications was the excavation and grading of the foundations for the flume and the construction of a reinforced concrete flume thereon, and, at one point, a concrete siphon. The defendant canal company owned the right of way upon which the canal was re-

constructed. The work was done, and materials used were cement, sand, gravel, and steel. The sand, gravel, and cement were mixed together, and, with the reinforcing steel, constituted the finished structure. The evidence is too plain for controversy that the defendant W. C. Betts made an oral agreement with Powell to furnish sand and gravel at an agreed price of 65 cents a yard. Betts had his own screening machinery and sand and gravel bins, and was to deliver the materials in his own bins, from which Powell was to haul them to the place of construction. Betts set up his machinery at a certain sand bar in the Natchez river, at a point about 200 yards from the nearest point of the canal right of way, and about one-fourth of a mile from the place where the work of reconstruction was in progress. The plaintiffs were employed by Betts in scraping up, screening, and separating the sand and gravel, storing these materials in the bins, and in running machinery for that purpose. As to the agreement with Betts, Powell testified: "He was to furnish me the sand and gravel for so much a yard in the bins at his machine." The witness Hillis Betts, son of the defendant W. C. Betts, testified that he did not know the particulars of the agreement, but that, as he understood it, his father was to furnish gravel for the work from the Natchez river, and that the plaintiffs were employed to scrape the gravel up into the elevator with slip scrapers; that the elevator carried it to a rotary screen, and the screen dropped it into the bins and bunkers, from which Powell's teams took it away. The defendant W. C. Betts, testifying to what his agreement was, said: "I was to deliver the gravel in the bunkers at the screen," and that he was to receive for it "65 cents per yard in the bins at the machine." He also testified that he employed all of the plaintiffs in preparing the sand and gravel. There was evidence to the effect that the screening plant belonged to W. C. Betts. There was no evidence that either Powell or the canal company furnished it or had any interest in it. Betts testified that he had operated the same plant at other places, and that some of the plaintiffs had worked for him in connection therewith before. Judgments by default were entered against the defendant W. C. Betts for the amounts due to the plaintiffs, the action was dismissed as to the defendant Powell, and a decree was entered establishing and foreclosing liens in favor of all of the plaintiffs save one Burnett upon the irrigating canal of the defendant canal company. From that decree the defendant canal company prosecutes this appeal.

[1] The respondents contend that W. C. Betts was a subcontractor, and, as such, the statutory agent of the canal company in employing the laborers who screened the sand and gravel. The appellant insists that Betts

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was a materialman, and had no part in the actual construction of the canal, and hence there was no basis in the facts for a statutory agency. The statute under which these liens were claimed, Rem. & Bal. Code, § 1129, so far as pertinent, reads as follows: "Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any * * * ditch, dyke, flume, * * * or any other structure * * * has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, subcontractor, architect, builder or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter." An analysis of this section, as it seems to us, clearly sustains the appellant's contention. The lien for labor is accorded for work performed upon the ditch or flume, and at the instance of the owner or his agent. No lien is accorded for labor performed in the preparation of materials being furnished by the materialman, and at the instance of the materialman. This seems plain from the language of the first clause of the section. All doubt, if there could be any, is removed by the next clause of the same section, which makes only the contractor, subcontractor, architect, builder, or person having charge of the construction the agent of the owner for the purpose of establishing the lien. The statutory agency is confined to the persons named. A materialman is not one of them.

[2] Betts employed all of the respondents. According to their own testimony, they performed labor for him alone. There was not a glimmer of evidence that the respondents did any work at the request of any one else. Neither of the respondents testified that he was employed by, or looked to, either the canal company or to Powell for his pay. Neither Betts nor any of his employes had any part in the actual work of constructing the canal. Betts was clearly a materialman, *Finley v. Tagholm*, 62 Wash. 341, 113 Pac. 1083. He was not the contractor, nor a subcontractor, architect, or builder, nor did he have charge of the construction of the canal or any part of it. "A subcontractor is one who takes from the principal contractor a specific part of the work, and the term does not include laborers or materialmen. *Farmers' Loan & Trust Co. v. Canada & St. Louis R. Co.*, 127 Ind. 250, 28 N. E. 784, 11 L. R. A. 740." *Young Men's Christian Association v. Gibson*, 58 Wash. 307, 814, 108 Pac. 766, 769. Betts merely furnished the sand and gravel used in the work, just as some one else furnished the cement, and still another the steel. If he was a subcontractor, then every materialman would fall within that class,

and the distinction manifestly intended by the statute would be obliterated. He was not a statutory agent of the owner by any construction of the statute, however liberal. To hold that he was would be to legislate, not to construe. "If one who furnishes the sashes, doors, and glass for a building is a subcontractor, every materialman would fall in that class, and such construction would nullify the plain terms of the statute. The argument that the contract to furnish the material is an entirety, and that it is difficult to comply with the statute, is one that should be addressed to another department of the state government. We are not responsible for the wisdom or the expediency of the law." *Finley v. Tagholm*, 62 Wash. 341, 344, 345, 113 Pac. 1083, 1084. See, also, *Munroe v. Clark (Me.)* 77 Atl. 696, 30 L. R. A. (N. S.) 82.

[3] The statute makes, and preserves throughout, a distinction between materialman and subcontractors. It accords a lien to both, but upon different conditions. The materialman must, within five days after the first delivery of materials, deliver or mail to the owner of the property a notice in writing that he is furnishing the materials. Laws of 1911, p. 876. It was testified and tacitly admitted that no such notice was delivered or mailed in this instance. Even if it could be held that the laborers employed by Betts might be subrogated to his right of lien as a materialman because their labor had gone into the materials (a thing not decided because not before us), still such a holding would not avail them here, since the specific condition for a lien in Betts' favor for the materials furnished was never performed. *Culbert v. Lindvall*, 73 Wash. 643, 132 Pac. 729. Conceding that the Legislature intended to provide a lien for all laborers, it would still be manifest that if these laborers could have had a lien it could only be as against Betts and on his plant, under section 1149, Rem. & Bal. Code, which gives a lien to laborers employed by a manufacturer on the manufacturing plant in which they are employed. Whether Betts' plant was such a plant as would properly fall within that section we do not here decide, since the lien here claimed is not asserted under that section. It is, however, the only section of all the lien statutes to which a plausible argument for a lien on anything in favor of these respondents could be addressed.

The respondents assert that the screening apparatus was placed, at Powell's direction, where it was most serviceable, relative to the balance of the work. No citation to the record in support of this statement is made, and a careful reading of the record fails to disclose any such testimony. In any event, that circumstance would be immaterial. The apparatus was doubtless located with a view to the convenience of all of the parties concerned.

[4,5] The respondents further contend that

the trial court, having found that Betts was a subcontractor, and the question involved being not one of law but of fact, this court is not at liberty to disturb that finding. This contention is erroneous for two reasons: In the first place, on undisputed evidence as to the facts, whether the lien arose or not was a question of law. In the second place, this is a trial de novo, in which the findings of the trial court, though entitled to weight, have no binding force upon us. *Johns v. Arizona Fire Insurance Co.*, 136 Pac. 120, and cases there cited; *Bord v. Kingsley*, 136 Pac. 1172; *Lewis v. Dean*, 137 Pac. 341; *Dougherty v. Soll*, 70 Wash. 407, 126 Pac. 924. These decisions clearly recognize the correct rule that findings of the trial court in a case triable de novo will be sustained only when supported by a fair preponderance of the evidence. It is our duty in such a case to weigh the evidence. That is what a trial de novo means.

Respondents cite decisions from other jurisdictions to the effect that, in order to have a lien for labor, it is not necessary that the labor be performed on the premises where the improvements are actually made. This is, of course, true if the labor was performed directly for the owner, or for the principal contractor, or for his subcontractor, who has undertaken to perform some specific part of the work of actual construction. The cases cited go no further. In *Evans Marble Co. v. International Trust Co.*, 101 Md. 210, 60 Atl. 667, 109 Am. St. Rep. 568, 4 Ann. Cas. 831, a subcontractor, by contract with the principal contractor, agreed to carve, erect, place, and finish all the exterior marble work on a certain structure. The statute there under discussion gave a lien for labor only. The subcontractor who directed all of the work of preparing and placing the marble in the structure was accorded a lien for his labor. The right to a lien in favor of laborers employed by him was not involved nor discussed. In *Scannell v. Hub Brewing Co.*, 178 Mass. 288, 59 N. E. 628, it was merely held that a lien could be maintained for labor performed under an agreement with the property owner to furnish and erect brewery boilers set up in brickwork, with all pipe connections, and also certain tankwork. Part of the work was done at the petitioner's works in preparing the material. The lien was claimed by, and allowed to, the original contractors for preparing and setting up the boilers. As in the last case cited, no right of lien as in favor of the claimant's employes was either involved or discussed. In *Daley v. Legate*, 169 Mass. 267, 47 N. E. 1013, it was held that workmen were entitled to a lien for labor on materials which they knew were intended for use on a building which their employer had contracted to build, and which were, in fact, so used, though the work was done in the contractor's own yard. In *Webster v. Real*

Estate Imp. Co., 140 Mass. 526, 6 N. E. 71, it was held that a mechanic's lien for labor in hauling sand to be used in work upon a building could not be maintained. The statute apparently gave no lien to a materialman as such; hence, there could be no lien for hauling the sand, since the work was not connected with the actual building of the structure. This case, like the last one cited, so far as it has any bearing upon the question here presented, is contrary to the respondents' contention. In *Wilson v. Sleeper*, 131 Mass. 177, the laborer was employed by, and the labor was performed directly for, the principal contractor, and consisted in preparing finish for certain houses. Had the claimants in the case here involved been employed by the original contractor, Powell, the case cited would be apposite. On the facts here it is not. These decisions clearly sustain the position that, in order to maintain a lien for labor against the structure itself, the labor must either be performed directly for the owner, or for the original contractor, or for a subcontractor who has contracted to build some part of the actual structure.

[6] Finally, we say that since the statute clearly contemplates a distinction between subcontractors and materialmen, the line of distinction contemplated by the statute between these two must be definitely drawn somewhere; otherwise the owner of property would never know how to protect himself. He would never know when or where even to seek the information necessary to protect himself. He can reasonably be expected to know of a subcontract, and the work performed in carrying it out, because the work of the subcontractor, or some part of it, is performed upon the property, and in the actual construction of the improvement. It would be wholly unreasonable to expect him to go afield and investigate as to all labor performed by employes of materialmen furnishing the various materials used in the work; none of such labor being connected with the actual work of construction, nor performed upon his premises. The statute must be liberally construed, but a liberal construction does not mean an unfair construction, even in the interest of a favored class.

The decree foreclosing the alleged liens is reversed, and the cause is remanded for dismissal as to the appellant canal company.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

ALTIER v. HAINSWORTH.

(Supreme Court of Washington. Dec. 27, 1913.)
DAMAGES (§ 130*)—PERSONAL INJURIES—EXCESSIVENESS.

An award of \$3,000 in favor of plaintiff, a switchman 30 years of age, who was earning \$125 per month at the time of the injury and who was incapacitated by reason of the breaking

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of his leg and dislocation of his ankle for over five months, and whose injuries were not completely healed at the trial seven months after the accident, is not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by John W. Altier against J. Walter Hainsworth. From a judgment for plaintiff, defendant appeals. Affirmed.

Hughes, McMicken, Doveil & Ramsey, of Seattle, for appellant. Geo. L. Palmer, of Spokane, and Chas. D. Fuller, of Seattle, for respondent.

PARKER, J. The plaintiff seeks recovery of damages for personal injuries which he claims resulted to him from the negligence of the defendant in the driving of an automobile. A trial before the court and a jury resulted in a verdict in favor of the plaintiff for \$5,000. After hearing argument upon the defendant's motion for a new trial, rested upon the ground of excessive verdict, among others, the court was of the opinion that the defendant would be entitled to a new trial upon that ground unless the plaintiff would remit from the verdict the sum of \$2,000 and permit judgment to be entered in his favor for \$3,000 only. This the plaintiff did, and judgment was accordingly rendered in his favor against the defendant for \$3,000, from which the defendant has appealed to this court. No question is here presented other than that of the alleged excessiveness of the verdict.

There was ample evidence tending to show, and which would warrant the jury in believing, the following: The plaintiff, at the time of the injury, was 30 years old, was then in good health, and was earning \$125 per month as a switchman for the Northern Pacific Railway Company, with which company he had permanent employment as such. The injuries for which he here seeks recovery consisted of the breaking of the fibula bone of his right leg and the dislocation of his right ankle. As a result of these injuries, his ankle and leg were required to be kept in a cast for eight weeks, he walked on crutches for four months, and was required to refrain from his usual vocation for five months, causing him a loss in wages of some \$600 to \$700. He has also been required to refrain from work to some extent since then. At the time of the trial in the superior court, which occurred approximately seven months after he was injured, he had not recovered. His ankle at times becomes swollen and painful, and he is not able to perform his work with the ease and efficiency he had been able to do prior to receiving the injuries. To what extent he will be so afflicted in the future is problematical. The decisions of the courts do not furnish any rule for the measurement of dam-

ages which can be applied with any degree of exactness. This is necessarily so by reason of the varying conditions and circumstances attending different injuries. In view of the facts disclosed by the evidence in this case, which we have summarized in so far as the nature and extent of respondent's injuries are concerned, we are quite clear that we cannot say that the awarding him of \$3,000 by the judgment of the trial court was excessive. Our views expressed in *Payne v. Whatcom County R. & L. Co.*, 47 Wash. 342, 91 Pac. 1084, and *Keane v. Seattle*, 55 Wash. 622, 104 Pac. 819, are in harmony with the conclusion here reached, though those decisions, like all others upon such questions, are only of aid here by way of an analogy which seldom, if ever, is capable of exact application.

The judgment is affirmed.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

LEONARD v. SHOWALTER.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1015*)—GRANTING NEW TRIAL.

The ruling of the trial court in setting aside the verdict of the jury and granting a new trial will not be disturbed on appeal, unless it clearly appears from the record that the trial court erred in a pure, simple, and unmixed question of law and but for such error would not have so ruled.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1015.*]

2. APPEAL AND ERROR (§§ 1097, 1195*)—LAW OF CASE—SUBSEQUENT PROCEEDINGS.

The opinion in a cause appealed to this court and remanded for further proceedings is the law of that case in the trial court as well as in this court on any subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358-4368, 4427, 4661-4665; Dec. Dig. §§ 1097, 1195.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by H. P. Showalter against B. V. Leonard, administrator of the estate of Granville Ryles, deceased. Judgment for defendant, and, from an order granting a new trial, he brings error. Affirmed.

Benjamin Martin, Jr., of Muskogee, for plaintiff in error. S. B. Dawes, of Muskogee, for defendant in error.

GALBRAITH, C. [1] This is the second time this cause has been before this court. An opinion was handed down on the first appeal September 25, 1908, and is reported in 22 Okl. 329, 97 Pac. 569. An examination of that opinion will show that the question presented on that appeal was whether or not

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the assignee of an agricultural lease could maintain an action of forcible detainer against the tenant of the lessor, holding over after the expiration of his term under the statutes of Arkansas in force in the Indian Territory. Although Mr. Justice Kane, speaking for the court in rendering the opinion, said: "The complaint in the case at bar not only alleges a purchase of the lease under which the appellee went into possession by the appellant but also the purchase of the land itself." The two decisions of the Supreme Court of Arkansas cited as authority for that decision were *Johnson et al. v. West*, 41 Ark. 535, and *Ish v. Morgan, McRea Co.*, 48 Ark. 413, 3 S. W. 440. In the *Johnson Case* the Supreme Court of Arkansas held that "the tenant can no more resist the title of the lessor when asserted by or in the hands of the assignee than when it is held by the lessor himself"; and in the *Ish Case* the court held that the mortgagee of the leased premises, who purchased the lands at a foreclosure sale, may maintain forcible detainer against the tenant of the mortgagor holding over after the expiration of his term. From the holdings of the Supreme Court of Arkansas in these two cases, relied upon by this court, in deciding the former appeal, it is clear that the law of the case, as declared by this court, is that Showalter, as the assignee of the lease, could maintain the action of forcible detainer against Ryles by reason of the purchase and assignment of the lease. This being the case, as declared on that appeal, it is the law of the case in all its subsequent stages, both in the trial court and in this court on any subsequent appeal. *Harper v. Kelly et al.*, 29 Okl. 809, 120 Pac. 293. This being true, and the law of this case being thus declared, it is not important that the pleading under consideration in the first appeal based the plaintiff's right to maintain the action on the assignment of the lease and the subsequent purchase of the premises, and that on the second trial in the district court the plaintiff abandoned his claim under the purchase and based his right altogether upon the purchase and assignment of the lease, since the court, in declaring the law in the case, held that the claim under the assignment of the lease was sufficient to entitle him to maintain the action.

In the trial of the cause, after the plaintiff had introduced his evidence, the defendant demurred to it and this demurrer was overruled. He then moved the court for an instructed verdict in his favor, and this was overruled, and the cause was then submitted upon the plaintiff's evidence and a verdict returned for the defendant. The plaintiff then filed a motion for new trial, which motion was by the court sustained. The defendant appealed and assigned as error the ruling of the court in refusing an instructed verdict, and the overruling of the demurrer to the

plaintiff's evidence, and the order granting a new trial, and the ruling of the court in admitting certain evidence. It is clear from an examination of the record that the ruling of the trial court in overruling the demurrer to the plaintiff's evidence and refusing to instruct a verdict for the defendant was right, since there was introduced competent evidence to show that the plaintiff in February, 1903, purchased the lease from the defendant's landlord, having some two years to run, and that the defendant was notified of this purchase. There was evidence, as shown by the record, sufficient to make out a prima facie case for the plaintiff—evidence sufficient, if not contradicted, to entitle him to a verdict and ample to support a verdict if returned for him. The court did not err in overruling the demurrer to the evidence and in refusing to instruct the jury to return a verdict for the defendant.

Under the assignments of error relative to the admission of the evidence, but one instance is referred to; that is the admission of a copy of the lease without the proper certificate attached thereto. The copy was not properly certified in order to entitle it to be admitted in evidence; still this error was immaterial. The defendant was not injured by it, as the verdict of the jury clearly demonstrates. Then the contents of the lease were not material anyway. The only material point about the lease was whether or not it had been assigned to the plaintiff and the length of time it had to run, and these facts were established by other testimony aside from this copy.

[2] As to the assignments challenging the action of the court in vacating and setting aside the verdict of the jury and granting a new trial, the rule is well established in this jurisdiction that such rulings will not be disturbed unless it is made clear that the trial court "manifestly and materially erred with respect to some pure, simple, and unmixed question of law," and but for such errors would not have so ruled. See *Ardmore Lodge No. 9 I. O. O. F. v. Dawson et al.*, 33 Okl. 37, 124 Pac. 66, and cases therein cited; *Hughes v. C., R. I. & P. R. Co.*, 35 Okl. 482, 130 Pac. 591.

Four separate grounds are set out in the motion for new trial. It does not appear whether the court granted the motion for new trial on one or all of them. We are unable to say that the court in vacating the verdict and granting a new trial erred in a simple, pure, and unmixed question of law, and but for that error would not have so ruled. We are rather inclined to the opinion that the trial court exercised wisely the discretion vested in it in this instance.

It therefore follows that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

SIMPSON TP. v. HILL†

(Supreme Court of Oklahoma. Nov. 11, 1913.)

*(Syllabus by the Court.)*TRIAL (§ 405*)—FAILURE TO MAKE FINDINGS
—WAIVER OF OBJECTIONS.

Where the court makes a general finding upon the facts in favor of plaintiff and makes special findings upon some of the issues, but fails to cover by special finding all the issues involved, and its attention was not called to the omission to find specially upon one of the defenses, and further findings are not requested by defendant upon such issue, it will be held that defendant has waived the right to complain because of the court's failure to find specially upon one of the issues of defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 963-965, 967; Dec. Dig. § 405.*]

Error from District Court, McIntosh County; Preslie B. Cole, Judge.

Action by V. E. Hill against Simpson Township. Judgment for plaintiff, and defendant brings error. Affirmed.

Van Court & Reubelt, of Checotah, for plaintiff in error. Brook & Brook, of Muskogee, for defendant in error.

HAYES, C. J. Defendant in error brought this action in the court below to recover judgment on certain warrants issued by plaintiff in error, a municipal township of McIntosh county. Defendant in error, hereinafter referred to as "plaintiff," alleges in his petition in the lower court that the warrants sued upon were legally and properly issued upon accounts legally presented, audited, and allowed by the board of directors of said Simpson township, and that all the claims so audited and allowed by the board were legal and just claims against the township. Said warrants were issued during the years 1909 and 1910. Plaintiff in error, hereinafter referred to as "defendant," denied by its answer, both by general denial and specific allegations, that said warrants were legally and properly issued by it, and alleged that the same were issued without any claim having been presented therefor, or audited and allowed by the officers of the township, as required by the statute. As a second defense, defendant further alleges that, when all said warrants were issued, the township was then indebted for the respective years in which said warrants were issued in an amount exceeding the income and revenue provided for such years, and that the warrants were therefore issued in violation of the statute.

The trial was to the court without a jury, who, upon request of defendant, made and filed findings of fact and conclusions of law. As to certain of the warrants sued upon, the court found that at the time they were issued the township was then indebted in an amount in excess of the amount allowed by the statute, and for this reason denied recovery upon such warrants. This action of

the court is not objected to by either party, and those warrants are eliminated from this proceeding. As to the remaining warrants sued upon, the court found that at the time they were issued they were not in excess of the funds and revenue coming to said township out of the levy provided for the respective years in which said warrants were issued. The court made no special finding of fact upon the other issue made by plaintiff's petition and defendant's answer, to wit, that the warrants sued upon were issued upon claims properly verified by the claimant, audited and allowed by the board, as required by section 8728, Comp. Laws 1909.

Defendant urges for reversal of the cause only that the findings of fact made by the court are not sufficient to support a judgment on said warrants rendered by the court in favor of plaintiff, because no special finding was made on the foregoing issue. Objections and exceptions were taken by defendant to the finding of fact made by the court upon the ground that such findings of fact did not state "all the necessary findings of fact and conclusions of law." There was no request by defendant for a special finding upon his defense that the warrants had been issued without verified claims having been filed, audited, and allowed therefor. Nor did he, by his objection and exception to the findings of fact made by the trial court, point out that no special finding had been made upon this issue. The finding of the trial court includes a general finding in favor of plaintiff upon all the warrants upon which judgment was rendered, which general finding is sufficient to constitute a finding against defendant upon his second issue of defense. If it desired a special finding upon this issue, it should have requested the court to make such finding; at least, it should have specifically excepted to the finding of the trial court because it failed to make a special finding upon this issue, and requested a further finding thereon. *Else et al. v. Freeman et al.*, 72 Kan. 686, 83 Pac. 409; *Allen v. Wildman*, 134 Pac. 1102. The ground, therefore, upon which defendant seeks to reverse this cause, is not presented by the record.

The judgment of the trial court is affirmed. All the Justices concur.

DODD v. COOK.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

INDIANS (§ 15*) — CONVEYANCES OF ALLOTMENT—MARRIED FEMALE MINOR.

The marriage of a female member of the Choctaw Tribe of Indians, under the age of 18 years, does not affect the restrictions imposed by the act of Congress against the sale of her allotments during minority, and a conveyance by such minor of her allotments without the supervision of the probate court is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

void, notwithstanding her marriage prior to the execution of such conveyance.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 34, 37-44; Dec. Dig. § 15.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Choctaw County; Tom D. McKeown, Judge.

Action by G. W. Dodd against R. L. Cook. Judgment for defendant, and plaintiff brings error. Affirmed.

H. A. Ledbetter, of Ardmore, and Cocke & Willis, of Hugo, for plaintiff in error. Howe & Stanley, of Hugo, for defendant in error.

HARRISON, C. This was an action in ejectment by G. W. Dodd against R. L. Cook for possession of a certain tract of land situated in Choctaw county. The plaintiff alleged that he had the legal estate in fee simple and equitable estate in and to the land in question and was entitled to immediate possession of same. That defendant had unlawfully kept him out of possession to his detriment in the sum of \$200. Defendant answered by general denial, and the cause was tried by a jury, resulting in a judgment for defendant, and plaintiff appeals.

The decisive facts involved are: That one John Gore, a half-blood Choctaw Indian, died prior to November, 1904; that he left surviving him only one heir at law, Minnie Gore, a quarter blood, who inherited her father's allotment. In November, 1904, Minnie Gore executed a deed to the land in question to G. W. Dodd. At the time of the execution of the deed, however, she was a minor but was married to one Gaskell and executed the deed in the name of Minnie Gaskell, née Gore. The question, then, is whether this deed, conveying the land in question to G. W. Dodd, while she was a minor, although she was a married woman, was a valid conveyance. If not, then the plaintiff, G. W. Dodd, had no title or estate in the land in question and no right of possession.

The question of the validity of a deed executed by a minor of any one of the Five Civilized Tribes was before this court in the case of *Jefferson v. Winkler*, 26 Okl. 653, 110 Pac. 755, where, in an opinion by Justice Hayes, after a careful review of the treaty and statutory provisions relating to such question, the court held: "A minor within the meaning of said section includes males under the age of 21 years and females under the age of 18 years, and the marriage of such a minor does not confer upon him or her the authority to sell his or her allotted lands independent of the jurisdiction and supervision of the probate courts of the state."

Also in the case of *Gill v. Haggerty*, 32 Okl. 407, 122 Pac. 641, the same question

was before this court, and in an opinion by Brewer, C., the court held: "The marriage of a Creek freedman under the age of 21 years does not affect the restrictions imposed by the acts of Congress and treaty provisions against the sale of his allotment during minority; and a conveyance by such minor of his allotment is void, notwithstanding his marriage prior to the execution of such a conveyance."

In both the foregoing cases the various treaty provisions and acts of Congress pertaining to the rights of minors to convey their allotments without the supervision of the probate courts, notwithstanding such minor may have been married at the time of the conveyance, are exhaustively discussed and a conclusion reached that a conveyance of this character, by a minor, although such minor may have been married at the time, conveys no title to the land in question and gives no right or interest to the grantee of such land.

It follows, therefore, that the deed executed by Minnie Gaskell, née Gore, to G. W. Dodd, while she was yet a minor, although married, conveyed no title to the land and gave the grantee no interest in or to same.

The remaining questions presented by plaintiff in error, being based upon the contention that the deed to Dodd was valid, become unnecessary to determine. For, if Dodd had no title or interest in the land, he had no right of action.

The judgment, therefore, is affirmed.

PER CURIAM. Adopted in whole.

ACKERMAN v. C. C. CHAPPELL HARDWARE CO.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(*Syllabus by the Court.*)

1. JUSTICES OF THE PEACE (§ 150*)—APPEAL—BILL OF PARTICULARS—NECESSITY—REPLEVIN.

Where, in an action in replevin in a justice's court, the affidavit for replevin contains everything that is necessary to be stated in a bill of particulars, and no objection is there urged, a subsequent objection that no bill of particulars had been filed, made on appeal to the county court, will not be deemed sufficient cause for reversal, though the court on appeal might properly have required the filing of new or amended pleadings.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 508-515; Dec. Dig. § 150.*]

2. JUSTICES OF THE PEACE (§ 174*)—APPEAL—PLEADING.

The right to file new pleadings in the county court, on appeal from a justice of the peace court, depends upon whether it is in furtherance of justice to permit such pleadings to be filed, which is to be determined by the county court in the exercise of a sound judicial discretion.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 665-693; Dec. Dig. § 174.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. TRIAL (§ 59*)—ORDER OF PROOF—DISCRETION.

The order in which evidence shall be received must to a great degree be left to the sound discretion of the trial court, and, unless it is made to appear that such discretion has been abused, no reversal will be had.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. § 59.*]

4. CHATTEL MORTGAGES (§ 247*)—PRIORITY OF LIENS—PAYMENT OF PRIOR MORTGAGE.

Upon the voluntary payment of a chattel mortgage indebtedness by the mortgagor, a second mortgage on the property included in the original mortgage, *eo instanti*, becomes a first and prior lien thereon, and the holder of such mortgage is entitled to recover possession of the mortgaged property according to the terms of his mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 508, 513½, 514; Dec. Dig. § 247.*]

5. CHATTEL MORTGAGES (§ 26*)—STIPULATION AGAINST SECOND MORTGAGE—EFFECT.

A provision in a chattel mortgage that the mortgagor shall not make a second mortgage or lien upon the mortgaged property, without the written consent of the mortgagee, and which is neither asked or given, does not thereby make void, as against one claiming under a second mortgage, a mortgage given in violation of said provision.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 72, 73; Dec. Dig. § 26.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Pottawatomie County; Ross F. Lockridge, Judge.

Action by the C. C. Chapell Hardware Company against J. N. Ackerman. Judgment for plaintiff, and defendant brings error. Affirmed.

A. M. Baldwin, of Tecumseh, W. W. Pryor, of Wewoka, and C. G. Pitman and A. J. Carlton, both of Tecumseh, for plaintiff in error. Mark Goode, of Shawnee, and Roscoe C. Arrington, of Tecumseh, for defendant in error.

SHARP, C. This is an action in replevin begun in a justice of the peace court in Pottawatomie county on March 7, 1910, by defendant in error, against plaintiff in error, to secure the possession of a span of mules at the time in the possession of the latter. No bill of particulars was filed; the affidavit in replevin being considered and treated as a bill of particulars. In said affidavit it was set out that the plaintiff was the holder of a mortgage on said mules and claimed a special interest in them by reason of the fact that an indebtedness of \$172.45, secured by said mortgage, remained due and unpaid; that defendant had, subsequent to the execution of said mortgage, acquired possession of said mules, and, although requested to deliver them to plaintiff, wrongfully refused so to do. The affidavit in replevin complies fully with the requirements of the statute (section 5399, Rev. Laws 1910) as to what such affidavit shall contain, and no objec-

tion on that account is made. Trial being had in the justice court, plaintiff was awarded possession of the mules, and defendant appealed to the county court, where trial was had before a jury, resulting in a judgment for the plaintiff for the mules, or for the value of plaintiff's interest therein. From this judgment the defendant below has appealed to this court.

[1] The first assignment of error urged is that the court erred in overruling defendant's objection to the introduction of evidence by the plaintiff for the reason that no bill of particulars had been filed. Is it necessary therefore that a bill of particulars be filed in a justice of the peace court in an action of replevin, or will an affidavit in replevin, containing all the elements necessary to constitute a good bill of particulars, suffice? Section 5414, Rev. Laws 1910, provides: "In all cases before a justice, the plaintiff, his agent or attorney, shall file with such justice a bill of particulars of his demand, and the defendant, if required by the plaintiff, his agent or attorney, shall file a like bill of particulars if he claim a set-off, and the evidence on the trial shall be confined to the items set forth in said bill." Section 5399, *supra*, provides what an affidavit in replevin shall contain. It does not appear that any objection was made to plaintiff's failure to file a bill of particulars in the justice court; the question for the first time being raised on appeal in the county court. Both statutes mentioned were adopted from Kansas, the Supreme Court of which state has twice determined the identical question here presented. In *Starr v. Hinshaw*, 23 Kan. 532, the court said: "This was an action of replevin brought by Andrew Hinshaw against William T. Starr before a justice of the peace, to recover 28 head of sheep and lambs. The action was regularly brought and tried, except that the plaintiff did not file any formal bill of particulars. The plaintiff, however, and the justice, treated the plaintiff's affidavit, upon which the summons and order of delivery was issued, as a bill of particulars. We perceive no error in this. The affidavit contains everything that is necessary to be stated in a bill of particulars; and, while a plaintiff in a replevin suit in a justice's court might very properly file an additional paper as a bill of particulars, yet if he chooses to use his affidavit as such, and the court permits him to do so, we do not think that any material error is committed. The statutes do not require that any additional paper be filed as a bill of particulars in a justice's court." In *Casterline v. Day*, 26 Kan. 306, the same conclusion was reached; the court expressing its views as follows: "It has been decided that an affidavit in replevin constitutes a sufficient bill of particulars, if unchallenged. *Starr v. Hinshaw*, 23 Kan. 532. True, the statute pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

scribes that, in all cases before a justice of the peace the plaintiff shall file a bill of particulars, but an affidavit in replevin states all the facts required to be stated in a bill of particulars, and hence in such cases a bill of particulars is necessary simply because of such technical provision of the statute. A trial and judgment upon simply the affidavit in the replevin action is, if not objected to, sufficient and valid, not only when attacked, but also when challenged by proceedings in error. 23 Kan. supra. Doubtless the district court on appeal may require new or amended pleadings. Justices' Act, § 122. But this only in furtherance of justice."

[2] Section 5467, Rev. Laws 1910, requires that a case on appeal from a justice of the peace court shall be tried *de novo* upon the original papers on which the cause was tried by the justice, unless the appellate court in furtherance of justice allow amended pleadings to be made or new pleadings to be filed. *St. Louis & S. F. Ry. Co. v. Steele*, 133 Pac. 209; *Horton v. Early*, 134 Pac. 436. We are satisfied with the rule announced by the Supreme Court of Kansas in the cases quoted, and conclude that no error was committed by the trial court in overruling defendant's objection to the introduction of plaintiff's evidence.

[3] The second assignment of error, that the court erred in admitting incompetent, irrelevant, and prejudicial evidence offered by the plaintiff, and objected to by the defendant, is evidently based largely upon the same argument as the first, namely, that all evidence was admitted improperly, there being no bill of particulars filed, and is decided adversely to plaintiff in error's contentions for the reasons already stated. It is further said, however, under this assignment, that all evidence as to the mortgage held by the plaintiff (a second mortgage) was improperly admitted for the reason that at the time no evidence had been introduced to show the first mortgage had been discharged. This contention does not demand further consideration than to say that the order of evidence is a matter of administrative control, and is usually said to be within the court's discretion. *Standifer v. Sullivan et al.*, 30 Okl. 365, 120 Pac. 624; *McBride v. Steinweden et al.*, 72 Kan. 508, 83 Pac. 822; 1 *Chamberlayne on Evidence*, § 367.

[4] Under the fourth assignment of error, counsel in their brief say: "The principal contention, however, is that the court erred in overruling the demurrer to the defendant in error's evidence." Apparently the theory of the plaintiff's case in the trial was that, although its mortgage when taken was a second mortgage, the first mortgage having subsequently been paid, thereby automatically its mortgage became a first lien; that, when Schiffman sold the mules to Lampe, they were sold subject to said mortgage, and likewise when the mules were sold by Lampe

to defendant. Defendant in the county court sought to prove that under the provisions of the first mortgage the mules had been purchased by the mortgagee, Holman, for the bank of which he was cashier, and that a bill of sale had been given by Schiffman to the bank, and the bank had sold the mules to Lampe, who in turn sold them to defendant. This testimony, however, was squarely met by that of Holman and Schiffman. The former testified that he had never had the mules in his possession, nor had he sold them or contracted to sell them to anyone; that neither he nor the bank had taken the mules under the mortgage; and that the note given him by Schiffman, secured by the first mortgage, had been fully paid off and discharged. Schiffman, the mortgagor, testified that he sold the mules to Lampe, and made out a bill of sale to him, and not to the bank; and that there was no foreclosure of the mortgage, but that instead, as already stated, a sale by him to Lampe, and on account of which transaction the mortgage note was paid. True, the purchaser, Lampe, testified that he obtained a bill of sale from the bank, but upon this conflicting testimony we are concluded by the jury's verdict. The manner, source, time, or means of payment, or by whom paid, are questions not presented for our consideration. Nor is the question of subrogation involved. No objection is made to the court's charge, nor is any objection urged in this court as to the testimony introduced or offered. We confine our decision on this question to the single issue that, by the payment of the note secured by the first mortgage, that mortgage was thereby satisfied.

[5] Attention is called to a provision in the first mortgage which reads: "The first party shall not make a second mortgage or lien upon said property, or remove the same from its location herein named, without the written consent of said second party." We need only to say that, this clause in the first mortgage having been violated by the mortgagor, neither he nor those claiming through him can take advantage of it to the prejudice of the holder of the second mortgage. In New Hampshire, a statute forbade the making of a second mortgage of personal property without reference in it to the first, and it was held that a second mortgage executed in violation of the statute was not void; that the object of the statute was to secure the rights of the second mortgagee, and this would be defeated by holding the mortgage void; that, while the mortgagee might avoid the mortgage if he was to suffer, it could not be avoided by the mortgagor. *Leach v. Kimball*, 34 N. H. 568; *Jones on Chattel Mortgages*, § 39. See, also, *Tootle et al. v. Taylor et al.*, 64 Iowa, 629, 21 N. W. 115.

The fifth assignment of error is based upon the action of the court in overruling defendant's motion to direct a verdict in his favor.

It does not appear from the record that such motion was ever filed, and the alleged error therefore cannot be considered.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

KIBBY v. CUBIE, HEIMANN & CO.
(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. COMMERCE (§ 46*)—CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—RIGHT TO SUE.

A foreign corporation, engaged in interstate commerce, is not barred by sections 1338 and 1341, Rev. Laws 1910, from maintaining an action on a contract of employment entered into with a citizen of the state of Oklahoma, although it has not filed a copy of its articles of incorporation, etc., with the Secretary of State of the state of Oklahoma, and has not appointed a service agent in the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 100, 113, 126; Dec. Dig. § 46; Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

2. CORPORATIONS (§ 672*)—FOREIGN CORPORATIONS—RIGHT TO SUE.

Where a defendant in such action, after having answered to the merits, by permission of the court files a supplemental answer setting up these statutes in bar of the action, *held*, that a demurrer to such supplemental answer was properly sustained.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. § 672.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Cubie, Heimann & Co., a foreign corporation, against C. F. Kibby, for debt. Judgment for plaintiff, and defendant brings error. Affirmed.

J. V. Cabell and Everest & Smith & Campbell, all of Oklahoma City, for plaintiff in error. Embry & Hastings, of Oklahoma City, for defendant in error.

GALBRAITH, C. Cubie, Heimann & Co., a New York corporation, engaged in the business of selling embroideries by samples, on orders, taken by traveling salesmen, which orders were sent to the plaintiff's place of business in New York City, and if approved by them the goods were shipped from there to the purchasers in the various states. The action was based upon a written contract of employment entered into by Cubie, Heimann & Co. and C. F. Kibby, in the city of St. Louis, Mo., on the 17th day of April, 1909, whereby Kibby was employed as a traveling salesman for the company, for the sale of its merchandise in a designated territory, embracing the states of Missouri, Kansas, and Oklahoma, for a term of one year, beginning on the 1st day of July, 1909, and ending on the 30th day of June, 1910. The contract provided that Kibby's compensation should be a specified percentage of the net amount of goods

sold, and also that during the term of the contract he should have a drawing account of \$250 per month, and in addition to this that he should be paid not to exceed \$75 per week for traveling expenses when out on the road, and other minor expenses were provided for in the contract. The contract also stipulated that if the amount paid Kibby on his drawing account and traveling expenses should exceed the total sum of the commissions due him on the sale of goods, Kibby should repay such excess to the company at the termination or discontinuance of the contract. It was alleged in the petition that the sum of \$4,233.30 had been advanced to Kibby during the term of his employment, and that the total amount of the commissions due him on sales as provided in the contract amounted to \$1,140.62, leaving a balance due from Kibby of the sum of \$3,092.68, and judgment was prayed for the last sum named. Kibby answered the petition by a general denial, and in the second count, in the nature of a cross-petition, alleged certain damages by reason of the fraud and deceit practiced upon him, being the inducing cause for his entering into the contract, and alleged damages in the sum of \$3,800, and prayed for judgment for the difference between the damages alleged in his cross-petition and the amount claimed in plaintiff's petition. A reply was filed to the cross-petition by way of a general denial, and the trial commenced on the 12th day of April, 1911. On the following day, and before the trial had closed, Kibby asked and obtained permission of the court to file a supplemental answer which was in words and figures following: "Comes now the defendant herein, C. F. Kibby, and for answer to the petition of plaintiff herein files this amendment to his original answer and counterclaim herein, leave of the court having been first had and obtained, and states that the plaintiff herein should not be allowed to maintain this cause against defendant, and that said case should be by said court dismissed for the reason that the petition shows upon its face that the plaintiff is a foreign corporation, and that the contract for the exploitation and sale of plaintiff's goods in the state of Oklahoma with reference to foreign corporations as provided by Snyder's Statutes of Oklahoma, being sections 1541, 1542, and 1543. Further, that defendant avers and alleges that said corporation has not complied in manner or form with the sections of Snyder's Statutes of the Compiled Laws of the state of Oklahoma, as above set out." Counsel for the company objected to the filing of this supplemental answer, and excepted to the ruling of the court permitting it to be filed, and after it was filed demurred to the same on the ground that it did not state facts sufficient to constitute a defense to the action or to bar the right of the plaintiff to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

maintain the action. This demurrer was sustained by the court, and exceptions taken by counsel for Kibby. At the close of the testimony counsel for Kibby obtained permission of the court to dismiss his cross-petition and claim for damages, leaving the cause standing upon the issues formed by the petition and general denial thereof. Then counsel for the company moved the court to instruct the jury to return a verdict for the plaintiff. This motion was granted, and the verdict rendered accordingly. After the overruling of the motion for a new trial presented by counsel for Kibby, judgment was entered on the verdict of the jury in favor of the company for \$3,064.28. From this judgment Kibby appealed.

[1, 2] The one assignment of error argued challenges the ruling of the court in sustaining the demurrer to the supplemental answer as hereinbefore set out.

It is clear from the record that the ruling of the court in sustaining the demurrer to this supplemental answer was correct, and may be sustained on any one of a number of grounds.

First. The supplemental answer was not filed until after the defendant had answered to the merits, and thereby admitted the capacity of the plaintiff to maintain the action. As was said by Mr. Justice Hayes, in rendering the opinion of the court in *Jantzen v. Church*, 27 Okl. 473, at page 475, 112 Pac. 1127, at page 1128 (Ann. Cas. 1912C, 659): "By pleading to the merits, and without raising the question of plaintiff's capacity, he admitted its capacity to maintain the action." See, also, *White Sewing Machine Co. v. Peterson*, 23 Okl. 361, 100 Pac. 513; *Engle v. Legg*, 135 Pac. 1058.

Second. Even if this supplemental answer had been filed in proper time, it did not state facts sufficient to constitute a defense to the cause of action set out by the plaintiff, or to deny the right of the plaintiff to maintain the action. These sections are reproduced as sections 1338, 1339, and 1341, Rev. L. 1910, and they did not become effective until June 10, 1909, and since the statutes were evidently not intended to be retroactive in effect, they could not possibly affect the rights of the parties accruing under a contract executed on the 17th day of April, 1909, prior to the taking effect of the statutes.

Third. Again, the facts set out in this supplemental answer are not sufficient to show that the plaintiff was within the terms of the statute, or that it was such a corporation as was intended by the statute to deny the right to maintain an action in the courts in this state. *Freeman-Sipes Co. v. Corticelli Silk Co.*, 34 Okl. 229, 124 Pac. 972; *Chicago Crayon Co. v. Rogers et al.*, 30 Okl. 299, 119 Pac. 630.

Fourth. Again this action was based upon a contract of employment entered into by a foreign corporation and its agent. In any

event the making of this contract at St. Louis with one who was referred to as a citizen of "the city of St. Louis" could not be said to be doing business in the state of Oklahoma, within the contemplation of the statutes of Oklahoma denying a foreign corporation a right to sue in its courts who had not complied with the provisions of the statute requiring that a copy of its charter be filed with the Secretary of State of Oklahoma and appointing a service agent in Oklahoma. It seems that the case of *Verdigris River Land Co. v. Stanfield et al.*, 25 Okl. 265, at page 271, 105 Pac. 337, at page 339, is a controlling decision on the question involved in this case. In that case an Indiana corporation entered into a contract with Stanfield, a citizen of the state of Oklahoma, for the purchase of lands in Oklahoma, and his compensation, as provided by the terms of the contract, was to be oil and gas mining leases covering the lands purchased. The action in that case was based upon this written contract, and a similar defense to that attempted to be set up in this supplemental answer was made therein. Mr. Justice Kane, in the course of the opinion, said: "The transaction thus necessary to inquire into in order to compel the agents of the corporation to account to them would be the contracts between the corporation and the citizens and residents of the Indian Territory that were made in relation to the lands and money in controversy. These transactions were not void except at the option of the citizens and residents of the Indian Territory with whom they were made, and, as far as the record shows in this case, they are not complaining. The defendants purchased certain lands from these citizens and residents of the Indian Territory with money belonging to the corporation, taking the deeds in the name of the defendant Stanfield, who thereafter conveyed an undivided one-half interest in them to Henry. The fiduciary relation of the defendants to the corporation is admitted; one Henry being the president, and Stanfield, an agent employed for the purpose of making the purchases. The contract of the corporation with its agent, Stanfield, which they claim to be void and under which they seek to avoid an accounting, is a contract of employment between Stanfield and the corporation, executed in the state of Indiana. We are of the opinion that the part of the provision pertaining to foreign corporations which provides that, unless they comply with the provisions of the law in relation to filing their certificate, etc., all its contracts with citizens and residents of the Indian Territory shall be void as to the corporation does not have reference to contracts entered into between the corporation and its fiduciary agents; the purpose of the statute obviously being to protect citizens of the territory in transacting business with foreign corporations, and not to offer opportunity to the fiduciary agents of foreign corporations to neglect to comply

with the law, and then exploit the corporation. The corporation must act through its agents, and would be a helpless entity, indeed, if its chief executive officer could, by his neglect to comply with a provision of the law, enrich himself, and then find protection behind the statute."

Fifth. Again, the business in which Cubie, Helmann & Co. were engaged was interstate commerce. Of this there is no doubt. *Freeman-Sipes Co. v. Corticelli Silk Co.*, 34 Okl. 229, 124 Pac. 972; *White Sewing Machine Co. v. Peterson*, 23 Okl. 361, 100 Pac. 513; *Chicago Crayon Co. v. Rogers*, 30 Okl. 299, 119 Pac. 630; *Harrell v. Peters Cartridge Co.*, 36 Okl. 684, 129 Pac. 872, 44 L. R. A. (N. S.) 1094; *Western Union Tel. Co. v. Kansas*, 216 U. S. 28, 30 Sup. Ct. 190, 54 L. Ed. 366; *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; *Lehigh Portland Cement Co. v. McLean*, 245 Ill. 236, 92 N. E. 248, 137 Am. St. Rep. 322.

The Legislature of Oklahoma was without power to deny a foreign corporation engaged in interstate commerce the right to maintain suits in the courts of this state. It cannot be contended that such was the purpose of the statutes under consideration, for the Legislature clearly recognized the limitation upon its power in this respect in section 1340, Rev. L. 1910, as follows: "This article shall not be effective in cases where its enforcement will conflict with the powers of Congress or the federal laws to regulate commerce between the states." It appears from the record that Mr. Kibby sought the employment with Cubie, Helmann & Co. repeatedly before the contract in suit was entered into; that he entered into this contract voluntarily for the term of one year, and refused to avail himself of the opportunity given him to rescind the contract prior to that time. Then, when the result was not as he expected, or as satisfactory as he had contemplated, he cannot escape the burdens of the contract in the manner he has attempted to do, after having enjoyed its benefits. He can find no protection behind this statute, even if he had properly pleaded its provisions.

It follows that the assignment urged is not well taken, and that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

CROSSAN v. COOPER.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 107*)—DEFAULT—PLEADING. There can be no judgment by default where there is on file an answer or other pleading raising an issue of law or fact.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.*]

2. JUDGMENT (§ 107*)—DEFAULT—PLEADINGS BY DEFENDANT.

Before a default judgment can be properly entered, the answer or other plea must be disposed of in an orderly way by motion, demurrer, or in some other manner.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.*]

3. JUDGMENT (§ 107*)—DEFAULT—LIMITATIONS.

A petition, to recover on a foreign judgment, on its face, clearly showed that the cause of action therein set out was barred by the statute of limitations; an answer was filed specifically setting up the bar of the statute, which answer was not attacked by demurrer or motion; the court, on motion of plaintiff, in the absence of defendant and his counsel, entered a purported default judgment, and trial without a jury was had on the petition and answer; the only evidence introduced was certified copies of the petition, answer, reply, and judgment of the original trial court. *Held*, the defense of the statute of limitations, being well pleaded, and properly before the court, should have been by the court sustained, and there being no competent evidence before the court sustaining the purported cause of action, and the defense pleaded being full and sufficient, the court committed reversible error in entering judgment for plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 198-200; Dec. Dig. § 107.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Pottawatomie County; Geo. C. Abernathy, Judge.

Action by William Cooper against W. B. Crossan. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

P. O. Cassidy, of Shawnee, for plaintiff in error. E. E. Hood and Lydick & Eggerman, all of Shawnee, for defendant in error.

ROBERTSON, C. This was an action on a foreign judgment rendered against W. B. Crossan in the district court of Miami county, Kan., on June 8, 1908, in the sum of \$1,000 and interest, in favor of Wm. Cooper, who on September 24, 1910, filed his petition in the superior court of Pottawatomie county and sought thereby to recover on, and keep alive, the said judgment in this state. The petition is in the usual form and has attached thereto and made a part thereof the petition, answer, reply, and judgment of the district court, the opinion and judgment of the Supreme Court of Kansas affirming the decision of the district court, together with an opinion and judgment of the Supreme Court of Kansas denying a rehearing, together with the mandate of the said Supreme Court of Kansas, all of which were attached to said petition as exhibits and certified to by the clerk of the district court of Miami county, Kan. Crossan answered first by general denial; second, by a plea of the statute of limitations in the following language: "As a second and further defense to the cause of action of plaintiff, the defendant alleges: That he has been an actual and bona fide resident of Pottawatomie coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ty, state of Oklahoma, for more than eight years last past, and is now a resident in good faith of said county and state, and that said residence has been actual and continuous. That the said cause of action as set out and alleged in the petition of plaintiff did not accrue to said plaintiff at any time within one year before the commencement of this suit, and that said cause of action is barred by the statute of limitations in such cases made and provided." This answer was filed January 21, 1911. On April 19, 1911, the case being reached for trial, and neither the defendant nor his attorney appearing, it was ordered that the defendant be adjudged in default, and, the plaintiff waiving a jury, trial was had to the court; evidence was introduced, and a judgment in favor of plaintiff and against the defendant was entered in the sum of \$1,324.20. On the same day the defendant filed his motion to set aside the judgment, alleging that default should not have been adjudged for the reason that defendant had answered in due time, and the said answer alleged that the cause of action stated in the petition was barred by the statute of limitations, which allegations were not denied by reply, or in any other manner, by the plaintiff, and that the petition shows on its face that the suit was on a foreign judgment obtained June 8, 1908, and that this action was not filed until December 24, 1910. The affidavit supporting the motion to set aside the default was made by P. O. Cassidy, who was attorney for defendant, and alleges that he had full and sole charge of the suit; that he filed the answer in due time; that no reply had ever been filed by plaintiff thereto; that the trial of the cause had been regularly set by the court for April 17, 1911; that he had been in court on the morning of April 17, 1911, and was informed by the court that the assignment was behind and that the cause would not likely be reached before the last of the week; the said attorney was in court on the morning of the 18th of April and was again informed that the assignment was still behind; that he went again on the 19th and was informed by some attorney who was then trying a case that the trial then before the court would take most of the day; and that said P. O. Cassidy caused the defendant Crossan to go to the courtroom about 3 o'clock p. m. on the 19th to ascertain the probability of the cause coming to trial on that day; and that said Crossan returned and reported that judgment by default had just been taken. A copy of the motion to set aside the default, together with the affidavit in support thereof, was served on plaintiff April 19, 1911, at 5 o'clock p. m. A motion for a new trial was filed in due time and alleged, among other things: (1) That the court erred in adjudging the defendant in default, his answer being on file. (2) Defendant and his counsel were absent from the courtroom; at the time the judgment was taken, by acci-

dent and excusable neglect. (3) Irregularities in the proceedings of the court by which defendant was prevented from having a fair trial: (a) Adjudging defendant in default when he had an answer on file which pleaded an affirmative defense; no reply having been filed thereto. (b) The petition is fatally defective and will not support a judgment; it shows on its face the cause was barred by the statute of limitations. (c) Judgment is not supported or proved by competent evidence. (d) Defendant had a valid and legal defense stated in his answer, which was not controverted by plaintiff. (e) The cause could not be tried without a jury; the same not being waived by defendant. (4) The judgment is not supported by competent evidence. (5) The judgment is contrary to law.

This motion, as well as a motion for new trial, was, after due consideration by the court, overruled, and the defendant brings this cause to reverse said order. At the threshold, we are met with a motion to strike the case-made and brief from the files of this court and to dismiss the appeal, there being many reasons assigned for such action, the first being that the said case-made was not made and served in the time provided by law. In support of this reason, it is urged that the defendant was not given 60 days in which to make and serve the case-made, but that the language of the court found on page 28 of the case-made is that the defendant serve his case-made within 60 days, and that it does not specifically give the defendant 60 days in which to prepare it, it merely provides that it shall be served at some time within the 60 days; that it does not undertake to extend the time for making the case-made for any definite period; and that therefore the case-made should have been made and served within three days from the rendition of the final order. This is not a fair interpretation of the language of the court. Even a casual reading of the record shows that it was the intent of the court, fully understood by the parties, that the defendant was given 60 days in which to make and serve a case-made on the plaintiff for appeal to the Supreme Court, and the rule laid down in *Springfield Fire & Marine Ins. Co. v. Gish*, 23 Okl. 824, 102 Pac. 708, does not apply or govern under the facts of this case.

The second and third ground for dismissal is that the defendant has failed to comply with rules 20 and 25 of this court (95 Pac. vii), in that defendant has failed to separately set forth and number the argument, and authorities in support of the point in his assignment of error, etc. There is some merit to this objection, but the discrepancy and shortcoming of the brief of the defendant is not of such magnitude or degree as would warrant us in dismissing the appeal under this ground of the motion.

The fourth reason is that the case-made

affirmatively shows on its face that it does not contain all the evidence. In this, counsel for plaintiff are evidently mistaken, and undoubtedly have overlooked the averment of the case-made by way of recital, found on page 26, that "the foregoing contains a true and correct statement of the pleadings, motions, orders, evidence, findings and proceedings, upon which judgment was rendered." While this certificate might have been more full and complete, yet to our mind it is sufficient under the statute and holdings of this court.

The last ground urged is for failure to comply with rule 25, wherein it is provided that the brief of the plaintiff in error shall contain a statement of facts. There is no merit in this allegation. The brief of defendant, on pages 2, 3, 4, 5, 6, 7, and 8, contains a full and correct abstract and statement of the facts of this case, and, while it is not labeled "Statement of Facts," yet it is a statement as fully and completely as though it were so labeled.

[1, 2] This brings us to the consideration of the case on its merits. The judgment by default was erroneously entered. There can be no judgment by default where there is on file an answer or other pleading of defendant raising an issue of law or fact. Before a default judgment can be properly entered, the answer or other plea must be disposed of in an orderly way by motion, demurrer, or in some other manner. 23 Cyc. 750. In this case there was an answer, filed in due time, consisting of a general denial, and in addition specifically challenging the sufficiency of the allegations of the petition by showing that the statute of limitations had run against the alleged cause of action prior to the time the action was instituted. Such pleas are in no wise inconsistent, and the judgment by default was improvidently entered, and no possible advantage could accrue thereunder to the plaintiff, nor could any detriment result therefrom to defendant.

But, without doubt, under the showing made in the record before us, plaintiff was entitled to proceed with the trial, even in the absence of defendant or his attorney. There is nothing in the record that warrants any other conclusion, and the entering of the purported default against defendant was of no consequence one way or the other.

[3] This brings us to the consideration of the grounds laid in the motion for a new trial. We will consider them altogether. The petition on its face shows that the judgment sued on was rendered in the district court of Miami county, Kan., on June 8, 1908; that suit thereon was filed in the superior court of Pottawatomie county, Okl., on December 28, 1910, two years, six months, and twenty days subsequent to the rendition of the judgment in the Kansas court. The judgment was not stayed by supersedeas or otherwise, so far as this record shows. Even though a valid default judgment had been entered against defendant, the judgment can-

not be sustained unless the petition, upon which it is based, states a cause of action and contains all those averments necessary to show plaintiff's right of recovery. If the petition shows on its face that the right to sue on the judgment was barred by the statute of limitations, a general demurrer would be sufficient to call the attention of the court thereto. In *M. K. & T. Ry. Co. v. Wilcox*, 32 Okl. 51, 121 Pac. 658, it was said: "The petition clearly shows on its face that more than two years had elapsed from the date the horses were killed until the filing of the suit. There is no allegation in the petition which takes, or attempts to take, the cause out of the operation of the statute of limitations, and when the petition shows clearly on its face, as this one does, that the statute of limitations had run against the cause of action, it was the duty of the court to sustain the demurrer, especially when no objection to the sufficiency of the plea was made by plaintiff in the court below." See, also, *Young v. Whittenhall*, 15 Kan. 580; *School Dist. No. 1, Hamilton Co., v. Herr*, 6 Kan. App. 861, 50 Pac. 101.

In *City of Phillipsburg v. Kincaid*, 6 Kan. App. 377, 50 Pac. 1093, it was said: "The only question in the case is: Does the petition state facts sufficient to constitute a cause of action against said defendant below, the plaintiff in error? The action was brought to recover damages for taking and detaining personal property. The petition alleges that the property was taken November 15, 1891. This action was commenced in the court below July 5, 1895. *There is nothing stated in the petition sufficient to take the cause out of the operation of the statute of limitations* (italics ours), and, under the provisions of paragraph 4095, Gen. St. 1895, the demurrer thereto should have been sustained."

While there was no demurrer filed against the petition yet under the circumstances of the case the answer, specifically setting up the plea of the statute of limitations, was the equivalent thereof and should have been so treated by the court. The answer being on file and no motion made to strike it or properly dispose of it in any other manner, it became and was the duty of the court to scrutinize the allegations of the petition closely, and if the same were insufficient to entitle the plaintiff to the relief sought, or to sustain a judgment, it should have been so found by the court, and the relief sought denied, and, even though the court failed to so scrutinize the petition, it became and was its duty to weigh the evidence introduced under and in support of it, and, if there was no competent evidence reasonably tending to warrant the relief sought, the same should be denied. Counsel for plaintiff ingeniously urge that there is nothing in the answer to show that defendant was ever present in the state of Oklahoma, and that therefore the plea of the statute of limitations is not open to him. The answer alleges that "he has

been an actual and bona fide resident of Pottawatomie county, state of Oklahoma, for more than eight years last past and is now a resident in good faith of said county and state, and that said residence has been actual and continued." This, giving it the meaning ordinarily given to language, is a sufficient allegation of residence to sustain the plea as offered, and, in the absence of motion to make more definite and certain or a denial of any sort by plaintiff, it is sufficient. Indeed, under the ordinary rules of pleading, it stands admitted in this case.

The only evidence introduced in support of the petition was copies of the record from the Kansas court. Without considering the competency of these copies, which is properly challenged by defendant in his brief (and which to us appears to be well taken), it is sufficient to say that, in view of the answer and its plea of the statute of limitations on file and properly before the court, and also in view of the fact that the petition is barren of any plea of exception to the statute of limitations, the judgment is absolutely void for want of any competent testimony to support the same.

Therefore the court erred in overruling defendant's motion for a new trial, and the judgment should be reversed, and the cause remanded for further proceeding not inconsistent with the views herein expressed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. SMITH.
(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 441*)—KILLING TRESPASSING ANIMALS—PRESUMPTION OF NEGLIGENCE.

In an action against a railway company for killing trespassing animals, negligence will not be presumed, in the absence of statute, from the mere fact of accident, which is as consistent with the presumption that it is unavoidable as it is with negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1575-1595; Dec. Dig. § 441.*]

2. RAILROADS (§ 411*)—KILLING OF TRESPASSING ANIMALS—LIABILITY.

In the absence of negligence, a railway company is not liable for animals injured or killed, when they come upon the track at a place where it is not required by law to be fenced, such as station grounds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1409-1450; Dec. Dig. § 411.*]

3. TRIAL (§ 139*)—DIRECTION OF VERDICT—EVIDENCE—NEGLECT.

In an action against a railway company for the negligent killing of stock, where the plaintiff's right of recovery depends upon defendant's negligence, and where there is no evidence tending to prove negligence, and no circumstance from which negligence might be reasonably inferred, it is the duty of the court to direct a verdict in favor of defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Commissioners' Opinion, Division No. 1. Error from McCurtain County Court; T. J. Barnes, Judge.

Action by T. W. Smith against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans, of St. Louis, Mo., R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, and Stephenson & Shaffer, of Hugo, for plaintiff in error.

SHARP, C. Of the several assignments of error urged, it will be necessary to consider only the action of the court in overruling defendant's motion for a peremptory instruction. At the time of the accident which resulted in the death of plaintiff's mule, the owner was living in the little town of Duval, about 75 yards distant from the railroad station platform, and had turned the mule out to permit it to graze in the adjoining woods pasture. On the same afternoon the mule was struck by an east-bound passenger train, and, as a result of the injury sustained, died a short time thereafter. The undisputed evidence shows that the animal was struck by the engine at the station platform. Plaintiff's amended petition charges that the animal's death was due to the negligence of the defendant in the operation of its train, and further charged that no fence had been erected by the railroad company where the injury occurred. The latter allegation, if indeed as alleged it could be charged as an act of negligence, was eliminated by the court's charge to the jury, so that the only ground upon which the verdict was permitted to stand was that the train at the time of the injury was being negligently operated, as the trial court was clearly correct in its instruction that the railway company was not required by law to fence its right of way at station grounds. Section 1389, Comp. Laws 1909; St. Louis & S. F. Ry. Co. v. Brown, 32 Okl. 483, 122 Pac. 136.

We have read the testimony very carefully, and fail to find any evidence tending to show any negligence on the part of the employees of the railway company. Four eyewitnesses testified concerning the accident, two on the part of the plaintiff, and two on the part of the defendant. C. B. Gardner, for plaintiff, testified that he saw the mule on the track at the dirt road crossing a short ways, probably 30 or 40 yards, west of the platform, at which time the animal was running down the track, and was but four or five feet in front of the engine, when the witness turned his attention elsewhere. When he next saw the mule, she was walking away from the track, limping as if injured. Bertha Davlin, a daughter of plaintiff, testified that she did not see the mule when it went on the track, but saw it running away from the train as it approached; that it ran probably 30 yards before

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

being hit; that the train was running pretty fast, but whistled, she thought, for the station; that the dirt road crossing was about 35 or 40 yards west of the platform; that she could not say how fast the train was running; that she saw the train hit the mule. On behalf of defendant, J. W. Bateman testified that at the time of the accident he was at the commissary store near by, and saw the mule walking down the track, and that when the train struck her it pushed her down, and that she afterwards got up and walked towards the store; that it seemed that the mule was "just shoved along on her four feet." Joe Goodman, for the defendant, testified that he was standing about 200 yards south of the railroad when he saw the mule on the railroad track; that the train ran against the mule and "pushed her along a little bit and then stopped"; that the mule got up and "fed on off"; that the mule was east of the dirt crossing when she was struck. We do not consider this testimony sufficient proof of negligence. It proves that the animal was struck and injured by the railway company's engine and nothing more. From all the evidence, it is clear that the mule which had that day been negligently turned loose by its owner, adjacent to the unfenced station grounds, had wandered on the track and was struck and injured; that it got on the track at a point not to exceed 35 or 40 yards from where the train stopped near the station platform.

[1] Negligence is not to be presumed from the mere fact of injury, which is as consistent with the presumption that it was unavoidable as it is with negligence, and there must be some evidence that the accident could have been avoided with proper diligence and precaution. *Stern et al. v. Michigan Central Railroad Co.*, 76 Mich. 591, 43 N. W. 587.

[2] Plaintiff's mule was unlawfully at large, and was a trespasser upon the tracks of the defendant company, and in such case, as was said in *St. Louis & S. F. R. Co. v. Brown*, supra, the correct rule is that the railway company is required to exercise only ordinary care to avoid injuring trespassing animals after they are discovered on or in dangerous proximity to the track. *Atchison, T. & S. F. Ry. Co. v. Davis & Young*, 26 Okl. 359, 109 Pac. 551; *Missouri, K. & T. Ry. Co. v. Savage*, 32 Okl. 376, 122 Pac. 656; *Atchison, T. & S. F. Ry. Co. v. Ward*, 32 Okl. 187, 120 Pac. 982; *St. Louis & S. F. Ry. Co. v. Little*, 34 Okl. 298, 125 Pac. 459; *St. Louis & S. F. Ry. Co. v. Hardesty*, 36 Okl. 682, 129 Pac. 739; *Memphis & Little Rock R. Co. v. Kerr*, 52 Ark. 162, 12 S. W. 320, 5 L. R. A. 429, 20 Am. St. Rep. 159. In the absence of negligence, a railway company is not liable for animals injured or killed, when they come upon the track at a place where it is not required by law to be fenced, such as de-

pot or station grounds. *International & Great Northern R. Co. v. Dunham*, 68 Tex. 231, 4 S. W. 472, 2 Am. St. Rep. 484; *Moser v. St. Paul & D. R. Co.*, 42 Minn. 480, 44 N. W. 530; *Becholdt v. Grand Rapids & I. R. Co.*, 113 Ind. 343, 15 N. E. 686.

[3] That the mule was struck within 30 or 40 yards of where it got on the track; that the whistle was sounded and the train quickly brought to a stop at or near the platform; together with the manner in which the animal was struck—all tended to negative, rather than prove, negligence. In the absence of any evidence tending to prove negligence, or where from the evidence negligence may not be reasonably inferred, it is the plain duty of the court to direct a verdict in favor of the defendant. *Baker v. Nichols & Co.*, 10 Okl. 685, 65 Pac. 100; *Richardson v. Fellner*, 9 Okl. 513, 60 Pac. 270; *Edmission v. Drumm-Flato Co.*, 13 Okl. 440, 73 Pac. 958; *Cooper v. Flesner*, 24 Okl. 47, 103 Pac. 1016, 23 L. R. A. (N. S.) 1180, 20 Ann. Cas. 29; *Atchison, T. & S. F. Ry. Co. v. Henderson*, 27 Okl. 560, 112 Pac. 986; *St. Louis & S. F. Ry. Co. v. Webb*, 36 Okl. 235, 128 Pac. 252; *St. Louis & S. F. R. Co. v. McClelland*, 36 Okl. 573, 128 Pac. 1081.

No brief has been filed in this court on the part of the defendant in error. In our opinion the plaintiff wholly failed to make out a case involving the legal liability of the company, and the judgment of the trial court should be reversed.

PER CURIAM. Adopted in whole.

In re THEIMER et al†

(Supreme Court of Oklahoma. Sept. 22, 1913.)

(Syllabus by the Court.)

COURTS (§ 202*)—PROBATE COURTS—APPEAL—JURISDICTION.

Under the provisions of section 1820, art. 1, Revised Laws of Oklahoma 1910, and section 6, c. 27, Laws of 1907-08 an appeal lies to the district court from the county court in probate matters.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 480-486; *Dec. Dig.* § 202.*]

Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action between H. C. Rice and Louis M. Theimer and others. From the judgment, H. C. Rice brings error. Appeal dismissed.

Stephen C. Treadwell, of Oklahoma City, for plaintiff in error. Geo. J. Eacock and W. J. Davidson, both of Oklahoma City, for defendants in error.

LOOFBOURROW, J. On September 30, 1912, Elizabeth B. Theimer, as guardian of Louis M. Theimer et al., minors, obtained an order from the county court of Oklahoma county to sell certain real estate belonging to such minors on and after October 26, 1912.

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series* & *Rep'r Indexes*
† Rehearing denied.

Pursuant to such order sale was made, the report thereof filed with the county court, and on the 6th day of November, 1912, the same was confirmed. On January 2, 1913, plaintiff in error, H. C. Rice, filed in the county court of Oklahoma county a petition to set aside the order confirming the sale of said real estate. Thereafter Elizabeth B. Thelmer, guardian, filed in the county court a motion to strike said petition from the files, which motion was, by the judge of the county court, sustained, to which ruling, order, and judgment the plaintiff in error, H. C. Rice, duly excepted and appealed to this court for relief from the alleged errors in such proceeding, and the defendants in error have filed a motion to dismiss said appeal.

Section 6, art. 1, c. 27, Session Laws of 1907-08, with minor changes in language, found at section 1820, Revised Laws of Oklahoma 1910, is as follows: "In all cases arising under the probate jurisdiction of the county court, appeals may be taken from the judgments of the county courts to the district court of the county, in the manner provided by law, and in all cases appealed from county court to the district court, the cause shall be tried de novo in the district court upon questions of both law and fact." The appeal, under the foregoing statute, lies to the district court, and not to the Supreme Court. *Apache State Bank v. Daniels*, 32 Okl. 121, 121 Pac. 237, 40 L. R. A. (N. S.) 901; *Barnett, Guardian, et al. v. Blackstone Coal & Milling Co.*, 35 Okl. 724, 131 Pac. 541.

The motion to dismiss is sustained. All the Justices concur.

OKLAHOMA CITY et al. v. COLT.

(Supreme Court of Oklahoma. Dec. 16, 1913.)

(Syllabus by the Court.)

WEIGHTS AND MEASURES (§ 8*)—MUNICIPAL SCALES.

A municipality with a population of more than 2,000 inhabitants, existing under a charter framed for its own government under sections 3a and 3b, art. 18 (sections 329 and 330, Williams' Annotated Edition), of the Constitution of this state, may install municipal scales, appoint a municipal weighmaster therefor, and place him in charge thereof, for the purpose of weighing cotton, grain, live stock, cotton seed, hay, coal, wood, broom corn, and such other commodities as may be offered for sale and delivery in such city.

(a) Such municipal weighmaster has a right to weigh on such municipal scales without interference from the county or public weigher.

(b) The right of the municipal weighmaster to weigh such products in said municipality does not exclude the right of the public or county weigher to weigh products in said city when offered to him for such purpose.

[Ed. Note.—For other cases, see *Weights and Measures*, Cent. Dig. § 10; Dec. Dig. § 8.*]

Error from Superior Court, Oklahoma County; E. D. Oldfield, Judge.

Action by L. C. Colt against the city of Oklahoma City and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with directions.

J. W. Johnson and V. V. Hardcastle, both of Oklahoma City, for plaintiffs in error. Reardon & Hereford, of Oklahoma City, for defendant in error.

WILLIAMS, J. The defendant in error is the regular elected public weigher of Oklahoma county and was acting as such on February 4, 1913, at which time the plaintiff in error, the city of Oklahoma, was a municipal corporation existing under a charter or commission form of government. On said date one of the plaintiffs in error, Don Sanford, as city weighmaster, was claiming to operate the city scales under and by virtue of the laws of said municipality. An action was commenced by the defendant in error as plaintiff to enjoin the plaintiffs in error as defendants from operating said scales. Upon a hearing injunction was granted and made permanent against them. This proceeding in error is to review the action of the lower court. The defendant in error, to wit, L. C. Colt, will hereinafter be referred to as the county weigher.

The duty of the county weigher within his county is "to receive, inspect and weigh, according to the standard weights of the United States, all cotton, grain of every kind, live stock, hay, cotton seed, coal, wood, broom corn and all other farm products sold by weight, and such articles shall be weighed by such weigher in the order in which they are received, and he shall, at the time of such weighing, make a record in duplicate form, either upon a stub attached, or by a carbon duplicate sheet, such records to be in a binding and kept for future reference. Such record shall contain a statement as to the article, its gross and net weight, its condition and the date of its weighing, together with the description of any marks, brands or other peculiarity essential to the complete description thereof. A copy of such entry shall be furnished the person applying for such weights. Said statement of the record of each weight shall be signed by the official weigher, and all such weights, when so made by the public weigher, shall be taken as the legal weight of any commodity mentioned in this section." Section 1743, Revised Laws of Oklahoma 1910.

"The purchaser of an article, weighed upon the official scales of any public weigher or deputy weigher, shall receive and accept such weights as official and correct, and no person, not a public weigher or deputy, shall hold himself out as such." Section 1745, Revised Laws of Oklahoma 1910.

The charter of Oklahoma City was framed and adopted by virtue of sections 3a and 3b, art. 18 (sections 329 and 330, Williams' Ed.),

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the Constitution of this state. Section 7 of article 1 of said charter provides: "General Grant of Powers Not Limited.—The legislative, executive and judicial powers of the city shall extend to all matters of local and municipal government, it being the intent hereof that the specification of particular powers by any other provision of this charter shall never be construed as limiting or impairing the effect of the general grant of powers hereby made."

Under the powers of such charter an ordinance was passed by said municipality entitled: "An ordinance relating to the inspection of scales, weights and measures, regulating the methods thereof, defining duties of certain officers, prohibiting the use of false scales and measures, forbidding the offering for sale of merchandise under a misrepresentation as to weights or measures, providing a penalty, and declaring an emergency."

Section 7 of said ordinance is as follows: "The Board of Commissioners shall appoint, in manner provided by law, public weighmasters for the city scales, who shall give bond to faithfully perform their duties, in the sum of one thousand dollars, with sureties to be approved by said board, and take the oath of office prescribed by law. They shall be paid such compensation as the board of commissioners may from time to time by ordinance prescribe, and shall account weekly for all fees collected by them. The city scales shall be in their charge, and they shall keep the same in good order and repair. They shall weigh all deliveries offered for that purpose and shall issue certificates identical with that issued by other weighmasters except they shall be printed on white paper, with the words 'Public City Scales' printed thereupon, and shall make such charges therefor as shall be ordered by said board of commissioners of said city."

The question essential for determination is whether the said city had authority to provide for a municipal weighmaster.

Section 591 of article 11, c. 10, Revised Laws of Oklahoma 1910, as to defining the powers and duties of the council of cities, is as follows: "The council may prescribe rules for the weighing and measuring of every commodity sold in the city, in all cases not otherwise provided for by law, and may provide for the inspection and weighing of hay, grain and coal, the measuring of wood and fuel, and determine the place or places of the same, and regulate and prescribe the place or places of exposing for sale hay, coal

and wood, and fix the fees and duties of the persons authorized to perform the duties named in this section"—clearly recognizing such regulation as a municipal matter.

Section 970, vol. 3, of McQuillin on Municipal Corporations (1912) is as follows: "Ordinances regulating the character of weights and measures to be used for coal, hay, lumber, cordwood, and other bulky articles, and meat, bread, and other specified market and food products sold and delivered within the corporate limits, are strictly an exercise of the police power and are common in all cities and towns."

The Constitution of Missouri contains a grant of power for the organization of municipal charters or commission forms of government very similar to that contained in sections 3a and 3b, art. 18, supra. See section 16, art. 9, Const. of Missouri 1875.

In *Sylvester Coal Co. et al. v. City of St. Louis et al.*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566, it was held that an ordinance of the city of St. Louis, which existed under a charter or commission form of government, by section 16, art. 9, Constitution of said state, requiring coal dealers to furnish official certificates to consumers, to be valid. See, also, *State v. Tyson*, 111 N. C. 687, 16 S. E. 238. See, also, authorities cited in footnotes 42 and 43 at pages 2155 and 2156, vol. 3, McQuillin on Munic. Corp. 1912; *Lamar v. Weldman*, 57 Mo. App. 507; *Lehigh Coal & Iron Co. v. Capeheart*, 409 Minn. 539, 52 N. W. 142; *Stokes v. New York*, 14 Wend. (N. Y.) 87; *Raleigh v. Sorrell*, 46 N. C. 49.

We conclude that the city of Oklahoma City, existing by virtue of a special charter, may maintain municipal scales in charge of a municipal weigher. *Ex parte Simmons*, 5 Okl. Cr. 399, 115 Pac. 380; *Lackey v. State ex rel. Grant*, 29 Okl. 255, 116 Pac. 913; *Mitchell v. Carter*, 31 Okl. 592, 122 Pac. 691; *Cottrell et al. v. Barker et al.*, 34 Okl. 533, 126 Pac. 211. We do not hold, however, that the municipal weighmaster supersedes the county weigher in said municipality, but that, acting under authority of the city, he has a right to weigh on municipal scales, for the ordinance is in harmony with the state statute. As to how conclusive his certificate is as to weights may be a matter of proof that is not essential here to determine.

The judgment of the lower court is reversed, and the cause remanded, with instructions that a new trial be granted, and the plaintiff's petition be dismissed. All the Justices concur.

ROGERS et al. v. QUABNER et al.
(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 152*) — MOTION — AMENDMENT.

A motion for a new trial may be amended, after the three days allowed by the statute for filing the motion, by a clearer, more appropriate statement or elaboration of the grounds originally set up; but such an amendment, filed after the statutory time has expired, cannot set up new and independent grounds therefor.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 282; Dec. Dig. § 152.*]

2. APPEAL AND ERROR (§ 1015*) — DISCRETIONARY RULING—GRANTING NEW TRIAL.

The discretion of the trial court in granting a new trial, is so broad that its action in so doing will not be disturbed on appeal unless the record shows clearly that the court has erred in the decision of some pure and unmixt question of law, and that the order granting the new trial is based upon such erroneous view of the law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Commissioners' Opinion, Division No. 2. Error from District Court, McIntosh County; Preslie B. Cole, Judge.

Action by Maria Rogers against James Quabner and others. From the judgment, plaintiff and defendant Edwin A. Welty bring error. Affirmed.

Robert J. Bone, of Tulsa, for plaintiffs in error. John F. Vaughan and J. G. Schofield, both of Checotah, for defendants in error.

BREWER, C. This is an action brought by Maria Rogers, plaintiff below, for possession of certain lands, damages for their detention, that a deed be declared to be a mortgage, for the cancellation of a mortgage, and to quiet title. Edwin A. Welty was made a defendant in the court below as the holder and owner of an admitted mortgage. James Quabner, the principal defendant below, answered that he was the owner and original allottee of the lands; that he had never sold same to plaintiff; that deeds under which she claims to hold were forgeries, etc. Harlin, Wiley, and Hill were merely tenants of Quabner. Buell answered, asserting title, and denied that his deed from plaintiff was intended as a mortgage. Welty, as defendant below, set out his mortgage, averred a breach of its conditions, and prayed for judgment and foreclosure against plaintiff.

The case was tried by agreement of the parties by the court and without the intervention of a jury. Much evidence was introduced, and, after what seems to have been a somewhat prolonged and stormy trial, the court found in favor of the plaintiff Maria Rogers as to the ownership and right to the possession of the land; that the deeds from Quabner to her, under which she claimed,

were not forgeries but were valid and subsisting; that the deed to Buell was in fact a mortgage; that Welty's mortgage was a valid and subsisting lien and should be foreclosed and the property sold to satisfy the same, etc. This finding and judgment was rendered on the 4th day of January, 1911. All of the defendants in the court below except Welty, who was satisfied with the decree, filed on January 5, 1911, their joint motion for a new trial, stating the following grounds therefor: "(1) Irregularities in the proceedings of the court by which the parties were prevented from having a fair trial. (2) Misconduct of the prevailing party. (3) Accident and surprise which prudence could not guard against. (4) That the decision is not sustained by sufficient evidence and is contrary to law. (5) Error of law occurring at the trial and excepted to by the party making the application." This motion for a new trial came up for hearing on April 6, 1911, and the consideration thereof was passed, on the court's own motion, until April 10, 1911.

On April 10, 1911, the defendants filed an amended motion for a new trial, setting up, in addition to some of the grounds in the former motion, that of newly discovered evidence, alleged to be material in the case, and which it is alleged could not have been produced with reasonable diligence at the trial. Also the ground that the court had erred in the admission of certain evidence specifically set out. This amended motion was supported by the affidavit of James Quabner, the principal defendant, and also affidavits of John King and Wesley Thompson, setting out the newly discovered evidence. The filing of this amended motion was objected to by the present plaintiffs in error, who also filed a motion to strike it from the files. The objection and the motion to strike were both overruled by the court, and the plaintiffs in error requested that the hearing thereof be continued to the end that they have an opportunity to examine the motion and affidavits and investigate the matters therein contained. The hearing on the motion was continued until the next day, but a further continuance thereof was denied by the court, and on the 11th day of April, 1911, the court sustained the motion for a new trial, and set aside and vacated the judgment as to all its parts, and granted a new trial of the cause. From this order granting a new trial the plaintiffs in error have appealed to this court on properly certified case-made.

The plaintiffs in error in their brief correctly apprehend, and as a matter of fact concede, that the only question involved in this appeal is as to whether or not the trial court abused the discretion, admittedly a large one, reposed in it by law.

[1] It is true some point is made that the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index:

amended motion for a new trial should not have been permitted. As to all of the new matter brought into the amended motion, except that of newly discovered evidence, the point is well taken. Of course as to this exception it is not; as a motion for a new trial, upon the ground of newly discovered evidence, may be filed at any time within one year. Section 5037, Revised Statutes 1910. On the question of amendments to a motion for a new trial, in the case of *Rice et al. v. Folsom*, 32 Okl. 496, 122 Pac. 236, this court has announced the following rule: "A motion for a new trial may be amended after the three days allowed by statute for filing the same by a clearer, more appropriate statement or elaboration of the grounds contained therein; but such an amendment, filed after the statutory time has passed, cannot set up new and independent grounds therefor."

[2] However, after eliminating from consideration the improper matter alleged in the amended motion, there still remains a number of grounds for a new trial in addition to that of newly discovered evidence, properly before the court for consideration; and as the court has given no indication as to why he sustained the motion or of the reasons impelling him so to do, and as we have no means of determining the same, how can we say, in justice to the court who heard this involved and complicated case, some of the parties to which were ignorant and illiterate negroes, that he has abused the very wide and extensive discretion vested in the court, under the rules announced in more than a score of cases decided by this court? How can we say that no fatal errors of law had crept into this case, in its lengthy and tortuous passage, which the court may have become convinced of, and yet which we cannot easily perceive? This was not a jury trial; the court heard all the evidence, necessarily with attention, saw the parties, heard them testify, in fact was surrounded by what is sometimes termed "the atmosphere of the case"; and thereafter, when maturely considering the entire record and proceedings, something convinces the court that the ends of justice would be best subserved by giving the defendants another chance. We cannot therefore say, on this record, that the court has committed error regarding some clear and unmixed question of law; nor can we say that an abuse of discretion has been shown justifying a reversal of this case. The following, and many other decisions, might be referred to as sustaining the views herein expressed. *St. L. & S. F. Ry. Co. v. Wooten*, 132 Pac. 479; *St. Bank of Lawton v. Chattanooga St. Band*, 23 Okl. 767, 101 Pac. 1118; *Davis v. Stilwell*, 32 Okl. 757, 124 Pac. 74; *Jamieson v. Classen Co.*, 33 Okl. 77, 124 Pac. 67; *Ardmore Lodge v. Dawson*, 33 Okl. 37, 124 Pac. 66; *Stapleton v. O'Hara*, 33

Okl. 79, 124 Pac. 55; *Chapman v. Mason*, 30 Okl. 500, 120 Pac. 250; *National R. & B. Sup. Co. v. Elsing*, 29 Okl. 334, 116 Pac. 790; *Jacobs v. City of Perry*, 29 Okl. 743, 119 Pac. 243; *Exchange Bank v. Bailey*, 29 Okl. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1032; *Hobbs v. Smith*, 27 Okl. 830, 115 Pac. 347, 34 L. R. A. (N. S.) 697; *Duncan v. M. C. Coal Co.*, 27 Okl. 427, 112 Pac. 982.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

STATE v. McDONALD.

(Criminal Court of Appeals of Oklahoma. Jan. 3, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1081*)—APPEAL—NOTICE.

(a) Where the notices of appeal required by statute were served upon the county attorney and clerk of the court in which the judgment was rendered, an appeal will not be dismissed because a summons in error was not served or waived.

(b) Where the notices of appeal required by statute have not been served, this defect may be cured by the service of a summons in error upon the attorney general, or by securing a waiver thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724, 2962; Dec. Dig. § 1081.*]

2. CRIMINAL LAW (§§ 273, 980*)—RIGHT TO MODIFY ACCUSATION—JURY TRIAL.

(a) The trial court has the power and lawful right, without the consent of the county attorney, where a defendant is charged with murder, to order the dismissal of said charge, and permit the defendant to plead guilty to manslaughter in either degree, and assess his punishment therefor without the intervention of a jury.

(b) Both the state and defendant have the right to demand a trial by jury as to all controverted questions of fact, but where a defendant pleads guilty it is not necessary for the court to submit the question of punishment to a jury unless the defendant so demands.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 631, 632, 634, 2493-2496; Dec. Dig. §§ 273, 980.*]

Appeal from District Court, Canadian County; John J. Carney, Judge.

A charge against A. L. McDonald for murder was dismissed without consent of the county attorney, and he was permitted to plead guilty to manslaughter in the second degree, and his punishment assessed without the intervention of a jury, and the State appeals. Affirmed.

C. J. Davenport, Asst. Atty. Gen., and S. T. Roberson, Co. Atty., of El Reno, for the State. J. G. Ralls, of Atoka, for appellee.

FURMAN, J. [1] First. A motion was made to dismiss this appeal because a summons in error had not been issued or waived. This motion is based upon section 5997, Revised Statutes, which reads as follows: "Instead of the appeal hereinbefore provided for any party desiring to appeal to the criminal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nal court of appeals in any criminal case may proceed by case-made and petition in error in all respects and with all the rights, as provided in 'Procedure, Civil,' and the summons in error shall be served upon the attorney general, unless the same is waived as in other cases. Instead of the case-made plaintiff in error may attach to his petition in error a transcript of the proceedings of record in the trial court." This section should be construed in connection with section 5992, Revised Statutes, which reads as follows: "An appeal is taken by the service of a notice upon the clerk of the court where the judgment was entered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the prosecuting attorney. If taken by the state, a similar notice must be served upon the defendant, if he can be found in the county; if not there, by posting up a notice three weeks in the office of the clerk of the district court."

We are of opinion that section 5997 is an enlargement upon, and is not an abridgment of, the right of appeal. That is to say, if a notice of appeal has not been served upon the county attorney and upon the clerk of the court where the judgment was entered, that an appeal should not be dismissed for want of such notice, if a summons in error is issued as provided for in section 5997. In this case proper notices of appeal were served. It was therefore not necessary to issue or waive summons in error. The motion to dismiss the appeal is therefore overruled.

[2] Second. As this was a prosecution in which the defendant was charged with the crime of murder, it is earnestly insisted by the attorney general that the trial court did not have the power to dismiss the charge of murder, except upon the motion of the county attorney, and to permit the defendant to plead guilty to manslaughter in the second degree against the objections of the county attorney. In some jurisdictions this is the law, but we think that the statute of Oklahoma settles this question adversely to the contention of the attorney general. Section 6099 of the Revised Statutes is as follows: "The court may either of its own motion or upon the application of the county attorney, and the furtherance of justice, order an action or indictment to be dismissed; but in that case the reasons of the dismissal must be set forth in the order, which must be entered upon the minutes."

The effect of this statute is to abolish the common-law right of the prosecuting attorney to nolle prosequi an indictment or information, except with the consent of the court. It goes further, and, under certain conditions, vests the trial judge with the power, whenever in his judgment the interest of justice may require it, to order the dismissal of an indictment or information, with or without the consent of the county attorney. This is the law of Oklahoma, and by it we are bound.

Independently of this statute, we are of the opinion that the trial court could rightfully exercise this power. It cannot be disputed that if, upon a trial for murder, there is no evidence tending to prove that the defendant is guilty of murder, and if all of the testimony in the case for the state simply tends to prove manslaughter, the trial court would be justified in submitting the issue of manslaughter alone to the jury. In fact, in such a case the court should in its instructions confine the consideration of the jury entirely to the question of manslaughter, in connection with any defense which the evidence might present. It is error for the court to submit an issue to the jury when there is no evidence to support it. There is a difference between insufficient evidence and no evidence as to the guilt of a defendant. If, in the opinion of the court, the testimony as to the guilt of a defendant is insufficient to warrant a conviction, the court may advise the jury to acquit the defendant (*Pilgrim v. State*, 3 Okl. Cr. 49, 104 Pac. 383), but, where there is absolutely no evidence as to his guilt, it is the duty of the court to instruct the jury to find the defendant not guilty. In such a case it would be folly to submit the case to the jury. Now, if the court may order an acquittal where there is absolutely no evidence of the guilt of a defendant, with what show of reason could it be said that the court cannot order the dismissal of a case under similar circumstances? Why the necessity of putting the state and the defendant to a trial, when the court is fully advised that an offense cannot be made out? Section 6099 goes further than this. It authorizes the court to dismiss a case whenever in its judgment the furtherance of justice may be subserved thereby. It may be that the evidence would warrant a conviction, but, if the court is of the opinion that such conviction would be unjust and that the best interest of society would be subserved by the dismissal of a case, the statute above quoted authorizes such action. It must never be forgotten that the enforcement of justice is the sole object of the law.

The discretion conferred by the statute herein quoted is not an arbitrary discretion and is subject to review, and the state has the right to bring it to this court upon a reserved question, but this court will not assume that the trial court has abused its discretion in the absence of a showing to that effect. If the court refused to consider legal evidence which was offered by the prosecuting attorney, then such evidence should be incorporated in the record either by bill of exceptions or case-made. Nothing of the sort appears in this record. In the absence of such showing, this court will not revise the action of the trial court. It is claimed that the trial court was without authority to dispense with the verdict of a jury in this case. It is true that our Constitution provides that the right of a trial

by jury shall be inviolate, and we are of the opinion that the state as well as the defendant has the right to a trial by jury as to all controverted questions of fact, and that the court cannot proceed with such a trial without the consent of both parties. *Dalton v. State*, 6 Okl. Cr. 85, 116 Pac. 954. But where a defendant pleads guilty, there is nothing to try. It is true that where a defendant requests it, the question of punishment must be submitted to the jury, but where no such request is made by the defendant, or where the jury do not assess the punishment, this is a question for the court alone. The statute does not point out what course must be pursued by the court before it can order the dismissal of a case, or by what means it must inform itself as to what punishment should be inflicted. This is a question for the judge to decide. These matters are within the discretion of the court, and an abuse of this discretion must be shown before his action will be reversed. Under the record in this case we fail to find that the trial court abused his discretion in ordering the dismissal of the charge of murder against the defendant, and in permitting him to plead guilty to manslaughter in the second degree, and assessing his punishment.

Judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

KILGORE v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 10, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 605*)—PROCEDURE—EXCLUSION OF WITNESSES.

Where the court orders witnesses to be sworn and excluded from the courtroom during the taking of testimony, and when the order of the court is willfully violated, it is a matter within the discretion of the court to allow or exclude the testimony of such witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549-1566½; Dec. Dig. § 665.*]

2. CRIMINAL LAW (§ 1184*)—APPEAL—MODIFICATION OF JUDGMENT.

Under section 6003, Rev. Laws 1910, this court has the power, in the furtherance of justice, to modify any judgment appealed from by reducing the sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3199, 3200; Dec. Dig. § 1184.*]

Appeal from District Court, McCurtain County; A. H. Ferguson, Judge.

J. P. Kilgore was convicted of aggravated assault, and appeals. Modified and affirmed.

N. W. Gore, of Idabel, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a judgment of conviction rendered on the 27th day of February, 1912, in which the defendant was found guilty of aggravated assault, and his punishment assessed at imprisonment in the penitentiary for a period of one year.

The evidence shows that the defendant, J. P. Kilgore, and the prosecuting witness, John Bullard, were both tenants of one Dr. Deberry, on land near Shawneetown, in McCurtain county. It appears that during the crop season of 1911, both of these tenants had raised some cane, and Bullard was a manufacturer of a sorghum molasses which he put up in one-gallon buckets, branded, "Bullard's Famous Ribbon-Cane Syrup." The demand for his syrup was such that he could not supply it, and he arranged with Dr. Deberry to purchase a quantity of molasses that was due as rent from the defendant. The delivery of this molasses was made on the day of this difficulty. Dr. Deberry went to the defendant's house and agreed with the defendant as to the amount of sorghum due to him. Bullard went to the defendant's house to get the sorghum, which was on the porch of the defendant's house; he drove his wagon along the side of the porch, and while they were loading the sorghum cans into his wagon, he asserted that the defendant was defrauding Dr. Deberry out of part of his rent. Dr. Deberry has settled on 65 cans for his share. Bullard claimed that he should receive 71 cans. The prosecuting witness testified that the defendant then said, "You have been meddling with me and my business all the year," and struck him with a knife, and that the defendant's wife and daughter cried out: "Don't do that! Don't do that, pa!"

The defendant as a witness in his own behalf testified that he was 71 years of age; that he "grewed" a patch of cane on a piece of Johnson grass land, and hauled the cane to "Bullards to make it up, and asked him to allow Dr. Deberry's share to remain at the sorghum mill," but Bullard would not permit it, so he hauled the sorghum home, and set it on the porch of his house, and he told Dr. Deberry that it was there for him; that on the day of the difficulty he hitched up his team and was ready to go to the gin with cotton, and Bullard came along and said he wanted Dr. Deberry's sorghum, and he told him it was on the porch, to go and get it, and Bullard said he was not going to have anything to do with it unless he went with him; that when they had loaded 65 buckets, Bullard claimed that the rent was 71 buckets, and said, "Where is that 15 buckets of molasses that I let you have?" and he told him, "You gave me that 15 buckets for a piece of cane;" that his wife and daughter were present, and Bullard called him a liar, and that, "He got me in a little bit of a rage,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

and I guess I done what I ought not to have done."

Malinda Kilgore, daughter of the defendant, called as a witness for him, was not permitted to testify in his behalf. The county attorney objected, because she was present in the courtroom and heard the testimony of the witnesses on the part of the state, in violation of the order of the court.

Several assignments of error are made here, and relied upon for a reversal of the judgment. However, in view of the fact that the defendant by his testimony admitted the facts necessary to a conviction, we are not prepared to say that the rulings of the court upon which the errors assigned are made constitute reversible error.

[1] It is the practice of courts, whenever requested, to have all the witnesses, both for the state and the defendant, called and sworn, and then instructed to retire beyond the limits of the courtroom, and there remain, without communication with any one as to what may have been testified to in the trial, until they are called to testify. And where the order of the court is willfully violated, it is a matter within the discretion of the court to allow or exclude the testimony of such witness.

The court instructed the jury in part as follows: "That no opprobrious epithets or abusive words would justify an assault by one person upon another." And, further, that: "The fact that the defendant was in a state of anger at the time would be no justification." But the court did not instruct the jury that abusive language, used in the defendant's own house in the presence of his family, constituted a trespass, and that the defendant had a legal right to expel the prosecuting witness from his premises as a trespasser, if necessary, by the use of any reasonable force short of endangering life or bodily harm.

[2] No exceptions were taken to the instructions given and no instructions were requested by the defendant. However, in view of the fact that the question of punishment was submitted to the jury, we think the court should have instructed the jury as to the defendant's rights in the premises under his theory of the case. The testimony in the case shows that the defendant was an old man, having passed the allotted three score and ten, and had lived an exemplary life; that he was an old Confederate soldier, having served four years in the Confederate Army, in the Eighth Texas Regiment, Morgan's Division, and was a man who doted upon his honor and was peculiarly sensitive in respect of the use by another of language reflecting on his honor and integrity. It is apparent that the assault was made in sudden anger and passion, but the provocation was not sufficient to justify the defendant's assault with a

dangerous or deadly weapon. However, our examination of the record in this case convinces us that the sentence pronounced against the defendant is too severe, and we do not think the vindication of public justice requires that this old man be imprisoned in the penitentiary. This court is not confined to the mere alternative of affirming or reversing a judgment of conviction. Under section 6003, Rev. Laws, this court has the power in furtherance of justice to modify any judgment appealed from by reducing the sentence. For the reasons stated, we have concluded to modify the sentence to the extent of reducing it to confinement in the county jail of McCurtain county, for the period of 30 days, and, as thus modified, the judgment will be affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

HARRIS v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 6, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§§ 763, 764, 784, 1122, 1163, 1172*)—INSTRUCTIONS—APPEAL—PRESENTATION FOR REVIEW—HARMLESS ERROR.

(a) The jury must be left free to determine for themselves whether the evidence is sufficient to satisfy the law, and an instruction which advises them on that subject invades the province of the jury to determine the weight and sufficiency of the evidence. See opinion for instruction held to be on the weight of circumstantial evidence.

(b) It would be error for the court to instruct the jury upon the chain and link theory with respect to circumstantial evidence.

(c) If attorneys desire to secure reversals on account of erroneous instructions to the jury, they must show that the defendant was injured thereby. The evidence produced on the trial should be incorporated in the record.

(d) Where the evidence of the guilt of a defendant is conclusive, and where the jury could not have arrived at any other conclusion, an instruction upon the weight of the evidence will be harmless.

(e) Where the testimony is not incorporated in the record on appeal, instructions which were erroneous will not be ground for reversal, if, under any conceivable state of facts, the defendant could not have been injured thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770, 1883-1888, 1922, 1960, 2940-2945, 3090-3099, 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. §§ 763, 764, 784, 1122, 1163, 1172.*]

2. CRIMINAL LAW (§ 789*)—INSTRUCTIONS—"REASONABLE DOUBT."

It is error for the trial court to instruct the jury that a reasonable doubt is one for which there exists a reason which an ordinarily intelligent man could readily give. Such an instruction deprives a defendant of the presumption of innocence, and shifts the burden of proof from the state to the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. CRIMINAL LAW (§ 1077*)—APPEAL—PREPARATION OF CASE—MADE.

Where a defendant is able to employ counsel to represent him, and the trial court refused to enter an order requiring the testimony to be extended without expense to the defendant, such refusal will not constitute ground for reversal, unless it affirmatively appears from the record that the defendant was a pauper, and that such counsel so employed could not have made up a statement of the evidence from memory, and that thereby the trial court had abused its discretion. For circumstances which clearly sustain the ruling of the trial court in refusing to make such an order, see opinion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2718, 2719; Dec. Dig. § 1077.*]

Appeal from District Court, Greer County; G. A. Brown, Judge.

M. L. Harris was convicted of grand larceny, and appeals. Affirmed.

H. D. Henry, of Mangum, for appellant. C. H. Davenport, Asst. Atty. Gen., and A. R. Garrett, Co. Atty. of Greer County, for the State.

FURMAN, J. [1] First. Counsel for appellant objected and excepted to the instructions of the court on the law of circumstantial evidence, which instructions are as follows:

"(3) In this case the state relies for a conviction upon circumstantial evidence, and you are instructed that to warrant a conviction upon such evidence each fact necessary to establish the guilt of the defendant must be established by the evidence beyond a reasonable doubt; all the facts relied on must be consistent with each other, and taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused committed the offense charged. The mere union of any number of circumstances, each of an imperfect and inclusive character, will not justify conviction. They must be such that, when taken together, generate and justify belief beyond a reasonable doubt of the guilt of the defendant on trial. It is not enough that they coincide with each other and render probable his guilt; but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, and the facts and circumstances relied on must be incompatible with the innocence of the defendant, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; otherwise the defendant must be acquitted.

"(4) It is not necessary, however, that every circumstance introduced and relied on by the state in and of itself be sufficient to establish the guilt of the accused, and in this case, if each fact and circumstance relied on, having relation thereto in some degree,

tends to prove the defendant guilty of the offense charged against him, and are consistent with each other and with the defendant's guilt, and, when taken and considered together and as a whole, they are incompatible with his innocence, and inconsistent with any other reasonable hypothesis or conclusion than that of his guilt of the offense charged against him, and satisfy your minds to a moral certainty and beyond a reasonable doubt that the defendant, M. L. Harris, on or about the 29th day of January, 1913, in Greer county, in the state of Oklahoma, did fraudulently take, steal, and carry away from the town of Willow, in said county, the two bales of cotton described in the information herein, or either of them, with the intent of the said M. L. Harris to deprive the owner of said cotton thereof, and of the value of same, and you further believe from the evidence beyond a reasonable doubt that the cotton so taken, if any, was of value exceeding \$20 at the time and place of the taking thereof, and were then and there the property of the Harris-Irby Cotton Company, and were taken without the consent of the said Harris-Irby Cotton Company, *then the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied, and in that event you should find the defendant guilty of grand larceny as charged in the information, and so say by your verdict. If you are not so satisfied, and do not so believe, after a careful consideration of all the evidence in the case, you must acquit the defendant.*"

After stating the law of circumstantial evidence more fully and favorably to appellant than the law requires, the court said: "Then the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied, and in that event you should find the defendant guilty."

In considering a similar instruction in the case of *Rose Smith v. State*, 133 Pac. 1136, decided June term, 1913, this court said: "The weight of circumstantial evidence is not for the consideration of the court in its charge to the jury, but for the exclusive consideration of the jury in rendering their verdict, and the statement, 'then the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied,' is erroneous as invading the province of the jury, who are the exclusive judges of the weight and sufficiency of the evidence. It is our opinion that the exception to this instruction, as a comment upon the weight and sufficiency of the evidence, was well taken, and that the defendant was thereby prejudiced."

We still adhere to the ruling made in the *Smith Case*, and think the instruction above quoted was a charge upon the weight of evidence, and should not have been given. It is an unnecessary and dangerous thing for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

courts, in charging upon the law of circumstantial evidence, to give lengthy and prolix instructions attempting to explain the law applicable to this character of evidence. It is sufficient if they instruct the jury in such cases that the circumstances proven must not only be consistent with the guilt of the defendant, but must also be inconsistent with his innocence, and incapable of any other reasonable explanation except upon the ground that the defendant is guilty. The jurors must be presumed to be men of ordinary intelligence, and capable of understanding the English language, and there is no danger that such men could be misled by the instruction suggested. See *Star v. State*, 9 Okl. Cr. 210, 131 Pac. 542. The court should not have instructed the jury upon the chain and link theory with reference to circumstantial evidence as requested by counsel for appellant. See *Ex parte Hayes*, 6 Okl. Cr. 321, 118 Pac. 609; *Ex parte Harkins*, 7 Okl. Cr. 464, 124 Pac. 931; *Ex parte Jefferies*, 7 Okl. Cr. 544, 124 Pac. 924, 41 L. R. A. (N. S.) 749.

In the case at bar the testimony given upon the trial was not incorporated in the record; we are therefore unable to determine as to whether or not the defendant was injured by the instruction given. If attorneys desire to secure a reversal for erroneous instructions, they must show that the defendant was injured thereby, and it is a rare thing indeed that this can be done unless the evidence in the case is incorporated in the record. The instructions must always be considered in connection with the testimony. In the case of *Killough v. State*, 6 Okl. Cr. 311, 118 Pac. 620, Judge Doyle, speaking for the court, said: "Error must affirmatively appear from the record. It is never presumed. Every presumption is in favor of regularity of the proceedings had upon the trial. The general rule often announced by this court is that the plaintiff in error must affirmatively show prejudicial error; otherwise the judgment of the lower court will be affirmed. In the absence of a transcript of the evidence or any part thereof in the case at bar, the presumption is that the evidence was amply sufficient as to the guilt of the defendant of the offense charged. The position assumed by counsel for the defendant is that, if error is found in the instructions, the judgment of conviction must then be reversed, whether such error operates to the prejudice of the defendant or not. Such is not the law in this jurisdiction. In many cases determined by this court, the contrary doctrine is announced. This court has often held that, when the instructions as a whole, taken and considered together, embrace the law of the case, though one of them may be erroneous, still, for such error, a judgment of conviction will not be reversed, unless it shall appear from the whole record that it was prejudi-

cial to the substantial rights of the defendant, or by reason thereof it seems probable that injustice may have been done. The instructions here, taken as a whole, substantially and fairly present the law of the case. That is sufficient, and, for the reasons stated, we shall not attempt to decide whether or not the instructions complained of were erroneous."

This opinion was followed and approved in the case of *Thornsberry v. State*, 8 Okl. Cr. 88, 126 Pac. 590. In the case of *Brown v. State*, 9 Okl. Cr. 382, 132 Pac. 359, this court held that, where the evidence of guilt is conclusive, an instruction upon the weight of evidence would be harmless. Following these decisions, section 6005, Revised Laws, was enacted, which in express terms declares that no judgment shall be reversed on the ground of misdirection to the jury, unless upon investigation of the entire record it affirmatively appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right. The testimony in this case might have been of such a character as to render the instruction given harmless. Suppose, for instance, that appellant took the witness stand in his own behalf, and that his testimony practically amounted to a plea of guilty; it would clearly be a miscarriage of justice to grant a new trial on account of the error complained of. In the case of *Thornsberry v. State*, supra, this court in express terms declared that, where the testimony is not brought up in the record on appeal, instructions, though erroneous, will not be ground for reversal where, under any conceivable state of facts which may have been proven, defendant was not injured thereby. The testimony in this case not being incorporated in the record, we are unable to say that appellant was injured by the instruction complained of, and therefore the case of *Smith v. State* is not in point; but it may be claimed that the testimony in the *Smith Case* was not incorporated in the record, but this was satisfactorily explained in that case, because the record affirmatively shows that the defendant was a pauper, and was unable to employ counsel to defend her, and the trial court refused to allow the record to be made up without expense to the defendant. Defendant was therefore in no way to blame because the testimony was not in the record, and the case should have been reversed on this question also. See *Jefferies v. State*, 9 Okl. Cr. 573, 132 Pac. 823. In the case at bar an entirely different state of facts is made to appear. Appellant was represented by an attorney of ability and experience. No abuse of the discretion of the court appears in the record in refusing to direct the evidence to be made up without expense to the defendant.

[2] Second. Upon an examination of the

entire instructions of the court we find no other material error therein save and except instruction No. 5½, which is as follows:

"(5½) The jury are instructed that a reasonable doubt is one for which there exists a reason in the minds of the jurors, founded upon the facts and circumstances in proof in the case, and is a state of mind of which an ordinarily intelligent man could readily give an explanation, consistent with the facts disclosed by the evidence, and the law, as given to the jury by the court."

But we also find that counsel for appellant did not except to this instruction. From this we infer that this instruction was given by request of counsel for appellant. The failure to except to this instruction was equivalent to an agreement by counsel for appellant that it might be given. We are decidedly of the opinion that instruction No. 5½ is not the law, and should not have been given; but, as it was not excepted to, we would not consider it now were it not for the fact that it is a verbatim copy of section 5876, Revised Laws, and therefore it may be repeated by other judges. We therefore think it our duty to pass upon this question now, and thereby prevent the unnecessary reversal of other convictions in the future.

Section 5876, Revised Laws, is as follows: "A reasonable doubt is a doubt for which there exists a reason in the minds of the jurors, founded upon the facts and circumstances in proof in the case, and is a state of mind of which an ordinarily intelligent man could readily give an explanation, consistent with the facts disclosed by the evidence, and the law, as given to the jury by the court."

Immediately below this section we find the following: "History. New section, defining 'reasonable doubt' in accordance with the reason and the weight of authority in order to settle the uncertainty thereon in this state." We suppose this was inserted for the purpose of explaining the section to which it relates. If so, the statement is based upon a misconception both of fact and of law.

Prior to statehood the people of what is now the state of Oklahoma were governed by two different and in many respects conflicting systems of criminal jurisprudence, namely, that in force in the western part of the state, which was formerly Oklahoma Territory, and that in force in the eastern part of the state, which was formerly Indian Territory. Since statehood the precedents established in these two territories have not been recognized as authorities by the courts of the state of Oklahoma except in so far as they construed statutes which remained in force in the state of Oklahoma. The criminal jurisprudence of the state of Oklahoma had its birth and origin at the incoming of statehood, and is based upon the concep-

tion that only those principles and precedents should be established and followed which were founded upon reason and justice. Consequently a great deal that was done by the courts in Indian Territory and Oklahoma Territory has been eliminated. It is a misstatement of fact to assert that there is any uncertainty as to the definition of "reasonable doubt" in the state of Oklahoma, and that the position assumed by the courts of Oklahoma on this question is not in accordance with reason and the weight of authority. This question was passed upon first by the Supreme Court of Oklahoma, before the organization of the Criminal Court of Appeals, in the case of *Abbott v. Territory*, 1 Okl. Cr. 1, 94 Pac. 179, 16 L. R. A. (N. S.) 260, 129 Am. St. Rep. 818, and again in the case of *Gibbons v. Territory*, 1 Okl. Cr. 198, 96 Pac. 466. The first opinion is by Chief Justice Williams; the second opinion is by Mr. Justice Turner. With unanswerable logic, and supported by the great weight of authority, these two opinions show that the instruction which we are now discussing amounts to the repeal of the presumption of innocence, and shifts the burden of the proof from the state to the defendant, and is illogical, and a violation of the fundamental principles of law. These opinions by the Supreme Court of Oklahoma were adopted and approved by the court, and no opinion can be found dissenting therefrom.

Section 6 of the Bill of Rights declares that justice shall be administered without sale, denial, delay, or prejudice. Section 7 of the Bill of Rights declares that no person shall be deprived of life, liberty, or property without due process of law. The doctrines of the presumption of innocence, reasonable doubt, and that the burden of proof is on the state to establish by legal evidence the guilt of every person charged with crime, are fundamental principles of justice which constitute the very life and soul of our criminal jurisprudence. They should be written over the portals of every court, and are among the inalienable rights of every citizen of this free country. To place a man upon trial, and prohibit the jury from acquitting him, unless they entertain a reasonable doubt of his guilt founded upon the facts and circumstances in proof, and for which they can readily give an intelligent explanation consistent with the facts disclosed by the evidence, would amount to a denial of justice, because a reasonable doubt may exist on account of the lack of proof on the part of the state, as well as on account of the facts proven by the defendant. It is often true that the wisest and best men entertain reasonable and serious doubts as to some propositions for which they could not give an intelligent explanation. The doctrines of reasonable doubt, the presumptions of innocence, and the duty of the state to prove the guilt of a person charged with crime constitute a part of the due process of

law, and the Legislature cannot in any manner deny or abridge these rights without violating the seventh section of the Bill of Rights. For these reasons, we hold that the instruction given is in direct conflict with the law, and that the statute upon which it is based is in violation of sections 6 and 7 of the Bill of Rights. Courts in Oklahoma are admonished not to give this instruction in the future, unless they desire to invite reversals of their judgments. In this case, as no exception was reserved to the instruction, and as a defendant may waive his constitutional rights, we cannot do otherwise than hold that the instruction was harmless error.

[3] Third. In this case counsel for appellant contend the trial court erred in not entering an order requiring the court stenographer to extend into longhand, at the expense of Greer county, his notes of the testimony and proceedings in the trial of this cause, upon the ground that appellant was a pauper, and was unable to pay for the same. The appellant did file an affidavit to the effect that he was a pauper, and had no means to pay for the extension of the evidence and transcript of the case. Thereupon the trial court investigated the question, and entered the following order: "On this the 5th day of August, 1913, came on to be heard in open court the defendant's motion for an order requiring the stenographer and clerk of this court to make and furnish the defendant with a case-made, including a complete extension of all the evidence and proceedings in the trial of this case into longhand, at the expense of Greer county, and, it appearing to the court that the defendant had employed, at his own expenses, the Hon. Harry D. Henry to represent him in said trial, and the court having judicial knowledge of the fact that the Hon. Harry D. Henry had so represented the defendant upon his trial in this cause, and there being nothing before the court to show that the said Hon. Harry D. Henry could not make a case-made, including all the proceedings and evidence introduced upon said trial, without the assistance of said the court stenographer and clerk of this court, the said motion is in all things overruled, to which ruling of the court, the defendant excepts, and exception is by the court allowed."

Upon the authority of *Jeffries v. State*, 9 Okl. Cr. 573, 132 Pac. 823, the action of the trial court must be sustained. For in the *Jeffries* Case it was expressly stated that, where a defendant had been able to employ lawyers to defend him, if for any reason the stenographer's notes could not be obtained, that then it was the duty of such lawyers to use their best exertion to make up a case-made from memory, and, if they failed to do so, the defendant would be held responsible for this neglect of duty on their part. Also, see *Dobbs v. State*, 5 Okl. Cr. 475, 114 Pac. 358, 115 Pac. 370. The writer of this opinion

practiced law many years in Texas before court stenographers were known in that state, and when, under the law, the evidence had to be written out as a matter of memory by the attorneys and filed in court within ten days from the adjournment of the term of court. The writer never had the least difficulty in preparing his statements of the evidence in his cases, and he knows from personal experience that it can easily be done. In fact he seriously doubts if the employment of court stenographers is at all necessary either in the administration of justice or to the development of lawyers. It has a tendency to breed carelessness on their part; but, be this as it may, the trial court has a large discretion as to when to order the stenographer's notes to be extended without expense to a defendant, and this discretion will not be reviewed, unless it clearly appears from the record that it was arbitrarily used or abused.

There are a number of other propositions submitted by counsel for appellant, none of which have been overlooked, and all of which have been considered, and we are of the opinion that they did not affect the substantial rights of appellant to his injury.

Judgment of the lower court is therefore affirmed.

ARMSTRONG, P. J., and DOYLE, J.,
concur.

REED v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 10, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§§ 1083, 1192*)—APPEAL—JURISDICTION—PROCEEDINGS AFTER REMAND.

(a) When a defendant has been convicted in a trial court, and an appeal is taken to the Criminal Court of Appeals, the jurisdiction of the said trial court over said case is lost, and said court has no right to make any order or render any judgment in such case except as directed by the Criminal Court of Appeals, and any such order or judgment or action taken would be a nullity.

(b) After a case has been affirmed on appeal to the Criminal Court of Appeals, and is sent back to the trial court, the trial court has no power to set aside said judgment, but it must be carried into execution as directed by this court; otherwise the enforcement of criminal law in Oklahoma would be involved in endless confusion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2732, 3231, 3240, 3243; Dec. Dig. §§ 1083, 1192.*]

Appeal from County Court, Canadian County; W. A. Maurier, Judge.

William Reed was convicted of violating the prohibitory law, and appeals. Dismissed.

On the 20th day of November, 1911, appellant was convicted in the county court of Canadian county for having violated the prohibitory liquor law, and his punishment as-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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sessed at a fine of \$500 and six months' imprisonment in the county jail. From this judgment of conviction he prosecuted an appeal to the Criminal Court of Appeals. On the 13th day of January, 1913, judgment of the lower court was affirmed on said appeal. See *Reed v. State*, 8 Okl. Cr. 738, 128 Pac. 911. On the 24th day of March, 1913, the mandate of the Criminal Court of Appeals was received by the county court of Canadian county with directions to said court to proceed with the execution of the judgment. Thereafter on the 16th day of April, 1913, appellant filed in the county court of Canadian county what is styled a motion for new trial, based upon alleged newly discovered evidence, fraud, accident, and mistake. On the 20th day of April, 1913, the county court of Canadian county sustained a motion filed by the county attorney to strike out said motion for a new trial. To which the appellant excepted, and the county judge fixed the time in which an appeal might be taken to this court from said order. Appeal dismissed.

Giddings & Giddings, of Oklahoma City, for appellant. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). When the appeal was taken, the Criminal Court of Appeals acquired jurisdiction of the cause, and the county court lost jurisdiction and all control over the case, and had no right to make any order or enter any judgment in said case, and any such order or action if taken would have been a nullity. It would be an absurdity to say that the cause could be legally pending in two courts at the same time. The jurisdiction of one must yield to the other. When the case was affirmed, it was returned to the county court, but only for the purpose of carrying out the final judgment of this court. As was well said in the case of *State v. Turner*, 39 S. C. 420, 17 S. E. 885: "A different ruling, in the language of Chancellor Gailard in *Perkins v. Lang*, 1 McCord, Eq. [S. C.] 31, note, cited in *Ex parte Knox*, 17 S. C. 214, involves the inconsistency: 'That after a case has been solemnly determined by this court in the last resort, a single judge in the circuit court might cause the decision to be again brought into question. This cannot be. It would utterly destroy the symmetry of the law, tend to prolong litigation and to produce endless confusion.'" This is not only the law upon reason and authority but is absolutely settled by our statute. Section 6007, Revised Laws, is as follows: "On a judgment of affirmance against the defendant the original judgment must be carried into execution, as the appellate court may direct." Both upon authority and upon the statute the county court should have paid no attention whatever to the pretended motion for a new trial, but should have proceeded at

once with the execution of the judgment. Under these conditions no court has the right to interfere by habeas corpus proceedings, injunction, motion for new trial, or in any manner, with the execution of the mandate of this court. There must be an end to litigation.

The pretended appeal is therefore dismissed, and the county court is directed to proceed at once with the execution of the judgment. Mandate will issue instant.

ARMSTRONG, P. J., and DOYLE, J., concur.

REMILLARD v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 10, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—QUESTIONS OF FACT.

Where there is a direct contradiction between the testimony of the complaining witness and that of the defendant, it is for the jury to determine which is worthy of belief, and their determination ordinarily will be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

2. CRIMINAL LAW (§ 778*)—INSTRUCTIONS—PRESUMPTION OF INNOCENCE.

The court instructed the jury in part as follows: "But, if you find from the evidence that he did not sell, or assist in the sale, or give or otherwise furnish, or assist in giving or otherwise furnishing the said liquor to the said Glen Hall, then you should acquit him." *Held* error, because it in effect required the jury, before finding for acquittal, to believe from the evidence adduced that the defendant was innocent, and substantially instructs against the presumption of innocence until his guilt has been established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.*]

On rehearing. Reversed.

For former opinion, see 133 Pac. 1132.

DOYLE, J. A petition for rehearing has been filed, in which it is averred: "That this court, in rendering its decision in this cause, overlooked the decisive question upon which this case was appealed, and the important question submitted in the motion for a new trial, and in the petition in error, to wit: That the court materially and manifestly erred in giving that part of instruction No. 4 which reads as follows: 'But, if you find from the evidence that he did not sell, or assist in the sale, or give or otherwise furnish, or assist in giving or otherwise furnishing the said liquor to the said Glen Hall, then you should acquit him'"—citing the case of *Weber v. State*, 2 Okl. Cr. 329, 101 Pac. 355.

[2] It is our opinion that this paragraph of said instruction is clearly erroneous, and in giving it the court misdirected the jury to

*For other cases see same topic and section NUMBER in Dec. Dig. & An. Dig. Key-No. Series & Rep'r Indexes

the prejudice of the substantial rights of the defendant. This paragraph in effect deprives the defendant of the benefit of the presumption of innocence. It required the jury to believe from the evidence that he was innocent before they could find him not guilty, and imposed upon him the burden of proving his innocence.

A defendant is presumed to be innocent until the contrary is proved, and the jury must presume his innocence until his guilt has been established beyond a reasonable doubt, and in case of a reasonable doubt it was their duty to acquit him, although they might not find from the evidence that he did not sell, or assist in the sale, or otherwise furnish the said liquor to Glen Hall as charged in the information.

For the giving of said instruction, the judgment is reversed, and a new trial awarded.

ARMSTRONG, P. J., and FURMAN, J., concur.

STATE v. GRIGG.

(Supreme Court of Idaho. Jan. 5, 1914.)

1. ERROR OF LAW.

Held, that the trial court did not err in questions of law arising on the trial of this case.

2. CRIMINAL LAW (§ 688*)—TRIAL—EXCLUSION OF EVIDENCE—REBUTTAL.

Held, that the court did not err in rejecting certain evidence offered in rebuttal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.*]

3. CRIMINAL LAW (§ 938*)—NEW TRIAL—EVIDENCE.

Held, that the court did not err in denying appellant's motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306-2315, 2317; Dec. Dig. § 938.*]

4. CRIMINAL LAW (§ 1163*)—HARMLESS ERROR—INSTRUCTIONS.

Held, that the court did not err in giving certain instructions, or in the refusal to give certain other instructions requested by the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. § 1163.*]

5. CRIMINAL LAW (§ 858*)—TRIAL—DELIBERATIONS OF JURY.

Under the provisions of section 7902, Rev. Codes, the jury may take with them to the jury room the written instructions given by the court; but they are not obliged to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059, 2062; Dec. Dig. § 858.*]

Ailshie, C. J., dissenting.

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Joseph Grigg was convicted of assault with intent to murder, and appeals. Affirmed.

Davis & Asher, of Sandpoint, for appellant. J. H. Peterson, Atty. Gen., and Wm. J. Costello, of Sandpoint, for the State.

SULLIVAN, J. The appellant was convicted of the crime of assault with intent to commit murder on one Clarence Franklin, and sentenced to imprisonment at hard labor in the penitentiary for not less than 3 years nor more than 14 years. A motion for a new trial was denied, and the appeal is from the judgment and said order.

[1] 1. The first error assigned is that the judgment of conviction is against the law. There is no merit in that contention, as it does not appear from the record that the judgment is against law, or that the court made any reversible error in questions of law arising during the trial.

[2] 2. The refusal of the court to allow appellant to give testimony in rebuttal of the testimony of one of the state's witnesses is assigned as error. This assignment arises over the question of the knife with which the cutting was done. The defendant admitted that he cut said Franklin, and claimed that he did it in self-defense, and whether or not he did it with a particular knife which was not admitted in evidence was immaterial. The defendant claimed that he had lost the knife with which he did the cutting shortly after the cutting was done. There is no merit in this assignment.

[3] 3. The next error assigned is that the court erred in denying appellant's motion for a new trial. A number of affidavits on the motion for a new trial were filed, setting forth what counsel claims to be newly discovered evidence. Some of those affidavits are in regard to whether defendant started the quarrel in which the cutting was done. On an examination of all of those affidavits, we are fully satisfied that the court did not err in denying a new trial because of anything contained in said affidavits. It appears that, if any of said testimony was material, no effort was made by the defendant to procure such evidence on the trial. The most of such evidence is merely cumulative and impeaching, and much of it not material.

[4] 4. The giving and refusal to give certain instructions is assigned as error. We have examined said instructions given by the court, and find that they correctly state the law applied to the facts of this case, and that there was no error in refusal to give the instructions refused by the court.

It appears that, after this appeal was taken, counsel for defendant discovered that on the last instruction given by the court (No. 22) the judge, through some inadvertence, wrote at the bottom thereof "guilty" instead of "given," and signed his name. That instruction is as follows: "In this case, in order to reach a verdict of guilty or not guilty, all of your number must agree thereon, and if you so agree, the verdict must be assigned by the foreman selected by you"—which instruction is in typewriting, and at the bottom thereof, in the handwriting of the judge, is the following: "Guilty" instead of "given"

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as was clearly intended. The word "guilty" being written there certainly could not have misled any one, and it does not appear that the jury ever saw said instruction, or that any prejudicial error resulted therefrom, or that the jury ever knew that the judge had made a mistake in writing the word "guilty" instead of "given."

[5] Under the provisions of section 7902, Rev. Codes, the jury "may" take with them to the jury room the written instructions given; but there is nothing in the record to show that said instructions were taken by the jury when they retired to deliberate on their verdict. That statute is a permissive and not a mandatory one, and it does not require the jury to take the instructions of the court to the jury room, but permits them to do so. Had it been a mandatory statute, and commanded them to take the instructions to the jury room, then the presumption would be that they did take it; but, as the statute leaves it optional with the jury, it will not be presumed that they did take the instructions with them, unless the record shows that they did do so. Had the jury taken the instructions to their room, it would have been an easy matter to have shown that fact by affidavit or otherwise, and it would be very technical to reverse this case on the presumption that the jury did take said instructions to their consultation room under that permissive statute. That contention is without merit.

The judgment of the district court, therefore, must be affirmed, and it is so ordered.

STEWART, J., concurs.

AILSHIE, C. J. (dissenting). I am unable to understand the reasoning of the majority in holding that there was no error in the giving of instruction No. 22 in the condition in which we find it. The majority hold, and I think correctly, that under the statute of this state, the jury in a criminal case may take to the jury room with them the written instructions given by the court. If that is the law, and I agree that it is, why should this court presume that the jury did not have the written instructions? The record fails to show whether they did or did not have them, and indeed a record would not show one way or the other, unless something special or out of the usual had occurred to cause the reporter to make a record of each action. In other words, the reporter would have no occasion to enter in his notes that the jury either did or did not take the instructions to the jury room. This court has uniformly held that where the statute authorizes or directs the doing of a thing in the trial of a case in the lower court that, in the absence of a showing to the contrary, the presumption will be indulged in this court that the law was complied with and the thing was done. Under that rule, there ought to be no question in this court but that the in-

structions in the case at bar were taken to the jury room by the jury. The typewritten part of the instruction No. 22 was in no way objectionable. It reads as follows:

"Instruction No. 22. In this case in order to reach a verdict of guilty or not guilty all of your number must agree thereon, and if you so agree the verdict must be signed by the foreman selected by you.

"Guilty—

"John M. Flynn, Judge."

At the end of this sentence the word "Guilty" is written in the handwriting of the trial judge, and immediately under the word "Guilty" he has his name signed as follows: "John M. Flynn, Judge." No question arises here as to what the trial court intended. That is immaterial. I should venture the guess myself, if guessing on the subject, that the trial judge made a mistake and intended to write the word "Given," but we are not here dealing with the secret intentions of any one. We are dealing with what actually occurred. There attached to this instruction was the unmistakable word "Guilty," and that word immediately following this peculiar instruction and over the signature of the judge, would certainly be significant to a jury. They would at once say that this indicated, whether placed there by mistake or not, that the judge had in his mind that the defendant was guilty, and that they should return their verdict accordingly. The fact that this was not called to the attention of the trial court could make no difference, for the reason it is one of those things that would not likely have come to the knowledge of the defendant or his counsel until he came to make up a record on appeal. This word was evidently not read to the jury when the instruction was read, but it was written on the instruction when the court signed his name to the instruction, and so there was no way that the defendant had of knowing of this until after he examined the written instructions on file with the clerk.

I do not think a court can escape the duty of reversing a case under such conditions by saying that the evidence was sufficient to convict the defendant anyway. That was a matter for the jury, and I think this case ought to be submitted to a jury free from the error here complained of. This court cannot get away from the legal presumption which arises from the record that this instruction was submitted to the jury and was examined and considered by them in the condition in which it comes here.

TROUSDALE v. WINONA WAGON CO. et al.

(Supreme Court of Idaho. Nov. 12, 1913.

Rehearing Denied Dec. 31, 1913.)

1. PLEADING (§ 237*)—AMENDMENT—REPLEVIN.

Where, in an action in replevin, the complaint alleges that the property claimed was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"one 2½-inch Winona wagon, complete with long or grain box or bed," and the proof showed that it was a 3-inch wagon of the same make, *held*, that there was no error in the trial court permitting the plaintiff to amend the complaint to conform to the proofs, and that the defendant was not injured or prejudiced thereby.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

2. SALES (§ 472*)—CONDITIONAL CONTRACT—CONSTRUCTION.

Where a manufacturer of wagons delivers wagons to a retail dealer upon a conditional sale contract providing that the title shall remain in the vendor until the property is paid for, and it is stipulated therein that, "if sales are made before payment, they shall be made only in the regular course of business, and their proceeds, whether in cash, book accounts, or notes, are to be held as the property of the Winona Wagon Company, in trust as collateral security, for their benefit, and subject to their order, etc.," *held*, that it was contemplated by such contract that the retailer would sell the property in the due course of business, and that a sale by the retailer should carry with it the title to the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1366-1376; Dec. Dig. § 472.*]

3. SALES (§ 473*)—CONDITIONAL CONTRACT—CONSTRUCTION.

Courts will so construe conditional sale contracts made between manufacturers or wholesale dealers and retail dealers as to protect the purchaser and consumer who deals with the retailer, and who has no notice or knowledge of the terms of the agreement or contract between the manufacturer or wholesaler and retailer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1377-1390; Dec. Dig. § 473.*]

4. FRAUDULENT CONVEYANCES (§ 147*)—CHANGE OF POSSESSION—SUFFICIENCY.

Where a retail dealer sells a wagon to a purchaser and receives the purchase price, and thereupon writes a card containing the words, "Sold to C. H. Trousdale," and places this notice on the wagon, and thereupon the wagon is left in the possession of the retailer, and, before it is taken away by the purchaser, a receiver takes charge of the property of the retailer, *held*, that in an action between the original vendor of the property on conditional sale contract and the purchaser from the retailer, that there has been sufficient change of possession to meet the requirements of section 3170, Rev. Codes.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 457, 469, 473-478, 481; Dec. Dig. § 147.*]

5. FRAUDULENT CONVEYANCES (§ 213*)—CHANGE OF POSSESSION—"CREDITOR."

Held, further, that, under the facts of this case, the manufacturer is not a creditor within the meaning and purview of section 3170 of the Revised Codes.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 635, 636, 638; Dec. Dig. § 213.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1713-1726; vol. 8, pp. 7622, 7623.]

Appeal from District Court, Washington County; Ed. L. Bryan, Judge.

Action by C. H. Trousdale against Winona Wagon Company and others to recover possession of personal property. From a judgment for defendants, plaintiff appeals. Reversed.

Ed. R. Coulter, of Welser, for appellant.
Lot L. Feltham, of Welser, for respondents.

AILSHIE, C. J. This is an appeal from a judgment of nonsuit against the plaintiff. The action was commenced in claim and delivery for the recovery of a farm wagon. After plaintiff introduced his evidence, defendant moved for a nonsuit, which was granted by the court. Judgment was thereupon entered dismissing the action.

The contention of appellant is that sufficient evidence was introduced to entitle his case to be submitted to the jury. The respondent, in reply thereto, and in support of the action of the trial court, insists that the judgment should be sustained for two reasons: First, on account of a material variance between the pleadings and proofs; and second, insufficiency of the proofs to make a *prima facie* case.

[1] The contention made under the first ground is that the complaint alleged that the wagon which was sought to be recovered was a "one 2½-inch Winona wagon complete with long or grain box or bed," while the proof showed that it was a 3-inch Winona wagon. It is true that the evidence described a different wagon from the one described in the pleading, but this was not such a variance as to mislead and prejudice the defendant. The court properly allowed the plaintiff to amend his complaint to conform with the proofs. Sections 4225 and 4226, Rev. Codes; Pennsylvania, etc., Min. Co. v. Gallagher, 19 Idaho, 106, 112 Pac. 1044; Maw v. Coast Lumber Co., 19 Idaho, 407, 114 Pac. 9. Had the defendants requested it, and shown the necessity therefor, the court would undoubtedly have granted such a continuance as might have been necessary to enable them to secure any other or different proofs available for their defense that they did not have to meet the original description. Section 4226, Rev. Codes. This would not have afforded any ground for a nonsuit.

[2] As a matter of fact, it appears from the record that the trial court granted the nonsuit on account of insufficiency of the evidence. The material facts shown are briefly as follows: The Roy White Co-Operative Mercantile Company was engaged in business at Welser, and purchased from the Winona Wagon Company of Winona, Minn., a shipment of wagons under what is commonly designated a conditional sale contract. These wagons were not paid for. On about January 23, 1912, the appellant hauled to the town of Welser a quantity of alfalfa seed, and after considerable negotiation sold the same to the Roy White Company for the sum of \$420, and took in payment therefor the wagon in controversy, at the price of \$135; and the company agreed to send appellant on the following week a check for the sum of \$265, and to give him credit on their books of \$20, which was to be traded out in their store. The appellant was not going directly home from Welser, and was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not prepared to take the wagon with him; so Roy White, manager of the Roy White Company, "went to the office and got a tag and marked on it, 'Sold to C. H. Trousdale,' and fastened it to the wagon." He testifies that he marked it in "big letters" and put it on the wagon. Appellant asked White if he could not leave the wagon there somewhere until he could attend to some business he had to see about, and return with his team to take the wagon home. It was accordingly agreed to, and the wagon was left, labeled as above indicated. Soon after this transaction the Roy White Company failed, and a receiver was appointed to take charge of the business and property of the company. Immediately thereafter the Kerr Hardware & Implement Company of Boise, which was the Idaho representative of the Winona Wagon Company, sent an agent to Weiser and demanded possession of this wagon, and were informed that the wagon belonged to Trousdale, but they insisted on taking the wagon, and did take it from the possession of the receiver, claiming it as the property of the Winona Wagon Company. Appellant thereupon commenced this action. The proofs show substantially the foregoing facts.

The clause of the contract under which the Winona Wagon Company claims this wagon, and over which the chief controversy arises is clause No. 8 of the contract, which reads as follows: "The title to and ownership of all goods shipped under this contract shall remain vested in the Winona Wagon Co., unless at their option it shall be expressly waived in writing, and the goods are to be held at all times subject to their order until paid for; and if sales are made before payment, they shall be made only in the regular course of business, and their proceeds, whether in cash, book accounts or notes, are to be held as the property of the Winona Wagon Co., in trust as collateral security, for their benefit and subject to their order, until all the obligations arising under or provided for in this contract are fully paid in money, or until full settlement is made at the net prices herein specified. It is further agreed that notes taken by the Winona Wagon Co. are not accepted as payment."

It is apparent from this contract that it was the intention of both the Winona Wagon Company, as vendor, and the Roy White Company, as vendee, that the title to this property should remain in the vendor until the purchase price should be fully paid. On the other hand, it is equally clear that both parties understood that the Roy White Company was purchasing these wagons for sale in a retail business, and that the purchaser of a wagon would take title to the same. We must assume that the parties to this contract were dealing in good faith, and that they did not intend to cheat or defraud any one who might buy a wagon from the Roy White Com-

pany. It would follow, therefore, that it was the intention that the local dealer might sell the property in due course of business and give a good title to it, and it must have been for that very reason that it was stipulated in the contract of sale as follows: "And if sales are made before payment, they shall be made only in the regular course of business, and the proceeds, whether in cash, book accounts or notes, are to be held as the property of the Winona Wagon Co., in trust as collateral security, for their benefit and subject to their order," etc. In other words, it was stipulated and agreed that when the Roy White Company should sell any wagon, that the proceeds realized from the sale should be held by them as the property of the Winona Wagon Company and in trust for that company. It was certainly not intended that the Winona Wagon Company should retain title to a wagon which the Roy White Company might sell at retail, and also take title to the purchase price for the wagon. It was rather the intention to substitute the purchase price for the wagon itself, and that the Roy White Company should hold that in trust for the Winona Wagon Company, and that, in the meanwhile, the title to the wagon should have passed from the Winona Wagon Company through the Roy White Company as its agent for such purpose to the purchaser at retail. This is the view taken by this court in *Peasley v. Noble*, 17 Idaho, 686, 107 Pac. 402, 27 L. R. A. (N. S.) 216, 134 Am. St. Rep. 270. In that case this court said: "Where the vendee of property under conditional sale is vested with the power to sell such property and deliver the proceeds to the vendor, a purchaser in good faith is under no obligation to follow the purchase price and see that it is delivered by the agent to the original vendor."

[3] Courts will not place such a construction on these conditional sale contracts, made between manufacturers or wholesale dealers and local retail dealers, as to enable either the wholesaler or retailer to perpetrate a fraud on purchasers who deal with such retailers in the due and regular course of business. These companies cannot hold the title for the purposes of protecting themselves, and at the same time place it in the power of the retailer to deal with the property in such a manner as to deceive a purchaser, and thereby cheat and defraud the local consumers for the purpose of enabling manufacturers or wholesale dealers to load up the retailers with a lot of these goods on conditional sale contracts.

[4] It appears that the trial court considered that there had been no change of possession of this wagon sufficient to meet the requirements of section 3170, Rev. Codes. That section provides as follows: "Every transfer of personal property other than a thing in action, and every lien thereon, other than a mortgage when allowed by law, is conclusively presumed, if made by a person hav-

ing at the time the possession or control of the property, and not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or incumbrancers in good faith subsequent to the transfer."

[5] It would be sufficient for our present purposes to observe that this question is not raised by a creditor, within the meaning of the foregoing section of the statute. The Winona Wagon Company does not fall within the purview of a creditor as designated in that statute, but rather claims to be the owner of the property itself, in which case this statute does not apply. It should be remembered, however, that the appellant did everything toward taking actual possession of this wagon that could be done, except to actually remove it from the premises and place of business of the Roy White Company. The price was agreed upon and paid, and the wagon was labeled, "Sold to C. H. Trousdale." In other words, it was there marked or branded as the property of the appellant. If a man goes to a store and buys a pair of shoes and has them wrapped up and his name written upon the package and pays the purchase price, and then leaves them in the store while he goes somewhere else to do an errand, he certainly has not thereby lost the right to the title and possession of the shoes. There has been a sale and transfer and change of possession, and the firm from which the purchase has been made is thereafter only a bailee of the goods so purchased. Section 3331, Rev. Codes; *Strong v. Morgan*, 8 Idaho, 269, 67 Pac. 1123.

The appellant made at least a prima facie case, and was entitled to have it submitted to the jury. (*Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494.)

The judgment should be reversed, and it is so ordered, and the cause is remanded for a new trial. Costs awarded to appellant.

SULLIVAN and STEWART, JJ., concur.

LOHMAN et al. v. REYMOND.

(Supreme Court of New Mexico. Oct. 14, 1913.
Rehearing Denied Dec. 17, 1913.)

1. PLEADING (§ 308*)—CROSS-COMPLAINT—WRITTEN INSTRUMENT—FILING—NECESSITY.

Where, in a suit to compel an accounting by trustees, cross-complainant, at the time of filing his cross-complaint for appointment of a receiver, was justified from the record in believing that he would only be required to present and prove his title to claims transferred to him in the receivership proceeding, and for that reason only set up the assignment of such claims to

show his capacity to join in the suit to compel the trustees to account, his cross-complaint was not based on the instrument of assignment; and hence the assignment, when offered in evidence, was not objectionable because such instrument or a copy thereof was not filed in compliance with Code Civ. Proc. subsec. 307 (Laws 1907, c. 107), providing that, when any instrument of writing on which the action or defense is founded is referred to in the pleadings, the original or a copy shall be filed with the pleading, if within the power or control of the party wishing to use the same, and if the original or a copy be not filed or a sufficient reason given for failure to file it, the instrument may not be admitted in evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 54, 935-941; Dec. Dig. § 308.*]

2. APPEAL AND ERROR (§ 1009*)—FINDINGS—REVIEW.

Where, in a suit to compel trustees to account, the trial court did not hear all of the witnesses testify, an assignment that the court erred in finding that certain claims had been assigned to cross-complainant L. required a review on appeal of all the evidence in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

3. ASSIGNMENTS (§ 41*)—FORM—RELEASE.

An instrument in the form of a release of claims of three creditors of an insolvent against the insolvent's trust estate to L., together with oral testimony explaining the same, might be properly held to amount to an assignment of such claims to L.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76, 77; Dec. Dig. § 41.*]

4. ALTERATION OF INSTRUMENTS (§ 11*)—INTERLINEATION—EFFECT.

Alteration of an instrument by interlineation by one who was acting as a friend of both parties, and who drew the original instrument at a time prior to his becoming interested in behalf of either party, was not a fatal alteration.

[Ed. Note.—For other cases, see Alteration of Instruments, Cent. Dig. §§ 57-76; Dec. Dig. § 11.*]

5. PLEADING (§ 168*)—NEW MATTER—REPLY—NECESSITY.

Where cross-complainant alleged that a certain release of claims against an insolvent's estate was made only on one condition, while defendant charged that the release was made on the same and also on another condition, such allegations presented a complete issue, and no reply was necessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 330; Dec. Dig. § 168.*]

6. PLEADING (§ 412*)—RIGHT TO REPLY—WAIVER.

By going to trial on the merits, and not objecting to evidence, defendant waived any right he may have had consequent on cross-complainant's failure to reply to defendant's answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1387-1394; Dec. Dig. § 412.*]

Appeal from District Court, Dona Ana County; Parker, Judge.

Action by Martin Lohman, as trustee, against Numa Raymond and others, in which George Lynch and another filed a cross-complaint. Judgment for cross-complainants and defendant named appeals. Affirmed.

On December 6, 1892, the cross-complainant George Lynch and his two brothers, since deceased, executed their deed of trust for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the benefit of creditors to the plaintiff, Martin Lohman, and to the defendant Numa Reymond, as trustees. Numa Reymond having left the country, Martin Lohman, trustee, had instituted this suit against Numa Reymond, trustee, and the creditors as defendants, including George Lynch and William Lynch, surviving members of the firm of Lynch Bros., to remove Numa Reymond as such trustee. Numa C. Frenger was appointed by order of the court trustee in place of Numa Reymond. Thereafter, and during the year 1900, George Lynch filed his cross-complaint in the nature of a bill in equity praying for an accounting by the trustees and the appointment of a receiver for the trust estate to take possession and dispose of the same under provisions of said trust deed, and under the direction and order of the court.

George Lynch alleged in his cross-complaint that he is also interested as a creditor of the estate by assignments from other creditors, in addition to his interest as a residuary beneficiary. Lohman and Reymond are sued only in their capacity as trustees. Martin Lohman and Numa Reymond, being in court only as trustees, undertook, nevertheless, to answer the cross-complainant in their individual and personal capacity, and to litigate their individual controversies with Lynch in this suit. The suit was tried upon the issues made by the cross-complaint of George Lynch, the answer of plaintiff, Martin Lohman, the reply of defendant George Lynch, and the answer of defendant Numa Reymond. It is also stipulated in the case that the reply of George Lynch to the answer of Martin Lohman shall be treated as a reply of Edward C. Wade, as co-cross-complainant, with George Lynch, to the answer of Numa Reymond. The vital question upon the appeal is whether Numa Reymond assigned to George Lynch his claim as a creditor against the estate in question.

On or about December 13, 1900, Numa Reymond, John H. Riley, and Martin Lohman, for the consideration of their mutual promises, and for the express consideration of \$1 in hand paid, agreed together orally to release (or assign) and did release (or assign) to George Lynch their claims against the trust estate of Lynch Bros. In pursuance of this oral agreement (or assignment), they executed and delivered to George Lynch a written instrument, appearing on its face to be a release to George Lynch, of all their claims against George Lynch. The trial court found as a fact that the said Lohman, Riley, and Reymond did, in fact, assign to George Lynch their claims against Lynch Bros., and upon conflicting evidence, the trial court found that this assignment was made unconditionally. The typewritten instrument in evidence contained a condition written with a pen below, after the signature of the parties.

N. C. Frenger, of Las Cruces, for appellant. J. H. Paxton, of Las Cruces, for appellees.

ABBOTT, District Judge (after stating the facts as above). The vital question for decision in this case is raised by the first assignment of error, which is: "That the district court erred in admitting in evidence the release submitted by appellees George Lynch and Edward C. Wade and marked Exhibit A under their evidence, upon the ground that the same was referred to in appellee's cross-complaint, and the same, or a copy thereof, was not filed with said cross-complaint, the same having been within their power and control, and no sufficient reason having been given for failure so to do, and which said cross-complaint and their action thereby was founded, as to their rights claimed against appellant, upon said release, it being an instrument in writing."

[1] The argument of appellant is that, in so far as appellee George Lynch claims to be the owner of the credits of appellant under said estate of Lynch Bros, this action was founded upon the writing appearing in evidence as Exhibit A. It is referred to in the cross-complaint. The same, or a copy thereof, was not filed with said cross-complaint, though within the power and control of said George Lynch, and no sufficient reason was given for failure to do so. The said writing was therefore not entitled to be admitted in evidence, under subsection 307 of the Code of Civil Procedure (Laws 1907, c. 107), which is as follows: "When any instrument of writing upon which the action or defense is founded is referred to in the pleadings, the original or a copy thereof shall be filed with the pleading, if within the power or control of the party wishing to use the same, and if such original or a copy thereof be not filed as herein required, or a sufficient reason given for a failure to do so, such instrument of writing shall not be admitted in evidence upon the trial."

It is evident upon the face of the record that George Lynch filed his cross-complaint against Numa Reymond only in Reymond's capacity as trustee. He prayed for an accounting by the trustee, and the appointment of a receiver for the trust estate. Unless George Lynch had something more than a mere interest as residuary beneficiary of the trust estate, it is questionable whether he would have an interest sufficient to entitle him to maintain his action; and it was therefore proper to allege that certain creditors had assigned their claims against the trust estate to Lynch, so as to show Lynch's interest and right to sue. The written instrument from Reymond, Riley, and Lohman to Lynch was not pleaded as a basis of the action, nor was any recovery sought upon it. Lynch did not sue as assignor individually or personally. There was no occasion to do so;

nor could he know that there ever would be such action. He was justified in taking the position that he would only have to present his title in the receivership proceedings. In his cross-complaint he was not seeking to confirm his title to the claims of Lohman, Raymond, and Riley against the trust estate.

The record shows that up to the time of the filing of the answer of Lohman and Raymond to the cross-complaint, that Lohman and Raymond were only sued in the action in their capacity as trustees. So far as the record shows, Lynch could not then know that there would be any occasion for personal suit against any of the creditors who had released (or assigned) their claims to him. The trustees, Lohman and Raymond, however, being in court only as trustees, undertook to answer the cross-complaint in their individual and personal capacity, and to litigate their individual controversies with Lynch in this suit under his cross-complaint. At the time of filing his cross-complaint, he was, from the record, justified in thinking he would only have to present his title in the receivership proceedings. To question his right and title to the claims of Lohman, Raymond, and Riley against the trust estate in his cross-complaint, in which he was suing for an accounting and receivership, would have been improper pleading. It is a copy of the instrument on which the suit is founded which is to be attached to plaintiff's complaint, and not the evidence required to sustain his case. In this case, the release from Raymond, Lohman, and Riley was not the instrument upon which the action of appellee was founded, but nothing more than a part of the evidence upon which he had a right to rely in case his title to the claims of Lohman, Raymond, and Riley was questioned. It was proper for appellee to set forth all of his interest in the trust estate, so that his right to maintain his action might be unquestioned. Suppose it was shown upon the face of his cross-complaint that the claims of creditors were in so large amount that appellee would certainly have no interest as residuary beneficiary. The record shows in this case that the appellee did not base his title wholly upon the so-called release, but that an oral agreement previous to the written instrument was also relied upon. He had no reason to believe that his title to the claims of Raymond, Lohman, and Riley would be questioned in this action; and his cross-complaint was not based upon such instrument, and it therefore becomes not only unnecessary but improper for the same to have been set forth in his cross-complaint, and his action not being founded thereon, the same was not inadmissible in evidence. *Latterett v. Cook*, 1 Iowa, 1, 63 Am. Dec. 428; *Fisher v. Patton*, 134 Mo. 32, 33 S. W. 451, 34 S. W. 1096; *Horne v. Mullis*, 119 Ga. 534, 46 S. E. 663; *Diggs v. Way*, 22 Ind. App. 617, 51 N. E. 429, 54 N. E. 412; *Vannice v. Green*,

14 Iowa, 262; *Bryson v. Kelley*, 53 Ind. 486; *Duffy v. Carman*, 3 Ind. App. 207, 29 N. E. 454; *Williams v. Frybarger*, 9 Ind. App. 558, 37 N. E. 302; *Lester v. People*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. Rep. 375; *State v. Wenzel*, 77 Ind. 428; *Worley v. Moore*, 77 Ind. 567; *Shetterly v. Axt*, 37 Ind. App. 687, 76 N. E. 901, 77 N. E. 865; *Conn v. State*, 125 Ind. 514, 25 N. E. 443.

The written instrument having been properly admitted in evidence, it remains to be determined what is the legal effect of said instrument, and this question is directly raised by the eighth assignment of error, which is: "That said court erred in finding that, in law, the appellant has assigned over to the appellee George Lynch his claims in and to the Lynch Brothers estate."

[2] Appellee claims that it is established by the evidence of the written instrument held to have been an assignment from Numa Raymond to George Lynch, and by evidence aliunde, that Numa Raymond assigned to George Lynch all his claims against the estate of Lynch Bros. Appellant argues that there is no evidence that a verbal contract or agreement to assign to George Lynch was made. The decision of this question brings us to an examination of the whole of the evidence in the case, under the rule announced in the case of *Gallup Electric Light Co. v. Pacific Improvement Co.*, 16 N. M. 86, 113 Pac. 848, as the trial judge did not hear all of the witnesses testify. The finding of the trial court that an assignment of the claims of appellants Raymond, Lohman, and Riley against the trust estate to George Lynch was made was based not only upon the written instrument heretofore referred to, but upon the oral testimony as well.

[3] We have carefully examined the entire record in this case, and are of the opinion that the finding of the trial court in this regard is sustained by a fair preponderance of the evidence. The instrument admitted in evidence in this case in the form of a release of the claims of Raymond, Lohman, and Riley, against the trust estate to George Lynch, together with the oral testimony explaining the same, was properly held by the trial court to be, in legal effect, an assignment of such claims to George Lynch. *Moore v. Lowrey*, 25 Iowa, 336, 95 Am. Dec. 790; *Metcalf v. Kincaid*, 87 Iowa, 443, 54 N. W. 867, 43 Am. St. Rep. 391; *Drake on Attachments*, § 562; *McDaniel v. Maxwell*, 21 Or. 202, 27 Pac. 952, 28 Am. St. Rep. 740; *Hull v. Smith*, 8 How. Prac. (N. Y.) 281; *Noble v. Hunter*, 2 Kan. App. 538, 43 Pac. 994; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Crone v. Braun*, 23 Minn. 239; *People v. Tloga Common Pleas*, 19 Wend. (N. Y.) 73; *Buchanan v. Taylor*, Add. (Pa.) 154; *G. C. & S. F. Ry. Co. v. Cusenberry*, 5 Tex. Civ. App. 114, 23 S. W. 851; *Hinkle v. Wanzer*, 17 How. 353, 15 L. Ed. 173; *Hooker v. Eagle Bank*, 30 N. Y. 83, 86

Am. Dec. 351; *Macklin v. Kinealy*, 141 Mo. 113, 41 S. W. 893; *Tatum v. Ballard*, 94 Va. 370, 28 S. E. 871.

[4] The alterations appearing in the instrument held to evidence an assignment from Numa Raymond to George Lynch are not such as to affect its validity or admissibility in evidence, the same not having been done by the parties to alter its meaning, but only by interlineation by the person who was acting as the friend of both parties, and who drew the original instrument at a time prior to his becoming interested in behalf of either party. *Ames v. Brown*, 22 Minn. 257; *Yeager v. Musgrave*, 28 W. Va. 90; *White Sewing Mch. Co. v. Dakin*, 86 Mich. 581, 49 N. W. 583, 13 L. R. A. 315; *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58; *Sharpe v. Orme*, 61 Ala. 263; *Sill v. Reese*, 47 Cal. 294; *Andrews v. Burdick*, 62 Iowa, 714, 16 N. W. 275; *Hervey v. Harvey*, 15 Me. 357; *Ames v. Colburn*, 77 Mass. (11 Gray) 390, 71 Am. Dec. 723; *McRaven v. Crisler*, 53 Miss. 542; *Footte v. Hambrick*, 70 Miss. 157, 11 South. 567, 35 Am. St. Rep. 631; *Lee v. Butler*, 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466; *Equitable Mfg. Co. v. Allen*, 76 Vt. 22, 56 Atl. 87, 104 Am. St. Rep. 915; *Lee v. Alexander*, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412; *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733; *Brooks v. Allen*, 62 Ind. 401; *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969; *Goodfellow v. Inslee*, 12 N. J. Eq. 355; *Condict v. Flower*, 106 Ill. 105; *Deering Harvester Co. v. White*, 110 Tenn. 132, 72 S. W. 962; *Mathias v. Leathers*, 99 Iowa, 18, 68 N. W. 449; *Forbes v. Taylor*, 139 Ala. 286, 35 South. 855.

[5] There was no admission, by Lynch's failure to reply to Raymond's answer, of Raymond's allegation that his agreement was conditioned upon the joinder of all other creditors. The allegation of the cross-complaint was to the effect that Raymond (together with other creditors), by his writing, released directly to Lynch his claim against the trust estate; "subject *only* that the claim so released should not incur to the use and benefit of any other creditors of said Lynch Bros."

The denial in Raymond's answer is as follows: "Said Raymond denies all of the allegations of paragraphs five and six of said cross-complaint, but, on the contrary, avers that he agreed to release all his rights as creditor in and to the said Lynch estate in favor of the said George Lynch, upon the condition however that all the other creditors of the said estate likewise relinquish their claims, and upon the further condition that the said relinquishments should inure to the sole benefit of the said George Lynch."

The issue is therefore formed by contrary averments, Lynch averring that the release was made only upon one condition, and Raymond averring that the release was made up-

on the same condition and an additional condition. The allegation of the cross-complaint and the denial in the answer, when taken together, make a definite and clear-cut issue. *Watkins v. So. Pac. R. Co.* (D. C.) 38 Fed. 711, 4 L. R. A. 241. Affirmative allegations in an answer are not necessarily new matter, so that a replication becomes necessary. If they in fact only show that some essential allegation of the complaint is not true, then they are only a traverse. *Goddard v. Fulton*, 21 Cal. 430; *Luther v. Brown*, 66 Mo. App. 227; *Jordan v. Buschmeyer*, 97 Mo. 94, 10 S. W. 616; *King v. Burnham*, 93 Minn. 288, 101 N. W. 302; *Johnson v. Andrews*, 34 Misc. Rep. 89, 68 N. Y. Supp. 764; *Union Ins. Co. v. Murphy* (Pa.) 4 Atl. 352; *Smith v. L. & M. N. R. Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72.

[6] By going to trial on the merits, and not objecting to evidence, Raymond waived any right he may have had, consequent upon Lynch's failure to reply to his answer. *Coler v. Board of Co. Comrs.*, 6 N. M. 117, 27 Pac. 619; *Faucette v. Ludden*, 117 N. C. 170, 23 S. E. 173; *Looney v. Linney* (Tex. Civ. App.) 21 S. W. 409; *Sawtelle v. Muncy*, 116 Cal. 435, 48 Pac. 387; *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; *Union P. R. Co. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597.

All of the assignments of error being disposed of, the judgment of the lower court will be affirmed, for the reasons given.

ROBERTS, C. J., and HANNA, J., concur.
PARKER, J., being disqualified, did not participate in this opinion.

GILMORE et al. v. OSTRONICH.

(Supreme Court of Montana. Dec. 9, 1913.)

1. APPEAL AND ERROR (§ 515*)—TRANSCRIPT ON APPEAL—INCORPORATION OF EVIDENCE—RULES OF COURT.

Under Supreme Court rule 7, subd. 3 (123 Pac. xi), providing that in equity cases where any questions of fact arising on the evidence are to be submitted for review by the Supreme Court, the testimony shall be presented by question and answer, the court on appeal in an equity case need not review the sufficiency of the evidence to justify the findings, where the evidence is incorporated in the transcript in narrative form.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2322-2325; Dec. Dig. § 515.*]

2. EVIDENCE (§ 587*)—SUFFICIENCY—CIRCUMSTANTIAL EVIDENCE.

Circumstantial evidence in a civil case need only produce, as provided by Rev. Codes, § 7856, moral certainty in an unprejudiced mind, and circumstantial evidence which furnishes support for plaintiff's theory of the case, and thereby tends to exclude any other theory, is sufficient to support a verdict for him.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2436; Dec. Dig. § 587.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Martin Gilmore and others against M. R. Ostronich. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chas. A. Wallace, of Butte, for appellant. James E. Murray and Joseph H. Griffin, both of Butte, for respondents.

BRANTLY, C. J. This action was brought by the plaintiffs to obtain a decree dissolving a mining copartnership composed of the plaintiffs and the defendant, and to compel the defendant to account to the plaintiffs for the value of certain ore alleged to have been extracted by him from the common property and converted to his own use. The plaintiffs reside in Butte, Silver Bow county, and are the owners of the Nellie Bly quartz lode mining claim, situate in Madison county. On or about October 15, 1910, the defendant, having acquired from the plaintiff Wm. J. Jennings an option to purchase an undivided one-tenth interest in the claim, entered into an agreement with the plaintiffs to go to Madison county and take charge of the property, to extract ore therefrom, and to ship the same to a smelter for reduction, in the name of the Nellie Bly mine, the net proceeds to be paid by the smelter company to the plaintiffs. Out of the proceeds were to be paid to the defendant all the costs and charges for the work done by him, including his wages fixed at \$3.50 per day. Any balance remaining was then to be divided among the plaintiffs and the defendant, in shares proportionate to their respective interests, the defendant's share to be one-tenth. In the event the enterprise resulted in a loss, each of the parties was to contribute his proportionate share. It is alleged that while the defendant was engaged in working the claim he entered into a conspiracy with Thomas Lero, Robert Angelich, and Spiro Vucnich to cheat and defraud the plaintiffs, by representing that certain of the ore shipped had not come from the common property, but from a pretended, fictitious location designated as the Grotto quartz lode claim; that thereafter the defendant caused to be shipped from the Nellie Bly claim to the Washoe Sampling Works at Butte, belonging to the Anaconda Copper Mining Company, but in the name of Robert Angelich, about 16 tons of ore of the value of \$900 per ton, representing that the shipment had been made from the Grotto claim, whereas in truth the ore was from the Nellie Bly claim; that thereafter Angelich and Vucnich procured the proceeds of the ore, amounting to \$13,250.24, to be paid over to them; that Angelich, Vucnich, Lero, and the defendant thereupon converted the money to their own use, and that the defendant failed to account to the plaintiffs for any portion of it. The answer denies all the allegations charging wrongdoing on the part of the defendant, and alleges that there is due

him, for wages during the time he was at work, a balance of \$288.84. The court found that the defendant had converted to his own use ore to the amount and of the value alleged in the complaint, and rendered and caused a decree to be entered dissolving the copartnership, and requiring the defendant to account to the plaintiffs for the full amount thereof, less the sum of \$1,325.02, the one-tenth to which he is entitled under the agreement. The defendant has appealed from the decree and the order denying his motion for a new trial, and has submitted the question whether the evidence is sufficient to justify the findings.

[1] The rule of this court relating to the form in which evidence shall be presented on appeal requires "that in equity cases and in matters and proceedings of an equitable nature, wherein questions of fact arising upon the evidence presented in the record are to be submitted for review by this court, the testimony relating to such questions shall be presented by question and answer." Rule 7, subdiv. 3 (123 Pac. xl). In the preparation of his bill of exceptions, counsel for the defendant failed entirely to observe the requirement of this rule. The evidence is incorporated in the transcript in narrative form. The defendant is therefore not entitled to have the appeals determined on the merits. Nevertheless, upon the merits so far as we have been able to ascertain them from the record as presented, we think the decree and order should be affirmed.

[2] The vital issue in the evidence is whether the ore in controversy was extracted from the common property, or was obtained from some other source. The evidence introduced by the plaintiffs is wholly circumstantial. Counsel for defendant, conceding that the law makes no distinction as to probative value between direct and circumstantial evidence, insists that when, as in this case, the plaintiff relies upon evidence of the latter kind alone, he must establish his claim beyond a reasonable doubt, by proof of circumstances consistent with each other and at the same time pointing so strongly to its validity as to exclude every other rational hypothesis, and that plaintiffs' evidence will not bear this test. The rule invoked by counsel is applicable to criminal cases, but has no application to civil cases. 1 Greenleaf on Evidence (16th Ed.) 81d. In the former the guilt of the defendant must be established beyond a reasonable doubt; in the latter the plaintiff will prevail if the preponderance of the evidence is in his favor. The solution of any issue in a civil case may rest entirely upon circumstantial evidence. Culbertson v. Hill, 87 Mo. 553. All that is required is that the evidence shall produce moral certainty in an unprejudiced mind. Rev. Codes, § 7856. In other words, when it furnishes support for the plaintiff's theory of the case, and thus tends to exclude any other theory, it

is sufficient to sustain a verdict or decision. *Shaw v. New Year Gold Mines Co.*, 31 Mont. 138, 77 Pac. 515; *Monson v. La France Copper Co.*, 39 Mont. 50, 101 Pac. 243, 133 Am. St. Rep. 549.

We shall not undertake to analyze the evidence. As we view it, it furnishes ample support for the findings and decision of the district court, even under the rule invoked by counsel. Accordingly, the judgment and order are affirmed.

Affirmed.

HOLLOWAY and SANNER, JJ., concur.

ANACONDA COPPER MINING CO. v. THOMAS.

(Supreme Court of Montana. Nov. 7, 1913.)

1. PLEADING (§ 345*)—FAILURE TO REPLY—JUDGMENT ON PLEADINGS.

Under Rev. Codes, § 6562, providing that if the answer contains new matter, and plaintiff fails to reply or demur thereto, defendant may move for such judgment as he may be entitled to upon such statement, and where, in an action to quiet title, the answer contained a further and separate answer and defense alleging that defendant since 1901 had been and then was in the actual, adverse possession of "the lands described in the complaint," claiming to own them by reason of such possession, as against the world, to which plaintiff neither replied nor demurred, defendant was entitled to such judgment on the pleadings as his statement of new matter justified, since the new matter required a reply, and the reference to the land as that described in the complaint instead of by legal description could not have misled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

2. JUDGMENT (§ 252*)—PLEADINGS TO SUPPORT—RELIEF TO DEFENDANT—PRAYER.

In an action to quiet title, an answer showing title by adverse possession, when its allegations were admitted by failure to reply, warranted a judgment establishing and quieting defendant's title, though it contained no prayer for such relief, since in equity the pleader is not concluded by his prayer, but the court, having before it all the parties and having obtained complete jurisdiction of the whole subject, will finally settle the whole controversy.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 441, 442; Dec. Dig. § 252.*]

3. ADVERSE POSSESSION (§ 110*)—PLEADING—FAILURE TO REPLY—EFFECT.

Where, in an action to quiet title, defendant's allegations that for over ten years he had been in adverse, etc., possession of the lands in question were admitted by plaintiff's failure to reply, it was thereby admitted that the lands were such as to permit possession of the character alleged during the entire period mentioned, and plaintiff could not ask the court to take judicial notice that the lands were unsurveyed and not subject to adverse possession within the period of ten years.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 636-645; Dec. Dig. § 110.*]

Appeal from District Court, Missoula County; F. C. Webster, Judge.

Action by the Anaconda Copper Mining

Company against Charles Thomas. From a judgment for defendant on the pleadings, plaintiff appeals. Affirmed.

Elmer E. Hershey, of Missoula, for appellant. Tolan & Gaines, of Missoula, for respondent.

SANNER, J. Suit by appellant to quiet title to the south half of the southwest quarter of section 25, township 12 north, range 16 west, Missoula county, Mont. The complaint alleges that plaintiff is the owner of the land; that defendant, without right, claims some estate or interest therein; and that such claim casts a cloud upon the title of plaintiff. The prayer is that the defendant be required to set forth the nature of his claim; that the same may be adjudged null and void; that the defendant be enjoined from asserting such claim; and that plaintiff have its costs and such other relief as may be meet and equitable. The defendant's answer, after admitting that he claims some title, right, and interest in the land and denying the other allegations of the complaint, contains the following "further and separate answer and defense": "This defendant avers that ever since the 20th day of March, 1901, this defendant has been and yet is in the actual, open, peaceable, uninterrupted, exclusive, undisturbed, adverse, and hostile possession of the lands described in the complaint herein, holding and claiming to own the same by reason of said possession of land, exclusive of any other right as against the world." The prayer of the answer is that the plaintiff take nothing, and that the defendant have his costs. No demurrer, reply, or other pleading to the answer was ever filed, and the defendant, after the time for filing reply expired, caused the default of plaintiff to be entered. Thereafter, on motion duly noticed, the court entered judgment for the defendant upon the pleadings. In this judgment it is ordered, adjudged, and decreed that the plaintiff take nothing by its action; that defendant have his costs; and that the claim of defendant to the premises "shall be and is hereby declared to be established, and * * * that the title to and the right of possession of said above-described premises shall be and the same is hereby forever quieted in and to the defendant Charles Thomas as against the claims of plaintiff," etc. After the entry of judgment the plaintiff filed a motion to vacate and set it aside, which was denied. This appeal is from the order denying that motion.

The contentions of appellant are: (1) That the so-called "further and separate answer and defense" does not contain any matter requiring a reply; (2) that it is ineffective to support the judgment as rendered; and (3) that it is ineffective to support any judgment at all.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] 1. As a matter of pleading, the allegations of defendant's "further and separate answer and defense" were such as to require a reply, and, since none was filed, he was entitled to have judgment entered without other proof than the pleadings. Rev. Codes, § 6562; *State v. Quantic*, 37 Mont. 32, 94 Pac. 491; *State ex rel. Montana C. Ry. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546. This conclusion is not affected by the reference to the lands in question as "the lands described in the complaint herein," instead of by legal description, since it not only could not mislead but served every substantial purpose attainable by a repetition of the description.

[2] 2. The plaintiff, asserting that the defendant claimed some right to the land which operated to cloud its title, brought him into court demanding that he set forth the nature of his claim. He did so, and, if the statement of new matter contained in the answer and admitted by failure to reply was such as to entitle him to any relief, it was the duty of the court to grant whatever relief he was entitled to upon such statement. Rev. Codes, § 6562; *State v. Quantic*, supra. Disregarding questions of form, the new matter alleged in the answer is confessedly sufficient to support the affirmative relief awarded; but the contention is that such relief was not warranted here because there was no formal plea for it. If the action were at law, the want of a counterclaim complete within itself would be fatal; but the action is in equity, and the pleader is not concluded by his prayer (*Gillett v. Clark*, 6 Mont. 190, 9 Pac. 823; *Leopold v. Silverman*, 7 Mont. 266, 16 Pac. 580; *Davis v. Davis*, 9 Mont. 267, 23 Pac. 715; *Kleinschmidt v. Steele*, 15 Mont. 181, 38 Pac. 827) nor by the form of his pleading (*Davis v. Davis*, supra). "It is a settled rule of equity practice that when the court has before it all the parties to any difference, and when it has obtained complete jurisdiction of the whole subject-matter, it will finally settle the whole controversy." *Davis v. Davis*, supra. Under this rule, the new matter set up in the answer was sufficient to support the decree. *Davis v. Davis*, supra; *Walker v. Burks*, 48 Tex. 206; *Chicago, etc., Land Co. v. Peck*, 112 Ill. 408; *McCormick v. District of Columbia*, 18 D. C. (7 Mackey) 534; *Sale v. Crutchfield*, 8 Bush. (Ky.) 636.

[3] 3. The contention that the answer is insufficient to sustain any judgment is based upon the assumption that judicial notice must be taken that the lands in question were unsurveyed and therefore not subject to adverse possession within the period of ten years next preceding the commencement of this action. As we view the case, determination of this question and others involved in it is unnecessary. The defendant alleged that he had since March 20, 1901, been "in the actual, open, peaceable, uninterrupted,

ed, exclusive, undisturbed, adverse and hostile possession" of the lands in question, and all this, precisely as pleaded, the plaintiff admitted by failure to reply. This admission was as complete and effective as if it had been made in set terms, and it necessarily admitted that the lands were such as to permit possession of the character alleged by the defendant, during the entire period mentioned. The plaintiff cannot now say, under the shield of judicial notice or otherwise, that such was not the fact.

The decree of the district court is not vulnerable to any of the objections urged by the appellant. Accordingly it is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

IN RE BLACKBURN'S ESTATE.

BLACKBURN v. BLACKBURN et al.

(Supreme Court of Montana. Nov. 1, 1913.)

1. EXECUTORS AND ADMINISTRATORS (§ 19*)—APPOINTMENT OF ADMINISTRATOR—NOMINATION OF WIDOW—RENUNCIATION OF RIGHT—EFFECT.

Rev. Codes, § 7432, requires administration to be granted in the following order, namely, to the surviving husband or wife, or some competent person whom he or she may request to have appointed; the children, etc. Section 7444 provides that administration must be granted to any applicant, though there are others having better rights thereto when such persons fail to claim letters. Section 7447 provides that when letters have been granted to any other person than the surviving spouse, child, etc., any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to administration, and section 7450 provides that the surviving husband or wife, when administration has been granted to a "child, father, brother, or sister, * * * or any of such relatives, when letters have been granted to any other of them, may assert his prior right and obtain letters of administration, and have letters previously granted revoked as prescribed in the three preceding sections." *Held*, that a widow's right of administration might be waived under section 6181, providing that any one may waive the advantage of a law intended solely for his benefit, and if such waiver or renunciation is freely made, the right cannot be subsequently asserted.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 78-82; Dec. Dig. § 19.*]

2. EXECUTORS AND ADMINISTRATORS (§ 17*)—RIGHT TO APPOINTMENT.

It is the policy of the law that intestate's widow shall control in limine the administration of his estate, and she may either administer it herself, or nominate a competent person to do so.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

3. EXECUTORS AND ADMINISTRATORS (§ 17*)—RIGHT OF WIDOW—INCOMPETENCY.

The fact that the widow claims property which the other heirs claim belongs to the estate does not make her or her nominee incompetent to administer the estate; that not be-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing made a ground of incompetency by Rev. Codes, § 7436.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

4. EXECUTORS AND ADMINISTRATORS (§ 19*)—APPOINTMENT—NOMINATION BY WIDOW—RENUNCIATION OF RIGHT.

If a widow's nominee for administrator pending her assent to his appointment intentionally lulled her into believing that he was not hostile to her claims, and thereby caused her to consent to his appointment, her waiver of her right to administration cannot be said to have been fairly procured, or freely given, so as to prevent her from reasserting such right.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 78-82; Dec. Dig. § 19.*]

5. EXECUTORS AND ADMINISTRATORS (§ 35*)—ACTION TO REMOVE ADMINISTRATOR—SUFFICIENCY OF EVIDENCE.

Evidence, in a petition by intestate's widow for the removal of an administrator appointed at her instance, *held* to show that his appointment was not fairly procured, in that his hostile attitude toward her claims was intentionally concealed until after his appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

6. EXECUTORS AND ADMINISTRATORS (§ 17*)—NOMINATION BY WIDOW—DUTY OF NOMINEE.

One who was appointed administrator as the widow's nominee should have candidly informed her, pending his appointment, that her claims to the estate might be questioned, and should not have concealed his hostile attitude toward such claims until after his appointment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

7. EXECUTORS AND ADMINISTRATORS (§ 35*)—REMOVAL OF ADMINISTRATOR—PROCEEDINGS—PLEADING.

In proceedings such as one by a widow for the removal of an administrator nominated by her, a party should not be required to observe the technical rules of pleading; it being sufficient if the complaint inform the administrator of its nature and proper scope.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 227-262; Dec. Dig. § 35.*]

8. EXECUTORS AND ADMINISTRATORS (§ 17*)—NOMINATION BY WIDOW.

Though intestate's widow was herself incompetent to be appointed administratrix, she yet had a right to nominate the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

In the matter of the estate of Gideon E. Blackburn, deceased. Petition by Hannah A. Blackburn against Charles A. Blackburn, as administrator, and others, for the removal of defendant administrator, etc. From an order dismissing the proceeding, petitioner appeals. Reversed and remanded.

Nolan & Donovan, of Butte, for appellant. Maury, Templeman & Davies, of Butte, and Wm. Wallace, Jr., John G. Brown, and T. B. Weir, all of Helena, for respondents.

SANNER, J. Dr. Gideon E. Blackburn, of Butte, died intestate on March 24, 1912, leaving some estate, and surviving heirs as follows: Hannah A. Blackburn, his wife, Charles A. Blackburn, a son, and two daughters. On March 29, 1912, Charles A. Blackburn filed in the district court of Silver Bow county a petition for letters of administration of the estate, and also filed a writing signed by the widow, wherein she formally waived her right to such letters, and requested his appointment. In the petition it is recited that the estate and effects in respect of which letters of administration are asked do not exceed the value of \$5,000, and that it consists of office and household furniture, libraries, book accounts, and miscellaneous stocks and bonds of unknown value. The petition came on for hearing in due course, and at the hearing the petitioner testified that, so far as he then knew, the value of the estate was not to exceed \$5,000; of this, \$2,900 was cash, the remainder being stocks, bonds, and other interests. The petition was granted, and Charles A. Blackburn has since acted as administrator. On June 5, 1912, he filed an inventory and appraisal, wherein he failed to list a gold watch and a pair of field glasses as part of the estate, but did list as the property of said estate a large number of securities and various parcels of realty claimed by the widow as her individual property. By this inventory it was made to appear that the estate was of the value of \$34,996.07. On June 7, 1912, the widow filed her petition, alleging, in substance, that the administrator had willfully and fraudulently failed and refused to list the watch and field glasses above mentioned, and had converted the same to his own use, and that, with the intent to involve the estate in useless and unnecessary litigation, he had listed the securities and realty above referred to, belonging exclusively to her. On the following day the administrator filed a supplemental inventory, listing the watch, the glasses, a revolver, and an additional piece of real estate; so that, as finally presented by the two inventories, the appraised value of the estate is made to appear at \$35,558.07. To the petition of the widow two answers were filed: One by the administrator, and the other by H. L. Maury on behalf of Daisy I. O'Neill and Sister M. Florentia, the daughters of deceased; the answer of the daughters, praying "that no relief be granted to Mrs. Hannah A. Blackburn," denies generally the allegations of her petition, including her widowhood; denies that the watch and glasses are of any value; alleges that she is not related to them, and that their mother is still alive. The answer of the administrator puts in issue the widowhood of the petitioner; explains the omission of the watch and glasses from the first inventory; denies the charges

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of fraud, waste, or intent to involve the estate in unnecessary litigation, or that any litigation he will bring will be in bad faith; and alleges that any claim he may assert or attempt to enforce will be under the permission of the court, for the sole use and benefit of the estate. By way of further answer the administrator pleads the waiver and request executed by the widow, and alleges that in consequence thereof, and of expenditures by him of money in the care of the estate, "she is not entitled to now assert any rights which she may have or claim, as widow, to have letters of administration issued to her." In reply to the answer of the administrator, the widow admits the execution of the waiver and request filed March 29, 1912, and alleges that the same was made by her "upon the solicitations of Charles A. Blackburn and the advices of John G. Brown, his attorney, and the representations of friendliness on the part of the said Charles A. Blackburn" towards her, and that since the issuance of letters of administration to him, he has become and now is hostile to her and the best interests of the estate "and dishonest and untrustworthy, as more fully appears from the petition herein on file." The matter was heard before the district court of Silver Bow county, the Honorable Jeremiah J. Lynch, judge presiding; and, upon the proceedings had, including the testimony taken, an order was made by which the petition of the widow was denied and the proceeding dismissed. From that order this appeal is taken.

The appellant contends that the petition should have been granted, because the widow is vested by the statute with a prior right to administer her late husband's estate, which cannot be affected by her renunciation; because the circumstances under which the administrator secured her renunciation were such that it ought not to be held effective in view of his present attitude towards her interests, and because the evidence establishes that he is not a fit and proper person to have control of the estate.

[1] 1. The position that the widow is entitled, notwithstanding her renunciation and the appointment of her nominee, to have him removed and letters issued to her whenever she so elects is grounded in the assumption that such is the unmistakable meaning of section 7450, Revised Codes. Notwithstanding the contention of appellant that this section is so clear as to be self-interpreting, its meaning cannot be ascertained from its language alone. Taken by itself—all collateral light excluded—we are without any information as to what right is recognized, what the character of that right is, or how that right may be asserted; all we can know is that whatever the right and however claimed, it would be unavailing where letters have been issued to the mother, since she is not mentioned among those as against

whom it may be asserted. Such a conclusion, so manifestly contrary to the general plan and purpose of the statute, is of course untenable; but it serves to show that, to give the statute any intelligible meaning, we are required to construe it in connection with other provisions to which it stands in obvious relation. When this is done, a result is reached different from that upon which the appellant insists.

"Administration of estate of all persons dying intestate, must be granted to some one or more of the persons hereinafter mentioned, * * * in the following order: 1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father or mother. 4. The brothers. 5. The sisters. * * *" Section 7432, Rev. Codes.

"Letters of administration must be granted to any applicant, though it appears that there are other persons having better rights to the administration, when such persons fail to appear and claim the issuance of letters to themselves" (section 7444); but when letters have been granted to any other person than the surviving spouse, child, parent, brother, or sister, "and one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration" by presenting to the court an appropriate petition (section 7447), on which a citation to the administrator shall issue (section 7448), and a hearing be had (section 7449).

"The surviving husband or wife, when letters of administration have been granted to a child, father, brother or sister of the intestate; or any of such relatives, when letters have been granted to any other of them, may assert his prior right and obtain letters of administration, and have letters before granted revoked in the same manner prescribed in the three preceding sections." Section 7450.

The primary purpose of these provisions is, of course, to confer a prior right of administration upon those most interested in the estate, to signify the legislative will concerning the order of priority, to provide a method by which it may be once asserted in every case, and to authorize its assertion by nomination in certain instances. There is no warrant for the inference that the Legislature intended the right to continue after it had been once freely exercised; for, valuable though it is, the advantage conferred is solely for the benefit of the persons named, and involves no public purpose. It may therefore be waived (section 6181, Rev. Codes), and the effect of its waiver cannot be different from the effect of a waiver in other cases. This result, derived from our statutory provisions alone, is supported by an abundance of authority, and compels us to hold that if the renunciation and request of appellant, because

of which the administrator was appointed, was fairly procured and freely given, she has exercised her prior right, and no longer has any to assert. In re Estate of Moore, 68 Cal. 281, 9 Pac. 164; Slay v. Beck, 107 Md. 357, 68 Atl. 573; Estate of Keane, 56 Cal. 407; In re Evans' Estate, 117 Mo. App. 629, 93 S. W. 922; Estate of Wooten, 56 Cal. 322; Stocksdale v. Conaway, 14 Md. 99, 74 Am. Dec. 515; In re Bedell's Estate, 97 Cal. 339, 32 Pac. 323; Estate of Kirtlan, 16 Cal. 162.

[2-4] 2. It is, however, the policy of our law that the widow shall control in limine the administration of her late husband's estate. Shields' Estate, 120 Cal. 347, 52 Pac. 808; Dorris' Estate, 93 Cal. 611, 29 Pac. 244. To that end she is authorized to either administer it herself, or to nominate some person in whom she places trust and confidence to administer it for her. In re Watson's Estate, 31 Mont. 438, 78 Pac. 702. No condition or limitation is imposed upon her choice save that she or the person she nominates be competent; nor does the fact that she asserts claim to property which the other heirs contend belongs to the estate render her or her nominee incompetent. Rev. Codes, § 7436; Rice v. Tilton, 13 Wyo. 420, 80 Pac. 828; Brundage's Estate, 141 Cal. 538, 75 Pac. 175; Estate of Bauquier, 88 Cal. 302, 26 Pac. 178, 532. In the instant case, considerations touching the burden of proof in any action affecting the title to the disputed property might easily render the attitude of the administrator a matter of grave importance to the widow; and she was entitled to retain, until lost by her voluntary act, such legitimate advantage as might arise from her right to control the administration. Therefore her due was absolute frankness on the part of the person seeking her nomination; and if he, pending her assent to his appointment, so demeaned himself as to deceive or lull her into a false security concerning his attitude, and she, believing him friendly to her and not hostile to her claims, waived her right and assented to his appointment to her disadvantage, it cannot be said that her waiver was fairly procured or freely given.

The voluminous record before us tends to show that the claim asserted by the widow to certain stocks, bonds, and real estate which were not mentioned in the petition for letters, but which have been listed in the inventory, is not wholly baseless. The evidence bearing upon the attitude of the administrator towards her and her claims comes entirely from her and from him. Prior to his appointment, she says, he had been kind and affectionate to her, and she was depending upon him. On the day after the funeral of Dr. Blackburn she and the administrator had gone through the boxes at the bank and he had seen her remove some deeds, and had at her request erased the name of Dr. Blackburn from one of the boxes, and had put hers in its place. He claim-

ed he knew that the stocks and bonds in the Miners' Savings Bank belonged to her, and he gave her to understand that there was no question about it. When they were going up the steps to court the morning he was appointed administrator, she said, "Now, Charley, there is no question about my bonds and stocks at the Miners' Bank, and I can have them?" and he said, "Yes, Mrs. Blackburn, I'll see to it right away;" "but he talked very different after he was appointed. Prior to his appointment he had shown no disposition to sue me or bring my property in question at all; none whatever." Again, touching the real estate: "Charles Blackburn has talked to me and discussed with me my title to the property. He saw all the papers before he was appointed administrator, and after he was appointed he said, in the presence of my sister, that there was no question of my ownership of the real estate.

* * * I cannot say how many times he made that statement, but he talked that way right along. He stated that more than once. I could tell you specifically the conversation we had about the Gallatin addition, and it was this: I owed \$2,000 on the Gallatin addition, and the interest was 10 per cent., and I wanted to stop the interest; so I paid my \$2,000. Charley was up in the room one day, and I said, 'Now, Charley, I am going to pay my \$2,000; as administrator you are not going to present any claim whatever to my Gallatin addition?' and he said, 'No, Mrs. Blackburn, that is absolutely yours.' * * * Charles Blackburn testified to the value and nature of the property belonging to the estate at the time he obtained his letters of administration. He at that time, as I remember, said there was no real estate in the estate, and that the property consisted of mining stock, office furniture, and book accounts, and I do not remember any more.

* * * He did not mention the Tuolumne stock at the Miners' Bank as belonging to the estate, nor the South Park Mining & Realty Company stock as belonging to the estate, nor the Independent Telephone bonds as belonging to the estate. As I remember it, he stated the value of the estate was from \$5,000 to \$7,000, or words to that effect—that the estate was not over \$7,000. He said there was no real estate. Before he made these declarations under oath he had not only examined the papers of the estate, but he had seen my papers also. * * * As we came down from Judge Donlan's court I said something about, 'Now, Charley, I will go and get my things,' and you [Mr. Brown] said, 'Oh, Mrs. Blackburn, Charley is under bond now,' and I said, 'Mr. Brown, those things don't belong to the estate; they belong to me.' * * * What I wanted was my Tuolumne stock. Charley had promised to go over there to the bank as soon as he was appointed. * * * And this conversation was right after the hearing at which

he testified in Mr. Brown's presence that the estate was worth something like \$5,000." The deeds which she had removed from the bank boxes in the presence of the administrator ran from her to Dr. Blackburn; these she destroyed, claiming that they had been executed to avoid administration in case of her death, but never delivered. In regard to that she testified that Charles Blackburn knew of her intention to destroy them, before it was done, and both he and Mr. Brown knew of their destruction after it was done, and before the appointment of the administrator. The waiver was signed on March 29, 1912. At that time she did not have, and had not had, any counsel. Concerning this, in response to inquiries by Mr. Brown, she testified: "You offered your assistance as attorney; otherwise I would have had an attorney to protect me. But Charley brought you to my house, and you offered your services, and I, as a professional man's wife, did not consult any other attorney until Charles Blackburn was appointed administrator, and then I said to you, 'Are you my attorney?' and you did not know about it."

The testimony of the administrator is as remarkable for what it does not contain as for what it does contain. On direct examination he gave no testimony in denial of the foregoing or concerning his attitude before and after administration, touching her and her claims, except that he had consulted counsel regarding the stocks, bonds, and real estate, and had listed them as the property of the estate on the advice of counsel. He also said: "I first knew the deeds had been destroyed when the matter was testified to here in court. * * * I can't recall whether Mrs. Blackburn told me she was going to destroy them; my recollection is that she did tell me that her intention was to destroy them." On cross-examination he said he could not tell when he first consulted counsel about the real estate, except that it was after his appointment. "I did not tell him about those deeds in the bank and their removal by Mrs. Blackburn before I petitioned for letters of administration. I knew about those deeds before I petitioned for letters of administration, but did not disclose the fact to my counsel. I don't know why I didn't, but it probably escaped me. I don't know whether I disclosed that fact to him before I secured letters of administration or not. * * * I testified at the hearing of the application for letters of administration * * * that the estate did not, to the best of my knowledge, own any real estate. * * * At that time I knew of those deeds which Mrs. Blackburn had removed, and had known of them some 10 days before, but began to see the light in regard to this real estate as soon as I had put the facts up to my counsel. I cannot say what date that was, but I am quite sure it was after my appointment. * * * I first learned of those bonds being down in the Miners' Sav-

ings Bank before Dr. Blackburn was buried.

* * * I took this matter up with my counsel, and got advice from him shortly before I was appointed, I think. I am not sure that I talked that matter over with him about it before my appointment. I am not positive whether I did or not. * * * Upon the advice of my counsel, it was true of my own knowledge that this was the property of the estate. It was my own knowledge that that was property of the estate, and Mrs. Blackburn was endeavoring to get it for her own use. * * * I remember Mr. Brown in my presence, and within a few minutes after I was appointed administrator, telling Mrs. Blackburn that those securities had to be turned into the estate. He told Mrs. Blackburn that standing in front of Judge Lynch's courtroom on Granite street. That was a few minutes after I was appointed. At that time Mrs. Blackburn said, 'Well, now, you can go right down and get my stocks and give them to me, can't you?' or 'Get my bonds and stuff at the Miners' Savings Bank,' and Mr. Brown said, 'Why, that stuff must undoubtedly go through the estate.' * * * I presume Mrs. Blackburn addressed the remark, 'Go down and get my bonds or stocks,' to me. All three of us were there. I had not previously agreed to do that. In a general way the ownership of the securities at the Miners' Savings Bank had been discussed between myself and Mrs. Blackburn. I did not tell her as late as the morning of my appointment that I would go down and get those things for her as soon as I was appointed. In this general conversation that I had about the ownership, I did not agree with her, that she was the owner. I did not say she was not. I took the position that until I had been more fully advised in the premises and had seen the securities, and had had an opportunity to investigate the conditions under which they had been left there, and the physical appearance of them, that it was not up to me to decide as to whose they were. I don't know whether I told her that at any time before I was appointed administrator or not. As to telling the court that when I was under oath, I wasn't asked about it. * * * I consulted with Mr. Maury in regard to this proceeding. He is not my attorney in this case. I have not consulted with him quite as frequently as I have with Mr. Brown. I retained him on behalf of Sister M. Florentia and Daisy I. O'Neill. I do not feel that I am controlling their case. I do not feel that I am their representative. They have not communicated directly with Mr. Maury or Mr. Templeman, to my knowledge. As far as I know, they have communicated with me."

[5, 6] Counsel insist that the zeal of the administrator in getting together all the property of the estate is no fault or ground for removal. Assuredly not, but that is beside the mark. The question is whether the

waiver of the widow and her request for his appointment was fairly procured and freely given. We think her testimony shows that it was not, and his serves only to confirm that impression. He received her consent to the administration by him of an estate of a certain character, estimated at not to exceed \$5,000 in value, and which did not claim any of the property in dispute; she never did consent that he should administer an estate of a different character, valued at \$35,558.07, three-fourths of which consists of property claimed by her as her own. Before his appointment she undoubtedly believed, and had reason to believe, that his attitude toward her claims was not adverse; whether this arose from what he said or failed to say is of no importance. *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950. His duty under the circumstances was candor toward her and toward the court; he should have told her that her claims might have to be questioned, and he should have given the court, in his petition for letters and in his testimony at the hearing thereof, all the information he then had in regard to the matter; instead of this, he evaded to the point of deception, if he did not expressly deceive. Deception cannot be countenanced in matters of this kind. *Lutz et al. v. Mahan et al.*, 80 Md. 233, 30 Atl. 645; *In re Farnham's Estate*, 41 Wash. 570, 84 Pac. 602. At the time he filed the inventories, at the time he filed his objection to her petition, and at the time he testified on this hearing, no material facts had come to his knowledge which were unknown to him at and before the time he received his appointment as administrator; yet he now questions her widowhood, is certain that none of the property is hers, charges her with endeavoring to convert the property of the estate to her own use, and causes counsel to appear and join in his attack on behalf of the other heirs. His offense is not in listing the property in question, but in the exhibition of an attitude so generally hostile to the widow as to warrant the inference that he had held it before his appointment, but carefully screened it from her until his position should be assured.

[7] It is urged, however, that there was no sufficient allegation in the appellant's "pleading" in the way of excuse or avoidance of her waiver and request. We do not think that in a proceeding of this kind the parties should be held to a strict and technical observance of the rules of pleading. It is sufficient if the administrator was informed, by the allegations of the widow, of the nature and probable scope of her complaint, and that he was so informed is evident from the fact that no surprise was claimed, that he testified concerning the matter so far as interrogated, and that the subject was canvassed without any objection touching the sufficiency of the "pleading." Some remarks are also made

about the discretion of the district court and the willingness of the administrator to have the disputed questions of title settled by an agreed statement of facts. Discretion in the trial court arises only when there is room for it. From the testimony, which presents no substantial conflict, it appears that the widow's renunciation of her right to administer was not fairly procured nor freely given; her prior right has therefore not been exercised. It is not within the power of any court to deny her the exercise of that right. As to the agreed statement of facts, the record does not show what the administrator proposed to agree to; hence we cannot tell whether his willingness to agree is a circumstance in his favor or not.

8. An examination of the record and of the authorities convinces us that the failure of the administrator to include the watch and glasses in his first inventory constituted no ground for his removal. As an impeachment of his integrity it was frivolous; but it illustrates the state of feeling and the lack of confidence on the part of the widow towards her nominee.

[8] We have said above that the widow is not incompetent merely because of her claims to the property in dispute; whether her conduct was such as to establish a want of understanding or integrity so as to render her incompetent we do not decide. But, competent or not, she still has her right of nomination. *McLean v. Roller*, 83 Wash. 168, 73 Pac. 1123; *Stevenson's Estate*, 72 Cal. 164, 13 Pac. 404; *Bedell's Estate*, *supra*.

The order appealed from is reversed, with directions to the district court of Silver Bow county to revoke the letters of administration heretofore issued to Charles A. Blackburn, and to grant the petition for the appointment of the appellant, unless the court shall find, from the evidence taken or which may be taken at a further hearing, that she is incompetent for want of proper understanding or integrity, in which event to appoint such competent person as she may nominate.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

NORTHERN PAC. RY. CO. v. MJELDE, County Treasurer.

(Supreme Court of Montana. Dec. 6, 1913.)

1. TAXATION (§ 233*)—PROPERTY EXEMPT—"MINE"—"MINING CLAIM"—"REAL ESTATE"—"PROPERTY."

Rev. Codes § 2501, provides that the term "real estate" includes the possession of, or claim to, the possession of land, and Const. art. 12, § 17, provides that the word "property" includes all matters and things, real, personal, and mixed, capable of private ownership. Section 2499 exempts from taxation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

property of the United States, of municipal corporations, and property used exclusively for educational, religious purposes, etc., and Const. art. 12, § 3, provides that "all mines and mining claims" containing coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground is used for other than mining purposes and has an independent value for such other purposes, when said surface shall be taxed at its value for such purpose. The Northern Pacific Railway Company conveyed land acquired by grant from the federal government, reserving to itself forever all mineral, including coal, with the use of necessary surface ground for exploring it. No explorations were ever made under such reservations, by the railroad company, though coal was believed to underlie part of the land. *Held*, that the reservation by the railroad company was not a "mine" within article 12, § 3, so as to be exempt from taxation, but was taxable as an interest in real estate; a "mining claim," within such section, being a tract to which the right of title or possession is acquired under acts of Congress relating to the disposition of mineral lands, including coal lands, and a "mine," as used therein, being a mineral deposit, metallic or nonmetallic, developed so as to produce and actually be capable of yielding proceeds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 380; Dec. Dig. § 233.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4511, 4512, 4517-4519; vol. 7, p. 5937; vol. 8, pp. 7778, 7779; vol. 6, pp. 5993-5728; vol. 8, pp. 7763-7770.]

2. CONSTITUTIONAL LAW (§ 26*)—NATURE OF CONSTITUTION.

The state Constitution is a limitation upon legislative action, and not a grant of power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 80; Dec. Dig. § 26.*]

3. TAXATION (§ 37*)—CONSTRUCTION OF STATUTES.

If the construction of a term in a provision of the Constitution relating to revenue and taxation be doubtful, the doubt should be resolved in favor of the definition under which the public revenues will be raised, rather than one which will defeat the purpose of the constitutional provision.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 64-66, 133; Dec. Dig. § 37.*]

4. CONSTITUTIONAL LAW (§ 20*)—CONSTRUCTION OF CONSTITUTION—LEGISLATIVE CONSTRUCTION.

The construction of a word used in the Constitution which has been accepted and acted on by the Legislature for 24 years in enacting statutes should have considerable weight in determining the meaning of such term.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 20.*]

5. CONSTITUTIONAL LAW (§ 13*)—CONSTRUCTION OF CONSTITUTION—INTENT.

The intention of the framers of the Constitution, as disclosed by the language employed in the particular provision when considered with the context and the history of the subject, should be considered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 9, 10; Dec. Dig. § 13.*]

6. TAXATION (§ 62*)—ESTATES IN LAND—SEVERAL ESTATES.

Several estates in the same land may be owned by different persons for the purpose of

taxation, as the surface, the growing timber, and the mineral rights.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 146; Dec. Dig. § 62.*]

7. TAXATION (§ 251*)—EXEMPTIONS.

The burden is upon one claiming an exemption from taxation to show that his property comes within the exempted class.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 343-345; Dec. Dig. § 251.*]

Appeal from District Court, Park County; Albert P. Stark, Judge.

Action by the Northern Pacific Railway Company against Fred J. Mjelde, Treasurer of Park County. From a judgment for defendant, plaintiff appeals. Affirmed.

O. M. Harvey, of Livingston, and Gunn & Rasch, of Helena, for appellant. D. M. Kelly, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for respondent.

HOLLOWAY, J. Under the grant of July 2, 1864, section 23, township 3 south, range 8 east, and section 31, township 4 north, range 10 east, in Park county, were transferred by the government to the Northern Pacific Railroad Company. The Northern Pacific Railway Company succeeded to the ownership of these lands, and some time prior to the first Monday of March of this year it conveyed section 23 to Bernhard Blome, and section 31 to another purchaser. Each deed contained this provision: "Excepting and reserving unto the grantors its successors and assigns, forever, all mineral of any nature whatsoever upon or in said land including coal and iron, and also the use of such surface ground as may be necessary for exploring for and mining or otherwise extracting and carrying away the same." These reservations were listed for taxation, and, to forestall action by the county treasurer, the railway company commenced this suit to cancel the assessments and to restrain the collection of the tax. It is alleged that no exploration has been made upon section 23 for minerals or coal and it is unknown whether the land contains either. With reference to section 31, the complaint alleges: "That no coal, iron, or other mineral has ever been extracted from said land, but as plaintiff is informed and believes and alleges said land contains coal." The trial court sustained a general demurrer to the complaint, and the railway company, electing to stand upon its pleading, suffered judgment to be entered against it and appealed.

[1] We are called upon to determine whether that which the company reserved to itself in each of these parcels of land constitutes property which is subject to taxation under the Constitution and laws of this state.

That neither deed conveys the entire estate to the land described is apparent. That each carves out some interest which the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

grantor retains is not open to question, and that this interest is an estate in land must be conceded. The coal deposits which underlie section 31 form a part of the real estate within the definition given in section 2501, Revised Codes, and the reservation of those deposits, with the right to mine, constitutes an interest in real estate. While subsequent development may demonstrate that there are not any minerals or coal in section 23, still the right to explore for minerals, which includes the right to the possession of any portion, or all, of the surface if necessary, is an interest in the land as a whole. Section 2501, above, provides that "the term 'real estate' includes: The possession of, claim to, ownership of, or right to, the possession of land." And this would be the rule independently of statute. "The word 'property' includes moneys, credits, bonds, stocks, franchises and all matters and things real, personal and mixed, capable of private ownership." Section 17, art. 12, Constitution of Montana; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882, and note; *Benavides v. Hunt*, 79 Tex. 389, 15 S. W. 396; *Gordon v. Million*, 248 Mo. 155, 154 S. W. 99; *Board v. Lattas Creek Coal Co. (Ind.)* 100 N. E. 561. But the particular character of these property rights is not of consequence now. Each reservation is property, and all property in this state is subject to taxation, except such as is exempt. Section 2498, Rev. Codes. The only property specifically exempted is enumerated in section 2499, Revised Codes, as follows: "The property of the United States, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals, and places of burial not used or held for private or corporate profit, and institutions of purely public charity are exempt from taxation, but no more land than is necessary for such purpose is exempt." Since these reserved rights do not fall within any of the classes of exempt property, they are subject to assessment for taxation, unless by some provision of the state Constitution they are relieved from the burden. The contention of appellant is that they are exempt by virtue of section 3, art. 12, which provides: "All mines and mining claims, both placer and rock in place, containing or bearing gold, silver, copper, lead, coal or other valuable mineral deposits, after purchase thereof from the United States, shall be taxed at the price paid the United States therefor, unless the surface ground, or some part thereof, of such mine or claim, is used for other than mining purposes, and has a separate and independent value for such other purposes, in which case said surface ground, or any part thereof, so used for other than mining purposes, shall be

taxed at its value for such other purpose, as provided by law; and all machinery used in mining, and all property and surface improvements upon or appurtenant to mines and mining claims which have a value separate and independent of such mines or mining claims, and the annual net proceeds of all mines and mining claims shall be taxed as provided by law."

[2] Our Constitution is not a grant of power, but a limitation—particularly a limitation upon legislative action. In section 2 of article 12 the framers declared what property shall be, and what other property may be, exempted from the burden of taxation. Generally speaking, the public property of the United States and of the state and its subdivisions constitutes the first class, and the property of eleemosynary and educational institutions and places of burial not used for profit comprise the second. Having thus determined what property should or might be relieved from the necessity of contributing to the expense of government, the problem before the constitutional convention was, not how to exempt mining property from taxation, but rather how to compel it to respond to the reasonable demands of the state for revenue, and at the same time protect it against such exactions as would or might discourage prospecting or development. The debates of the convention, so far as they are available in their unpublished form, disclose this fact, and the history of our mining legislation furnishes added evidence of the correctness of this conclusion. The first revenue measure adopted in 1864 specifically exempted mining claims from taxation. *Bannack Statutes*, p. 411. The next statute in terms exempted mines and mining claims. *Fifth Session*, p. 41. The succeeding act exempted "mines and mining claims except those held under a patent from the United States." *Laws 7th Session*, p. 600. By an act approved February 21, 1879, the net proceeds of mines were made subject to taxation, and it was further provided: "That from and after the passage of this act, no direct tax shall be levied upon any placer claim, quartz lead, or lode, except to the extent of the price paid for any mining claim in obtaining patent therefor from the government of the United States, and the only taxation of the proceeds thereof shall be that provided in this act." *Laws 11th Session*, p. 65. This was succeeded by the Act of March 10, 1887, which specifically exempted from taxation "mines, except on the net proceeds thereof, and mining claims, except those held under a patent from the United States, the surface of which shall be taxed as other real estate." *Compiled Statutes*, Fifth Div., p. 1108. This was the status of mining property before the revenue law, at the time the constitutional convention met in 1889.

During the life of the territory, public property was always exempt; but in addition

certain private property as well shared the privilege of being relieved from the burden of maintaining the government. Doubtless, as an aid to the encouragement of the mining industry, mines and mining claims were placed in the exempt class, except for the period from 1872 to 1879, during which time patented mining claims were subject to taxation as other property; but this was corrected by the act of the Eleventh Session above, and, at the time section 3 of article 12 was under consideration, mines and mining claims, as such, were exempt from taxation. The net proceeds of mines were taxed as other taxable personal property, and the surface of a patented mining claim was subject to taxation as other taxable real estate. When, then, the framers of the Constitution removed this species of property from the exempt to the taxable class, they must be held to have acted deliberately with the purpose, as disclosed by their debates, of subjecting mines and mining claims to what in their judgment was the equitable proportion of the burden of governmental expense.

Instead of section 3, art. 12, being a provision exempting property from taxation, it is in fact a revenue measure. It fixes an arbitrary valuation upon the surface of patented mining claims, as such, and provides the method by which the value of a mine shall be determined, viz., by the net value of its proceeds; but neither is relieved from producing its proportion of the revenue upon the basis thus established. While this provision does not exempt the nonproducing mine, by implication at least it determines that such a mine, independently of its surface, does not have any value for the purpose of taxation, whatever value it may have as a speculative or commercial enterprise, and likewise that minerals, while in a mine or mining claim, have no taxable value.

Counsel for appellant apparently concede that most of what has been said is correct, but insist that since the surface of each of these parcels of land has been assessed to the purchaser, and since neither parcel has ever yielded any net proceeds from mining operations, there is not anything upon which to fix a valuation for the purpose of assessment, and consequently nothing to tax. The indispensable premise to this conclusion, however, is that the thing which is reserved in each instance is a mine or it is something without value. That definitions of the word "mine" sufficiently comprehensive to include the reservation in section 31, and possibly that in section 23, may be found, must be conceded at once. To indicate their scope, a few illustrations will suffice: A mine is: "An opening or excavation in the earth for the purpose of extracting minerals." Anderson's Law Dictionary. "An excavation in the earth for the purpose of obtaining minerals." Bouvier's Law Dictionary. "A pit or excavation in the earth from which metal-

lic ores or other mineral substances are taken by digging." Black's Law Dictionary. "An excavation in the earth from which some useful product is extracted. A deposit of useful material." English's Law Dictionary. "An opening in the earth made for the purpose of taking out minerals, and in case of coal mines, commonly a worked vein." Kinney's Law Dictionary & Glossary. "A work for the extraction of minerals by means of pits, shafts, levels, tunnels," etc. Rapalje & Lawrence's Law Dictionary. "An underground excavation made for the purpose of getting minerals." Stroud's Judicial Dictionary. "Quarries or places where anything is digged." Jacob's Law Dictionary. "An excavation properly underground for digging out some useful product as ore, metal or coal. Any deposit of such material suitable for excavation and working, as a placer mine." Standard Dictionary. "An excavation in the earth made for the purpose of getting metals, ores or coal. When the term 'mine' is used it is generally understood that the excavation so named is in actual course of exploitation, otherwise some qualifying term is required." Century Dictionary. "The underground passage and workings by which the minerals are gotten, together with these minerals themselves." Bainbridge on Mines, p. 2. "A mine is not properly so called until it is opened; it is but a vein of coal before." *Astry v. Ballard*, 2 Mod. 193, 8 Morrison, 316. "It may be conceded that the term 'mine' when applied to coal is generally equivalent to a worked vein, for by working the vein it becomes a mine." *Westmoreland Coal Co.'s Appeal*, 85 Pa. 344. "Coal Mine: A mine or pit from which coal is obtained." 7 Cyc. 266. "The mode of obtaining the material and not the nature of the material itself is to be considered in order to come to a decision whether it constitutes a mine." Denman, C. J., in *Rex v. Dunsford*, 2 A. & E. 568, 4 L. J. M. C. 59. In speaking of the terms "known mine" as used in the pre-emption statute, the Supreme Court said: "It will thus be seen that, so far as the decisions of this court have heretofore gone, no lands have been held to be known mines unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine which had been worked or was capable of being worked." *Colorado Coal Co. v. United States*, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182. In *Davis v. Wiebold*, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238—a case involving the town site of Butte—the court speaks of mines which lay buried, unknown in the depths of the earth. These definitions serve no other purpose than to disclose the wide range covered by lexicographers, courts, and text-writers in their attempt to define what would appear at first blush to be a very simple term, and to confirm Mr. Ross Stewart, the learned Scotch law writer, in his assertion that "the

terms 'mine' and 'mineral' are not definite terms; they are susceptible of limitation according to the intention with which they are used; and in construing them, regard must be had not only to the deed or statute in which they occur, but also to the relative position of the parties interested and the substance of the transaction or arrangement which the deed or statute embodies. Consequently, in themselves, these terms are incapable of a definition which would be universally applicable." Stewart on Mines, p. 1.

[3] The determination of this controversy depends upon the meaning attached to the term "mine." Of necessity any definition adopted must be formulated more or less arbitrarily—grounded, as it will be, upon the intention of the framers of the Constitution as that intention is gathered from the Constitution itself and from contemporaneous history. Starting our investigation with the premise that in formulating section 8 the constitutional convention had under consideration the subject "revenue," and was concerned with the question of producing sufficient funds to support the government, the elementary rules of construction, as well as the dictates of reason, require that, if there is a doubt as to the sense in which the term "mine" is used in that section, the doubt should be resolved in favor of a definition under which public revenue will be raised, rather than one which will defeat the obvious purpose of the convention. Conscious of the fact that the meaning of this term will be varied largely by the context or by the character of the instrument in which it is found, it devolves upon us to determine, if possible, the particular significance which the framers of the Constitution attached to the word "mine," independently of the surface ground, when they employed it in section 8 of article 12. The idea of taxing the net proceeds of a mine was not new to them. For more than ten years the plan had prevailed in the revenue laws of the territory. Its operations had been tested, and its results were matters of history. There was not any room for doubt as to the meaning of the word "mine" in those statutes. They spoke from the standpoint of raising revenue. The act of 1879 is entitled "An act to provide for the taxation of the proceeds of mines," and section 1 provided that every person, corporation, or association engaged in mining upon any quartz vein or lode or placer mining claim should furnish to the assessor annually a verified statement of the gross yield and necessary expenses of his or its mining operations, and that a tax should be levied upon the net proceeds. That legislative assembly in effect declared that the developed but dormant mine was without any value for the purpose of taxation, while the diminutive products of mining claims doubtless furnished sufficient excuse for the failure to mention them. The one

predominant idea running through the legislation was that consideration was given only to the active, open, and working mining property whose development had proceeded past that point which marks the boundary between a mining claim and a mine. To the members of the eleventh territorial legislative assembly the word "mine" meant a developed mining property, yielding or in a condition of development capable of yielding revenue upon the basis of the value of its gross output, less the necessary cost of mining operations and expense of reduction. The very subject-matter under consideration, the plan adopted for carrying their ideas to practical results, the language employed to give expression to their views, and their knowledge of existing exemption statutes, preclude the possibility that any hidden, unknown, or undeveloped deposit of ore or coal was ever contemplated as within the meaning of the term "mine."

When the framers of the Constitution formulated their ideas into article 12, they caused all private property, except that enumerated in section 2, to be transferred from the exempt to the taxable class. In their zeal to compel every species of property to contribute to public expense, they included, as subject to taxation, the net returns from development or representation work on mining claims, however insignificant they might be. They also impliedly declared that a nonproducing mine has no taxable value, and there is not the slightest evidence that they used the term "mine" in any different sense from that employed in the act of 1879. On the contrary, aside from the persuasive fact that they were dealing with the subject revenue and must have contemplated something in a condition which would or might produce revenue, we have the added force and effect of a legislative construction of section 8, from the time of its adoption in 1889, to the present time.

[4, 5] There has been no period in the history of the state when the provisions of the act of 1879, in every substantial particular, have not been in full force and effect. They were reproduced in the first revenue measure enacted after statehood (Laws 1891, p. 93, § 50 et seq.), carried into the Political Code of 1895 (sections 3760-3768), and are now found as the existing law upon the subject, in sections 2563-2571, Revised Codes. The identity of expression, the harmony of plan, and the unity of purpose pervading these several measures, forbid the imposition of a different definition for the term "mine" in our state statutes, from that which was attached by the legislative assembly of 1879. For 24 years that definition has been accepted and acted upon by the legislative branch of our state government, and we thus have a construction of section 8—a construction manifestly in harmony with the views of the framers of that section themselves—but

whether so or not, in the absence of anything to indicate a contrary purpose, that construction is entitled to most respectful consideration. *State ex rel. Haire v. Rice*, 33 Mont. 365, 83 Pac. 874; *Johnson v. City of Great Falls*, 38 Mont. 369, 99 Pac. 1059, 16 Ann. Cas. 974. It will not do for us to adopt a particular definition of the word "mine," merely because some other court has chosen the same definition. For example: In *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313, the Supreme Court of the United States held that the term "mining claim," as used in the Nevada statute, referred only to an unpatented claim held under the mineral laws; but such a definition never could have prevailed in Montana, for, from our first territorial legislation to the present time, a mining claim included one held under patent as well as one held merely by location before patent. The most elementary rules of construction require that we ascertain the intention of the framers of the Constitution, and this we may do only so far as that intention is disclosed in the language employed when considered with the context, in the light of our history, the surrounding circumstances, the subject-matter under consideration, and the object sought to be attained.

While it is impossible for any one to know with certainty what meaning the framers of our Constitution attached to the terms "mines" and "mining claims" in section 3, the application of these tests, denominated rules of construction, adopted and acted upon by courts throughout the civilized world, leads us to the conclusion that a mining claim, as therein used, indicates a tract of land to which the right of possession or the title has been acquired pursuant to the acts of the Congress relating to the disposition of mineral lands, including coal lands, and that a mine, independently of the surface, in the revenue sense as therein employed, is a mineral deposit, whether metallic or non-metallic, developed to the point of production and actually yielding, or capable of yielding, proceeds. The character of legislation, under which title or right of possession is acquired, is not a controlling factor at all. A mine upon a patented homestead is not less a mine because title from the government was acquired under laws providing for the disposition of agricultural lands only; and an undeveloped body of ore is not a mine though title to it was secured under the mineral laws, but it is merely a part of the real estate itself. In providing a fundamental law for the new state, the framers of our Constitution spoke in comprehensive terms; but we decline to believe that they used the word "mine" in section 3, in a sense which would include hidden, unknown, or undeveloped deposits of ore or coal. In that section they spoke with reference to revenue and referred to something which would or might produce revenue in its present state of develop-

ment. It was not necessary for them to consider rich deposits developed to the point of production but not operated. They were men of broad experience in this Western country. They knew something of human nature, something of the prospector's daydreams of wealth, something of humanity's greed for gold. The avarice of man was doubtless deemed a sufficient dynamic force to subject all paying properties to constant employment, and justified their implied declaration that an unworked mine is not of sufficient value to justify the expense of taxation. Our conclusion is that neither reservation involved in this controversy constitutes a mine within the meaning of that term as employed in section 3, art. 12, of the Constitution, but each is an interest in real estate. Land may be divided horizontally as well as vertically.

[6] That several estates in the same land may be owned by different parties is recognized generally. One may own the surface, another the growing timber, and a third the minerals underground, and each estate be subject to taxation. *Smith v. Mayor*, 68 N. Y. 552.

[7] It will not do to say that, because neither of these reservations produces revenue, it is not of any value. From the very act of making the reservation, the presumption arises that each interest has some appreciable value, or the reservation would not have been made. Taxation is the rule, exemption is the exception; and, if either of these rights in fact is valueless, the burden is upon the party, claiming to come within the exception, to allege and prove the facts necessary, to bring his property within the favored class. *State v. Downman* (Tex. Civ. App.) 134 S. W. 787.

The asserted right to tax these reservations rests entirely upon the fact that each constitutes an interest in real estate, and that neither is a mine or a mining claim within the meaning of section 3, art. 12, of our Constitution.

Section 1 of article 12 imposes upon the legislative assembly the duty to "prescribe such regulations as shall secure a just valuation for taxation of all property, except that specifically provided for in this article." But this is only one of several injunctions laid upon the lawmakers by the Constitution. Of course, the legislative assemblies should give heed to these commands, but if they fail there is not any remedy. They cannot be coerced except by public opinion. We doubt, however, that anything more was contemplated by this provision of the Constitution than has been provided by law. Section 2502 declares that "all taxable property must be assessed at its full cash value." The duties of the county assessor are prescribed. A tribunal is created to review his acts, and every opportunity is afforded a dissatisfied taxpayer to present his grievances and have them determined or his assessment duly

equalized. The difficulty which may confront the assessor in determining the full cash value of a property interest of this character cannot operate as a factor in characterizing the interest itself.

In the absence of any allegation bringing either of these rights within the definition of a mine, or disclosing that they are, or either of them is, valueless, the complaint fails to state a cause of action. If this conclusion in its ultimate analysis involves a classification of property, which will result in denying to any person within this jurisdiction the equal protection of the laws—and we do not think that it does—the responsibility must rest upon the framers of our Constitution, who, in their zeal to promote the mining industry, arbitrarily gave to mines and mining claims a status before the law not enjoyed by other species of property.

The judgment is affirmed.

BRANTLY, C. J., and SANNER, J., concur.

STATE ex rel. HILLIS v. SULLIVAN,
County Treasurer.

(Supreme Court of Montana. Dec. 13, 1913.)

1. CONSTITUTIONAL LAW (§ 16*) — RULES OF CONSTRUCTION.

The intention of the framers of a Constitution is to be ascertained not merely from the language used, but in the light of history, the surrounding circumstances, the subject-matter under consideration, and the object sought to be attained, and in connection with the rule that Constitutions assume the existence of a well-understood system of law, which is still to remain in force and be administered under such limitation and restrictions as that instrument imposes, especially in view of Const. Schedule, § 1, providing that all laws of the territorial legislative assembly in force at the time of the state's admission into the Union, not inconsistent with such Constitution or the Constitution or laws of the United States, shall remain in force until altered or repealed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. § 16.*]

2. CONSTITUTIONAL LAW (§ 56*)—COURTS (§ 58*)—ORGANIZATION—ATTENDANTS.

Rev. Codes, § 2894, charges the board of county commissioners with the care of the property and disbursement of the funds of the county. Section 6302 provides that, if suitable rooms for holding the district court and chambers of the judge thereof be not provided by the board of county commissioners together with the attendants, etc., sufficient for the transaction of business, the court or judge may direct the sheriff to provide such rooms, attendants, etc., and that the expenses incurred certified by the judge are a charge against the county treasury and must be paid out of the general fund. Section 3010 requires the sheriff to attend all courts at their respective terms or sessions and obey their lawful orders and directions. Section 3026 provides that the sheriff in attendance upon the court must act as the crier thereof, calling the parties and witnesses and other persons bound to appear before the court and make proclamation of the

opening and adjournment of the court and of any other matter under its direction. *Held*, that the district court has no power to appoint its own attendants, fix their compensation, and compel payment out of the public funds, unless the sheriff and county commissioners fail to provide attendants, and hence, where the sheriff was ready and willing to perform the duties of court bailiff, the court had no power to appoint an attendant, since the sections mentioned merely declare the law as it existed when the Constitution was adopted, and do not invade the inherent powers of the courts as a distinct department of the government.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 62-65; Dec. Dig. § 56.* Courts, Cent. Dig. §§ 201-203; Dec. Dig. § 58.*]

3. CONSTITUTIONAL LAW (§ 26*)—CONSTRUCTION OF CONSTITUTION.

The Constitution is not a grant, but a limitation, of power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 30; Dec. Dig. § 26.*]

Appeal from District Court, Lewis and Clark County; Roy E. Ayers, Judge.

Proceeding by the State, on relation of W. W. Hillis against Stephen Sullivan, as Treasurer of Lewis and Clark County. From a judgment directing the issuance of a peremptory writ of mandate and an order denying a new trial, defendant appeals. Reversed and remanded, with directions.

Andrew H. McConnell, Co. Atty., and Joseph P. Donnelly, Asst. Co. Atty., both of Helena, for appellant. Chas. H. Cooper, of Helena, for respondent.

SANNER, J. This cause was presented to the district court upon an agreed statement of facts, and judgment was entered directing that a peremptory writ of mandate issue to the appellant, as county treasurer of Lewis and Clark county, requiring him to pay to the respondent the sum of \$100 for services rendered as court attendant for the month of June, 1913. From that judgment and from an order denying him a new trial, the treasurer has appealed. The following are the material facts: The Honorable J. Miller Smith is, and since January 6, 1909, has been, one of the judges of the First judicial district of this state, presiding over department No. 2. On January 6, 1909, the respondent was appointed by Judge Smith as court attendant in said department No. 2, and ever since that time he has performed the duties required of him, devoting "all the working hours of every judicial day to the care and custody of the courtroom, the judge's chambers, and all the books, papers and other property connected with the said court and the judge thereof." He also acts as crier of said court, opening and adjourning court, and "when the court is engaged in the trial of cases, with a panel of jurors in attendance, takes care of jurors, under the usual oath, and performs all the duties required of bailiffs and court attendants" in the district court. For these services he was, up to and including the month of May, 1913, paid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the sum of \$100 per month, but on May 1, 1913, he received a notice from the board of county commissioners of Lewis and Clark county, to the effect that from and after June 1, 1913, bailiffs or court attendants would be allowed the sum of \$3 per day "for those days upon which the jury was in attendance at their respective courts." On June 30, 1913, he made out his receipt in the sum of \$100 for salary as court attendant for the month of June, 1913, and, after indorsement of approval by the county auditor, presented the same to the board of county commissioners; but the board declined to allow or authorize payment of such sum for the reason that under its above-mentioned order there was not due to the relator to exceed \$24 for the eight days of June upon which a jury was present in department No. 2. Thereupon the relator cast his demand into the form of a verified claim, in which he recited that his services had been rendered "at the special instance and request of the judge presiding," presented the same to Judge Smith who, on July 3, 1913, indorsed it as follows: "It is hereby certified that the foregoing claim and account is correct, and a proper charge against the county treasury of Lewis and Clark county, and must be paid out of the general fund thereof; and the treasurer of Lewis and Clark county is hereby authorized and directed to pay the same." A similar order was on the same day entered on the minutes of the court, preceded by the following recitals: "The board of county commissioners of Lewis and Clark county not having provided a court attendant for department No. 2 of this court, and a court attendant being necessary in said department of this court for the proper and expeditious transaction of the business of this court, and the judge of department No. 2 of this court having heretofore requested and appointed W. W. Hillis to act as court attendant of department No. 2 of this court, and the said W. W. Hillis having presented his claim and account for services, * * * it is hereby certified," etc. Notwithstanding the above indorsement and order, the county treasurer refused and still refuses to pay the respondent's claim. In the agreed statement of facts there appears this further recital: "That immediately upon the qualification of the sheriff of Lewis and Clark county, Mont., he offered to perform the duties of court bailiff as required of him under the statute, and has ever since been willing, and is now willing, to perform such duties specified in the statute; but the court objected, as the relator herein had been and is now performing such services."

Briefly stated, the position of the appellant is that by the statute it is made the duty of the sheriff to attend upon the district court, act as crier thereof, call the parties, witnesses, and all other persons bound to appear, and make proclamation of

the opening and adjournment of court, and of any other matter under its direction (Rev. Codes, §§ 3010, 3026); that by the statute the board of county commissioners is charged primarily with the care of the property and the disbursement of the funds of the county, and upon them, in the first instance, is imposed the duty of furnishing suitable rooms, attendants, etc., for the district court (Rev. Codes, §§ 2894, 6302); that if the board shall fail to furnish suitable rooms, attendants, etc., the court may direct the sheriff to procure them, and, when so procured, the expense thereof, certified by the judge, is a proper charge upon the county (Rev. Codes, § 6302); and that if the court has any power to appoint an attendant to perform the service required of the respondent, to fix his compensation, and make it a county charge payable without the assent of the board, such power can only be exercised upon and during necessity, and after the failure or refusal of the sheriff to perform such service, or that of the board to furnish the same.

On behalf of respondent we are favored with an elaborate and able brief, devoted to the demonstration of the following propositions: That by the Constitution of this state the powers of government are divided into three distinct departments: The legislative, the executive, and the judicial. That no person or collection of persons charged with the exercise of powers properly belonging to one of these departments can lawfully exercise any powers properly belonging to either of the others, save as expressly authorized by the Constitution. That the whole judicial power of the state is vested by the Constitution in the judicial department, of which the district court is an integral part. That the district court is a court of record and, as the one court of general original jurisdiction in this state, is vested with all the powers necessarily incident to the full and free exercise of all its functions, save as limited by the Constitution. That included in these powers is the right to appoint its own attendants whenever necessary, and to itself determine the necessity in every case. That included in the right to appoint is the right and power to fix their compensation. As a conclusion from these postulates, it is contended that the district judge was authorized to appoint the respondent, to impose upon him the duties which he has performed, to fix his compensation, and to make it a liquidated charge upon the county, without regard to the neglect or default of either the board or the sheriff in the premises. We should be loath indeed to question any of the above propositions; but we think that, properly understood, they make for a conclusion quite different from that for which the respondent contends.

[1] "It is an elementary rule," said this court in *State ex rel. McGowan v. Sedgwick*,

46 Mont. 187, 127 Pac. 94, "that Constitutions are to be construed in the light of previous history and the surrounding circumstances." The framers of our Constitution spoke in general terms, and their intention is to be ascertained not merely from the language used, but "in the light of our history, the surrounding circumstances, the subject-matter under consideration, and the object sought to be attained." *Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. —, 187 Pac. 388. Our Constitution uses many terms that it does not define, provides for many offices the duties of which it does not prescribe. "In judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes." *Cooley's Const. Limitations* (7th Ed.) p. 94; *Constitution of Montana*, Schedule 1; *Wastl v. Montana Union Ry. Co.*, 24 Mont. 159, 61 Pac. 9.

[2, 3] When the Constitution was adopted, "the previous history" of this community, "the well-understood system" then in use, included a political organization of more than 20 years' standing, which was republican in form, constitutional in character, and broadly resembled in all but complete autonomy the scheme of government with which we are familiar. Then, as now, the common law was "the law and rule of decision," save as affected by legislation. There was also an extensive body of statute law, all of which was continued in force except where inconsistent with the Constitution. Schedule, § 1. And there were such instrumentalities of government as district courts, sheriffs, and county commissioners. These instrumentalities were continued by the Constitution—the district court with an expression of its general jurisdiction only, the sheriff and county commissioners without any definition whatever. The Constitution is not a grant, but a limitation, of power (*Northern Pac. Ry. Co. v. Mjelde*, supra; *In re Beck's Estate*, 44 Mont. 561, 121 Pac. 784, 1057), and it is manifest from its text that as to all unexpressed duties and powers—whether of the district court, the sheriff, or the county commissioners—the convention that framed and the people who adopted it had in view these offices, as they were commonly known, as possessing the attributes and authority which had theretofore been declared by the written and the unwritten law, and which "were shadowed forth and symbolized by their names." *French v. State*, 52 Miss. 759; *King v. Hunter*, 65 N. C. 609, 6 Am. Rep. 754; *Warner v. People*, 2 Denio (N. Y.) 272, 43 Am. Dec. 740; *Kennedy v. Brunst*, 26 Wis. 412, 7 Am. Rep. 84.

Under the Organic Act, the district court was a tribunal of grave dignity; in it and the Supreme Court of the territory were vested all the jurisdiction formerly possessed by the

superior common-law courts of England (*Territory v. Flowers*, 2 Mont. 531), together with that of chancery (*Zimmerman v. Zimmerman*, 7 Mont. 114, 14 Pac. 665); and doubtless it was clothed with all the power and authority necessary to render its jurisdiction effective. It is by no means clear, however, that the superior common-law courts of England were wont to assert or claim the right in limine to select, and fix the compensation of, their own attendants, without reference to other agencies of government. Certainly this was not the case when the judges of these courts were holding the assizes, for we read that of old it was incumbent upon the sheriff "to meet the judges on their progress through their circuits, usually upon the borders of the county, escort them to the assize town with much display and antique ceremonial, procure for them suitable quarters, attend them with his undersheriff and a sufficient corps of deputies and bailiffs during their settings, and at the close of the term speed the parting guests with the like demonstrations of respect with which they were welcomed." *Murfree on Sheriffs*, § 427. This, doubtless with some abatement of the fanfare, it is still his duty in England to do (25 *Halsbury Laws of England*, p. 895, § 1391); but these attendants were always servants of the sheriff, and for their conduct and compensation he was answerable. 1 *Blackstone*, pp. 339, 347. In general, the common-law relations of the courts to the sheriff have been preserved in the United States. In the absence of statute to the contrary, the office of sheriff imports, and always has imported, that he is the executive arm of the district court, that it is both his duty and his privilege to attend upon its sessions, either in person or by deputy, to act as the crier of the court, to execute the lawful orders of the court, and to furnish the court, when no other provision has been made, such apartments, appliances, and attendants as the court may require for the transaction of its business. *Murfree on Sheriffs*, c. 10; *In re Court Officers*, 3 Pa. Dist. R. 196; *Commissioners v. Patterson*, 2 *Rawle* (Pa.) 106.

An examination of the various statutes of the territory which are pertinent to this controversy unmistakably evinces that such was the relation of the district court to the sheriff for the entire period from the Organic Act to the Constitution. "The sheriff, in person or by his undersheriff or deputy, shall * * * attend upon the several courts of record in his county." *Bannack, Statutes*, p. 511, § 7; *Codified Statutes 1872*, p. 445, § 58; *Revised Statutes 1879*, p. 492, § 404; *Compiled Statutes 1887, General Laws*, § 855. "If a room for holding the court be not provided by the county, together with attendants, etc., suitable and sufficient for the transaction of business, the court may direct the sheriff to provide such room, attendants, etc., and the ex-

pense shall be a county charge." Bannack, Statutes, p. 137, § 476; Codified Statutes 1872, p. 161, § 623; Revised Statutes 1879, p. 168, § 683; Compiled Statutes 1887, p. 243, § 703.

So, too, the functions of the county commissioners were well known when our Constitution was adopted. Then and during the whole territorial régime the county commissioners were three in number in each county; they constituted a board; as a board they represented the county, were the custodians of its property, and the managers of its business and concerns; they were charged with the exercise of its powers, including the making of contracts and the incurring of expense. It was their special duty to examine, settle, and allow all accounts chargeable against the county, and they were the only agency through which the county could perform the duties imposed upon it. Bannack, Statutes, pp. 499, 500, 501; Codified Statutes 1872, pp. 434, 435; Revised Statutes 1879, pp. 479, 480, 481; Compiled Statutes 1887, pp. 842, 843, 844.

With these relations, then, the district courts, the sheriffs, and the county commissioners passed from territorial to constitutional agencies of government; the district courts having no more power to secure attendants than they had to secure rooms. Could the district judge have hired a courtroom at the expense of the county without regard to whether suitable provision had already been made? The Code provisions now in force and relied on by appellant (sections 2894, 3010, 3028, 6302, Rev. Codes) merely declare relations which have always existed. These statutes cannot be effectively assailed as invasions of the inherent power of the court, because the power of the court, as organized by the Constitution, did not include the right to appoint attendants without prior recourse to the sheriff and to the county. The very conception of inherent power carries with it the implication that its use is for occasions not provided for by established methods. When we say that it is primarily the duty and right of the sheriff, either in person or by deputy, to perform all the duties for which an attendant upon the district court may be had at public expense, that if additional attendants are required the county through its board of commissioners shall furnish them, that if the county fail in that regard the court may procure them through the sheriff, we express the normal situation, the orderly method which must be observed so long as it is adequate in results. When, however, these methods fail and the court shall determine that by observing them the assistance necessary for the due and effective exercise of its own functions cannot be had, or when an emergency arises which the established methods cannot or do not instantly meet, then and not until then does occasion arise for the

exercise of the inherent power. *Los Angeles v. Superior Court*, 93 Cal. 380, 28 Pac. 1062; *County of San Joaquin v. Budd et al.*, 96 Cal. 47, 30 Pac. 967.

Neither, in our opinion, is it necessary for the preservation of judicial independence that the district court should have the power to appoint its own attendants, fix their compensation, and compel payment out of the public funds, without recourse to the sheriff, who is paid for that service, or to the county commissioners, who are charged with the supervision of county expenditures. The court is entitled to trustworthy and competent attendants as needed; it is not obliged to accept any other; it may procure such service if the sheriff does not, or the board will not, supply it. How, then, can its independence be endangered when the remedy is in its own hands? The most important of all its ministerial officers is the clerk, with whose selection it has nothing to do; if a vacancy occurs in that office it is filled by appointment, not of the judge but of the county commissioners. The separation of the government into three great departments does not mean that there shall be "no common link of connection or dependence, the one upon the other in the slightest degree" (1 Story's Com. on the Constitution, § 525); it means that the powers properly belonging to one department shall not be exercised by either of the others (Constitution, art. 4, § 1). There is no such thing as absolute independence. The Governor may recommend or veto legislation, and he may fill vacancies occurring on the bench of this court or of the district court. The Legislature may increase the number of judges in any district, it may prescribe, as it has prescribed, the entire scheme of pleading and practice by which rights are asserted and wrongs redressed in the courts, and it may impose additional duties upon certain executive officers. The judiciary may set aside acts of the Legislature that are clearly unconstitutional, and it may coerce the executive into the performance of ministerial duties. The protection of the judicial department from encroachment is not to be sought in extravagant pretensions to power, but rather in a firm maintenance of its own clear authority coupled with "a frank and cheerful concession of the rights of the co-ordinate departments." *Smith v. Judge*, 17 Cal. 547.

But it is insisted that under the decision of this court in *State ex rel. Schneider v. Cunningham*, 39 Mont. 165, 101 Pac. 962, this appeal must be determined in favor of the respondent. Mr. Schneider was the appointee of this court to an office, that of stenographer, which had not been formally created by legislative act but had arisen out of the necessities of this court; the Legislature had from session to session, however, made appropriations to pay for the services rendered therein; the question presented

was whether, after the Legislature had made an appropriation of \$200 per month in that behalf, the state board of examiners were vested with the authority to say that the appointee of this court was not entitled to the compensation thus provided. The right claimed by the board of examiners was absolute and unconditional; but we held that the power vested by the Constitution in that board "to examine all claims against the state, except salaries or compensation of officers fixed by law," did not authorize it to deny to the stenographer of this court the compensation for which the Legislature had provided; nor was it authorized by section 262, Revised Codes, to grant this court permission to employ a stenographer, since that implied the right to withhold such permission and thus disable the court or seriously hamper it in the discharge of its duties. We said: "The Legislature, recognizing the fact that the court has the power by which it may supply its own necessities, enacted section 6248 of the Revised Codes. * * * In case no provision had been made for a stenographer, there would have been furnished by this section a mode by which one could have been secured, as well as the power to fix and order his compensation paid. This provision indicates recognition on the part of the Legislature of the necessity that this court should be free from any control in the selection of its assistants in case the Legislature should itself have failed to make suitable provision for them." There is nothing in the *Schneider* Case to conclude us upon any of the questions now presented, for the power of the district court to appoint its own assistants in any event is not assailed. It is the exercise of that power without the necessity therefor appearing. The relator at bar was appointed by the district court to render a service which by statute and by the common law it was the right and duty of the sheriff to render, or of the county to supply. He was appointed *ex gratia*, without recourse to the mode prescribed by law and without anything to indicate that such recourse would be unavailing. He has been kept, not out of the necessities of the court so far as the record discloses, but in spite of the sheriff's offer to render all the attendance for which public moneys may be paid. His compensation has been fixed by the district judge without reference to legislation, and has been ordered paid out of funds for the expenditure of which the board of county commissioners is primarily responsible. To state the instant case is to state its necessary conclusion, *viz.*, that the service of the respondent covered by his claim was without authoritative warrant. Therefore his claim, though audited by the judge, is not a liquidated charge against the county, and therefore the appellant cannot be compelled to pay it.

The judgment below is reversed, and the cause remanded, with directions to dismiss the proceeding.

Reversed and remanded.

BRANTLY, C. J., and HOLLOWAY, J., concur.

THOMAS v. BLYTHE.

(Supreme Court of Utah. Dec. 18, 1913.)

1. ACTION (§ 45*)—MISJOINDER.

A complaint could join a cause of action for damages for willfully driving defendant's sheep on plaintiff's grazing land, and feeding the pasturage therefrom against plaintiff's protest with another cause of action, alleging special damages by plaintiff's sheep becoming infected with a contagious disease with which defendant's sheep were affected, and alleging the dates of the trespasses somewhat differently; Comp. Laws 1907, § 2961, permitting the union of special causes of action arising out of injuries with or without force to the person or property of another.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 386-448; Dec. Dig. § 45.*]

2. PLEADING (§§ 18, 19*)—AMBIGUITY—UNCERTAINTY.

The complaint alleged that plaintiff owned certain uninclosed arid lands, and that defendant owned a large number of sheep, and that there was much grass, etc., on the land valuable for pasturing, and that defendant knew the boundaries of plaintiff's land which were well marked, and willfully and wrongfully trespassed on the land by driving a large number of sheep thereon, and maintaining camps thereon, and by such trespasses the grass and underbrush, etc., was destroyed to plaintiff's damage, and that defendant willfully permitted his sheep to remain on the land, and refused to remove them therefrom, as a result of which the vegetation was destroyed, etc. *Held*, that the complaint was not demurrable on the ground that it was ambiguous, unintelligible, and uncertain.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 39, 40, 64; Dec. Dig. §§ 18, 19.*]

3. ANIMALS (§ 92*)—INJURIES BY TRESPASSING ANIMALS—UNINCLOSED LAND.

One who willfully and against the owner's protest brings sheep on uninclosed arid land for grazing is liable for resulting damages.†

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 330-333; Dec. Dig. § 92.*]

4. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

Material allegations in the complaint are admitted for the purposes of a general demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. ANIMALS (§ 92*)—TRESPASS—FENCE LAWS—UNINTENTIONAL TRESPASS.

Under Comp. Laws 1907, § 20, providing that if sheep trespass on premises, except those not inclosed by a lawful fence where required, the party aggrieved may recover damages, a sheep owner is not liable for damages resulting from an unintentional trespass on uninclosed land in a county in which the fence law is in force.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 330-333; Dec. Dig. § 92.*]

6. APPEAL AND ERROR (§ 714*)—BILL OF EXCEPTIONS.

Exceptions to instructions and to the refusals to charge cannot be reviewed upon the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† *Buford v. Houts*, 5 Utah, 591, 18 Pac. 633; *Jones v. Blythe*, 23 Utah, 262, 33 Pac. 264.

court stenographer's certificate that certain exceptions were taken, if such exceptions are not contained in a bill of exceptions properly allowed; such certificate not being a part of the judgment roll.†

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958-2963; Dec. Dig. § 714.*]

7. APPEAL AND ERROR (§ 497*)—BILL OF EXCEPTIONS.

Appellant need only include in his bill of exceptions that part of the proceedings at trial and exceptions thereto which he desires to have reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2964; Dec. Dig. § 497.*]

Appeal from District Court, Box Elder County; W. W. Maughan, Judge.

Action by Thomas Thomas against John Blythe. From a judgment for plaintiff, defendant appeals. Affirmed.

Stewart, Bowman & Morris, of Salt Lake City, for appellant. Edward McGurrin and W. E. Rydalph, both of Salt Lake City, for respondent.

FRICK, J. The plaintiff, respondent in this court, brought this action against the defendant, appellant here, to recover damages for alleged willful trespasses by appellant's sheep on respondent's lands and for eating and destroying the herbage and grasses growing thereon. In the complaint respondent, for a first cause of action, in substance, alleged that during all of the time when the wrongs complained of were committed he was the owner and in possession of certain arid, uninclosed, and uncultivated lands located in Box Elder county, Utah, which lands he particularly described; that the appellant, during all of said time, was the owner and in possession of about 10,000 head of sheep, all of which were kept in said Box Elder county; that on respondent's lands "there are growing a large quantity of timber of the quaking asp variety, together with much underbrush; that the said land is covered with and has growing thereon native grasses of various kinds, * * * and that said land is valuable for grazing and pasturing purposes." It is then further alleged as follows: "(4) That the defendant and his agents and servants well knew the boundaries of said land, which said boundaries were marked by well-defined marks and corners, consisting of large posts set in the ground at stated intervals, and that the same was claimed, occupied, and owned by this plaintiff. (5) That the plaintiff is the owner and has the care of a large number of sheep, which sheep require the grass from a large scope of country for their support, and the said land herein described and the grass thereon, together with other grass owned by the plaintiff, was being reserved for his said sheep during the months of August and September, and which grass so reserved was only sufficient to maintain said sheep,

all of which facts the defendant well knew.

(6) That at divers times, and upon each and every day between about the 1st day of July, 1911, and the 29th day of July, 1911, the defendant and his agents and servants willfully and wrongfully trespassed on and upon said land by driving thereon a large number of sheep, to wit, about 2,500 head, and during all of said time maintained camps and sheep beds and herded and kept said sheep in and upon said land. (7) That by reason of the defendant's willful trespass thereon in driving and keeping and maintaining his said sheep upon said land as herein alleged, the grass and verdure, roots, and underbrush, have been destroyed, to the damage of this plaintiff as hereinafter alleged. * * *

(9) That the defendant negligently and willfully permitted his sheep to remain and be upon said land in the same place for a great length of time, and some portions thereof have been reduced to an ash bed and all the vegetation, roots, and grasses have been completely destroyed and killed. (10) That the said sheep were on said land as herein alleged by reason of their being driven and held thereon by the defendant and his agents and servants, and were there against the protests of this plaintiff, who demanded of the defendant that he remove the same. That the said defendant refused to take said sheep therefrom, and was prepared to and would resist any attempt on the part of the plaintiff to remove them therefrom, and did declare that they should depasture said land and the whole thereof." Then follows a statement of the amount of damages. The allegations in the second cause of action are substantially the same as in the first, except that different lands are described and that the alleged wrongs were committed "between about the 1st day of April, 1911, and the 29th day of July, 1911," and that the respondent suffered damages because a large number of appellant's sheep were affected with an infectious and contagious disease whereby respondent's lands had become infected, whereas in the first cause of action the wrongs complained of are alleged to have occurred "between about the 1st day of July, 1911, and the 29th day of July, 1911," and upon different lands. Nothing is said about the disease in the first cause of action. There was also a third cause of action, in which respondent sought to quiet the title to all of said lands in himself, but this cause of action was eliminated from the complaint after appellant had interposed a demurrer to it, and therefore needs no further consideration. After the complaint had been amended by eliminating therefrom the third cause of action, appellant again, both generally and specifically, demurred to it. The special demurrer was based upon the grounds that the two causes of action remaining in the complaint were improperly joined, and that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Snow v. Tarpey, 25 Utah, 126, 69 Pac. 712.

the complaint was ambiguous, etc. The court overruled both demurrers, and the appellant filed an answer to the complaint in which he, in substance, denied the wrongs set forth in the complaint. A trial to a jury resulted in a verdict and judgment in favor of respondent, and the appellant appeals upon the judgment roll without a bill of exceptions.

[1] The overruling of that ground of the special demurrer relating to the joining of the two causes of action is assigned as error. Comp. Laws, 1907, § 2961, so far as material here, provides: "The plaintiff may unite in the same complaint several causes of action, legal or equitable, or both, where they all arise out of: * * * Injuries, with or without force, to person and property, or either." Here we have a plain, unambiguous statement of what causes of action may be joined in one complaint. Can any one successfully contend that the injuries set forth in the foregoing complaint do not squarely come within that portion of the section we have quoted above? We think not. We think the statute is so clear that neither argument nor authorities can be required to show that the two causes of action were properly joined in the complaint. In giving the right to join different causes of action our statute differs from those of some of the other states. We are clearly of the opinion that upon the ground that two causes of action were improperly joined the trial court committed no error in overruling the special demurrer.

[2] Nor do we think the court erred in holding that the complaint was not vulnerable to a special demurrer upon the ground that it was ambiguous, unintelligible, and uncertain. True it is that there are portions of the complaint that are inartificially drawn and the language is not as clear and precise as it could have been. Yet, taking the complaint as a whole, it is no more faulty in that regard than, in the nature of things, pleadings of that character frequently are. It would be quite as impracticable to attempt as it is impossible to force attorneys into preparing what may be called perfect pleadings. While no doubt the ordinary rules of pleading should be enforced, yet courts could easily create much more harm than they could prevent by insisting upon too strict a rule with respect to the precision of statement that should be used in pleadings. In that regard it is safe to say that we had "rather bear those ills we have than flee to those we know not of." We remark that the complaint already contained some statements of evidentiary facts; and what counsel's criticism really amounts to, if it were allowed, is that the respondent should be required to plead still further evidentiary facts. The complaint was sufficiently clear and specific to advise appellant of the wrongs he was charged with and of the relief de-

manded, and we cannot see how he could have been prejudiced in any way by the overruling of the latter ground of his special demurrer.

[3] This brings us to the general demurrer. Counsel for appellant strenuously insist that this case comes within the rule laid down in the case of *Buford v. Houtz*, 5 Utah, 591, 18 Pac. 633, affirmed in 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618. In that case it was in effect held that the uninclosed uncultivated lands of the West, which practically form a part of the public domain although owned by private owners, are nevertheless not governed by the same rules respecting trespasses committed on them by cattle or other animals going thereon and eating the grasses and herbage therefrom as are the inclosed or cultivated lands. It is held that merely to permit cattle to graze on uninclosed and uncultivated lands does not constitute a trespass upon real estate as that term was generally understood and applied at common law or some general statute. In view of that decision counsel contend that their client had a right to turn his sheep out on the public domain, and that if they went upon respondent's uninclosed and uncultivated lands to eat the grasses that were growing thereon, respondent had no legal cause for complaint. While the rule laid down in the *Buford Case*, supra, has in effect been reaffirmed by this court in a much later case, yet in the latter case the conditions under which the owner of uninclosed and uncultivated lands can recover damages for trespasses committed thereon are clearly and fully stated. See *Jones v. Blythe*, 33 Utah, 362, 93 Pac. 994. The ruling in that case is clearly reflected in the first headnote, which is as follows: "Though under Rev. Stat. 1898, § 20, providing that if sheep, etc., shall trespass on the premises of any person, except where such premises are not inclosed by a lawful fence in counties in which a fence is required by law, the party aggrieved may recover damages by action or by distraining, as therein provided, an owner of sheep is not liable for damages resulting from an unintentional trespass on uninclosed lands in a county in which a fence law is in force, yet he is liable where he intentionally drives his sheep on such land."

[4] If in the case at bar appellant's sheep, without his knowledge, had casually strayed upon respondent's lands in question, and had eaten the grasses and herbage growing thereon, then the case would come within the rule laid down in the *Buford Case*. According to the allegations of the complaint, however, which, for the purposes of the general demurrer, are admitted, appellant willfully and intentionally drove his sheep onto respondent's lands and kept them there against the protests of respondent, for the express purpose of having them eat the grasses and herbage growing thereon. It certainly must

be conceded that under the allegations of the complaint in this case respondent could have proved the very facts which this court held were sufficient to entitle the owner of lands to recover in *Jones v. Blythe*, supra. These facts are stated in the second headnote of that case as follows: "Evidence in an action for damages caused by sheep trespassing on premises held to show that the owner of the sheep, after being notified to keep them off the premises, willfully drove them thereon and kept them there till they had eaten and destroyed much of the grass." In our opinion the allegations of the complaint brings this case squarely within the rule laid down in the last case referred to.

[8] Respondent's counsel, however, contend that the demurrer was properly overruled because appellant's sheep were trespassing by merely going onto respondent's lands in question, and that such was the case although appellant did not know such to be the fact, and did not know the boundaries of respondent's lands. In other words, they contend that the same rule applies to the lands in question that would apply to cultivated farm lands in this state as provided in Comp. Laws 1907, § 20, to which reference is made in *Jones v. Blythe*, supra. We have already pointed out that this court is committed to a contrary doctrine. Section 20 aforesaid should be given a reasonable construction and application, and we are still of the opinion that the construction and application given it in *Jones v. Blythe*, supra, is both just and practical. To hold that the Legislature intended the provisions of section 20 to have any application to the arid uninclosed and uncultivated lands of this state is tantamount to holding that the Legislature intended to pass unjust and oppressive laws. There are, perhaps, no less than 50,000 to 75,000 square miles of arid uninclosed and uncultivated lands in this state, most of which is still held by the general government, and on which animals have, from time immemorial, gone at will for the purpose of eating the small amount of grass and herbage growing thereon. Respondent's lands come within the vast area of arid lands aforesaid, and the mere fact that he may be the owner of the lands described in the complaint does not change their character in the least degree. Nor does that fact, standing alone, give him any special rights as against animals that are not intentionally driven or kept thereon against his will. It is only when animals are driven onto or kept on his lands against his consent that he has any legal cause for complaint. It is his protest or refusal to consent that makes the owner of such animals a wrongdoer and liable for damages. The rights and duties aforesaid arise out of the nature of things in this arid country. However, when one is warned to keep his animals off certain lands which are owned by another, and which are pointed out by the latter to the former, the former can-

not complain if he is held liable for the damages he may cause to such other by intentionally having his animals eat and destroy the grass and herbage growing upon such land. It would be cause for complaint, however, if it were held that he must keep his animals off arid uninclosed and uncultivated lands at his peril the moment such lands passed into private ownership. Such a rule, under the conditions prevailing in this state, would be unreasonable and oppressive. For the reasons, therefore, that under the allegations of the complaint the appellant was charged with willfully and intentionally driving and keeping his sheep on respondent's lands in question against the latter's will and consent, the general demurrer was properly overruled.

[6] Appellant also contends that the district court committed numerous errors in its charge to the jury, and in refusing appellant's requests to charge. As already stated, this appeal is upon the judgment roll without a bill of exceptions. Appellant asks us to review his exceptions to the charge and to the refusals to charge as requested upon the certificate of the court's stenographer who certifies that certain exceptions were taken to the instructions given by the court, and also to the refusal of the court to give certain requests offered by appellant, which certificate is included in the judgment roll. Such a certificate cannot legally be made a part of the judgment roll. Exceptions to instructions given or to the refusal of requests, like all other exceptions which are not preserved by force of the statute, must, in order to be available for review in this court, be served on the adverse party, and settled and allowed as a bill of exceptions, and certified by the trial judge within the time and in the manner provided by the statute. The court's stenographer cannot settle a bill of exceptions. The precise question here presented was passed on by this court in *Snow v. Tarpey*, 25 Utah, 126, 69 Pac. 718, where it was held that exceptions inserted in the judgment roll, as was done in this case, cannot be considered by this court on appeal. While it is true that both the instructions given by the court and the requests offered by the parties, if filed, are a part of the judgment roll, yet this is not true of the exceptions to either. The exceptions must be settled and allowed by the trial judge as before stated. For the reason that such was not done in this case, we cannot review the exceptions to the instructions, nor those to the refusal of the requests.

[7] By what we have said we do not mean to convey the idea that, in order to have a bill of exceptions settled and allowed, a party is required to include in it all or any particular part of the evidence given or proceedings had at the trial. All that he is required to do is to include such exceptions, and the evidence bearing thereon, if any, as he desires this court to review, whether

few or many, and prepare, serve, and have his bill allowed and certified within the time and in the manner provided by our statute.

While from a mere cursory examination of some of the instructions we are impressed that the district judge misconceived and misstated the law, yet we are powerless to correct the errors for the reasons before stated.

It follows, therefore, that the judgment should be, and it accordingly is, affirmed, with costs to respondent.

MCCARTY, C. J., and STRAUP, J., concur.

STATE ex rel. SPARKS et al. v. STATE
BANK & TRUST CO. et al.
ESMERALDA COUNTY v. WILDES.
(No. 2,083.)

(Supreme Court of Nevada. Dec. 22, 1913.)

1. APPEAL AND ERROR (§ 1*)—RIGHT TO APPEAL—BASIS OF RIGHT.

The right of appeal to the Supreme Court is based entirely on statute, and that court is prohibited from taking jurisdiction unless the appellant has the statutory right of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

2. APPEAL AND ERROR (§ 151*)—PERSON AGGRIEVED—RECEIVER.

Under Rev. Laws, § 5327, providing that any party aggrieved may appeal, a receiver appointed to take over, administer, and wind up the affairs of a bank could not appeal from an order directing the preferential payment of a claim on the ground that the claimant's deposit in the bank was special and not a general deposit, since, while the receiver may appeal where his commissions or other allowances are affected, where he is interested in the fund to be distributed as a creditor, or where the increase or diminution of the whole fund in his hands is involved and such increase or diminution would inure to the benefit or loss of all the creditors, he is not interested in the adjustment of the equities of the various claimants, as he represents all of the creditors, and not any one or any class.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.*]

3. RECEIVERS (§ 81*)—DUTIES OF RECEIVER.

It is the duty of a receiver appointed to take over the affairs of an insolvent institution to carefully and faithfully collect, protect, and enhance the assets of the institution, and to administer its affairs to the end that its creditors may receive what is justly due them, and that its stockholders if any there be may receive the residue.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 150; Dec. Dig. § 81.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5993-5997; vol. 8, pp. 7780, 7781.]

4. RECEIVERS (§ 196*)—COMPENSATION FOR SERVICES AND EXPENSES.

A receiver appointed to take over the affairs of an insolvent institution is entitled to proper compensation for his services and to an equitable allowance for administrative expenses.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 387, 389-391; Dec. Dig. § 196.*]

5. APPEAL AND ERROR (§ 151*)—RIGHT TO APPEAL—"AGGRIEVED"—"GRIEVANCE."

The word "aggrieved" in Rev. Laws, § 5327, authorizing any party aggrieved to appeal, re-

fers to a substantial grievance, and the imposition of some injustice, illegal obligation, or burden, or the denial of some equitable or legal right, constitutes a "grievance" within the contemplation of the statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947-952; Dec. Dig. § 151.*]

For other definitions, see Words and Phrases, vol. 1, pp. 271-273; vol. 8, p. 7569; vol. 4, p. 3185.]

6. APPEAL AND ERROR (§ 1*)—JURISDICTION OF APPELLATE COURT.

Where no right of appeal is given by statute, the Supreme Court cannot invest itself with jurisdiction, however anxious it may be to do so, or however urgent the matter may be, and the lower court, by granting permission to appeal, cannot authorize the Supreme Court to take jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1-4; Dec. Dig. § 1.*]

Appeal from District Court, Ormsby County; Frank P. Langan, Judge.

Proceedings by the State, on relation of John Sparks and others, against the State Bank & Trust Company and others, in which the defendant bank was adjudged insolvent and a receiver appointed, and in which Esmeralda county filed an intervening petition. From an order directing the preferential payment of the intervening petitioner's claim, Frank L. Wildes as receiver, appeals. Appeal dismissed.

History of the Case.

On October 23, 1907, the State Bank & Trust Company, a corporation, which had theretofore been engaged in the general banking business with its principal place of business at Carson City, Ormsby county, Nev., was adjudged insolvent by the district court of the first judicial district, in and for Ormsby county. The State Bank & Trust Company, as a corporation, had, prior to the date mentioned, conducted and maintained branches in several parts of the state, one of which was located in Goldfield, Esmeralda county. Subsequent to the action of the district court in adjudging the institution insolvent, and on the 18th day of May, 1908, the court appointed Frank L. Wildes receiver of the insolvent institution. Thereafter the said Wildes duly qualified as receiver and entered upon the discharge of his duties.

On October 19, 1911, the petitioner, Esmeralda county, filed its original petition in the district court of the first judicial district, by which said petition the county prayed the court to decree that a certain sum of money, to wit, the sum of \$4,870.03, alleged to have been deposited by the county treasurer of Esmeralda county in the Goldfield branch of the State Bank & Trust Company, be held to be a special deposit, and that the court make an order directing the receiver of the State Bank & Trust Company to pay Esmeralda county the sum of \$4,870.03, with costs. To an amended petition filed by Es-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

emeralda county as petitioner, the receiver, Wildes, answered, denying that the money placed by the county treasurer of Esmeralda county in the Goldfield branch of the State Bank & Trust Company was placed on special deposit, or for safe-keeping, or that the same was received or accepted by the State Bank & Trust Company as a special deposit, or for safe-keeping. In his answer, the receiver admitted that the sum specified had been deposited with the State Bank & Trust Company at its Goldfield branch by E. Hardy, the county treasurer, but denied that the same was deposited for the use and benefit of the county.

A hearing on the petition was conducted before the court, at the conclusion of which the court rendered judgment in favor of petitioner county, and entered its decree that the sum of \$4,870.03 was received by the Goldfield branch of the State Bank & Trust Company from E. Hardy, county treasurer of Esmeralda county, as a special deposit; that the same was a preferred claim in favor of Esmeralda county and against the assets of the State Bank & Trust Company, which came into the hands of the receiver, Wildes; that the sum of \$974 had been paid by said receiver on said claim by way of dividends; that there remained a balance due Esmeralda county on said preferred claim of \$3,896.03. Whereupon an order was made by the said court directing the said Frank L. Wildes, receiver of the State Bank & Trust Company, to pay to Esmeralda county the sum of \$3,896.03 out of any funds on deposit in his hands as receiver and to reimburse said county for its costs expended in the proceeding. Following the service of this order upon the receiver, the court made an order that the said Frank L. Wildes, as receiver of the State Bank & Trust Company, be permitted to appeal to this court from the decision and judgment theretofore entered.

Following the perfecting of the appeal on the part of the receiver, Esmeralda county, the petitioner and respondent herein, filed its motion to dismiss the appeal upon the ground that the appellant Frank L. Wildes, as receiver, had no interest in the proceedings; that he was not an aggrieved party within the meaning of section 5327, Revised Laws; that neither the order of the district court directing the receiver to pay Esmeralda county the sum of money stated, nor the order adjudging the said sum a special deposit, or preferred claim, were orders from which an appeal could be prosecuted under the laws of Nevada.

Mack, Green & Heer, of Reno, for appellant. M. A. Diskin, Dist. Atty., of Goldfield, for respondent.

McCARRAN, J. [1] The right of appeal to this court is one based entirely on statute, and this court is prohibited from taking

jurisdiction unless the party appealing has, in the first instance, the statutory right of appeal.

[2] Section 5327 Revised Laws of Nevada prescribes: "Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent."

In the case of Kapp v. Kapp, 81 Nev. 70, 99 Pac. 1077, 21 Ann. Cas. 599, this court cited approvingly its former decision rendered in the case of the State v. Langan, 29 Nev. 459, 91 Pac. 737, wherein it said: "An appeal to this tribunal is a matter purely of statutory right, and, unless authorized by statute, any attempted appeal taken from an order not appealable is void, and therefore could not confer any jurisdiction upon this court to act."

The right of receivers to appeal from orders of the court by which they were appointed has been variously dealt with by the several jurisdictions. The Supreme Court of California, in the light of a special provision of the Code of Civil Procedure in that state (section 963, Code of Civil Procedure), held that an order directing a payment of a preferred claim is appealable. In *re Smith*, 117 Cal. 506, 49 Pac. 456. It was a rule under the old chancery practice, and this rule is adhered to in states where that practice is unchanged by statute, that a receiver may appeal from any order where such order might affect his proper duties. It is almost universally held that a receiver may appeal from any order which affects his personal rights, such as passing upon his accounts, or fixing his fees or compensation. In the case of *People v. St. Nicholas Bank*, 77 Hun, 159, 28 N. Y. Supp. 407, the court held that a receiver, having a right to apply to the court for instruction, was entitled to instruction by the entire court, and therefore might appeal from a special to a general term. This decision, however, was rendered in the light of a system of procedure peculiar to the statutes of New York. In an instance where the estate as a whole is interested, the receiver thereof may appeal from a judgment against him officially. In a case where an action is commenced by a party not interested in the estate, the receiver may appeal from an order establishing the party's claim against the estate. In a contest between two sets of creditors as to the distribution of the funds, the receiver has no interest and is not entitled to the right of appeal. *Alderson on Receivers*, § 246; *Battery Park Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461.

Speaking upon this subject the Supreme Court of North Carolina in the *Battery Bank Case*, *supra*, a case somewhat analogous to the one at bar, said: "The receiver is the agent of the court. Its judgment is full protection to him, and it is a rare case that he can be justified to appealing, and

certainly he is not when, as in this instance, the question is merely between two sets of creditors as to the distribution of the fund."

In the case at bar the petitioner county sought to have itself placed in that set of creditors who, by reason of the nature of their deposits with the defunct institution, were entitled to have their claims adjudged to be preferred and thereby segregated from that other set of creditors who, by reason of the nature of their deposits with the institution, were general creditors and only entitled in law to share pro rata the accumulation or residue of the estate. As we have already stated, a receiver in an instance of this character has the right of appeal when the court, of which he is the representative, charges, or refuses to allow, items, by which action the court does him wrong personally. His right of appeal, however, is limited to that peculiar class of orders or decisions in which, or by reason of which, he is the person interested, or may be personally affected, or, by which the estate as a whole is affected.

A receiver appointed by a court to collect the assets of an insolvent institution and to administer its affairs cannot be said to be personally interested in the segregation or distribution of the funds that may, by reason of his activities, or the performance of his duties, come into his hands, unless he occupies the dual capacity of both creditor and receiver, in which instance his right of appeal, as a creditor, from an order or decree of the lower court might be sustained upon the theory that, being personally interested in the prorating or distribution of the estate, he could invoke by appeal or review a mandate of the higher court to enforce a right of which he might have been deprived by the lower court, or to relieve him of a wrong inflicted upon him. As receiver, acting in his official capacity, and without personal interest, he is bound by the orders of the court of which he is the appointed representative when those orders affect only those parties who, by reason of their relationship as creditors, are interested in the equitable distribution of the estate, and in no wise affect him personally.

If a receiver in a case of this kind may appeal from one order, the result of which would not affect him personally, may he not with equal propriety appeal from every order, and thereby increase his expenses and multiply his attorneys' fees to the injury of the legitimate creditors and the unnecessary depletion of the estate? In the case of Chicago Title & Trust Company, Receiver of the Jas. H. Walker Co., v. Jos. Caldwell, 58 Ill. App. 219, the appellate court of Illinois in passing upon this identical question said: "We cannot sanction, even by silence, the idea that a receiver may set up in opposition to the court, his theories of how the assets shall be disposed of. Next we will have clerks appealing from directions of the

courts to enter orders, unwise in the opinion of the clerks."

[3,4] Where, as in this instance, a receiver is appointed to take over the affairs of an insolvent institution, he is not appointed for the purpose of representing any one individual or class of individuals as against the others. It is his duty under his appointment as receiver to carefully and faithfully collect, protect, and enhance the assets of the institution, and to administer its affairs to the end that its creditors may receive what is justly due them, and that its stockholders, if any there be, may receive the residue. He is entitled to proper compensation for his services as he is also entitled to an equitable allowance for administrative expenses, and, where an order of court is entered with reference to either of these, they being matters in which he is personally interested, he has the right of appeal from such orders, if he believes himself aggrieved. As is stated by Mr. Alderson in his work on Receivers, the receiver has the right of appeal with respect to any claim asserted by or against the estate, from any decree which affects his personal rights, but not from any order or decree declaring the respective equities of the parties to the suit. Alderson on Receivers, p. 315.

In the case of the First National Bank of Pocatello v. C. Bunting et al., 7 Idaho, 27, 59 Pac. 929, 1108, the Supreme Court of Idaho, passing upon this question in a case very much analogous to the one at bar, and in which an appeal was taken by a receiver from orders made by the lower court directing that moneys deposited in the insolvent institution by county treasurers and which had come into the hands of the receiver be turned over to the several counties, said: "It should be borne in mind that this is not an action against the receiver but that in this action the receiver was appointed. Then the receiver has no personal interest in the judgments from which he appeals. It is of no personal interest to the receiver whether he pays the money mentioned in the several judgments to the respondent counties, or whether he pays them to the general creditors. It was his duty to obey the orders of the court appointing him, of which he is only an agent. He had no right to appeal from said orders."

[5] It must be observed that our statute prescribes that parties aggrieved may appeal. The word "aggrieved" refers to a substantial grievance. The imposition of some injustice, or illegal obligation or burden, by a court, upon a party, or the denial to him of some equitable or legal right would constitute a grievance in the contemplation of this statute. Wilson v. Board of Regents, etc., 46 Colo. 100, 102 Pac. 1088.

The segregation of creditors into classes with reference to the priority or preferment of their claims, or an order directing the payment of a certain claim in preference to oth-

ers, or an order adjudicating a certain claim to be preferred as against others that may be merely general, are not such orders as affect a receiver in an instance of this character, to the extent of denying him personally some claim of right either to property or person, or of imposing upon him personally some burden or obligation.

The Supreme Court of Colorado in the case of *Wilson v. Board of Regents*, *supra*, passing upon the right of an executor to appeal from an order directing partial distribution of an estate said: "It is not apparent that appellant is thus affected by the order complained of. He is not concerned in the slightest degree, in any legal sense, with the question of the proposed partial distribution of the residuum of said estate. * * * He has no personal interest in it; he acts purely in a representative and official capacity. * * * If the contention of the appellant is correct and to be upheld, the power is placed in the hands of such a representative official to indefinitely tie up and postpone the settlement and distribution of any estate, where no dispute of substance whatever exists, and upon flimsy and trifling pretexts, in the interest only of one seeking in his official capacity to retain possession of the property involved. The law does not contemplate or approve such action, and courts should neither allow nor sanction it when properly called to their attention. * * * The order of the court below is a full and complete protection to the executor for whatever he may do, by way of disposition of the property, within its terms. This being true, what possible interest has he in the further prosecution of the action?"

As we have already stated, there are instances in which the receiver may rightfully appeal from an order of the court of which he is the appointee, as for instance, where his commissions or other allowances as trustee are affected by the order, or where he is interested in the fund to be distributed as a creditor, or where the question of the increase or diminution of the whole fund in his hands as trustee is involved, and such increase or diminution would inure to the benefit or loss of all the creditors.

The order made by the lower court in this instance does not affect the receiver for any of the reasons stated above. His commissions are not affected; he is not a creditor, and the order does not involve an increase or diminution of the estate; but, on the other hand, the matter resolves itself into a contest between creditors of the insolvent institution, wherein one creditor seeks to have its claim preferred for payment as against all the others. "In such a case," says the Supreme Court of Maryland, "the trustee has no right to intervene, and it is not his duty to prolong the litigation. The creditors whose rights are affected are the proper persons to appeal." *Frey, Trustee, v. Shrewsbury Savings Institution*, 58 Md. 151.

It was held by the Supreme Court of Maryland in the case of *Knabe v. Johnson*, 107 Md. 618, 69 Atl. 421, in passing upon an appeal taken in a proceeding similar to the one at bar, that such an order was one simply affecting the distribution of the funds in the hands of the receiver among two classes of persons entitled thereto and, as such an order in no wise affected the compensation of the receiver, or any personal right that he might have, or his duty in serving the whole estate, he was not entitled to prosecute an appeal. In this respect the court said: "His holding is the holding of the court from whom the possession was taken. * * * His appointment is not to oust any party of his right to possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it; and when that is ascertained, the receiver will be considered as his receiver."

A petition in a case of this character is merely an appeal to the lower court to determine and adjudicate the respective equities of the parties who may be creditors of the insolvent institution, and, when such adjudication and determination has been made, to require its servant, the receiver, to carry out the orders of the court made pursuant to such determination. When the determination has been made and the order issued, it constitutes the investiture by reason of which and under authority of which the acts of the receiver cannot be questioned. It is true that one or more of the creditors, the party or parties really interested in the proceedings and affected by the order, might appeal from the order but the receiver not being a party affected should stand indifferent and not a partisan. His duty is to all the parties in common; he should not become an advocate of one creditor against another or of one class of creditors against another.

[8] The appellant contends here that as the court made an order allowing the receiver to appeal, and as such appeal is taken pursuant to the authority and order of the lower court, therefore the appeal should be heard and determined. We see no merit in this contention. The power of this court to hear and determine matters on appeal is prescribed by statute. It is a question of jurisdiction, and this jurisdiction is one with which this court cannot invest itself, however anxious the court might be so to do or however urgent the matter might be. No order of the lower court, no sanction, or permit, can authorize this court to take cognizance of a matter on appeal, unless the right of appeal clearly appears as a matter of law.

While it is true that in this case the receiver, appointed by the court to take over and administer and wind up the affairs of the defunct institution, was invested with general powers to perform his duties to the end that all the estate and assets might be

collected, conserved, and thereafter properly distributed, nevertheless, this conference of power conveyed no beneficial title upon, or interest in, the receiver. There was no duty imposed upon him to assert the rights of one creditor or class of creditors over those of another in respect to the common fund, nor in respect to their particular claim or preference. *Knabe v. Johnson et al.*, 107 Md. 616, 69 Atl. 420; *State ex rel. Miller, Attorney General v. People's State Bank*, 22 N. D. 583, 135 N. W. 196.

In the case of *State ex rel. Miller v. People's Bank*, supra, the Supreme Court of North Dakota, in considering a matter identical with the one at bar, and in a case where the conditions and circumstances were almost analogous, sustained their former decision in the case of *Hoffman v. Bank of Minot*, 4 N. D. 473, 61 N. W. 1031, wherein they declared that a receiver, being an officer of the court, in matters of this character must assume an indifferent attitude as between creditors of the estate; and where one creditor seeks to have his claim preferred as against another, or as against all the others, and the court determines and decides in favor of his claim and orders the receiver to pay the claim, the effect of the order neither enhances nor diminishes the assets of the insolvent institution as a whole. The relative rights of the respective claimants with reference to the distribution of the assets are the only things that are determined by the order, and, on this subject, the receiver is without interest, and, being a disinterested party, as between the claims of the creditors of the estate, he is not a party aggrieved and hence cannot maintain an appeal from the order of the court appointing him.

The doctrine as laid down in the case of *State ex rel. Miller v. People's State Bank*, supra, and which is especially applicable in the case at bar by reason of the fact that the conditions are analogous is a doctrine that has been generally indorsed to a degree of considerable uniformity by the courts of last resort to which the matter has been presented. *Milton J. Foreman, Receiver, et al. v. Defrees, Brace & Ritter*, 120 Ill. App. 486; *Jno. W. Sutton, Receiver, v. Louis Weber*, 100 Ill. App. 360; *First Nat. Bank, etc., v. O. Bunting*, 7 Idaho, 27, 59 Pac. 929, 1106; *Bates v. Ryberg et al.*, 40 Cal. 463; *Frey, Trustee, v. Shrewsbury, etc.*, 58 Md. 151; *Wilson v. Board of Regents*, 46 Colo. 100, 102 Pac. 1088; *Battery Parl Bank v. Western Carolina Bank*, 127 N. C. 432, 37 S. E. 461; *Dorsey v. Sibert*, 93 Ala. 312, 9 South. 288; *Bosworth v. Terminal Rd. Ass'n*, 80 Fed. 969, 26 C. C. A. 279.

In the case of *Bosworth v. Terminal Rd. Ass'n*, supra, the United States Circuit Court of Appeals for the Seventh Circuit, having under consideration the question of the right of a receiver to appeal, where the court below made an order similar to the one ap-

pealed from in this case at bar, said: "While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all the parties in interest. His duty is to defend the estate against all claims which he deems to be unjust. His duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled. He represents the estate, with right to sue to recover demands due to it, with right to defend it against claims asserted. In this respect we concur with the Circuit Court of Appeals for the Fourth Circuit, that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. * * * This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters the receiver has no right of appeal, while in respect to others his right of appeal may not be gainsaid. * * * The true line of demarcation we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate. He has the right of appeal from any decree which affects his personal right, for therein he has an interest. But he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent, and not a partisan. His duty is to all parties in common. He should not become an advocate of one against another." This case, decided by the Circuit Court of Appeals for the Seventh Circuit, was by writ of certiorari carried to the Supreme Court of the United States; and that court, speaking through Mr. Justice Brewer, declared that in that particular action, it being one in which a receiver was appointed on the foreclosure of a mortgage to take charge of the mortgaged property, the proper entry should have been an affirmance of the decree rather than a dismissal. In speaking of the right of the receiver generally to appeal the court said: "He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not, in such defense, question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him. * * * Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. * * * He is to stand indifferent between the parties, and may not be heard, either in the court which appointed him or in the appellate court, as to the rightfulness of any

order which is a mere order of distribution between the parties." *Bosworth v. Terminal Rd. Ass'n*, 174 U. S. 182, 19 Sup. Ct. 625, 43 L. Ed. 841.

Having concluded that the receiver in an action of this kind is not a party aggrieved in the contemplation of the statute, and cannot, therefore, prosecute an appeal to this court from an order of this character, we have determined to dismiss the appeal. Any creditor or any set of creditors of the insolvent bank might have appeared in the lower court pursuant to the notice given at the time of the hearing of this matter and resisted the making of the order, and it was within their power to prosecute an appeal to this court from such order, they being properly the parties aggrieved.

While it is our opinion, without determining the matter, that on the record as it is disclosed, the judgment of the lower court should have been affirmed in this instance, yet the seriousness and importance of the result of dismissing an appeal in cases of this general character causes us rather to reflect on the absence of a law which would provide for a better protection for the creditors and their respective interests. The receiver being by rule prohibited from taking sides with one creditor or set of creditors against another, and being required to remain neutral in an action of this character, and therefore being deprived of the privilege of appeal, it appears to us regrettable that some power is not vested in the court appointing a receiver, in a case of this kind, whereby, at the very time of the appointment of the receiver, or on occasions when the court might deem it essential, it might appoint some agent, either selected by the creditors or by the court, whose duty it would be solely to represent the creditors separate and apart from the receiver, and who might be empowered, by reason of his representative capacity, to prosecute an appeal so that the sanction or guidance of the court of last resort might be afforded not only to the receiver, as the representative of the estate, but also to the court appointing him.

It is manifest from the order made by the lower court in this case that it was the desire of that court, if the statute permitted it, that

this court should pass upon its findings and conclusions in this matter, but, however beneficial such a review might be, the jurisdiction of this court is fixed by the Constitution and the statute. It therefore follows that the appeal in this case must be dismissed.

It is so ordered.

NORCROSS, J., concurs.

TALBOT, C. J. I concur in the order.

STATE ex rel. SPARKS et al. v. STATE
BANK & TRUST CO. et al.

INGALLS v. WILDES.

(No. 2,062.)

(Supreme Court of Nevada. Dec. 22, 1918.)

Appeal from District Court, Ormsby County; Frank P. Langan, Judge.

Proceedings by the State, on relation of John Sparks and others, against the State Bank & Trust Company and others, in which the defendant bank was adjudged insolvent and a receiver appointed, and in which W. A. Ingalls filed an intervening petition. From an order granting the relief asked for in the intervening petition, Frank L. Wildes, as receiver, appeals. Appeal dismissed.

Mack, Green & Heer, of Reno, for appellant. Sweeney & Morehouse, of Reno, for respondent.

McCARRAN, J. The question of the right of the receiver to appeal in this case having been raised by the respondent, and the matter involved being analogous to that determined by this court in the case of the State of Nevada ex rel. John Sparks et al. v. State Bank & Trust Company et al. (being No. 2083) 137 Pac. 400, and the decision therein being determinative of the question of appeal as involved in this case, it follows from the reasoning as laid down therein that the appeal should be dismissed.

It is so ordered.

TALBOT, C. J., and NORCROSS, J., concur.

STATE v. PATCHEN et al. (No. 2,079.)

(Supreme Court of Nevada. Dec. 22, 1913.)

1. BURGLARY (§ 41*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

On a trial for burglary, evidence *held* sufficient to support a verdict of guilty.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94–103, 109; Dec. Dig. § 41.*]

2. BURGLARY (§ 41*)—SUFFICIENCY OF EVIDENCE—NONCONSENT OF OWNER.

On a trial for breaking and entering a cigar store with intent to steal, evidence *held* sufficient to show that the owners of the store did not consent to the larceny, although one of them testified as a witness and did not directly testify that he did not consent, especially where he testified that he did not know who broke into the store.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 94–103, 109; Dec. Dig. § 41.*]

3. BURGLARY (§ 46*)—INSTRUCTIONS—ELEMENTS OF OFFENSE.

Rev. Laws, § 6634, provides that every person who enters any house, etc., or other building with intent to commit larceny or any felony is guilty of burglary. Section 6635 provides that every person so unlawfully entering or breaking and entering any such building shall be deemed to have done so with intent to commit larceny or a felony, unless such entry is explained by satisfactory testimony to have been made without criminal intent. On a trial for burglary, an instruction that, to constitute burglary, it was not necessary to prove that defendants or either of them actually stole any goods contained in the store alleged to have been burglarized, and that the gist of the crime was the entering of the store with intent to steal the goods contained therein, "regardless of the fact whether or not there was an actual stealing of the said goods," was modified by drawing a line through the quoted words. *Held*, that the instruction as modified was not erroneous.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 111–120; Dec. Dig. § 46.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 908–911; vol. 8, p. 7593.]

4. CRIMINAL LAW (§ 834*)—WRITTEN INSTRUCTIONS—FORM.

The manner in which the court modified an instruction by drawing a line through the stricken words instead of erasing or totally obliterating them was not error, where had such words not been stricken, the instruction would have been correct, and it was manifest that it was the court's intention to eliminate them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

5. CRIMINAL LAW (§ 834*)—WRITTEN INSTRUCTIONS—FORM.

The practice of modifying instructions by striking out portions thereof in such manner as to leave the words stricken out legible should not be followed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2013, 2014; Dec. Dig. § 834.*]

6. CRIMINAL LAW (§ 556*)—WEIGHT OF EVIDENCE—STATEMENTS OF DEFENDANTS.

On a trial for burglary, an officer testified that, between 2 and 3 o'clock in the morning, he was attracted by the sound of breaking glass, and saw two men at a cigar store; that he and another officer went up the street and found defendants standing at the cigar store; that some merchandise was on the window sill,

commonly used as a counter, and some on the sidewalk; that gum of the kind and character contained in a showcase which was broken was found on the person of one defendant; that one of the defendants had a fresh bleeding wound on one of his fingers; that one of them said he was going to buy some tobacco and the other said he and his partner found the stuff on the sidewalk. *Held* that, though these explanations by defendants were proved by the state, the state was not bound thereby and their weight was for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 918, 1258; Dec. Dig. § 556.*]

Talbot, C. J., dissenting in part.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Charles Patchen and another were convicted of burglary in the first degree, and they appeal. *Affirmed*.

Thomas E. Kepner, of Reno, for appellants. George B. Thatcher, Atty. Gen., for the State.

McCARRAN, J. This is an appeal from the judgment of the second judicial district court and from the order of that court denying appellants' motion for a new trial. Appellants were convicted of burglary in the first degree, after having been tried on an indictment, the charging part of which reads as follows: "That said defendants on the 10th day of March, A. D. 1913, or thereabouts, and before the finding of this indictment, at and within said county of Washoe, state of Nevada, did then and there, wilfully, unlawfully, feloniously, and burglariously enter that certain store situate at the southeast corner of Commercial row and Virginia street, in the city of Reno, county of Washoe, state of Nevada, with the intent, then and there, to steal, take, and carry away the goods and chattels of Joseph Caton and A. J. Caton, copartners doing business under the firm name and style of Joseph Caton & Son, in the said store contained; the aforesaid store being then and there owned by and in the use, possession, and occupancy of the said Joseph Caton & Son."

The appellants, in this case, after verdict and before judgment, moved the court for a new trial upon several grounds, one of which was that the verdict of the jury was contrary to the evidence, and was not sustained by the evidence introduced in the case, for the following reasons: "There is no evidence in this cause, and was no evidence before said jury, to show nonconsent of the owners, or alleged owners, of said goods and chattels, to the alleged larceny, and it is a well-established rule of law that, where the owner is called as a witness, in a case where the indictment charges a burglarious entry with intent to commit larceny, circumstances tending to show nonconsent will not suffice, and the failure of the owner to testify as to nonconsent is fatal."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] As appears from the transcript and proceedings of the trial Joseph Caton, the senior member of the firm of Jos. Caton & Son, and one of the owners of the cigar store alleged to have been burglarized, was called as a witness in behalf of the state, and testified at length as to the location of the cigar store, the time at which he left the place on the evening of the 9th of March (the night before the burglary), as to having locked the place with a padlock at the time of leaving; and he further testified to having been called on the telephone by a member of the police force at about 2:30 on the morning of the 10th, and as to having immediately gone to the cigar store and having found the outside window broken. The last question propounded to the witness Caton by the state was as follows: "Q. Do you know of your own knowledge who broke into it? A. No, I do not."

The testimony of Capt. Chas. Tremblay, one of the arresting officers in this case, is to the effect that between 2 and 3 o'clock on the morning of the 10th of March, he was in front of the Arcade Saloon, a distance of 140 or 150 feet from the cigar store alleged to have been burglarized. His attention was directed by the sound of breaking glass. He looked up the street and saw two men at the cigar store, and he then called his fellow officer and went up the street and found the defendants standing at the cigar stand. Some of the merchandise was on the window sill, commonly used as a counter, and some was on the sidewalk. On the person of defendant Burke he found two packages of gum of the same kind and character as that contained in the showcase in the cigar store, which showcase he also found broken. At the time of the arrest, the defendant Patchen had a fresh bleeding wound on one of his fingers, and, as disclosed by the testimony at the preliminary examination, the officer discovered blood on some of the articles spread about the window sill. At the time of making the arrest, the defendant Burke said that he was going to buy some tobacco. The defendant Patchen, at or about the same time, said that he and his partner came along and found the stuff on the sidewalk.

Counsel for appellants contends that the state failed to make out its case in that it did not show by the witness Caton upon the stand that the breaking and entry were without his consent, and in support of their contention, after paying a high tribute to the Supreme Court of Criminal Appeals of the state of Texas, cite the case of *Ridge v. State*, 66 S. W. 774, and *Young v. State*, 42 Tex. Cr. R. 301, 59 S. W. 890.

It will be observed from a careful consideration of the decisions rendered by the Court of Criminal Appeals of the state of Texas that, in dealing with the subject of non-consent in burglary cases, that court has tak-

en many different positions, and, in fact, in a very recent case (*Brown v. State*, 58 Tex. Cr. R. 336, 125 S. W. 916) the court held that, in a trial for burglary, where the indictment charges that the burglary was with intent to steal, it is essential to both allege and prove the want of consent of the owner or person in possession, but even in that case the court held that proof of nonconsent might be established by circumstantial evidence which would absolutely exclude every reasonable presumption that the owner gave his consent. It will be observed in this recent decision the court held that in a case where the prosecution relied upon circumstantial evidence to prove nonconsent, having the owner or party in possession on the stand as a witness, it was necessary, if the defendant objected to the proving of nonconsent by circumstantial evidence, that he interpose his objections in the court below, and bring the matter to the attention of that court at the proper time. In this respect the court said: "There is no doubt of the correctness of this proposition, and had objections been made in the court below, and a proper bill of exceptions reserved, showing that such circumstantial evidence was objected to when tendered on the trial, this court would have been compelled to have said that the testimony was not sufficient." It is our judgment that in a case of this kind the trial court should have been apprised of the position taken by defendants at the proper time. As has already been stated, the Court of Criminal Appeals of Texas has announced contrary rules on several occasions on this subject.

In the case of *McMahon v. State*, 1 Tex. App. 105, that court said: "But it is contended that the evidence does not show, in a satisfactory manner, that the taking was without the consent of the owner of the property. Whilst it is conceded that the want of consent of the owner to the taking, in a charge of theft, is a necessary ingredient to the crime, yet it is believed that this want of consent may be established by circumstantial, as well as direct, testimony. This we regard as a settled proposition laid down by the elementary writers, and acted on by our own Supreme Court, without variation, from the decision in *Henderson v. State*, 14 Tex. 503, down to the present time."

In the case of *Erskine v. State*, 1 Tex. App., at page 406, the same court said: "It is held, 'when nonconsent is an essential ingredient in the offense, as it is here, direct proof alone from the person whose nonconsent is necessary can satisfy the rule. You are put to prove a negative, and the very person who can swear directly to the necessary negative must, if possible, always be produced. Other and inferior proof cannot be resorted to until it is impossible to procure the best evidence.' 1 Phillips on Ev. 635. * * * These rules have been so far modified, it seems, as that the want of consent may be proved by circum-

stantial evidence. * * * But this modification would not do away with the necessity of proving the want of consent to the taking, by the person whose consent was necessary, by either direct or circumstantial evidence. His consent being necessary to authorize the taking, so as to relieve the party from the consequences of taking without consent, his want of consent might be proved by circumstantial evidence."

It must be observed in the case at bar that appellants are charged with the crime of breaking and entering with intent to commit larceny. The actual asportation is not charged. In the case of *Ridge v. State*, relied upon by appellants, the Court of Criminal Appeals of the state of Texas, in deciding that case, cited as authority the case of *Wisdom v. State*, 42 Tex. Cr. R. 579, 61 S. W. 926, and in the latter case it appears that, passing upon a similar question, they decided that proof of nonconsent to the entry was not necessary. In the case of *Willis v. State*, 33 Tex. Cr. R. 168, 25 S. W. 1119, the Court of Criminal Appeals of the state of Texas held that it was not error on the part of the trial court to refuse to charge the jury that the state must prove the want of consent of the owners or parties in possession.

In the case at bar it is our judgment that the circumstances proven establish the want of consent almost conclusively. The entry was accompanied by the breaking of the glass window. It was accomplished at an hour and time and in a manner that absolutely precluded the idea of consent of the owner or party in possession. It is manifest from the record that the entry was made with the intent to do more than merely enter, for it is disclosed that the small showcase in the interior of the cigar store was broken into, and on the person of one of the defendants was found packages of merchandise similar to those contained in the showcase. Moreover, the testimony of witness Caton, who from all the record appears to have been the party in possession, discloses that he had no knowledge as to who broke into the cigar store. His answer in this respect excludes all idea of consent.

[3, 4] The statute under which the defendants were convicted is as follows:

Section 6634, Rev. Laws: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary. Every burglary committed in the nighttime is burglary of the first degree, and every burglary committed in the daytime is burglary of the second degree," etc.

Section 6635 of the Revised Laws provides: "Every person who shall unlawfully break and enter or unlawfully enter any

building or structure enumerated in the last preceding section shall be deemed to have broken and entered or entered the same with intent to commit grand or petit larceny or a felony therein, unless such unlawful breaking and entering or unlawful entry shall be explained by testimony satisfactory to the jury to have been made without criminal intent."

By the last section, the unlawful breaking and entering or the unlawful entering carries with it a presumption of intent to commit larceny. Circumstances may be presented by the evidence during the course of a trial for such an offense, which would eliminate the idea of criminal intent.

Appellants assign error in the giving of instruction No. 9, principally upon the ground that the court, in modifying the instruction, instead of erasing the portion which it intended to eliminate, struck the same out by drawing a line through it. The instruction reads as follows: "You are further instructed that in order to constitute the crime of burglary, it is not necessary to prove that the defendants, or either of them, actually stole, took, or carried away any of the goods and chattels of Jos. Caton & Son, contained in the store alleged in the indictment to have been burglarized. The gist of the crime of burglary is the entering of a store with the intent to steal the goods contained in the said store, regardless of the fact whether or not there was an actual stealing of the said goods." Through the words "regardless of the fact whether or not there was an actual stealing of the said goods" the court drew a line, and indorsed the instruction "Given as modified." We can see no merit in appellants' objection to this instruction as modified, or the manner in which it was modified, for, had the court seen fit to give the entire instruction without modification or without an attempt to eliminate the words through which a pen line was drawn, it would have correctly stated the law.

This court held in the case of *State v. Simpson*, 32 Nev. 148, 104 Pac. 244, Ann. Cas. 1912C, 115, that the offense of burglary is completed when the house or other building is entered with the specific intent designated in the statute. The actual stealing or attempt to steal property therein is only evidentiary to the criminal intent. Hence, as we have already stated, had the court seen fit to give the entire instruction without striking any portion of it, no error would have been committed, but, as the court saw fit to strike the latter portion of the instruction by drawing a pen line through the words, it was thereby manifest that it was the intention of the court to eliminate those words, and any intelligent person must necessarily have so regarded it.

[5] This manner of amending instructions by striking out so as to leave the words

stricken out legible is not to be subscribed to. This is a practice that in our judgment should not be followed by trial courts. It is a saving of time at the hazard of injury and perhaps error.

[8] It is the contention of appellants that the prosecution in this case having introduced evidence as to statements made by the defendants at the time of the arrest, the state is bound by the credit given to the statements or admissions of appellants by offering the statements or admissions in evidence, and cannot now insist upon the conviction of appellants upon that portion of the evidence which tends to show burglary. If the statements of the defendants, made at the time of the arrest, constituted the only evidentiary fact or circumstance against them, the contention of appellants in this respect might admit of more serious consideration. Under the theory of appellants, the state would have been precluded from disproving exculpatory statements or admissions of the parties at the time of arrest or during the actual perpetration of the crime, notwithstanding the fact that such statements or admissions, even if not introduced by the state, could be introduced and relied upon by the accused as part of the *res gestæ*. This contention we think is not well founded.

In the case of *Oldham v. State*, the Court of Criminal Appeals of the state of Texas in passing upon this question said: "The state is not necessarily bound by every statement made by a witness introduced by it, but the jury has a right to consider all the surrounding circumstances." *Oldham v. State*, 52 Tex. Cr. R. 516, 108 S. W. 667.

Where, in a case of this kind, the prosecution introduced statements made by the accused as a part of the state's case in chief, the weight to be given to such statements is a question for the jury, and the prosecution is not bound by them, even though they be not shown to be untrue. *Gankyo Mitsunaga v. People*, 54 Colo. 102, 129 Pac. 241. Statements or explanations made by the accused at the time of the arrest may be introduced as part of the state's case in chief, but the improbability of the statements or explanations may be so apparent that the jury will not believe them, even though they be not contradicted. Their reasonableness is a matter entirely for the jury. *State v. Mandich*, 24 Nev. 336, 54 Pac. 516.

In a criminal case, the question of the guilt of the accused is always with the jury, and, even if a reasonable explanation is given, the defendant is not entitled to an instruction that the prosecution must show the explanation to be false. *Wilson v. State* (Tex. Cr. App.) 84 S. W. 284; *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913.

Considering all the circumstances in this case as they are disclosed by the record, it is our judgment that the verdict of the jury in this case was supported by the evidence,

and we find no error committed by the trial court, the nature of which would be prejudicial to appellants. It therefore follows that the judgment of the trial court and the order denying appellants' motion for a new trial should be affirmed. It is so ordered.

TALBOT, C. J. I concur in the foregoing opinion, except as indicated herein. From a conviction of burglary and an order denying a motion for a new trial the defendants have appealed. On the trial Joseph Caton, senior member of the firm of Caton & Son, and one of the owners of the store burglarized, testified on behalf of the state as to the location of the store at the southeast corner of Commercial row and Virginia street, in the city of Reno; that he closed and locked and left the place about 11 o'clock the night of the burglary, and was called up by telephone by a member of the police force about half past 2 o'clock that night, and went immediately to the cigar store, and found that the outside window had been broken.

One of the grounds upon which defendants moved for a new trial was that there was no evidence to show nonconsent of the owners of the goods and chattels, and that "it is a well-established rule of the law that, where the owner is called as a witness in cases where the indictment charges a burglarious entry with intent to commit larceny, circumstances tending to show nonconsent will not suffice, and the failure of the owner to testify as to nonconsent is fatal." In support of this contention we are referred more especially to Texas cases, holding that, if obtainable, the testimony of the owner that he did not consent must be supplied. These opinions are not in harmony with others in that state, and are contrary to the common law and the practice prevailing in most of the other states. It is somewhat unusual to find conflicting opinions of the same court, written by the same judge, published in the same report. In *McMahon v. State*, 1 Tex. App. 106, and in *Rains v. State*, 7 Tex. App. 588, it was held that the owner need not be called to prove nonconsent; and in *Erskine v. State*, 1 Tex. App. 406, and *Jackson v. State*, 7 Tex. App. 363, it was held that he must be called. In *Wilson v. State*, 12 Tex. App. 487, it was held that both the owner and possessor must be called, if available, before resorting to circumstantial evidence. Among the other cases in that state which are not in harmony are *Wisdom v. State*, 42 Tex. Cr. R. 579, 61 S. W. 926; *Bowling v. State*, 13 Tex. App. 388; *Henderson v. State*, 14 Tex. 504; *Dresch v. State*, 14 Tex. App. 175; and *Williamson v. State*, 13 Tex. App. 514. The cases in Texas holding that there must be direct evidence of the nonconsent of the owner, and the one in Nebraska so holding, which has been overruled, apparently resulted from Phillips on Evidence, 635, which followed an early case in England which was afterwards repudiated and never

became the law generally in that country. In the English case, *R. v. Rogers*, 2 Camp. 654, under an indictment for coursing a deer without the consent of the owner, it was held, in the year 1811, that the owner must be called to negative the consent; but in cases 15 years later, *R. v. Hazy*, 2 O. & P. 458, for cutting timber without the owner's consent, and in *R. v. Allen*, 1 Moo. C. R. C. 154, for killing deer without the owner's consent, it was held that direct evidence of nonconsent of the owner or landlord was not required. In Nebraska, following Phillips on Evidence and the early English case, it was held that the owner must be called to prove that he did not consent. *Rema v. State*, 52 Neb. 376, 72 N. W. 474; *Perry v. State*, 44 Neb. 415, 63 N. W. 26. Later the Supreme Court of that state declined to adhere to that rule, and in *Wiegrefe v. State*, 66 Neb. 23, 92 N. W. 161, and *Von Syoc v. State*, 69 Neb. 522, 98 N. W. 267, said: "All the circumstances surrounding the alleged larceny were inconsistent with a taking with the consent of the owners; and want of consent may be inferred from circumstances shown in evidence, as well as by direct testimony that none was given."

In *Hurst v. Territory*, 16 Okl. 600, 86 Pac. 280, it was held that, under an indictment for larceny of an animal, it was not necessary to allege or prove the nonconsent of the owner of the stolen property. See, also, *State v. Booth*, 46 Mont. 334, 127 Pac. 1017. In *People v. Davis*, 97 Cal. 194, 31 Pac. 1109, after citing *People v. Nelson*, 56 Cal. 82, the court said: "The money was in the possession of Ah Chung, and was taken from his person by the defendants. Therefore it was presumptively his property, and that was sufficient proof of ownership." Under the Penal Code of this state, it is not necessary to allege in the indictment or information that the property was taken against the will of the owner. There is nothing found in the definition of larceny to that effect."

The question is considered by Prof. Wigmore at section 2089, vol. 3, of his work on Evidence, in which he says: "At the suggestion of two eminent American writers and judges, based upon a single English ruling afterwards repudiated, a rule came near to be built up that, on a charge of larceny, the evidence that the taking was done against the owner's consent must include the owner's testimony as an indispensable element. * * * This proposed rule—which might perhaps be more correctly classed as a rule of preference—had but a slight foundation. Premised by certain unimportant English rulings as to the burden of proof in showing a negative, there came a single tentative ruling requiring, in proof of nonconsent, the testimony of the person whose nonconsent was affirmed. This was afterwards wholly repudiated in England. Nevertheless the approval of the eminent writers above quoted

gave the question a vogue in this country, and left it a living one long after the suggestion had been negatived in England. In at least three jurisdictions the suggestion seems to have become the law, and perhaps in one or two others. In the remainder, no notice of the suggestion has in general been taken. So far as the policy of it is concerned, there is nothing to be said in its favor. The accused is amply protected by the rule of reasonable doubt, and the proposed rule merely adds an unnecessary complication and an opportunity for contriving a verbal trap for the judge in his instructions to the jury."

At section 752a, Bishop's New Criminal Procedure, it is said: "At common law, except under such special circumstances as will vary the rule only to outward appearance, if the owner of a chattel consents to another's taking it, such taking cannot be larceny. If the consent was given it is matter simply of defense. Hence nonconsent is not averred in the indictment, and it need not be proved. But in a few of our states there are, as in Texas, statutory larcenies whereof nonconsent is an affirmative element; thus, 'without the consent of the owner.' Then nonconsent must be alleged by the prosecutor and proved. In such a case, while we have seeming rulings that the agent or his owner must be called to the nonconsent, the better doctrine accepts, as adequate in law, circumstantial evidence and the testimony of other witnesses."

In order that the rights of accused persons may be properly safeguarded, there is no necessity, under a statute like ours, which does not require it, for the enforcement of so strict a rule as one requiring the owners and possessors of property stolen or burglarized to take the stand and testify directly that they did not consent. In this day and generation, when an accused person in this country is allowed counsel and to take the stand and have witnesses produced in his behalf, and when the state is required to satisfy every one of 12 disinterested jurors beyond a reasonable doubt that he is guilty before conviction can be secured, there is no good reason why in burglary and larceny the nonconsent of the owner must be proved by his direct testimony, nor why it may not be shown by circumstances, the same as any other fact, if the circumstantial evidence indicates it and the other essential elements of the crime beyond a reasonable doubt. To exact the direct testimony of the owner that he did not consent, when this is shown by the circumstances, is not only to require a vain thing, but would in many cases where the owner is ill or absent, or is a corporation, tend to delay or obstruct the administration of justice without bringing any necessary safeguard to innocent persons accused of crime. The failure to have the owner testify that he did not consent to any breaking or burglary was not sufficient ground for a nonsuit nor for the granting of a new trial, be-

cause the circumstantial evidence indicated that he did not consent.

The testimony of one of the owners of the cigar store alleged to have been burglarized that he closed the store about 11 o'clock that evening and went home, and was called on the telephone by the police at about half past 2 o'clock that night, and, upon going immediately to the cigar store, found the outside window broken, is satisfactory circumstantial evidence that there was an attempt to commit burglary and that the window was broken without his consent.

When the circumstances proven will lead to the conclusion, as in this case, that the owner did not consent, if the accused wishes to avail himself of the consent of the owner, he ought to be required to prove it and to overcome the case made for the state by the circumstantial evidence. Whatever doubt may exist as to whether the defendants broke the window or committed a burglary does not pertain to the evident fact that the owners did not consent to the breaking. The state should not be required to show the facts by direct testimony, even when obtainable, if there is conclusive circumstantial evidence indicating the commission of the crime beyond a reasonable doubt.

If the accused wished to rely upon the consent of the owner as a defense, or desired to have his testimony in this regard, they were at liberty to use him as a witness and ask him whether he had given his consent, or take the stand and show by their own testimony that he had given his consent. No suggestion was made nor exception taken on the trial which called this objection to the attention of the court so that direct evidence would have been supplied if desired. If, in the nighttime, at the point of a gun, a man is relieved of his money, there would be as much necessity for his testimony that he did not consent as in this case. The rule is well settled that, when the ground of the objection is not specified and the exception promptly taken on the trial, the objection is waived. *McGurn v. McInnis*, 24 Nev. 370, 55 Pac. 304, 56 Pac. 94; *Finnegan v. Ulmer*, 31 Nev. 523, 104 Pac. 17; *State v. Williams*, 31 Nev. 360, 102 Pac. 974; *State v. Jones*, 7 Nev. 408; *State v. Mangana*, 33 Nev. 511, 112 Pac. 693; *State v. Foster*, 136 Mo. 653, 38 S. W. 721; *State v. Clark*, 36 Nev. —, 135 Pac. 1083; *Wigmore on Evidence*, § 20. It is also well settled by numerous cases in this court that any technical error which does not prejudice the substantial rights of the accused is not ground for the reversal of a verdict of the jury. *State v. Mircovich*, 35 Nev. 485, 130 Pac. 766; *State v. Clark*, 36 Nev. —, 135 Pac. 1083. As the circumstances indicated the nonconsent of the owner, his failure to testify that he did not consent did not prejudice the defendants.

As offered to the court, instruction No. 9, to which exception is taken, reads: "You

are further instructed that, in order to constitute the crime of burglary, it is not necessary to prove that the defendants, or either of them, actually stole, took, or carried away any of the goods and chattels of Joseph Catton & Son, contained in the store alleged in the indictment to have been burglarized. The gist of the crime of burglary is the entering of the store with the intent to steal the goods contained in said store, regardless of the fact whether or not there was an actual stealing of the said goods." The instruction was given as modified by drawing a pen through the clause "regardless of the fact whether or not there was an actual stealing of the said goods." It would have been sufficient to have eliminated the words "the fact." There is no particular harm in crossing over part of the words in an instruction and leaving them legible, unless they state some matter which is not the law or which is prejudicial, in which case they should be obliterated so as not to be discernible, or the instruction should be rewritten before given to the jury. This instruction is attacked as leaving to one side the entire question of burden of proof, presumption of innocence, reasonable doubt, and as being biased, one-sided, and misleading. It properly told the jury that it is not necessary that there be an actual stealing or taking of goods in order to constitute the crime of burglary. Under the statute, entering with intent to steal constitutes the crime. It was not necessary to have every legal proposition covering the case stated in the instruction; and if the defendants desired instructions on other principles of law applicable, it was their privilege to have them drawn, and to request that they be given to the jury. *State v. Hing*, 16 Nev. 307; *State v. St. Clair*, 16 Nev. 207; *State v. Davis*, 14 Nev. 407; *State v. Pritchard*, 15 Nev. 74; *State v. Raymond*, 11 Nev. 98.

It is also claimed that the verdict is contrary to the evidence and the law. It is urged in the brief that the "officer testified that the defendant Patchen said when arrested that the window was broken and the goods scattered on the pavement when defendants arrived at the cigar stand; that they picked the things up and placed them on the window sill or counter, and that the defendant Burke said, when asked what he was doing, that 'they wanted to buy some tobacco.' Was there anything criminal about such conduct? The place was ablaze with light, the window wide open." It is said that the testimony introduced by the state is inconsistent with the crime of burglary, and that the state is bound by its evidence, including proof of the statement made by the defendants. As they were found at the counter by the broken window of the cigar store between 2 and 3 o'clock in the morning, when the street was usually deserted, and the officer testified that while he was on the sidewalk a few doors away he heard the break-

ing of the glass, and the interval from that time until the arrest of the defendants at the cigar stand being so brief, and considering the proximity of the officers and the defendants, it seems improbable that any other person could have broken into the cigar store without having been observed by the defendants and the officers.

There was evidence for the jury to consider, sufficient to sustain the conviction. Nor should the state be bound by the self-serving declarations of defendants, not under oath, made at the time they were arrested, that they wanted to buy tobacco, when other circumstances were proved by the state from which the jury may have inferred that they had broken through the window and committed burglary.

LENORD v. STATE.

(Supreme Court of Arizona. Dec. 30, 1913.)

1. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS.

On a trial for rape on a female under the age of 17 years, an instrument executed by accused, wherein he admitted that he was the father of the unborn child of prosecutrix, and made provision for the support of her and the child, was admissible to corroborate her as to the principal fact of her having had intercourse with accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.*]

2. CRIMINAL LAW (§ 696*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE—FAILURE TO MOVE.

Where, after an instrument executed by accused on trial for rape, wherein he admitted that he was the father of the unborn child of prosecutrix, had been received in evidence, he offered evidence of the circumstances under which the instrument was signed, indicating that it was signed under duress, but made no motion to exclude it because so executed, the evidence of the circumstances bore only on the weight the jury would give to the instrument as evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.*]

3. CRIMINAL LAW (§ 1170½*)—APPEAL—HARMLESS ERROR—EXAMINATION OF WITNESS.

Where a prosecution for rape was not instituted by prosecutrix, or by any member of her family, but by one interested in the case for accused, and prosecutrix admitted that she had requested money from accused, and had been refused, the exclusion of a question on her cross-examination as to whether she had threatened to prosecute accused if he did not pay her a specified sum was not prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

4. RAPE (§ 35*)—ELEMENTS OF OFFENSE.

To support a conviction for rape, the state must show by competent evidence every material allegation in the information, and every fact essential to the crime, including the fact that prosecutrix was not the wife of accused at the date of the offense alleged in the information.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 42-45; Dec. Dig. § 35.*]

5. RAPE (§ 59*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, on a trial for rape, the court in its instruction gave the statutory definition of the crime, and charged that the presumption of innocence attached to every fact essential to a conviction, an instruction that, if accused raped prosecutrix, and she was under the age of 17 years, the jury must find accused guilty was not objectionable, as permitting a conviction without finding that prosecutrix was not the wife of accused.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88-100; Dec. Dig. § 59.*]

6. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—CONSTRUCTION.

The instructions must be considered as a whole in determining their correctness, and if, when so construed, the law applicable to the facts is correctly stated, an error in an instruction standing alone is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

7. CRIMINAL LAW (§ 732*)—INSTRUCTIONS—COMMENT ON FACTS.

Pen. Code 1901, § 921, subd. 6, providing that the judge may, when the evidence is closed, charge the jury, and must do so on any points pertinent to the issues, if requested by either party, but must not state the testimony, does not conflict with Const. art. 6, § 12, declaring that judges shall not charge with respect to matters of fact, nor comment thereon, but shall declare the law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1696; Dec. Dig. § 732.*]

8. CRIMINAL LAW (§ 825*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Where the trial court declares in its instructions the general principles of law to be applied by the jury in reaching a verdict, accused, if dissatisfied with them, must request others, and, where no such request is made, an omission to give particular instructions is not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

9. CRIMINAL LAW (§ 1172*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

Where, on a trial for rape on a female under 17 years, all the evidence on the age of prosecutrix fixed her age as under 17, and the court specifically charged that, to render a verdict of guilty, the jury must be satisfied that prosecutrix was under that age, an instruction that, if the jury were convinced beyond a reasonable doubt that she was 17 or older, the verdict should be not guilty was not prejudicial as placing on accused the burden of establishing her age at 17 or above before entitling him to an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.*]

10. RAPE (§ 51*)—EVIDENCE—SUFFICIENCY.

On a trial for rape on a female under the age of 17 years, evidence held to show that prosecutrix was not the wife of accused.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

11. RAPE (§ 51*)—EVIDENCE—CIRCUMSTANTIAL EVIDENCE.

On a trial for rape, the fact of nonmarriage of accused and prosecutrix may be established by circumstantial evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

12. CRIMINAL LAW (§ 1134*)—APPEAL—QUESTIONS REVIEWABLE.

The refusal of the trial court to grant a certificate of probable cause for appeal raises no question on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3087-3071; Dec. Dig. § 1134.*]

Appeal from Superior Court, Cochise County; Fred Sutter, Judge.

George L. Lenord was convicted of rape on a female under the age of 17 years, and he appeals. Affirmed.

Doan & Doan, of Douglas, and John Wilson Ross, of Bisbee, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

CUNNINGHAM, J. The appellant complains of errors committed on the trial in admitting evidence, in rejecting evidence, in instructions to the jury, in refusing a new trial because of the failure of the evidence to establish a material allegation of the information, and in refusing to issue a certificate of probable cause for appeal.

The appellant was charged in the information with having on or about the 10th day of November, 1911, committed the crime of rape upon one, Fannie L. Aronwald, a female under the age of 17 years, she not being the wife of him (the said George L. Lenord).

The prosecution offered a number of witnesses, who gave evidence tending to establish, among other things, the act of criminal intercourse and a state of pregnancy of the prosecutrix resulting therefrom, and the birth of the child on February 5, 1913. The prosecution then offered a written document in the form of a contract purporting to have been made between George L. Lenord, the party of the first part, Brandla Aronwald, the mother, Wolf Aronwald, the father, and Aaron Aronwald, the brother of Fannie L. Aronwald, the parties of the second part, and Fannie L. Aronwald, the party of the third part. The document bears the date of November 22, 1912, and recites: "That whereas, the said Fannie L. Aronwald, now in Los Angeles, in the state of California, is in a state of pregnancy, and accuses the said party of the first part with being the father of her unborn child, and the said party of the first part admitting the fact that he is the father of such child, and all the parties hereto desiring to do what is best under the circumstances for the party of the third part, agree among themselves as follows: * * *" The document purports to be an agreement by which the appellant undertook to pay certain sums of money for the use and benefit of the prosecutrix, and for the care and education of the child. On its face is recited that the contract is to be kept secret, and that it is made as a compromise of any and all future civil actions that may arise between the parties thereto on account of the connections of the

appellant with the prosecutrix. We deem it unnecessary to further set out the document. The paper at the foot bears the signatures of "G. L. Lenord" and "Fannie L. Aronwald."

[1] The prosecution proved the signature upon the document and a copy thereof as that of the accused, and proved that he signed both the paper and the copy, and proved that they were duplicates, and offered them in evidence. Defendant objected for the reason that the offer was a confession, and was not shown to have been voluntarily made. The objection was sustained. Then the document was offered as an admission against interest, and admitted as such over the objection of defendant; to which ruling defendant reserved an exception. These are the grounds for the first assignment of error; but the allegation of error is in these words: "The court erred in admitting in evidence the agreement dated November 22, 1912, as it was proven to have been executed under duress, and was not a voluntary confession, and hence inadmissible." The record does not bear out this allegation that it was proven to have been executed under duress. At the time it was admitted in evidence, it was shown to have been executed by the defendant, and upon its face tended to corroborate the evidence of the ultimate fact sought to be established, that is, the act of sexual intercourse, as charged in the information. *Woodruff v. State*, 72 Neb. 815, 101 N. W. 1114.

That this evidence was introduced solely for the purpose of corroborating the prosecutrix as to the principal fact of her having had sexual intercourse with the defendant on November 10, 1911, was well understood, and it, as well as other acts of the same kind, which took place subsequently to the one specifically charged in the information, was admissible for that purpose. *Leedem v. State*, 81 Neb. 585, 590, 116 N. W. 496; *People v. Mathews*, 139 Cal. 527, 78 Pac. 416; *Smith v. Commonwealth*, 109 Ky. 685, 60 S. W. 531; *State v. Robertson*, 121 N. C. 551, 28 S. E. 59; *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972; *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108.

[2] After the evidence had been admitted, the appellant offered the circumstances under which the contract was made and signed. Such evidence was not offered in support of a motion to exclude the evidence, and cannot be considered to have that effect, in the absence of such motion, the evidence having been previously admitted. If the circumstances surrounding the execution of the document were such as would satisfy the trial court that the so-called contract was executed under duress, or from any cause it appeared that it was not the voluntary act of the appellant, and such evidence was submitted to the court, or an opportunity was asked to submit such evidence to the court before the document was admitted, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

having admitted the document, if such evidence was offered to the court in support of a motion to exclude such evidence, the evidence of the circumstances would then bear upon the admissibility of the document as evidence, and would be addressed to the consideration of the court in admitting or in excluding the same as evidence. The record discloses that the circumstances were not so offered for the consideration of the court, but were offered as other evidence, for the consideration of the jury, and, as such, had a bearing not upon the admissibility of the document attacked thereby, but upon the weight the jury would give to such document as evidence. The evidence of the circumstances of the execution of the document was addressed to the weight and not to the admissibility of the evidence.

[3] The appellant contends that error was committed by the court in sustaining the objection to a question, propounded to the prosecutrix on cross-examination, as to whether she had threatened to prosecute the defendant herein if he did not pay her the sum of \$2,500, and offered that, if he did pay her that sum, she would not have him prosecuted.

The record discloses that counsel had the prosecutrix under cross-examination, and had developed the fact that, while she was in California, she wrote the accused, asking him to send her some money. He said he would send her money, but failed to do so. She was asked why she came back, which was met by an objection, and then she was asked: "Did you or did you not state to Lenord that, if he would not pay you \$2,500, that you would come back here and have him prosecuted, and that if he would pay you that you would drop it, and it would be all right?" An objection was sustained to the question. Counsel stated, before the court ruled upon the objection, that the evidence was material to show motive of the entire case, and that he expected to follow it up with a little more just like it, and intimated that the statements were put in for impeaching purposes. This is the state of the record upon which the error complained of is assigned. Clearly the circumstances under which the question was asked compel the candid mind to conclude that the question called for an answer giving the contents of letters written by the prosecutrix to the accused. If so, the accused would be presumed to have the possession of those letters, or to be able to account for their absence, and they would be the best evidence of their contents. The question called for secondary evidence, and not the best evidence. This was a sufficient objection to the offer as made. In the absence of any evidence that the prosecutrix instituted the prosecution, her motive in the case was immaterial. She had admitted that she requested money, and it was in evidence that she did not receive the money. Appellant contends that because it was in evidence

over his objection that the accused had made an agreement providing for the payment of \$2,500, that it was eminently proper to ask this witness the question as to whether or not she had not offered to withhold the prosecution if money was paid her. It would be eminently proper to offer such testimony in connection with testimony that the prosecutrix instituted the action, and commenced the prosecution after a refusal; but the judgment roll in this cause discloses that this action was commenced by one presumably in no manner connected with the prosecutrix or any member of her family, either as a blood relation, business relation, or otherwise, in fact, by one who at subsequent stages of the proceeding, appears conclusively to be interested in the case in opposition to the success of the prosecution. Such being the state of the record, any propositions to withhold a prosecution would appear to have no reference whatever to prosecutrix's motives in that respect. The answer would be immaterial, and the court committed no error in rejecting the offer.

[4] The complaint is made that the court erred in instructing the jury to find the defendant guilty, without proof or evidence that the prosecuting witness was not the wife of the defendant. The appellant has not pointed out wherein the court gave any instruction to the jury to find the defendant guilty, without proof or evidence that prosecuting witness was not the wife of the defendant. In order to justify a conviction under the information, it was necessary for the state to establish from competent evidence, to the satisfaction of the jury, beyond a reasonable doubt, every material allegation contained in the information, and every fact essential to the crime charged. That the prosecutrix was not the wife of the accused at the date of the act was an allegation in the information, and such allegation was material, and the establishment of the fact from the evidence beyond a reasonable doubt was essential to a conviction.

[5, 6] A complete search of the instructions given fails to disclose such instruction complained of. In his argument, appellant particularly designates the following paragraph of the instructions as containing the charge alleged in the assignment: "You are instructed, however, that if you find from the evidence, beyond a reasonable doubt, that the defendant, on or about the 10th day of November, 1911, did have sexual intercourse with the said Fannie L. Aronwald, and you further find from the evidence, beyond a reasonable doubt, that at the time of the commission of said alleged offense, the prosecuting witness, Fannie L. Aronwald, was under the age of 17 years, you should find the defendant guilty as charged."

Standing alone, such an instruction is open to severe criticism in failing to add thereto "unless the prosecuting witness was,

at the time the alleged offense was committed, the wife of the accused, and, if the jury entertain a reasonable doubt from the evidence or from the absence of any evidence upon that question, then you should give the defendant the benefit of the doubt, and acquit him." Courts have generally considered the practice of charging juries to enumerate a part of the essential facts necessary to a conviction, and to omit from the enumeration one or more such facts, as more or less vicious. The effect to be given to such charge when it arises depending upon whether the omitted condition was closely contested or otherwise, and whether the condition was elsewhere sufficiently covered in the instructions, and in a measure the extent to which the law requires the trial court to go in covering the law in the light of the facts in the case. The instructions must be construed as a whole, and, in so construing them, we find that the court read to the jury the charge laid in the information. In the language of the statute, the court gave the jury the definition of rape, and also, in the language of the statute, informed the jury in what the essential guilt of rape consists. Then the court instructed in order to convict of any criminal offense there must exist a union or joint operation of act and intent or criminal negligence. Also, that the law presumes that every one charged with crime is innocent of the offense charged until his guilt has been established by competent evidence, beyond a reasonable doubt, and that this presumption attaches at every stage of the case, and to every fact essential to a conviction. The jury was then instructed as to what is meant by a reasonable doubt, and as to their duty and powers while considering the evidence in arriving at the truth and facts of the case. They were instructed as to their duty in case they found from the evidence, beyond a reasonable doubt, that the criminal act was accomplished, and that Fannie L. Aronwald was under the age of 17 years, and that she made no complaint of the commission of the offense, if such fact existed, and that her failure to so complain could not be considered by the jury because that fact is not material; that, if the jury found from the evidence, beyond a reasonable doubt, that the accused did have sexual intercourse with the prosecutrix on or about the date alleged, and they are further convinced beyond a reasonable doubt that the prosecutrix at such date was 17 years of age or older, then it was their duty to acquit the defendant; that, if they found from the evidence beyond a reasonable doubt that on the date charged the defendant did have sexual intercourse with the prosecutrix, and, if they found from the evidence beyond a reasonable doubt that at such time the prosecuting witness was under the age of 17 years, then they should find the defendant

guilty, and it made no difference whether the prosecuting witness, at the time, consented to the act of sexual intercourse or not. "The law is that a girl under the age of 17 years cannot legally consent to the act of sexual intercourse with any person other than her husband." The jury was then instructed as to the form of their verdict, and how it should be signed and returned. The jury was told two different times that the charge on trial included the fact that the female violated must not have been the wife of the accused, once in the definition of the offense, and once in the closing part of the charge last quoted. The jury was instructed that the presumption of innocence attaches at every stage of the case, and to every fact essential to a conviction. The jury could not have entertained any doubt that it was necessary for them to believe from the evidence that the prosecutrix was not the wife of the defendant before they could convict him, from these instructions taken as a whole.

[7, §] The state Constitution requires that the "judges shall not charge juries with respect to matters of fact nor comment thereon, but shall declare the law." Section 12, art. 6. The statute (subdivision 6, § 921, Pen. Code Ariz. 1901) in no way conflicts with this constitutional provision, wherein it provides that the "judge may then (when the evidence on both sides is closed) charge the jury, and must do so on any points pertinent to the issue if requested by either party; and he must not state the testimony, but shall declare the law." The expression in the Constitution and the statute means that the judge shall instruct the jury as to the general principles of the law which of necessity must be applied by them in reaching a correct conclusion upon the questions submitted for their consideration. That duty was performed by the judge in this case sparingly, it is true, but sufficiently, under the law, and appellant must be deemed to have been satisfied with the instructions as delivered at the time they were delivered to the jury, otherwise he could and we presume he would have requested more specific instructions upon the points of law pertinent to the issue. No such request appears in the record, and no such request was made. The general rule seems to be that, if the defendant is not satisfied with the charge as delivered by the court, he should submit such instructions as he desires, with a request that they be given, and, if no request is made, the omission to give particular instructions is not reversible error, particularly when the charge given covers the facts in the case, and states the law applicable thereto, and presents the case fairly, and guards the substantial rights of defendant. 12 Cyc. 658, 659.

[8] Appellant complains of the following paragraph of the instructions: "If you find from the evidence in this case beyond a rea-

sonable doubt that on or about the 10th day of November, 1911, defendant had sexual intercourse with the complaining witness, * * * and you are further convinced beyond a reasonable doubt that the said Fannie L. Aronwald, at the time said alleged crime was committed, was 17 years old or older, you are then instructed that, notwithstanding the fact that you find that the defendant did have such sexual intercourse with the prosecuting witness, your verdict should be not guilty." Appellant contends that this instruction places upon defendant the burden of establishing beyond a reasonable doubt the age of the prosecutrix before he is entitled to an acquittal; whereas the law only requires a reasonable doubt as to her age to exist to entitle him to an acquittal. The instruction as given is open to a great extent to the criticism advanced. However, all the evidence in the record bearing upon the question of the age of the prosecutrix at the date of the act of intercourse fixes her age as under 17 years. An effort was made to discredit the testimony of the prosecutrix and her father by proving that they had each made statements of her age that conflict with their testimony given on the trial touching that question. The record discloses no evidence tending in any manner to fix the age of prosecutrix at 17 years or older at the date of the alleged criminal act. The jury was, during the course of the instructions, specifically instructed by the court three different times that they must be satisfied from the evidence, beyond a reasonable doubt, that the prosecutrix was under the age of 17 years at the time of the commission of the alleged criminal act, before they could convict him of the charge; and, in view of the positive evidence fixing her age as under 17 years, and in view of the absence of any testimony tending to fix her age as 17 years or over, if the instruction complained of had been omitted, the result must have been the same; and, though erroneous, it could not have been prejudicial. The whole case considered, the jury could not have been misled to the prejudice of the accused by the instruction in this case, in the absence of any evidence tending to show the age of the prosecutrix was 17 years old or older.

[10] The appellant contends that there is no evidence in the case proving or tending to prove that the prosecutrix was not the wife of the defendant. This question was raised upon a motion for a new trial and otherwise, and it is sufficiently assigned as error on this appeal. This is the principal error relied upon by appellant for a reversal of the judgment of conviction. A careful examination of the evidence in the case discloses that no direct proof was offered by the prosecution, or by the defendant, upon the question whether the prosecutrix was

or was not his wife at the time the act was accomplished. The cause was tried by all the parties and by the court upon the theory that the accused and the prosecutrix were not husband and wife.

We find abundant circumstantial evidence in the record bearing upon the question of the relation of the parties. The evidence presents these circumstances: That the prosecutrix in 1896 was a nursing child, in the family of Wolf Aronwald at Warsaw, Russia; that she came to Douglas in 1907 as a part of the family, and entered the public schools there; that she worked in Kline's store in Douglas, and, after she quit working there in 1911, she worked for her father; that about the 10th of November, 1911, she applied to George L. Lenord for a position, but was not employed by him; subsequent to that date she made frequent applications to him for a position; that she came to his store with her little sisters and other relatives many evenings and waited for the picture shows to open; that she left with the defendant for safe-keeping small sums of money, which he returned to her when she was about to leave Douglas for Los Angeles; that, when she learned that she was pregnant, and informed defendant of that fact, he advised her to consult a doctor, and he recommended a remedy to produce an abortion, and advised her to take the drug which he believed would have that effect; he consulted a doctor about her condition, or told her he had so consulted a doctor on that subject; during the trial she gave her name as Miss Fannie L. Aronwald, and she was referred to as "Miss" a number of times during the course of the trial.

The appellant denied ever having had sexual intercourse with the prosecutrix. In reference to a contract he had signed, in which he admitted the fact that he was the father of her unborn child, under date of November 22, 1912, when asked by his counsel why he signed the document, answered: "Why, I had another Jew girl to make an allegation against me that I was under bond for, and I had just recently married, just a short time before that, and Mr. French called me up. * * *". He did not sign the contract then, but several days after he was called and told that the Jews were getting impatient (by the Jews meaning the family of the prosecutrix), and that he had better do something, in answer to which information, appellant said: "Well, I will send my wife home and you bring them down to my store. * * * I signed it and dug up \$42.50 to pay their transportation to Los Angeles. They wanted to visit the girl." Witness Miss Rogers testified that Lenord was married to her sister at the time of the trial.

These facts are certainly inconsistent with the fact that the prosecutrix was the wife of the accused on the 10th day of November, 1911. In April, 1913, he was the husband of

Miss Rogers' sister. On November 22, 1912, he had recently married, according to his own testimony. On November 10, 1911, the prosecutrix first applied to him for a position, when he accomplished the act. If the law permits the proof of the allegation that the prosecutrix was not the wife of the accused to be made by circumstantial evidence, there is such evidence in abundance in this record. If the law requires direct proof of such fact, the prosecution has failed, and the verdict is contrary to the law and evidence.

[11] Appellant contends that direct and not circumstantial proof must be made of that fact of nonmarriage, before a conviction can stand, and cites, among other cases, *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013. The question considered by the court in the *Gonzalez* Case was whether the evidence in the case was sufficient to sustain the verdict of guilty of statutory rape. The court decides that there was some testimony from which the inference might be drawn that the parties were not married, yet, such testimony being true, it was not inconsistent with the fact that they were married; and for that reason the testimony was not sufficient to sustain a conviction. The court was not considering the question whether circumstantial evidence is incompetent to prove that the prosecutrix was not the wife of the accused at the time of the alleged criminal act, and any language used by the court seeming to decide that question must be considered in connection with the sufficiency of the evidence in that case before the court, otherwise the remarks of the court are dictum, and not binding as authority. If the *Gonzalez* Case is to be considered as holding that direct evidence alone is necessary from which to establish the fact that the prosecutrix was not the wife of the accused, upon a trial of a charge of statutory rape, then that case stands alone in the courts of the country that are unaffected by statute so requiring such evidence.

Beyond question, under our statute it is necessary to allege and prove that the prosecutrix was not the wife of the accused at the date of the alleged criminal act, as that fact is an essential ingredient of the crime; still it is not absolutely necessary to prove that fact by direct and positive testimony, but, like every other essential fact, it may be proven by facts and circumstances from which the conclusion may be drawn. *State v. May*, 59 Wash. 414, 109 Pac. 1028, Ann. Cas. 1912B, 113; *State v. Pipkin*, 221 Mo. 453, 120 S. W. 17; *State v. Reed*, 153 Mo. 451, 55 S. W. 74; *Brenton v. Territory*, 15 Okl. 6, 78 Pac. 83, 6 Ann. Cas. 769; *Munger v. State*, 57 Tex. Cr. R. 384, 387, 122 S. W. 874. The fact may be established by circumstantial evidence, and we think it was sufficiently so established in this case. The facts and circumstances bearing upon the question could

not be true, and yet the fact exist that the prosecutrix was the wife of the accused. Even the *Gonzalez* Case makes that the rule for decision.

[12] The appellant complains of error committed by the judge of the trial court in refusing to grant a certificate of probable cause for appeal. This assignment raises no question for consideration upon this appeal.

No reversible error appearing, the judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

ARIZONA COPPER CO., Limited, v. STATE
ex rel. and to Use of WEBSTER,
County Treasurer.

(Supreme Court of Arizona. Sept. 26, 1913.
Rehearing Denied Dec. 30, 1913.)

1. TAXATION (§ 587*)—COLLECTION—DEFENSE
—WAIVER—UNJUST ASSESSMENT.

Where a taxpayer fails to apply for a reduction of his assessment to the county board of equalization at its July meeting, as required by Civ. Code 1901, pars. 3867, 3868, he cannot set up that the assessment was unjust, as a defense in an action to collect the taxes thus assessed, even though he applied for a reduction to the board at its August meeting, and though the assessor were guilty of fraudulent and corrupt conduct.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1196-1200; Dec. Dig. § 587.*]

2. TAXATION (§ 592*)—COLLECTION—ACTION—ANSWER—ALLEGATION OF FRAUD.

In an action for taxes due the state, an allegation of the answer merely that the county board of equalization, actuated by personal hostility and acting with the unlawful and malicious purpose of injuring defendant, refused to reduce the valuation of his property was not a sufficient allegation of fraud as against the board, in the absence of any statement that defendant in due time appeared before the board and was refused a hearing, or that the board allowed a hearing and arbitrarily disregarded conclusive evidence of overvaluation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1205-1218; Dec. Dig. § 592.*]

3. TAXATION (§ 468*)—EQUALIZATION—EVIDENCE.

While the action of the county board of equalization is necessarily informal, it cannot reduce a valuation in the absence of any evidence that it was erroneous.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 837; Dec. Dig. § 468.*]

4. TAXATION (§ 493*)—EQUALIZATION—RIGHT OF APPEAL.

A taxpayer may appeal, under Civ. Code 1901, par. 3875, from the action of the county board of equalization, though the board merely approves and neither raises nor lowers the valuation made by the assessor.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

5. TAXATION (§ 587*)—COLLECTION—ACTION—DEFENSE—ADEQUACY OF REMEDY BY APPEAL.

Where a taxpayer, by failing to apply to the county board of equalization in due time for a reduction of his assessment, loses his right to appeal from an order of the board approving the valuation by the assessor, he cannot

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
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not be heard to complain, in a subsequent action against him for the taxes thus assessed, that the remedy of appeal provided by Civ. Code 1901, par. 3875, is inadequate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1196-1200; Dec. Dig. § 587.*]

6. TAXATION (§ 490*)—EQUALIZATION—COLLATERAL ATTACK.

An order of the county board of equalization, approving the valuation of a taxpayer's property as made by the assessor, cannot be collaterally attacked in an action under Laws 1903, No. 92, against the taxpayer for the taxes thus assessed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 872, 873; Dec. Dig. § 490.*]

7. TAXATION (§ 592*)—COLLECTION—ACTION—JUDGMENT ON PLEADINGS.

Where the complaint, in an action for taxes, complies with requirements of Laws 1903, No. 92, § 87, prescribing the essentials of such complaint, a mere general denial is insufficient to overcome its probative force and prevent the rendition of a judgment on the pleadings, where the answer admits defendant's ownership, the value, assessment by the proper officer, its equalization, and tenders the amount admitted to be due.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1205-1213; Dec. Dig. § 592.*]

8. TAXATION (§ 598*)—COLLECTION—ACTION—COSTS—ALLOWANCE OF ATTORNEY FEES.

In view of Civ. Code 1901, pars. 1557, 1558, providing that the prevailing party shall file and serve a statement of his costs, to which the opposing party may file exceptions, it was not error to allow attorney fees to the amount of 25 per cent. of the judgment rendered against defendant in an action for taxes, pursuant to Laws 1903, No. 92, § 86, providing that such fees shall be taxed as costs, though a general denial was filed and the attorney's contract with the collector was not introduced in evidence, where defendant did not move to retax the costs; the presumption in such case being that the amount charged was authorized by the attorney's contract and was properly included in the judgment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1220; Dec. Dig. § 598.*]

Appeal from Superior Court, Greenlee County; F. B. Laine, Judge.

Action by the State, on the relation and to the use of John M. Webster, Treasurer and ex officio Tax Collector of Greenlee County, against the Arizona Copper Company, Limited, a foreign corporation. From judgment for plaintiff, defendant appeals. Affirmed.

This is an action at law to collect taxes for the year 1911 alleged to be due the state. The action is authorized by the provisions of Act 92, Laws of 1903, which provides for the collection of delinquent taxes. The appellant's answer to the complaint consists of (1) a general demurrer, (2) special demurrer, (3) general denial, and (4) fraud on the part of assessing and equalizing officers. The fraud is alleged as follows:

"For further answer to the said complaint defendant says: That it is, and was at all the times mentioned in the complaint herein, the owner and in the possession and control of the property described therein. That, for the purposes of taxation, property in the ter-

ritory of Arizona for the year 1911, being the year for which the plaintiff seeks by this action to enforce the collection of taxes alleged to have been levied upon and against the defendant's property described in said complaint, the various officers of the territory of Arizona charged with the valuation of the property in said territory for taxation determined upon and fixed as a basis therefor (except as to the products of producing mines) a valuation of not to exceed 40 per centum of the full cash value thereof. That, in pursuance of such determination, the officers in the various counties in said territory, and the territorial board of equalization, as well as the boards of equalization of the several counties of said territory, charged with the valuation of the property in said territory for the purpose of taxation for said year 1911 and with the duty of the equalization of such valuations, valued, and equalized the valuations of, all the property in said territory and in the several counties thereof, subject to taxation, except that of this defendant, as hereinafter set forth (and excepting the products of producing mines), at not to exceed the said 40 per centum of its full cash value. That the assessor of said Greenlee county, acting in that respect in accordance with the general rule of valuation of property adopted, practiced, and under which property was valued for the purpose of taxation in said territory and in the several counties thereof as aforesaid, did in fact value all other property in said Greenlee county (except the products of producing mines and excepting that of the defendants as hereinafter set out), for the purposes of taxation for said year 1911, at a valuation not exceeding 40 per centum of its full cash value. That the assessor of said Greenlee county was by law charged with the valuation of property in said Greenlee county in said territory for the purposes of taxation for said year 1911, and in fact did fix the valuation thereof, including that of the defendant, as hereinafter mentioned, it all being then located and situated in said county of Greenlee, upon which the taxes, the collection of which is sought by this action to be enforced, were actually levied. That the said assessor was at all said times personally hostile toward this defendant and its corporate officers, agents, and managers, and entertained personal animosity toward it and toward them, and was during all said times in such a state of mind toward this defendant and its corporate officers, agents, and managers as would and did preclude him from acting fairly, impartially, and justly in the matter of the valuation of defendant's said property for the purposes of taxation. That said assessor as aforesaid, intending thereby to harass, embarrass, and oppress, injure, and damage this defendant, valued the property of this defendant, described in the complaint, for the purposes of taxation for said

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

year 1911, and each and every part thereof, at a sum greatly in excess of 40 per centum of its value, to wit, at more than 60 per centum thereof in the aggregate. That 40 per centum of the true cash value of all said property of the defendant described as aforesaid in the complaint is and was not to exceed the sum of \$1,170,368.95. That the said assessor, acting as aforesaid with a malicious and unlawful intent to harass, embarrass, annoy, oppress, injure, and damage this defendant, valued the said property of the defendant for the purposes of taxation at the sum of \$1,899,458.50, being in excess of \$729,489.55 over and above the true and just valuation thereof as aforesaid.

"Defendant further says: That the district attorney of said county of Greenlee, and each of the members of the board of supervisors of said county, were, during all of said year 1911 and during all the times while said property was being listed for taxation and valued, and the valuation thereof equalized, and each of them was personally hostile toward this defendant and its officers, agents, and managers and bore personal animosity against it and them, and that there existed in each of them such a state of mind as would preclude them severally and collectively, and which did in fact preclude them severally and collectively, from acting in the matter of the valuation of defendant's said property, and in the equalization of the valuation thereof, proportionately to that of other property in said county, with fairness, justice, and impartiality. And on or about the — day of August, 1911, and while the board of supervisors of said Greenlee county was in session and acting as a county board of equalization, and while the said assessor or said county and the district attorney of said county were present aiding, advising, and assisting said board of equalization, this defendant appeared before said board of equalization and then and there asked that the valuation of its property fixed as aforesaid by said assessor might be reduced by the sum of \$729,489.55, being the excessive valuation thereof as aforesaid, to the sum of \$1,170,368.95, so that such valuation of defendant's property aforesaid might accord with and be valued by the rule aforesaid applied to the valuation of all other property for the purpose of taxation in said county and in said territory for said year 1911. That said board of equalization, aided and assisted therein by the county assessor and said district attorney as aforesaid, and all acting in the premises with the unlawful and malicious purpose of harassing, embarrassing, oppressing, injuring, and damaging this defendant, refused to reduce said valuation of said property or any part thereof, and ordered that the valuation thereof as made by the assessor as aforesaid should be, remain, and stand as the assessed valuation of defendant's said property for the purpose of

taxation for said year 1911. That thereafter, as defendant is informed and believes, the board of supervisors of said Greenlee county did levy and assess against said property, and all thereof, taxes based at and proportioned upon said grossly excessive valuation thereof, all substantially as stated in the complaint, to wit, in the aggregate a sum of \$38,458.29, being the amount of taxes for the enforcement and collection of which plaintiff brings this suit."

To the answer of fraud, appellee interposed: (1) A plea to the jurisdiction of the court to hear the issue, alleging that the court's powers were limited by paragraph 3875, tit. 62, c. 3, Revised Statutes of 1901. (2) Specially demurred (a) that the answer showed that appellant's property was assessed for only 60 per cent. of its cash value; (b) that answer is a collateral attack on judgment of board of equalization; (c) that tender is insufficiently pleaded; (d) that insufficient facts to show legal fraud are pleaded. (3) Plea in bar (a) in that answer admits jurisdiction of assessing and equalizing officers; (b) that tender pleaded is an estoppel to deny jurisdiction; (c) a failure to appeal from action of board of equalization after appearing at the August meeting and asking for a reduction. * * * (4) A general and special denial of all the allegations of appellant's affirmative answer.

The special demurrer was sustained, and, appellant refusing to amend, judgment was entered for appellee for taxes, penalties, interest, and costs. From this judgment this appeal is taken.

Kibbey, Bennett & Bennett, of Phoenix, for appellant. Stoneman & Ling, of Phoenix, for appellee.

ROSS, J. (after stating the facts as above). The demurrers to appellant's answer alleging fraud upon the part of the assessing and equalizing officers present two questions: First. As to whether the equitable defense of fraud may be interposed in an action at law to collect delinquent taxes under the provisions of Act 92, Laws of 1903. Second. Granting that such a defense is allowable, are the facts alleged in answer sufficient to constitute fraud? We will consider these two propositions in the inverse order stated above.

[1] The county assessor, under our revenue law, must take the initial step in ascertaining and valuing the assessable property of his county. Indeed, this duty is solely his. Having listed and valued the property of his county, his assessment roll is given over to the board of supervisors as a board of equalization whose duty it is to equalize the values of the property within their county. It is in connection with these duties enjoined by law upon the assessor to list and value, and the board of equalization to equalize, the property of their county that

the appellant bases its claim of fraud. It is charged that the assessor was hostile towards appellant, its officers, agents, and managers, and entertained personal animosity toward it and them, and, because of this state of mind, he would not and could not act fairly, impartially, and justly in the valuation of appellant's property, but that, intending thereby to harass, embarrass, and oppress, injure, and damage appellant, he valued its property at more than 60 per cent. of its true value in the aggregate, while all other property in Greenlee county was placed at a valuation not exceeding 40 per cent. of its full cash value. It requires no argument to discover in these facts a clear case of discrimination and inequality. The taxpayer is entitled to the fair and honest judgment of the assessing officer in fixing valuations. To say the least, it is apparent from the facts as alleged (and they must be taken as true on demurrer) that the assessor acted arbitrarily, partially, and unjustly towards appellant. There was not only discrimination as between taxpayers but the fundamental principle of uniformity was violated. The appellant was entitled to have the wrong done it corrected. Its property, being proportionately overvalued or excessively valued when compared with the valuation of other property in Greenlee county, was entitled to a reduction so as to equalize it with other values. A taxpayer in such a situation, under the laws of Arizona, must first take his case before the county board of equalization. This board, which meets in July of each year, has power to determine whether the assessed value of any property is too small or too large, and it may change or correct any valuation by adding thereto or deducting therefrom. Reduction may be made on its own motion or upon application of the taxpayer. Paragraphs 3867, 3868, Revised Statutes of 1901.

In those jurisdictions where an aggrieved taxpayer is permitted under the law to make his objections to an assessment, as made by the assessing officer, to a reviewing or equalizing body, it is uniformly held, so far as we have seen, that he must first exhaust that remedy before he may invoke the aid of the courts to relieve him. In 87 Cyc. 1079, the law is so well stated that we quote: "When the statutes provide a remedy against an excessive, erroneous, or improper assessment of property of an individual, by proceedings before a board of equalization or review, the taxpayer must at his peril avail himself of this remedy and cannot resort to the courts in the first instance; and, if he neglects properly to bring his complaint before the board of review, he cannot assail the assessment in any collateral manner nor invoke the common-law or equitable powers of the courts for the redress of his grievance."

The appellant made no application to the county board of equalization for a reduction of the valuation of its property at its July

meetings. It was decided by this court in *State v. Supervisors*, 127 Pac. 727, that the board of equalization had power at its July meetings, on its own motion or on application, to reduce valuations when in its judgment the value was fixed too high, and it was also held that the board had no power or jurisdiction to make a reduction at its August meeting. The application to the board at its August meeting for a reduction of valuation was a futile thing. If the request had been granted and values lowered by the board, the order would have been of no effect as without and beyond the jurisdiction of the board. *State v. Supervisors*, supra. The appellant, therefore, did not avail itself of the remedy of applying to the board of equalization, as provided by our statutes, to have its excessive valuation corrected.

It is insisted, however, that the fraudulent and corrupt conduct and action of the assessor vitiated the assessment; that fraud vitiates all transactions; and that the assessor's acts were void, resulting in no assessment whatever. The board of equalization's power to correct an overvaluation is the same whether the excess is the result of defective judgment honestly exercised or good judgment corruptly and fraudulently exercised. The damage or injury to the taxpayer is the same whatever the motive of the assessor or even in the absence of a motive. The language of the statute is: "Said board shall have power to determine whether the assessed value of any property is too small or too large, and it may change and correct any valuation, either by adding thereto or by deducting therefrom. * * *" Paragraph 3868, Revised Statutes of Arizona 1901.

The reasoning of the court in *Crawford v. Polk County*, 112 Iowa, 118, 83 N. W. 825, wherein the taxpayer was complaining of an arbitrary and fraudulent and excessive assessment, applies with force to the facts of this case. The court in that case said: "An error in overvaluation is always subject to correction and, if fraudulent, differs from others only with respect to the motive of the assessor. The same remedy is available, and there appears no good reason for not following it. But it is said fraud vitiates everything, and for this reason resort may be had directly to the courts. That may be true as between private parties, but the state and its agencies ought not to be deprived of the revenues nor the citizen relieved of his just portion of the burden of taxation because of the evil motive of the officer."

In *Los Angeles Gas & Electric Co. v. County of Los Angeles*, 162 Cal. 164, 121 Pac. 384, the court said: "Where the only alleged effect of the fraud of the assessor is excessive valuation of the property of the taxpayer for assessment purposes, the conclusion of the board of equalization that the fair value for such purposes is the amount fixed by the assessor would appear to render the fraud of

that officer immaterial, for it is in no way injurious. According to the conclusion of the board, the property is assessed at the same value proportionately as all the other property in the county. Unless that determination can be avoided, it is conclusive on the question of fairness of the valuation, hence on the question of injury. Under the authorities it cannot be avoided unless the board has proceeded 'arbitrarily and in willful disregard of the law intended for their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers' (Oregon, etc., *R. R. Co. v. Jackson Co.*, 38 Or. 589, 599, 84 Pac. 307, 65 Pac. 369), or unless there be something equivalent to fraud in the action of the board. Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board. Such a board is, 'in the absence of fraud or malicious abuse of its powers, * * * the sole judge of questions of fact and of the values of property' " (*La Grange, etc., Co. v. Carter*, 142 Cal. 565, 76 Pac. 243).

[2] There is an attempt in the appellant's answer to impeach the honesty, fairness, and impartiality of the board of equalization. They are charged with having the same prejudices and motives as the assessor. They, however, did not originally fix the value of which complaint is made. It is not shown that they even knew that appellant's property was proportionately overvalued. When the untimely application at the August meeting of the board was made, the extent of appellant's efforts, using its own language, was that it "appeared before the board of equalization and then and there asked that the valuation of its property fixed as aforesaid by said assessor might be reduced by the sum of \$729,489.55, being the excessive valuation thereof. * * * " The matter of raising or lowering valuations of property by the board of equalization is not so trivial or unimportant as that it may ordinarily be done upon the mere "asking" of the taxpayer. There should be submitted to the board real and substantial reasons before expecting its members to change or modify the official finding of another officer of the county.

[3] While the procedure of necessity is informal and there is an absence of technical requirements, the judicial action of the board in lowering valuations should be founded in reason and upon facts. To lower a valuation upon a request and without evidence would be as arbitrary as it would be to raise a valuation without notice or proof. In the absence of an allegation that there was a tender of proof that appellant's property was proportionately overvalued, and there being nothing alleged to indicate or show that the board knew of the discrimination or proportionate overvaluation, the charge of fraud and oppression on the part of the board falls to the ground. To the al-

legations of fraud and oppression in appellant's answer, the language of the court in *County of Cochise v. Copper Queen Co.*, 8 Ariz. 221, 232, 71 Pac. 946, 949, seems particularly applicable. The court there said: "It is a general rule of pleading that, in alleging fraud, the facts which constitute such fraud must be stated. To characterize an act as 'fraudulent' does not, in legal effect, charge it as fraudulent, unless some circumstances or fact be charged which shows in what the fraud consists and how it has been effected." The general charge that the board, being actuated by motives of personal hostility, and "acting in the premises with the unlawful and malicious purpose of harassing, embarrassing, oppressing, injuring, and damaging" the appellant, "refused to reduce" the valuation of property, and "ordered the valuation thereof as made by the assessor should be, remain, and stand as the assessed valuation" of appellant's property, is not a sufficient allegation of fraud as against the board and, standing alone, amounts to nothing. Had such allegation been aided and supported by a showing that appellant, at a time allowed by law, appeared before the board and demanded a hearing and a hearing was refused, or, if allowed, the evidence of overvaluation, although conclusive, was arbitrarily disregarded, the court would have something by way of specific acts to test the truth of the general allegation of wrong conduct. The board of equalization when legally assembled with jurisdiction to act in the premises, upon a proper and sufficient showing, should have been appealed to to rectify the wrong here complained of. From appellant's own showing no such opportunity was ever presented. It is not even shown that the board knew of the alleged overvaluation.

[4] The appellant has devoted much of its brief to an effort to show that the remedy by appeal, as provided in paragraph 3875, Revised Statutes of 1901, could in no event be availed of by it, and that, unless it is sustained in its contention in its present form, it is without remedy. One of the reasons assigned against the remedy of appeal, as granted by paragraph 3875, supra, as not being open to appellant, is that the terms of the statute limit the right to those only, the value of whose property was "fixed by the board of equalization." The valuation as returned by the assessor is the valuation of which complaint is made. It was neither raised nor lowered by the board, and therefore it is argued the board had nothing to do in fixing the value. If that be true, the appellant has argued itself out of court. For if the board, as such, did not fix the valuation, the charge that they equalized the appellant's property and ordered the valuation to remain and stand as fixed by the assessor with the unlawful and malicious purpose of oppressing and damaging appellant falls to

the ground. In other words, if the board of equalization in their official capacity were not called upon to act and did not act on the valuation of property as returned by the assessor, neither fraud nor malice in fixing the value could be charged to the board. The process of equalizing the values of property, whether raised, lowered, or approved as returned by the assessor, requires the exercise of discretion and judgment, and as much so in one case as the other. We do not agree with appellant in its contention that he only may appeal the value of whose property has been raised. Indeed, its argument along that line is in direct conflict with the allegations of its answer, for in the answer it is charged that the board "equalized" its property and "ordered" that the valuation fixed by the assessor remain and stand as the true valuation of its property. The appellant was entitled to an appeal from the order of the board of equalization.

[5] But appellant complains with great energy and ability of the inadequacy of the remedy of appeal, as provided in paragraph 3875, *supra*; but inasmuch as it has failed to avail itself of the other legal remedies open to it, and in so doing lost its right of appeal, as therein provided, we do not feel called upon to pass upon that very interesting question.

It would seem that the demurrers were properly sustained for the following reasons: (1) Granting that the overvaluation of appellant's property by the assessor was fraudulent and arbitrary, the appellant's remedy for correcting the error was by a timely application to the county board of equalization for a reduction. (2) No such application was made. (3) The judgment of the board that the value fixed by the assessor was the correct value renders the fraud of that officer immaterial. (4) The determination of the board that the valuation of appellant's property was proportionately assessed with other property in Greenlee county was final, in the absence of a showing that the board acted arbitrarily and in willful disregard of the law. (5) Treating the application made to the board in August as timely, it fails to show fraud on the part of the board, fails to show that the board refused to hear appellant's application, fails to show that appellant gave or offered proof of overvaluation, and fails to show that the board had any information or knowledge of an overvaluation of appellant's property by the assessor.

[6] The judgment of the board on the valuation of appellant's property is conclusive and may not be collaterally attacked, as is attempted in this proceeding.

Act 92, Laws of 1903, provides for the collection of delinquent taxes and is the law under which this proceeding is being prosecuted. This act is copied almost bodily from the Missouri law covering the same

subject-matter. *State ex rel. v. Western Union Telegraph Co.*, 165 Mo. 502, 65 S. W. 775, was an action at law to collect back taxes for the year 1899. In that case it is said: "The answer contains two defenses: First, that the State Board of Equalization intentionally discriminated against defendant in assessing its property at its full value, while other property in the state is only assessed at from 35 to 40 per cent. of its value. * * *" After citing and discussing a number of cases bearing on the contention of the defendant, the court said: "The defendant cannot avail itself of these cases for the reasons: First, that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization." This case was affirmed by the Supreme Court of the United States in 190 U. S. 412, at page 427, 23 Sup. Ct. 730, at page 734 (47 L. Ed. 1116), the language of the court being: "We think overvaluation of property cannot be a ground of defense at law. In other words, the action of the tax officers, being in the nature of a judgment, must be yielded to until set aside. This can only be done in a direct proceeding."

The assessment here contested was made for the year 1911, while Arizona was a territory, and the decision of the Supreme Court of the United States would be binding and conclusive if Arizona were still a territory. It certainly is entitled to more than ordinary weight with the state court for that reason and the additional reason that the decision is upon a case of discriminatory overvaluation in a suit at law based upon the same statute from which ours is copied.

[7] Judgment was rendered on the pleadings. It is contended by appellant that evidence should have been submitted to overcome its general denial. It is said that all the facts in the complaint were denied and that the denial had the effect of requiring evidence of a valid assessment and levy. Section 87, Act 92, Laws of 1903, provides that the petition or complaint in this kind of action shall show "the different years for which taxes are due as well as the several kinds of taxes or funds to which they are due, with the respective amounts due to each fund, all of which shall be set forth in a tax bill of said back taxes, duly authenticated by certificate of the tax collector and filed with the petition, and said tax bill or bills, so certified shall be prima facie evidence that the amount claimed in said suit is just and correct. * * *" The complaint conforms with this requirement of the statutes, and a mere denial is not sufficient to overcome its probative force. Besides, construing the answer as a whole, it admits the ownership of the property to be in appellant, admits the value, admits the assessment as made by the proper officer, ad-

mits the equalization of the assessment, and makes a tender of what it conceives to be due. The denial, when viewed in connection with these admissions, traverses no material allegation of the complaint. The only issue, indeed, was the issue of fraud, and, having decided that against appellant, it was the duty of the court to render judgment in favor of the appellee.

[8] There was taxed as costs and included in the judgment attorney's fees in amount 25 per cent. of the judgment for taxes. It is complained that this was error in the face of the general denial. Section 86, Act 92, Laws of 1903, provides: " * * * To enforce the lien of the territory and for the purpose of prosecuting suit for taxes under this chapter the collector shall have power, with the approval of the county board of supervisors to employ such counsel as he may deem necessary who shall receive, as fees in any suit such sum, not to exceed twenty-five per cent. of the amount of the tax actually collected and paid into the treasury, as may be agreed upon in writing and approved by the county board of supervisors before such services are rendered, which sum shall be taxed as costs in the suit and collected as other costs. * * * "

Appellant insists that the attorney's contract with the collector should have been introduced in evidence before the court was authorized to give judgment for the attorney fees. It will be observed that the attorney's fees are to be "taxed as costs in the suit and collected as other costs." The provisions of the above Act 92, concerning attorney's fees, are in substance the same as the Missouri law on the same subject, and in *State ex rel. v. Edwards*, 144 Mo. 467, 46 S. W. 160, the Missouri Supreme Court construed their statute holding that the attorney's fees are properly taxed as costs in the suit. It appears that they were so taxed in this case and included in the judgment as the other costs. Paragraph 1557, Revised Statutes of 1901, is as follows: "The party in whose favor judgment is rendered and who claims his costs, shall file a statement of his costs, and shall serve a copy thereof on the opposing attorney. In his statement he may include therein the fees of officers, of witnesses, cost of taking depositions, compensation of referees, and such other disbursements as may have been made or incurred pursuant to any order of court or agreement of the parties. The statement must be filed within ten days next after judgment, unless, for good cause shown, the time shall be extended by the court." Paragraph 1558 provides that the opposing party may file exceptions to the cost bill within five days after the receipt of a statement of the costs, whereupon the court shall pass upon the same and correct it if it requires correction.

If the trial court committed error in giving judgment for attorney's fees, the appellant was afforded ample remedy to have the same corrected by a motion to retax the costs. The main question, as to whether the appellant owed the taxes claimed, having been decided adversely to appellant, and judgment ordered therein, the costs, including attorney's fees, followed the judgment. Their amount and legality, when properly questioned by the appellant, was subject to adjudication and correction by the trial court. No motion to retax the costs having been made, we must assume that the amount charged was authorized by the attorney's contract with the tax collector and was properly included in the judgment.

The judgment of the trial court is affirmed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

In re HAIGLER.

(Supreme Court of Arizona. Dec. 30, 1913.)

1. BAIL (§ 43*)—ADMISSION TO BAIL.

Under Const. art. 2, § 22, providing that all persons charged with crime shall be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great, and McNeill Book, p. 469, § 1171, which is declarative of the Constitution a person charged with crime may, in all cases, claim admission to bail as a strict legal right, except where he is charged with a capital offense, and the proof of his guilt is evident or the presumption great.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 153-164; Dec. Dig. § 43.*]

2. HABEAS CORPUS (§§ 33, 54*)—ADMISSION TO BAIL—PROCEEDINGS.

Any one who is in custody on a criminal charge for want of bail is entitled to a writ of habeas corpus admission to bail, and the petitioner need only allege that he is confined for want of bail, this being in accordance with House Bill 1, entitled "An act to establish a Penal Code," not yet published.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 18, 31, 51; Dec. Dig. §§ 33, 54.*]

3. HABEAS CORPUS (§ 107*) — ADMISSION TO BAIL—PROCEEDINGS.

In capital offenses, where the accused desires admission to bail, the court should hear such testimony as may be offered respecting the commission of the offense, for the purpose of determining what crime has been committed, and the probable guilt of the accused, and accused should be admitted to bail, unless the whole evidence satisfies the court that the offense is a capital one and that there is a strong presumption of guilt, the general rule being to grant bail.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 96; Dec. Dig. § 107.*]

4. BAIL (§ 49*)—ADMISSION TO BAIL—EVIDENCE—PRESUMPTIONS.

The presumption of innocence which attends the accused throughout the entire trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is with him upon an application for admission to bail.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195-208, 241, 244; Dec. Dig. § 49.*]

5. BAIL (§ 49*)—ADMISSION TO BAIL—BURDEN OF PROOF.

In a proceeding for admission to bail, where the state objects on the ground that the offense is capital, and that the presumption of guilt is great, the burden of establishing those facts is upon the state.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 195-208, 241, 244; Dec. Dig. § 49.*]

Cunningham, J., dissenting.

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

In the matter of the application of Roy Haigler for admission to bail. From an order denying bail, he appeals. Reversed and remanded.

Wm. B. Cleary, of Bisbee, for appellant.
Wm. G. Gilmore, County Atty., of Tombstone, opposed.

FRANKLIN, C. J. This is an appeal from an order in habeas corpus refusing the petitioner admission to bail. After a preliminary examination before a magistrate, the petitioner was held without bail to answer in the superior court of Cochise county upon a charge of murder in the first degree, alleged to have been committed upon the body of one John Wall. Upon the hearing of a writ of habeas corpus in the superior court that court denied the petitioner admission to bail, hence this appeal.

[1] The Constitution of this state secures to all persons charged with crime the right to bail, except for capital offenses, and in that case also when the proof is not evident or the presumption great. It is provided: "All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great." Article 2, § 22, Const. Ariz. This identical provision of the Constitution was before the Supreme Court of California in the case of *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77. The court, speaking through Mr. Justice Field, said: "The admission to bail in capital cases, where the proof is evident or the presumption great, may be a matter of discretion, and may be forbidden by legislation, but in no other cases. In all other cases the admission to bail is a matter of right which the accused can claim, and which no judge or court can properly refuse."

Our statute provides: "A defendant charged with an offense punishable with death cannot be admitted to bail where the proof is evident or the presumption thereof is great. The finding of an indictment or filing the information does not add to the strength of the proof or the presumption to be drawn therefrom." See House Bill No. 1, Title Bail, "An act to establish a Penal Code," not officially published. A person charged with

crime may in all cases claim his admission to bail as a strict legal right, with but one exception, and that is where he is charged with a capital offense, and the proof of his guilt is evident or the presumption thereof is great. If the case comes within this exception, the granting of bail is not even discretionary, but the right of the person thereto is forbidden by the law.

[2] If a person is in custody on a criminal charge for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail, upon averring that fact. The petitioner need not otherwise allege that he is illegally confined. It is so provided by law. See House Bill 1 (chapter 67), "An act to establish a Penal Code," not yet officially published.

[3, 6] What rule should govern magistrates and courts in the matter of allowing bail has been the subject of much judicial discussion and contrariety of opinion. The phrase "except for capital offenses when the proof is evident or the presumption great" is very difficult to define with such precision that it may serve as a guide in determining the facts of any particular case. We think, however that a very terse and satisfactory summary has been made by Mr. Bailey. He says: "The judicial officer should hear such testimony as may be offered respecting the commission of the homicide, for the purpose of determining what crime has been committed, and the probable guilt of the accused, and if he is satisfied therefrom that the offense is one not capital he should admit him to bail. If the evidence is of such character and weight as to create a strong presumption of guilt, bail should be denied." Bailey on Habeas Corpus, vol. 1, p. 471.

A defendant, by express provision of the law, is presumed to be innocent until the contrary is proved, and the presumption in his favor attends him at all stages of the prosecution. The law in its mercy so commands. The very theory of an accused person's right to bail is based largely on this presumption, and that one charged with the commission of a public offense with but one exception should not be punished by imprisonment previous to his conviction in the mode prescribed by law—provided he is able to give reasonable security for his presence when required to answer.

Looking at all of the evidence offered and viewing it in the light of the presumption of innocence, and remembering that to grant bail is the rule and the refusal of it is the exception, Does such evidence place the case within the exception? Does it clearly impress the mind of the magistrate or court that the offense committed is murder in the first degree and is there a strong presumption arising from a fair consideration of such evidence that the accused is guilty thereof? If all of the evidence offered when so considered makes it clear to the understanding and satisfactory to the judgment

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the crime committed is murder in the first degree and the presumption is great that the accused is guilty thereof, the case then fulfills the requirements of the law in this respect, and bail must be denied, for the burden imposed upon the state to show that the case of the accused comes within the exception prohibiting the allowance of bail has been discharged, otherwise bail should be granted in such sum as under all the circumstances of the case may be just and reasonable. See *In re Hammock*, 78 Ala. 414; *State v. Kauffman*, 20 S. D. 620, 108 N. W. 246; *Ex parte Newman*, 88 Tex. Cr. R. 164, 41 S. W. 628, 70 Am. St. Rep. 740; *Ex parte Wray*, 30 Miss. 673.

In announcing our conclusion in this case, we maintain the attitude of appellate courts, generally, in discussing neither the facts nor the law, lest it prejudice either the case of the prosecution or the rights of defendant on the final trial of the cause. The duty of passing upon the right of an accused person to bail must not be confounded with that of the trial court on the final trial of the accused, as the granting or the refusal of bail is governed by different considerations than those which confront the trial court, and must have no bearing or influence thereupon.

Sitting as a court of revision we are confined to an examination of the evidence contained in the record, and, in arriving at our determination, we have not been unmindful of that consideration which should be given the judgment of an inferior officer who has had an opportunity to see the witnesses, hear them testify, and determine their credibility. When the record presents perplexities by reason of serious conflicts in the testimony, the judgment of such officer is at least very persuasive, and such record will be examined with regard for a presumption that the officer who had an opportunity that we have not is correct in his judgment.

We have carefully examined the evidence upon which the accused claims his right to be admitted to bail, and in our opinion, the case presented by the record does not come within the exception denying him the right. The order of the superior court is therefore reversed, with directions to admit the defendant to bail with sufficient sureties in such sum as may be reasonable and just in view of all the circumstances of the case. Reversed and remanded.

ROSS, J., concurs.

CUNNINGHAM, J. I concur in the rule adopted from 1 Bailey, *Habeas Corpus*, 471.

Upon a petition for a release on bail, the general rule is that the petitioner must bring himself within the law under which he claims the right to bail, and the rule obviously casts upon him the burden of proof in capital cases of showing that the proof is not evident and the presumption not great. *Ex parte Hammock*, 78 Ala. 414; *Ex parte Treola*, 64 Cal. 152, 28 Pac. 231; *Rigdon v. State*, 41 Fla. 308, 26 South. 711; *Brown v. State*, 147 Ind. 28, 46 N. E. 34; *Ex parte Finlen*, 20 Nev. 141, 18 Pac. 827; *Ex parte Springer*, 1 Utah, 214; *State v. Crocker*, 5 Wyo. 385, 40 Pac. 681; *Ex parte Nathan* (Fla.) 50 So. 88; *State v. Hedges*, 177 Ind. 589, 98 N. E. 417; *State v. Dist. Court*, 35 Mont. 504, 90 Pac. 513; *State v. Kauffman*, 20 S. D. 620, 108 N. W. 246. The rule is simply one of procedure, and has no relation to the rule of the presumption of innocence, which must accompany the accused at every stage of the case. The matter of bail has reference to the question of procedure insuring the presence of the accused at the trial of the issues of guilt or innocence. The order of the committing magistrate is presumed correct until overcome, and the state may rest upon such presumption, thereby maintaining the burden cast upon it until the accused has by the evidence overcome such presumption. The presumption of correctness following the order denying bail has no reference whatever to the guilt or innocence of the accused of the charge, and like the filing of an indictment or information, it, as they, does not add to the strength of the proof or the presumption to be drawn therefrom. Such order denying bail is no evidence of guilt at any stage of the case, and no inference of guilt can be drawn therefrom, but when it has been made by an officer authorized by law to make the same, it must be considered properly and regularly made by such authority until the contrary is made to appear, and the burden is upon one denying its correctness to show wherein it is incorrect. In so far as the majority opinion conflicts with these views, I dissent.

I am of opinion the accused has failed to overcome the presumption accompanying the order denying him bail; that the evidence respecting the commission of the homicide is insufficient in character and weight to overcome the presumption of the correctness of the order denying bail. I do not concur in the order admitting the appellant to bail.

LA TOURETTE et al. v. LA TOURETTE et al.

(Supreme Court of Arizona. Jan. 2, 1914.)

1. HUSBAND AND WIFE (§ 273*)—COMMUNITY PROPERTY—RIGHTS OF PARTIES.

Civ. Code 1901, pars. 2124, 2125, 3102, 3104, 3108-3110, defining separate property of husband and wife and community property, and providing that community property passes to the survivor, if decedent leaves no children, while, if he leaves children, the surviving wife shall be entitled to one-half of the community property, charged with debts, recognize a marital community wherein both husband and wife are equal, and though, during the marriage, the personal property of the community may be disposed of by the husband, a sale or incumbrance of the real estate may not be made without the wife joining, and the interest of the wife in community property during marriage is not a mere possibility or an expectancy, and, on the death of the husband, she acquires the right to control and dispose of her share.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024; Dec. Dig. § 273.*]

2. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

The court must construe a will according to the intention of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

3. WILLS (§ 487*)—CONSTRUCTION—PAROL EVIDENCE.

Parol evidence is admissible to aid in construing a will by showing the surrounding circumstances, thereby placing the court in the position of the testator, but the intent of testator to dispose of his property must appear from the will itself, and cannot be proved by parol.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1023, 1026-1032; Dec. Dig. § 487.*]

4. WILLS (§ 782*)—CONSTRUCTION—PROPERTY DEVISED.

Where a testator, owning only an undivided interest in real estate, disposes by his will of his property only, and by same words gives benefits to his wife, who is his co-owner, the wife need not elect between the benefits conferred by the will and her own share in the property, but she may take the benefits and her own share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. § 782.*]

5. WILLS (§ 490*)—CONSTRUCTION—PROPERTY DEVISED.

A testator must be presumed not to intend to devise any property over which he had no power of testamentary disposition, and his will must be read as applying only to the property within the power of his disposition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1047-1057; Dec. Dig. § 490.*]

6. WILLS (§ 577*)—CONSTRUCTION—PROPERTY DEVISED.

Where a will executed by a husband, who, with his wife, was in possession of community property, gave to his wife for life all of the property of which he might die possessed, with a gift over of what she was possessed at her death, the wife was not required to elect between the benefits conferred by the will and her own share, but she could take her share and a life estate in the other share.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1257; Dec. Dig. § 577.*]

7. WILLS (§ 799*)—ELECTION—EFFECT.

Where a widow makes an election between the interest devised by her husband's will and

her own interest in the property on the supposition that a duty of election devolved on her, when no necessity for an election existed, the election was ineffectual.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2071-2073; Dec. Dig. § 799.*]

8. LIFE ESTATES (§ 6*)—DISTRIBUTION UNDER WILLS—SECURITY FROM LIFE TENANT.

Where testator gave all the property of which he died seised to his wife for life, with gift over of what remained at her death, and empowered his executors to sell, with the approval of the wife, to provide for her, the court distributing the personal estate to her for life was not required to exact from her security for the management of the personality.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 18, 23; Dec. Dig. § 6.*]

9. HUSBAND AND WIFE (§ 276*)—COMMUNITY PROPERTY—ADMINISTRATION—JURISDICTION OF COURT.

The court, in administering community property disposed of by the will of the deceased husband, may assume jurisdiction of the whole of the community estate to determine the debts chargeable against it, and to direct their payment out of the community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1032-1045; Dec. Dig. § 276.*]

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge.

Action between Lyman D. La Tourette and others against Peter La Tourette, executor of John La Tourette, deceased, and others for the construction of the will of the deceased. From a judgment construing the will, the former appeal. Affirmed.

Armstrong & Lewis, of Phoenix, for appellants. O'Neill & McKean, of Phoenix, for appellees.

FRANKLIN, C. J. John La Tourette, the deceased, left surviving him a widow and children. The will of deceased was duly admitted to probate. Omitting the formal parts, it is as follows:

"I, John La Tourette, of Phoenix, county of Maricopa, Arizona territory, of the age of seventy (70) years, and being of sound disposing mind and memory, and not acting under duress, menace, fraud, or under the influence of any person whatever, do make, publish and declare this my last will and testament in the manner following, that is to say:

"First, I direct that my body be decently buried and in a Christian manner, without undue ceremonies, and that the expenses of my last sickness and funeral be first paid by my executor hereinafter named, from my estate.

"Secondly, I give, devise and bequeath unto my beloved wife Rose Ann La Tourette, of Phoenix, Arizona, all of the property of which I may die possessed, of any and every nature, and wheresoever situate, whether the same be real, personal or mixed, to have, hold, use and enjoy the same, for the purpose of yielding to her a good, comfortable and certain and satisfactory living during her natural life, and I desire and direct, that after her death

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

all of said property of which she is then possessed shall go to our surviving children, and to the issue of those who may be dead, to the extent of the share which would have gone to the deceased parent, if alive, share and share alike.

"The names of our now surviving children are: Peter La Tourette, 36 years old, of Phoenix, Arizona, James T. La Tourette, 34 years old, of Phoenix, Arizona, Cornelia Ann Munda, 31 years old, of Phoenix, Arizona, Rose Olive Sheridan, 28 years old, of Phoenix, Arizona, Viola Wells, 24 years old, of Phoenix, Arizona, and they are to be the participants in said distribution, above mentioned, or in the event that any of them is dead leaving issue the issue shall receive the share that would have gone to the dead parent, if alive; and in the event of the death of any of the above named five children, before such distribution, without issue, the share of such one shall be divided share and share alike among the surviving ones, as above arranged.

"I hereby direct, authorize and empower, my said executors to sell and dispose of any or all of the property whether personal or real, at any time, when they deem it necessary, upon the consent and approval of my beloved wife, and without the necessity of having or obtaining the consent or approval of any court, and with or without notice.

"It being my wish, desire and intention to provide, beyond doubt, and to her satisfaction, a living and money to satisfy the desires of my beloved wife during her natural life, I hereby direct and order that my said executors shall at all times first see and attend to that, and if necessary, to sell and dispose of any of the said property for the said purpose.

"Lastly: I hereby nominate and appoint my sons Peter La Tourette and James T. La Tourette the executors of this my last will and testament, without bonds of any kind and hereby revoke all former wills by me made."

By a codicil to this will, the testator mentioned one of his daughters, who was indebted to him, and directed that such indebtedness specifically named in character and amount be deducted from the share that would go to her or, in the event of her death, to her children.

All of the estate involved was the community property of the deceased and his surviving wife, Rose Ann La Tourette. After administration had on this community estate, and upon the final settlement of the accounts of the executor, there was a decree of distribution. In this decree the court distributed "An undivided one-half ($\frac{1}{2}$) of said residue to Rose Ann La Tourette, to have, hold, use, and enjoy the same for the purpose of yielding her a good, comfortable, certain, and satisfactory living, and money to satisfy the desires of said Rose Ann La Tourette during her natural life, and after her death, all of said property of which she is then possessed

shall go to Peter La Tourette, the issue of James T. La Tourette (deceased), Cornelia Ann De Mund, Rose Olive Sheridan, subject to the payment of certain notes and sums as set forth in the codicil of the last will and testament of said John La Tourette, and Viola Wells, and in the event of the death of any of the above-named children leaving issue, the issue shall receive the share that would have gone to the dead parent, if alive, and in the event of the death of any of the above-named legatees and devisees before distribution and without issue, the share of such one shall be divided share and share alike among the surviving ones as above arranged; the remaining one-half ($\frac{1}{2}$) of said residue to Rose Ann La Tourette, surviving widow of deceased, absolutely and in fee."

This appeal involves the validity of the decree. It is claimed that the decree of distribution is contrary to the terms of the will of the deceased, and erroneous because the surviving widow has never renounced or in any wise excepted to the terms of the will. The necessity for an election by the widow is pressed, because by the terms of the will it is claimed that there was an intent upon the part of the testator to give to the wife a life estate in the whole of the community property in lieu of her own proprietary right therein; that thereby the widow was put to an election either to take her share in the community property, as provided by law, or to take the right and interest therein given her by the will; that she may not take both, and having failed to make an election, she will be deemed to have accepted and taken only the interest given her by the will. It is also urged that the decree of distribution is wrong in not safeguarding the interest of the remaindermen by requiring the widow, as a trustee of such remaindermen, to give security for the proper holding and distribution of the personal property coming into her hands under the will.

We are asked to construe this will, and, as a necessary background to consider its effect, let us examine somewhat into the rights of married persons with respect to their property interests. These rights are defined in the law, and we shall quote the following provisions of the Revised Statutes of 1901, as pertinent to the question presented.

"Par. 3102. (Sec. 16.) All property, both real and personal, of the husband, owned or claimed by him before marriage and that acquired afterward, by gift, devise or descent as also the increase, rents, issues and profits of the same, shall be his separate property, and all property both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, as also the increase, rents, issues and profits of the same, shall be her separate property."

"3104. (Sec. 18.) All property acquired by

either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children, while she has lived or may live separate and apart from her husband, shall be deemed the common property of the husband and wife, and during the coverture personal property may be disposed of by the husband only; but the wife must join in all deeds and mortgages affecting real estate except unpatented mining claims."

"3108. (Sec. 22.) The community property of the husband and wife shall be liable for the community debts contracted by the husband during marriage, except in such cases as are specially excepted by law.

"3109. (Sec. 23.) The wife may contract debts for necessities for herself and children upon the credit of her husband, in which case she and her husband must be sued jointly.

"3110. (Sec. 24.) Upon the trial of any suit as provided for in the preceding section the court shall decree that the execution be levied, first upon the common property, second upon the separate property of the husband, third upon the separate property of the wife."

"2124. (Sec. 9.) Upon the dissolution of the marriage relation by death, all the common property belonging to the community estate of the husband and wife shall go to the survivor if the deceased have no child or children; but if the deceased have a child or children, his survivor shall be entitled to one-half of said property and the other half shall pass to the child or children of the deceased.

"2125. (Sec. 10.) In every case the community estate passes charged with the debts against it."

By the provisions of the law married persons have two distinct and well-defined property rights. The first is the separate property of each of the spouses, and the second is the community property belonging to both. In construing the will we shall be aided materially in determining its consequence by some reflection upon the nature and character of this estate known as community property. And the observations we shall indulge will, of course, be limited in their application to the point under consideration and the facts before us, except, as in cases by analogy, they may elsewhere be applicable.

[1] The law makes no distinction between the husband and wife in respect to the right each has in the community property. It gives the husband no higher or better title than it gives the wife. It recognizes a marital community wherein both are equal. Its policy plainly expressed is to give the wife in this marital community an equal dignity, and make her an equal factor in the matrimonial gains. It recognizes that property acquired during marriage by community funds or the labor and industry of either spouse, except what is earned by the wife and her minor

children while she has lived or may live separate and apart from the husband, is the common property of the husband and wife. All that either the husband or wife or both may acquire during the existence of the marriage, otherwise than is specifically excepted, is an acquiescence of the community, and the presumption in all doubtful cases is strongly in favor of treating that which either spouse may own as community property. It recognizes that the wife in her station is as much an agency in the acquisition as the husband, and is entitled to just as great an interest. It is altogether fitting and proper that woman should be thus esteemed by the law in fixing her status if she is to be considered in fact as well as in theory an essential factor in the economy of the marital community. It is true that during the coverture the personal property belonging to the community may be disposed of by the husband only; but it is equally true that no sale or incumbrance of the real estate may be made by the husband without the consent of the wife. She must join in all deeds and mortgages affecting real estate, except unpatented mining claims.

The law, in giving this power to the husband during coverture to dispose of the personal property, does not do this in recognition of any higher or superior right that he has therein, but because the law considers it expedient and necessary in business transactions affecting the personality to have an agent of the community with power to act. So it has clothed the husband with this agency, deeming him the best qualified for the purpose, but limiting such agency to the personality and during the period of coverture. And this agency to dispose of the community personality may not be exercised by the husband to defraud his wife, for in one way or another she would have a remedy for a disposition by the husband in fraud of her rights, or made with the intent and purpose of defeating her interest. And further, this power of the husband to dispose of the personal property of the community is limited to the period of coverture, and does not extend to his disposal thereof by will, but he is restricted in the disposal by will to his one-half thereof.

Mr. Reeves in his most excellent and scholarly work attributes this species of ownership of property by husband and wife as having its origin in the French and Spanish control of some of the southern and western states of this country. Designated as the "community system of matrimonial gains," founded chiefly on common-law principles, it has been moulded to some extent by statutes and common-law rules, having, as its basal idea, the united ownership of husband and wife, and the benefit to them of property acquired by either or both of them during the coverture. Reeves, Real Property, § 691.

From its nature and origin this particular estate arising during the existence of the

marriage relation may not be defined with such precision as will comprehend all of its phases, but in its devolution and descent this species of ownership bears a striking resemblance to two kinds of estates, that of an estate or tenancy by the entirety, and a tenancy in common. Upon a dissolution of the marriage relation by death, if there be no child or children of the deceased, all of the property belonging to the community estate of the husband and wife goes to the survivor. In this aspect of the community relationship, the husband and wife may be considered as one, owning the property during the existence of the marriage with the unities of time, title, and interest and possession present, and at the death of one the survivor takes all.

So, in tenancy by the entirety, each one may be regarded as owning all the property with the unities of person, time, title, interest, and possession with a survivorship. A conveyance of real and personal property to a husband and his wife makes them owners by the entirety at common law. They are not seised as joint tenants per tout et per my, but by the entirety per tout et non per my.

But under the statute also, if the deceased have a child or children, the survivor is entitled to his or her one half of the property, and the other half passes to the child or children of the deceased. In this latter feature of the statute there is no right of survivorship, and, except that of possession, the unities are lacking, thus resembling a tenancy in common.

"If a terse summary of the aims and results of community ownership be attempted, it may be said that the object of the system is to make a beneficial cotenancy between husband and wife, of such property as either or both may acquire, otherwise than by gift or exchange for 'separate property,' during the coverture, and that such ownership, practically indissoluble during the existence of the marriage, generally involves the right of survivorship when the first owner who dies leaves no descendant, but otherwise resembles a tenancy in common." Reeves, *Real Property*, § 691, p. 982.

That the interest of the wife in the community property during the coverture is not a mere possibility—not the expectancy of an heir—is quite apparent. The old saying is not true that community is a partnership which begins only at its end. Upon the dissolution of the community by death, the wife does not inherit her share of the common property, but with the death of the husband the management and control of the statutory agent or trustee ceases. The wife acquires not her share for that was already hers, but in addition to her share she acquires the right of management, control, and disposition of that share. Her status being thereby fixed as that of a feme sole. If there be no child or children of the deceased husband, all of the common property goes to the sur-

viving wife. She has her share in the property, and in addition, by right of survivorship and not as an heir, she acquires the share that belonged to the husband, and she takes all of the property in her own right, and with respect to the management, control, and disposition of such property is reduced to the status of a feme sole and must thenceforward with respect to it act for herself. That the interest of the wife in the community property during the coverture is more substantial than that of an heir's expectancy, see *Warburton v. White*, 176 U. S. 484, 20 Sup. Ct. 404, 44 L. Ed. 555; *Arnett v. Reade*, 220 U. S. 311, 31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040; *Kohny v. Dunbar*, 21 Idaho, 258, 121 Pac. 544, 39 L. R. A. (N. S.) 1107, Ann. Cas. 1913D, 492.

[2] Passing to the will, no citation to authorities is necessary to show that it is to be construed according to the intention of the testator. Such a canon of construction is elementary. It is "rock-ribbed and ancient as the sun." We shall look at some of the rules of interpretation governing the construction of a will when the doctrine of election is contended for because the widow receives benefits by her husband's will. There are some particular rules belonging to this branch of the subject which we shall notice.

[3] "While parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments—that is, to show the condition of the subject-matter, and the surrounding circumstances, so far as to place the court in the position of the testator—yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence dehors the instrument." *Herrick v. Miller*, 69 Wash. 456, 125 Pac. 974. Such extrinsic evidence is admissible for the purpose of placing the court in the shoes of the donor, but such evidence can go no further. *Pom. Eq. Juris.* § 473.

[4] "If a testator owning an undivided share uses language of description and donation which may apply to and include the whole property, and by the same words gives benefits to his co-owner, the question arises whether such co-owner is bound to elect between the benefits conferred by the will and his own share of the property. *Prima facie* a testator is presumed to have intended to bequeath that alone which he owned—that only over which his power of disposal extended, wherever, therefore, the testator does not give the property *specifically*, but employs *general words* of description and donation, such as 'all my lands,' and the like, it is well settled that no case for an election arises, because there is an interest belonging to the testator to which the disposing language can apply, and the *prima facie* presumption as to his interest will control." *Pom. Equity Juris.* § 489 (3d Ed.).

"* * * Where the testator has a partial interest in the property devised or bequeathed by his will, the necessity of an election is always much less apparent than where he purports to bestow property in which he has no interest whatever. In such cases it is a settled rule that courts will lean as far as possible in favor of an interpretation which shows an intention of the testator to give only the interest, estate, or share which he is enabled, by virtue of his own right to deal with, or to give the property in its present condition, subject to all existing incumbrances and charges upon it. It requires a strong and unequivocal expression or indication of an intent on the part of the testator to bestow the entire property, and not simply his own interest in it, or to bestow the property freed from its incumbrances and charges, in order to raise the necessity of an election." Pom. Eq. Juris. § 488.

"* * * The doctrine of election is not applicable to cases where the testator, erroneously thinking certain property is his own, gives it to a donee to whom in fact it belongs, and also gives him other property which is really the testator's own; for in such case the testator intends that the devisee shall have both, though he is mistaken as to his own title to one. * * *" Pom. Eq. Juris. § 475.

Again, at section 505, Mr. Pomeroy clearly states the rule which should govern in such cases. He says: "It cannot be said that the courts have settled any special rules applicable to particular forms of devise or bequest by the husband, but the general rule for the determination of all cases they have established in a very clear and certain manner. Whenever a husband has made some testamentary provision for his wife, and has also assumed to dispose of more than his own half of the community property, in order that she shall be put to her election the testamentary provision in her behalf must either be declared in express terms to be given to her in lieu of her own proprietary right and interest in the community property, or else an intention on his part that it shall be in lieu of such proprietary right must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to her share of the community property would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them. An intent of the husband to dispose of his wife's share of the community property by his will, and thus to put her to an election, will not be readily inferred where the words of the gift may have their fair and natural import by applying them only to the one half of the community property which he has the power to dispose of by will."

Chancellor Kent, in *Adsit v. Adsit*, 2 John. Ch. (N. Y.) 448, 7 Am. Dec. 539,

reviews the cases dealing with the widow's right of dower, and says that, to enable the court to deduce an intention that a testamentary gift to the widow should be in lieu of dower, "the claim of the dower must be inconsistent with the will and repugnant to its dispositions or some of them, it must in fact, disturb or disappoint the will." See, also, *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Payne v. Payne*, 18 Cal. 292; *Silvey's Estate*, 42 Cal. 210; *King v. Lagrange*, 50 Cal. 328; *Frey's Estate*, 52 Cal. 658.

More recent California cases fully sustain the earlier decisions to the effect that a devise or bequest of "all the property of which I may die possessed," or of "all my property," will not create the necessity for an election. *Estate of Gwin*, 77 Cal. 319, 19 Pac. 527; *Estate of Gilmore*, 81 Cal. 240, 22 Pac. 655.

[5] The testator must be presumed not to have intended to devise any property over which he had no power of testamentary disposition, and his will should be read as applying only to his property within such power. *King v. Lagrange*, 50 Cal. 332. In the *Estate of Silvey*, 42 Cal. 212, the court announce this rule: "The devise must be read as applying only to that moiety which was within his testamentary power. A purpose to attempt the disposition, by will, of property, which by statute, would pass to the wife, as survivor of the matrimonial community immediately upon his death, is not to be readily inferred, especially where, as here, the words employed by the testator may have their fair and natural import, by applying them only to that moiety of which he had by law the testamentary disposition." See, also, *Herrick v. Miller*, *supra*, a well-considered case in which many of the authorities are reviewed.

[6] Applying to the will of the deceased the rules of construction which we have noticed, it is not difficult to discover that the language used by the testator does not present a case where an election is necessary. Regarding the aptitude of the testamentary limitations to the testator's interest, the language used manifests no intention upon the part of the testator to dispose of his wife's community interest, and make a testamentary provision for her in lieu of such interest. In view of the wife's proprietary interest in the property being a vested right, and imputing to the testator a knowledge of the law with respect to such interest, with an indulgence also in the presumption that the testator had in mind and was dealing with his own interest over which he had the power of disposition by will, we see that by the language of his will the testator does not give the whole of the community property specifically. He does not describe and define the whole corpus of the thing in which his partial interest exists as a distinct and identified piece of property, but, his proprietary right or share being limited to

an undivided one-half thereof, he employs the most general words of description and donation. He says: "I give, devise and bequeath unto my beloved wife Rose Ann La Tourette, of Phoenix, Arizona, all of the property of which I may die possessed, of any and every nature, and wheresoever situate, whether the same be real, personal or mixed, to have, hold, use and enjoy the same, for the purpose of yielding to her a good, comfortable and certain and satisfactory living during her natural life, and I desire and direct, that after her death *all of said property of which she is then possessed* shall go to our surviving children, and to the issue of those who may be dead, to the extent of the share which would have gone to the deceased parent, if alive, share and share alike."

When the will was executed the husband and wife were both in possession of the community property with an equal interest therein, though, as the statutory agent or trustee of the community, the husband had power of disposition over the personalty. He does not express any intention to make the donation in lieu of the wife's proprietary right. Her claim to this proprietary right in the community property is in no wise inconsistent with the provisions of the will or repugnant to its dispositions. So no necessary antagonism arises. The enjoyment of her proprietary right is entirely compatible with the enjoyment by her of her husband's donation, and hence no necessity for an election on the part of the widow is created.

Appellants contend that there was not only a necessity for an election, but that the widow by her conduct has made an election to take under the will by her long acquiescence in its provisions, and by not declaring her election to retain her proprietary right in the community property, and so is estopped from urging that her title to the interest in the community property was not devised by the will. But we have seen that a retention of her interest in the property, under the law is not inconsistent with her acceptance of the benefits conferred by the will. She could take her share in the community property, and could also take her life estate, under the testator's will, without disturbing in the least the testator's disposition. As between the widow and the beneficiaries under the will, it is quite clear that she is not concluded by reason of an equitable estoppel.

[7] Even if the widow had formally made an election under the supposition that such a duty devolved upon her by the law, when no necessity for an election by her had been created, the supposed election is ineffectual. Estate of Wickersham, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437; Pratt v. Douglas, 38 N. J. Eq. 516; In re Smith, 108 Cal. 115, 40 Pac. 1037; King v. Lagrange, 50 Cal. 328. In the last case cited the testator owning land,

all of which was community property, devised it all to his wife, with a power of sale, however, given to the executor, which, in its legal effect, was confined to the one-half of the real estate capable of being disposed of by the testator. The executor, in ignorance of the law concerning community property, sold all the land devised, by virtue of his power; the purchaser, in like ignorance, supposed he was buying the entire estate, and the widow, in like ignorance, received the purchase money for the whole. Held, that the widow was not thereby precluded from setting up and enforcing a claim to the half of the land which, as community property, belonged to her of her own right, and that the will did not present a case for an election.

Comparing the provisions of the will before us with those found in the cases cited by appellants, a very marked difference is at once discerned. As for instance in the Estate of Vogt, 154 Cal. 508, 98 Pac. 265, the testator dealt with his separate property and the whole of the community property. He gave certain real property to the widow, specifically describing it, and which was the separate property of the testator; the widow being his second wife by whom he had no children. All the residue of his estate and the whole thereof he bequeathed to his wife and children in equal parts, to each an undivided one-fifth share thereof. He described the property as "the rest and residue of my estate, real, personal and mixed, wheresoever situated," and he gave "the whole thereof" to his wife and children in equal shares. He declared "*all of my estate is my separate property* except a portion thereof equal to a value of eight thousand dollars * * * only eight thousand dollars of *my estate* is community property." And otherwise, by the language used, made it appear that *his estate* embraced both his separate property and the entire interest in the community property, evincing a clear intent to dispose of the whole and not of a moiety thereof. The court said that under such a will the widow could not take the moiety given her by the law without defeating the dispositions made by the testator, and therefore an election was necessary.

[8] Finally, it is urged that the court below should have required the widow to give security for the proper holding and distribution of the personal property coming into her hands under the will. No testamentary trust was attempted to be created by the will. The testator gives all of the property of which "*I may die possessed*" to the widow "to have, hold, use and enjoy the same, for the purpose of yielding to her a good, comfortable, and certain and satisfactory living during her natural life," and then directs that after her death "*all of said property of which she is then possessed*" shall go to their children and to the issue of those who may be dead. He empowers his execu-

tors to sell and dispose of any or all of the property upon the consent and approval of his wife, without notice, and without the consent or approval of any court. The testator says: "It being my wish, desire and intention to provide, beyond doubt, and to her satisfaction, a *living and money to satisfy the desires of my beloved wife during her natural life*, I hereby direct and order that my said executors shall at all times first see and attend to that, and if necessary, to sell and dispose of any of the said property for the said purpose." Beyond all else, the comfort of his life's companion, and the gratification of his wife's desires in her declining years was the thought uppermost in his mind. It is the clear distinct chord sounded in the will. Manifestly it was his intention that she should have the use of the property, and, if her comforts or desires dictated it, the right to consume the corpus of the property. The testator's wishes must be respected. Appellants urge that, while there is a conflict in the authorities upon the question, the better line of authority is that it is within the discretion of the court to require or not to require the giving of such security. Conceding that it was discretionary, we find in the refusal of the court to require security no abuse of such discretion.

[8] The lower court took jurisdiction of the whole of the community estate, and, after paying the debts against it and the expenses of administration, distributed the residue. In every case the community estate passes with the debts against it. It was not improper for the court to assume such jurisdiction of the community estate in order to determine the amount of the charges or debts thereon and direct their payment out of the property. Even if the decree of distribution added nothing to the strength of the widow's title to an undivided one-half of the property vested in her by law, it did definitely and finally determine the amount or extent of such interest freed from community obligations or debts. And it is immaterial whether it be denominated a decree of distribution or a judgment or order fixing the amount or extent of her interest in the community estate free of community charges or debts, and which she is entitled to demand and receive from the executor, the desired end is accomplished.

Putting into the melting pot what we have said, its refinement is this and nothing more, no reversible error, and the decree or order appealed from stands affirmed.

CUNNINGHAM and ROSS, JJ., concur.

NORTHERN PAC. RY. CO. v. PIERCE
COUNTY et al.

(Supreme Court of Washington. Jan. 8, 1914.)

TAXATION (§ 390*)—VALUATION OF RAILROAD
LAND—EXCESSIVENESS.

A strip of land approximately 100 feet wide and 21 miles long, procured by a railway company for the relocation of its road, was valued at \$137,980, being an average valuation of \$1,000 per acre on land within city limits and of \$500 per acre on land outside the city limits. The average valuation of other land within the city was less than \$150 per acre and on other land outside the city less than \$40 per acre, and no shore lands similarly situated to the railroad land was valued to exceed one-third of the value placed upon the railroad land. The railroad land extended along the shore, but the company had no monopoly of shore lands, since not only were there other lands on the shore suitable for right of way purposes but, under the Desile Act (Laws 1890, p. 301), any other railroad company could, in case of necessity, require surrender of a portion of such railroad land. The state tax commissioner valued all railroad grades upon which ties were not laid at \$1,320 per mile, and an extension of the strip of land in question into another county was there valued at this rate, and this strip in the preceding year was valued at only about one-fourth of the present valuation, though lands generally were worth more then than now. *Held*, that the discrepancy in the valuation of the lands was so gross as to amount to constructive fraud, and that no valuation of such strip of railroad land in excess of \$45,993.34 could stand.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 652-655, 658, 659; Dec. Dig. § 390.*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by the Northern Pacific Railway Company against Pierce County and another. From a judgment dismissing the action, plaintiff appeals. Reversed, with directions.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for appellant. Lorenzo Dow and W. W. Keys, both of Tacoma, for respondents.

FULLERTON, J. In the years 1911 and 1912 the appellant, Northern Pacific Railway Company, owned a tract of land approximately 100 feet in width and 21 miles in length, extending from a certain point in the city of Tacoma, called in the record the west portal of the Point Defiance tunnel southerly, following near the shores of Puget Sound to the boundary line between the counties of Pierce and Thurston. The land was procured by the railway company for railway purposes; it being intended for use as a part of its right of way for the relocation of its railroad between the city of Tacoma, in Pierce county, and the town of Tenino, in Thurston county, which the company contemplated making. The land lies wholly within the county of Pierce and for approximately one-third of the way within the boundary lines of the city of Tacoma. For the purposes of taxation for the year 1912, the assessor and board of

equalization of the county of Pierce valued the land lying within the boundaries of the city of Tacoma at an average of \$1,000 per acre and that lying without such limits at an average of \$500 per acre. The land at that time contained no improvements whatever but lay in a state of nature and was undistinguishable from the abutting and adjacent lands save only as it may have been marked off by stakes driven to mark its general course. On the assessment roll the land was described as parts of the several tracts from which it was originally taken and separately assessed as such, although, as we say, at a uniform rate per acre. The assessed valuation aggregated \$137,980, on which a levy was made of \$3,272.58.

The appellant railway company conceived that the property had been grossly overvalued, and, estimating that its actual value was not to exceed \$31,360 and that a proper levy thereon would not exceed \$737.21, tendered this sum in lieu of the assessment actually levied. The taxing officers refused to receive the amount tendered in satisfaction of the levy, whereupon the railway company paid the entire sum under protest, and thereupon instituted the present action to recover back from the county the difference between the amount the tax it concedes to be due and the amount actually paid. The lower court, after a trial, dismissed the action. This appeal followed.

If we are to consider the land in question as merely a part and parcel of the general territory of which it forms a part, the evidence discloses that it is palpably and grossly overvalued by the assessor. It was shown that, whereas the lands of the appellant in the city limits of the city of Tacoma were valued at the rate of \$1,000 per acre, the abutting and adjoining lands, in many instances the tracts from which the right of way was taken, were assessed at from \$40 to \$300 per acre, the average valuation being less than \$150 per acre; that outside of the city limits, while the right of way was assessed at an average valuation of \$500, the adjoining and abutting lands were assessed at from \$5 to \$165 per acre, the average valuation being less than \$40 per acre. Since it was shown that these adjoining and abutting lands were assessed at their fair value, it requires no argument to demonstrate that, if these several tracts of land forming this right of way were still in the hands of the owners from whom the appellant purchased them, they are grossly overvalued, so much so indeed as to require relief.

Is the land of greater value than the adjoining and abutting lands because of its single ownership or peculiar situation? The respondent argues that it is. It does not claim, of course, that the land has any peculiar or any greater value than the surrounding lands because it is owned by a railroad company,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—28

or because it will be used for railroad purposes, but it contends that it occupies the water front of Puget Sound for the greater part of the way and is the only feasible and practicable means of approach with proper grades and curves for a railroad into the city of Tacoma from the south, and as such has a special and peculiar value not possessed by the adjoining and abutting lands. It contends further, also, that there is no evidence in the record that the land, when considered with reference to these particular features, is grossly or excessively overvalued.

But it seems to us that these contentions are not wholly justified by the record. The strip of land in question, it is true, follows the general contour of the shores of Puget Sound for its greater distance, but the plats introduced in evidence show that it is taken for the greater part from the uplands. The tracts left between the strip and the shore line are, in many instances, narrow, but they are of sufficient width for use, and no monopoly of the shore lands was acquired by the acquisition of the right of way. In this connection it may be noticed also that the valuations placed upon the shore or tide lands by the assessor, which were not taken by the railway company, did not in any instance to which our attention has been called exceed one-third of the value placed on the lands of the railway company. As to this being the only feasible and practicable pass for a railway into Tacoma from the south, the only witness who was seemingly competent to give evidence on the question, a civil engineer, testified that another railroad could be built paralleling one built upon this tract of land at practically the same cost. Moreover, if the contention of the respondent that this was the only feasible route for a railway were true, the railway company first acquiring it could have no monopoly of its use. Under the act of the Legislature of this state, known as the Deifle Act, any other railway company finding it necessary to build over the same route can compel the present owners to surrender to it a part of the right of way at all places where the necessities of the case required it. Laws 1890, p. 301; *North Coast R. v. Northern Pac. R. Co.*, 48 Wash. 529, 94 Pac. 112.

Since, therefore, the tract at the time the valuation was made was in a state of nature, unimproved in any particular, and undistinguishable from the adjoining and surrounding lands to the ordinary observer, its only claim to an enhanced value is that it formed a continuous strip in the hands of a single owner. But conceding that this gives it a value in excess of the surrounding lands, the title to which is in the hands of a number of owners, we cannot think the added value anywhere near equals the added value the assessor chose to put upon it. Indeed, it appears to us that discrepancy is so gross

as to amount to constructive fraud. Its actual assessable value is, however, not easily determinable from the record, but we think there was evidence from which a proper value could be ascertained. In addition to showing of the excess of valuation over the abutting and surrounding lands, it was shown that the State Tax Commission on lands coming within their jurisdiction situated similarly to these lands (that is to say, "all railroad grades, and rights of way, upon which the ties have not been laid") had placed a uniform valuation of \$1,320 per mile, or 25 cents per lineal foot, and that the assessor of Thurston county had placed a value on this same right of way where it extended into Thurston county at this rate. It was shown also that the assessor of Pierce county for the year preceding the year of this assessment had placed a value thereon of about one-fourth of the present valuation, and that lands generally in this vicinity had rather decreased than increased in value during the interim. Taking these figures as a basis, we are satisfied that no assessment in excess of \$45,993.34 should be permitted to stand.

The judgment of the court below is therefore reversed, with directions to allow a recovery of the taxes paid in excess of a tax based on an assessed valuation of \$45,993.34.

CROW, C. J., and MOUNT, MORRIS, and PARKER, JJ., concur.

COLUMBUS VARNISH CO. v. SEATTLE PAINT CO.

(Supreme Court of Washington. Jan. 2, 1914.)
APPEAL AND ERROR (§ 1010*)—FINDINGS—CONCLUSIVENESS.

A finding sustained by evidence, and not contrary to the weight of the evidence, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the Columbus Varnish Company against the Seattle Paint Company. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Douglas, Lane & Douglas, of Seattle, for appellant. John W. Roberts and Geo. L. Spirk, both of Seattle, for respondent.

MORRIS, J. Appellant brought this action seeking to recover upon account of goods sold and delivered. Respondent filed a complicated answer, in which reference seems to be made to several defenses not altogether consistent, but in the main the answer is a plea that no liability should be enforced against defendant because of the failure of appellant to comply with the con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tract of sale in several particulars. This answer was not moved against in any way, appellant filing a reply to it, and the case proceeded to trial without a jury. The difficulty of making a clear statement of what the real issue was between the parties is best illustrated by the fact that the first 10 pages of the record are taken up with a discussion between the trial judge and respective counsel in the endeavor to understand clearly just what issues were to be submitted to the court for determination. The issues seem to have finally narrowed down to one, whether or not respondent had complied with the agreements and the representations entering into and forming the basis of the dealing between the parties. At the conclusion of the evidence, the trial judge announced that he was satisfied that respondent had, by a great preponderance of the evidence, sustained its defense that appellant had not complied with its contract, that the goods were not as represented, and that appellant should accept a return of all goods then unsold. Judgment, however, was given appellant for a small sum representing the result reached after the allowance of proper credits for the value of the goods sold, the value of the goods returned, and an item of freight paid by respondent.

We find no question of law involved in this case that requires any special reference or statement. The first thing is to determine what the contract was, and then whether or not it had been complied with. Like most cases where oral contracts are sought to be enforced, there is quite a conflict as to what agreements were made touching the sale of the goods, and the conflict is as broad upon the question of the quality of the goods. The record, however, is ample to sustain the findings of the lower court in these particulars, and, not being able to say, after a full reading of the record, that the weight of the evidence demands different findings, we will not disturb those made by the lower court; and the judgment is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

In re QUEEN ANNE BOULEVARD.

(Supreme Court of Washington. Dec. 26, 1913.)

1. EMINENT DOMAIN (§ 145*)—SPECIAL BENEFITS—DEDUCTION.

Under Rem. & Bal. Code, § 7782, providing that when an ordinance providing for an improvement does not authorize any assessment on property specially benefited, the compensation found for land or property taken or damaged shall be ascertained over and above any special benefits, special benefits for the public improvement may be offset against the compensation for taking land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

2. EMINENT DOMAIN (§ 204*)—COMPENSATION—ASSESSMENTS.

In proceedings by a municipality to condemn land for a public improvement, evidence of the resolution of the board of park commissioners and other ordinances relating to the general scheme of the improvement is admissible to show special benefits, even though the condemnation ordinance did not, in terms, refer to such ordinance and resolution.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 543; Dec. Dig. § 204.*]

3. EMINENT DOMAIN (§ 167*)—PUBLIC IMPROVEMENTS—SPECIAL ASSESSMENTS.

Where a municipal corporation condemned land for a boulevard, compensation therefor being made by special assessments, the municipality could thereafter proceed with the physical improvement of the boulevard upon the local improvement and assessment plan.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 451-456; Dec. Dig. § 167.*]

4. EMINENT DOMAIN (§ 243*)—CONCLUSIVE—MATTERS CONCLUDED.

Where a municipality condemned land for a boulevard, compensation being paid out of special assessments, the judgment is not a bar, in a subsequent proceeding to condemn additional land, to the setting off of special benefits for the land so taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 551, 627-629, 700; Dec. Dig. § 243.*]

5. EMINENT DOMAIN (§ 145*)—CONDEMNATION—SPECIAL BENEFITS.

Where an existing boulevard was improved and land necessary to the improvement was taken by condemnation, special benefits to the property taken or damaged may be set off regardless of any equalization of benefits flowing to other property abutting on the improvement; the analogy between the setting off of special benefits in a condemnation suit and the apportionment of the charge for such benefits between separate properties going only so far as requiring the offset to be limited to special benefits.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

6. EMINENT DOMAIN (§ 204*)—CONDEMNATION—EVIDENCE.

In condemnation proceedings, where special benefits were to be offset, the expenses of the improvement being paid for by the municipality, evidence, tending to show the amounts which would have been chargeable against the property taken as special assessments if the improvements were being constructed upon the local improvement and assessment plan, is admissible.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 543; Dec. Dig. § 204.*]

7. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICT.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935-3937; Dec. Dig. § 1002.*]

8. EMINENT DOMAIN (§ 145*)—COMPENSATION—SPECIAL BENEFITS.

The benefit resulting to one lot or tract from an improvement cannot be set off in determining the compensation or damages due to the same owner for the taking or injuring of a separate, although contiguous, tract.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. EMINENT DOMAIN (§ 221*)—CONDEMNATION—SEPARATE TRACTS.

In a proceeding to condemn land for a public improvement, it was improper for the court to treat defendant's two adjoining lots as one tract of land, so that benefits to the larger tract, which was not injured by the condemnation, might be offset against the damages to the smaller one, where the two lots were vacant and were not put to any common use, even though one of the lots was small and it might be beneficial to the owner to use them together.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 560, 561; Dec. Dig. § 221.*]

10. EMINENT DOMAIN (§ 221*)—CONDEMNATION—JURY QUESTION.

Whether two adjoining tracts shall be treated as one tract or as two, in a condemnation proceeding for a public improvement, is a question of fact, unless the undisputed evidence as to their use and situation leaves no room for different views on the question.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 560, 561; Dec. Dig. § 221.*]

Department 2. Appeal from Superior Court, King County; Kenneth Mackintosh, Judge.

Condemnation proceedings by the City of Seattle against F. W. Wald and wife, W. E. Hopkins and wife, L. H. Wheeler and wife, and I. M. Rushton and wife, for Queen Anne Boulevard, in which judgment was rendered for the complainant city, and defendants appeal; their appeals being consolidated. Affirmed except as to the appeal of F. W. Wald and wife, and reversed and remanded as to them.

Moore, Wardall, Wardall & Martin, L. H. Wheeler, and N. S. Peterson, all of Seattle, for appellants. Jas. E. Bradford, Howard A. Hanson, and Geo. A. Meagher, all of Seattle, for respondent.

PARKER, J. These are eminent domain proceedings instituted by the city of Seattle as a single proceeding in the superior court for King county, whereby the city seeks to acquire, as against numerous owners of property abutting upon Queen Anne Boulevard, certain rights necessary for the city to possess in order to improve that boulevard in accordance with the recent officially established and re-established grades thereof along several miles of its course, and to change the use of the boulevard from ordinary street to park, drive and boulevard uses. The defendants Walds, Hopkinses, Wheelers, and Rushtons, separate owners of lots and tracts abutting upon the boulevard, were awarded damages by verdicts and judgments rendered thereon, and, deeming themselves aggrieved thereby, have appealed to this court.

Separate trials were had in the superior court, but before the same jury, to determine the amount of damages to be awarded to appellants because of injury resulting to their respective properties. While the rights of these appellants are before us for deter-

mination upon four separate appeals, each upon its own record and statement of facts, except as to a number of exhibits introduced in evidence which are common to all, the appeals have so much in common, both as to the controlling facts as well as in the contentions made thereon, that we have concluded to dispose of all of them in this one opinion, and thereby save much useless repetition, both in statement of the somewhat involved facts and discussion of contentions made by counsel for the respective appellants.

Queen Anne Boulevard is several miles in length, running for the most part through one of the best residence districts of the city of Seattle, on and around Queen Anne Hill. The boulevard was laid out, and, so far as was then necessary, the land therefor was acquired by eminent domain proceedings prosecuted in pursuance of ordinance No. 16790, mentioned in ordinance No. 26253, in pursuance of which these eminent domain proceedings are prosecuted. The boulevard follows, in the larger part of its course, streets which had theretofore been platted and dedicated. Eminent domain proceedings were resorted to in its laying out for the purpose of acquiring land in addition to the dedicated streets which it followed. The matter of the change of the established grade of those streets, the establishment of original grades where necessary, and the physical improvement of the boulevard, which is the purpose to which these eminent domain proceedings look, were not then involved. Ordinance No. 16790 provided only for the acquisition of additional land for the laying out of the boulevard, and not for its physical improvement. There are some recitals in that ordinance which suggest an intention on the part of the city to acquire rights other than the mere acquisition of the necessary additional land therein described for laying out the boulevard as contemplated, but such rights are not described in that ordinance with certainty. Evidently, in view of this fact, the city officers considered the ordinance as only authorizing the condemnation of the necessary additional land, and proceeded accordingly. The judgments rendered in those eminent domain proceedings, which are before us, make it plain that nothing more than this additional land was then acquired by the city. The expense incidental to the acquiring of the additional land for the laying out of the boulevard as contemplated by ordinance No. 16790 was paid by special assessments made by eminent domain commissioners against the property specially benefited thereby. In this manner, Queen Anne Boulevard came into existence, so far only as its mere laying out and the acquisition of the land therefor is concerned, in the year 1909.

In January, 1910, the board of park commissioners of the city of Seattle passed a resolution looking to the acquiring of juris-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

diction over Queen Anne Boulevard as a park driveway, providing, so far as we need here notice its contents as follows:

"Be it resolved by the board of park commissioners as follows:

"Section 1. That in case the city council of the city of Seattle shall by proper ordinance transfer, set aside and place under the jurisdiction of the board of park commissioners, the property described and mentioned herein for parkway and boulevard purposes, it is the intention of the board of park commissioners, and said board of park commissioners of the city of Seattle, does hereby bind and pledge itself to improve the same by grading, parking and macadamizing and in no other way improving the same, from moneys under its control and jurisdiction and without any cost or expense for such improvement being assessed against any property abutting upon, contiguous or adjacent to the property herein described. [Here follows a description of the land covered by the boulevard.]"

Thereafter, in January, 1911, looking to the permanent physical improvement of the boulevard, there was passed and approved by the city council and mayor ordinance No. 26253, providing for the acquisition of the rights sought to be acquired by these eminent domain proceedings, which ordinance, so far as we need here notice its provisions, reads as follows:

"Whereas, public necessity and convenience demand that said Queen Anne Boulevard be graded and regraded in conformity with the grades established herein, and that the use of said boulevard be changed from commercial to park, drive and boulevard uses; now, therefore,

"Be it ordained by the city of Seattle, as follows:

"Section 1. That the curb grades of Queen Anne Boulevard, as established by ordinance No. 16790 of the city of Seattle, be and the same are hereby changed and established at the following elevations above city datum, to wit: [Here follow specified grades of the boulevard along its entire course to be improved.]

"That in the construction of the slopes for cuts and fills upon the property abutting upon said boulevard and approaches thereto, in conformity with such established grades, each cut shall be carried back into and extended upon the abutting real property one (1) foot for each foot in depth of cut, and each fill shall be carried back and extended upon the abutting real property one and one-half (1½) feet for each foot of elevation of fill.

"Sec. 2. That the use of Queen Anne Boulevard, as established by ordinance No. 16790 of the city of Seattle, be and the same is hereby changed from commercial to park, drive and boulevard uses.

"Sec. 3. That all lands, rights, privileges

and other property necessary to be taken, used or damaged in the grading and regrading of said Queen Anne Boulevard, as established by ordinance No. 16790, and approaches thereto, all in the city of Seattle, in conformity with the grades established in section one hereof, and in the construction of the necessary slopes for cuts and fills upon the real property abutting upon said boulevard and approaches thereto, are hereby condemned to the public use for such purposes; and all lands, rights, privileges and other property necessary to be taken, used or damaged by the change from commercial to park, drive and boulevard uses, are hereby condemned to the public use for such purpose. Said lands, right, privileges and other property are to be taken, used and damaged only after just compensation has been made or paid into court for the owner in the manner provided by law.

"Sec. 4. That the cost of the property and property rights necessary to be condemned, appropriated, taken and damaged in order to carry out the provisions of this ordinance, together with the cost of the necessary condemnation proceedings, shall be paid from the general fund."

Thereafter, in February, 1911, there was passed and approved by the city council and mayor ordinance No. 26340, manifestly in response to the request and action taken by the board of park commissioners as evidenced by its resolution above quoted, which ordinance, so far as we need here notice its provisions, reads as follows:

"Whereas, heretofore, the board of park commissioners have in writing designated Queen Anne Boulevard as laid out, widened, extended and established under ordinance No. 16790, of the city of Seattle, as property to be set aside and transferred to the board of park commissioners, for park, parkway and boulevard purposes; now, therefore,

"Be it ordained by the city of Seattle as follows:

"Section 1. That all of Queen Anne Boulevard, as widened, extended, laid out and established by ordinance No. 16790 of the city of Seattle, including street intersections * * * be, and the same is hereby set aside for park, parkway and boulevard purposes, and the control and jurisdiction thereof transferred to the board of park commissioners subject to the provisions of section 2 hereof.

"Sec. 2. That nothing herein contained shall be deemed or construed to divest the city council of jurisdiction and control, and the city council hereby expressly reserves unto itself full and complete jurisdiction and control of all streets, avenues and highways herein transferred for the purpose of making any and all local improvement upon, on or under the same, except for grading, regrading, paving and parking and for creating local improvement district therefor."

The establishment of the grades specified in ordinance No. 26253 authorizing these eminent domain proceedings, meant the change of previously established grades upon portions of Queen Anne Boulevard, and the establishment of original grades upon other portions thereof. Whether that ordinance constituted the changing of a previously established grade on the portion of the boulevard in front of appellants Hopkins' and Rushtons' properties is one of the questions to be noticed later. After the passage of these ordinances and the adoption of the resolution of the board of park commissioners, the physical improvement of the boulevard, which was commenced and carried on by the board of park commissioners in pursuance of the scheme contemplated by these ordinances and this resolution, had proceeded to the extent that the boulevard was graded in front of appellants' properties, and the improvement upon some other portions of the boulevard had proceeded to the extent that its surface was paved, at the time the trials occurred in these eminent domain proceedings, which was in December, 1911, resulting in verdicts and judgments from which these appeals are taken. Other facts will be noticed as may become necessary in our discussion of the several contentions made by counsel.

[1] Counsel for the city introduced evidence at the trials upon the theory that since the expenses incurred by the city in acquiring the rights here sought as against appellants were not to be paid for by special assessments against benefited property, but were to be assumed and paid by the city from its general fund, there should be offset against appellants' damages any special benefits resulting to their property from the proposed improvement. Counsel for appellants apparently do not seriously contend against the right of the city, in eminent domain proceedings of this nature, speaking generally, to offset benefits against damages when such damages are not to be paid for by special assessments. Indeed, there would seem to be no room for such a contention in the light of the express provisions of section 7782, Rem. & Bal. Code, reading as follows: "When such ordinance does not provide for any assessment in whole or in part on property specially benefited, the compensation found for land or property taken or damaged shall be ascertained over and above any local or special benefits from the proposed improvement." Our former decisions also render it plain that this may be done in an eminent domain proceeding, prosecuted by a municipal corporation, without violating any constitutional right of the property owner. *Lewis v. Seattle*, 5 Wash. 741, 32 Pac. 794; *Lincoln County v. Brock*, 37 Wash. 14, 79 Pac. 477; *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261; *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

[2] Counsel for appellants do insist, however, that the trial court erred in permitting certain evidence to be introduced by the city, bearing upon the question of benefits. The claimed objectionable evidence introduced on behalf of the city consisted of the resolution of the board of park commissioners and ordinance No. 26340, above quoted from, pledging the construction of the physical improvement of the boulevard without the levying of any special assessment upon the property benefited to pay therefor, evidence of the nature, extent, and value of the proposed improvement, evidence of the present progress made in the construction of the proposed improvement, evidence of the amount of special benefits flowing therefrom to appellants' property, and evidence of the amounts which would be chargeable against their respective properties as special assessments, to pay for the proposed improvement if the same were constructed upon the local improvement and assessment plan.

It is contended that this evidence was erroneously admitted because the proposed improvement was not specifically provided for and described in ordinance No. 26253, authorizing the prosecution of these eminent domain proceedings. We do not think that the exact nature and extent of the improvement which the city and board of park commissioners contemplated was to follow the acquisition by the city of the rights here sought was necessary to be made in that ordinance in order to entitle the city to have the special benefits flowing therefrom to abutting property offset against damages resulting to such property from slopes, fills, change of grade, and change of use of the boulevard. If, upon the trial of the question of damages resulting from these causes to abutting property, the city, by competent evidence, made the nature and extent of the proposed improvement when completed to appear with reasonable certainty, and that such improvement would be completed within a reasonable time following the acquisition of the rights here sought, all of which we think the city did make appear with reasonable certainty by competent evidence, it seems to us that special benefits flowing from such improvement to the abutting property may be offset against the damages resulting thereto from these causes. Not only did the city's evidence show with reasonable certainty the extent, nature, and value of the proposed improvement, and that it would be completed within a reasonable time following the acquisition of the rights here sought, but it also showed by competent evidence, we think, that these eminent domain proceedings, together with the proposed physical improvement of the boulevard by grading and paving, in accordance with the grades established by ordinance No. 26253, constituted one united project, so that it may be said that the benefits flowing to the dam-

aged property resulted from the very improvements contemplated by the city to follow the acquisition of the rights here sought.

[3, 4] Some contention is made by counsel for appellants that special benefits cannot be lawfully offset against damages in these proceedings because in the prior eminent domain proceedings under ordinance No. 17690, by which additional land was acquired for the laying out of the boulevard, benefits were charged against abutting property, including property of appellants, by special assessments to pay for the land so acquired. We have already noticed that nothing was then acquired by the city save the necessary additional land to lay out the boulevard. Of course, no benefits were offset against damages in those proceedings, since compensation for the land taken was there paid for by special assessments; and it is plain that these special assessments were levied upon specially benefited property to pay for nothing but the additional land so acquired. Manifestly, no special benefits were considered in making those assessments save the benefits flowing from the mere acquisition of the additional land and the laying out of the boulevard. The physical improvement of the boulevard then remained a matter to be provided for in the future. The city could have thereafter lawfully proceeded with the physical improvement of the boulevard upon the local improvement and assessment plan, without its power in that regard being in the least impaired by the previous assessment levied to pay for the mere acquisition of the additional land. *Martenis v. Tacoma*, 66 Wash. 92, 95, 118 Pac. 882. This being the law, we think it follows that the right of the city is not curtailed in having such benefits offset in condemnation proceedings necessary to the acquisition of additional rights incident to the physical improvement of the boulevard. Another thought worthy of note in this connection is that the city is prosecuting these condemnation proceedings and appellants are resisting them upon the theory that the city has not heretofore acquired the rights which it here seeks. That being true, it is difficult to see how there has ever been a previous adjudication, upon either the question of these damages or of the benefits which will flow from the improvement being made, without expense to appellants as a result of the acquisition of these rights. If this contention of appellants be regarded as sound, it would seem to necessarily follow that neither the question of damages or benefits need be tried in these proceedings. We conclude that the former assessment of benefits to pay for the mere acquisition of the land is no bar to the offsetting of benefits in these proceedings.

[5] Some contention is made by counsel for appellants, rested upon what they conceive to be an analogy existing between the offsetting of benefits against damages as in

these proceedings and the charging of the expense of the improvement against specially benefited property by special assessment. The argument is, in substance, that in the offsetting of benefits—that is, the considering of the damages and the benefits as to each particular tract or parcel of land aside from all others—there is a failure to equalize the benefits flowing to abutting property from the proposed improvement, and thus there is a failure to comply with one of the principles upon which special assessments are chargeable. It is true that the authorities do seem to recognize, in a measure, an analogy existing between the offsetting of benefits in an eminent domain proceeding and special assessments. 1 *Page & Jones, Taxation by Assessment*, § 62. It seems to us, however, that as the question is here involved, this being a pure eminent domain proceeding, the purpose of which is the ultimate ascertaining of the net damages resulting to the property of appellants and others separately, it not being sought to impose any charge whatsoever upon appellants' property, the analogy invoked goes no further than to require the offsetting of benefits to be limited to special benefits, and that there is not thereby drawn into the case any question of apportionment of charge for such benefits between separate properties.

In *Lewis v. Seattle*, 5 Wash. 741, 758, 32 Pac. 794, 799, Justice Scott, speaking for the court, observed: "It is generally held that only such benefits as are special and peculiar to the particular property can be taken into consideration. But the laying out or widening of a street may be a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose land is taken therefor, although parties upon the opposite side of the street are similarly benefited and are not chargeable therewith, for the reason that none of their lands were appropriated and no damages were claimed by them. *Hilbourne v. Suffolk*, 120 Mass. 393 [21 Am. Rep. 522]; *Donovan v. Springfield*, 125 Mass. 371; *Cross v. Plymouth County*, 125 Mass. 557; *Abbott v. Cottage City*, 143 Mass. 521, 10 N. E. 325 [58 Am. Rep. 143]; *Trosper v. Commissioners*, 27 Kan. 391; *Allegheny v. Black*, 99 Pa. 152." This view is reaffirmed in *Spokane Traction Co. v. Granath*, 42 Wash. 506, 511, 85 Pac. 261, where it is also pointed out that benefits are not rendered general so as to prevent their deduction from damages, as counsel seems to contend, merely because other property in the neighborhood of the improvement may also receive benefits of like nature. We are of the opinion that there is not here involved any question of apportioning benefits between different properties, and that the city may have all the special benefits resulting from the proposed improvement to any particular lot or parcel offset against the damages resulting to such lot or parcel,

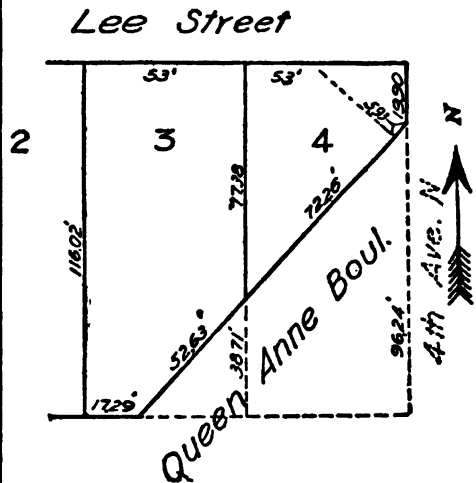
without any consideration of the question of apportioning benefits between different parcels. Our attention has not been called to any decisions which, when critically read, we regard as holding to the contrary.

[6] Contention is directed particularly against the admission of evidence which tended to show the amounts which would have been chargeable against the property of appellants as special assessments if the city were constructing this improvement upon the local improvement and assessment plan. That the evidence presented for the purpose of showing the amount such assessment would be was competent and sufficient for that purpose we think there is but little room for controversy. Indeed, we do not understand that it is seriously contended otherwise; but it is contended that the amount of such assessments that appellants' property would be subject to if the city were proceeding upon that plan in making the improvement is immaterial to the question of benefits as here involved. It seems to us, however, in view of the fact that appellants' property is going to receive special benefits from this improvement without being compelled to pay therefor by special assessment, that this evidence has a direct and material bearing upon the value of the special benefits so received. We are not able to see any prejudicial effect of this evidence upon appellants' rights, since the amounts which would be assessable against their property would, in no event, be more than the special benefits, and might be materially less than such benefits, since assessments for special benefits are not only limited by the amount of such benefits, but also by the amount of the cost of the proposed improvement, which may be materially less than the actual benefits received therefrom. We think there was no error in receiving this evidence, and that it was material as tending to show the amount of special benefits the city was entitled to have offset against appellants' damages.

[7] Contention is made in behalf of appellants Hopkinses and Rushtons that the establishment of the grade in front of their property by ordinance No. 26253, under which these eminent domain proceedings are prosecuted, constituted the change of a previously established grade in front of their property, and that they were entitled to damages upon that theory. The evidence upon the question of there being a previously established grade in front of their property, we think, is such as would warrant the conclusion that there was no previously established grade, and that this was the establishment of an original grade upon that portion of the boulevard. However, the trial court did not so decide as a matter of law, but submitted that question to the jury upon evidence which was quite voluminous, and which we think might lead reasonable minds to different conclusions, with appropriate instructions as to what constituted the establishment of a grade,

pointing out how a grade might be established by actual physical improvement, as well as by ordinance. Upon the question so submitted, the jury made a special finding against appellants, finding that there never had been a previously established grade in front of their property. It is apparent, therefore, that counsel's contention upon this question presents only a question of fact, which was found against them by the jury upon evidence which we think was sufficient to support such finding.

[8, 9] It is contended in behalf of appellants Wald and wife that the trial court erred in deciding, as a matter of law, that the two platted, unoccupied lots owned by them, and described by the city in its eminent domain proceedings as being in some degree damaged by the proposed improvement, constituted a single tract for the purpose of determining both damages and benefits, and in submitting to the jury the question of their damage and benefits upon that theory, which, it is conceded, was the result of the court's rulings. It will be conducive to a clearer understanding of appellants Walds' contention to have before us the plat of their lots as introduced in evidence and conceded to show the location of the lots relative to each other and to the boulevard as follows:



These lots had been platted as a part of Nob Hill addition many years before the laying out of Queen Anne Boulevard. As originally platted, they were each 53 by 116 feet in area, manifestly of such size as to be separately suitable for ordinary city residence lots. By the first condemnation proceedings, there was taken from these lots a considerable portion off the southeasterly corners thereof, reducing the size of lot 3 but a small amount, and taking approximately one-half of lot 4; leaving lot 4, however, of sufficient size for use as a small residence lot, as the evidence tended to show. It is conceded that the lots have never been improved, and are unoccupied. The evidence

does not indicate that they are held by their owners with any view to a common use. There is some evidence which may be regarded as indicating that they might be used in common to some advantage, but, if so, it is only because of the manner in which they have been cut by the laying out of Queen Anne Boulevard and not because of anything voluntarily done by their owners. During the trial appellants disclaimed any damages to lot 3, claiming damages to lot 4 only. The evidence introduced over appellants' objections renders it highly probable that the net damage awarded by the jury for injury to lot 4 was materially reduced by benefits flowing to lot 3. These rulings of the trial court were erroneous if the two lots were, in fact, separate tracts. In the text of 15 Cyc. p. 768, it is said: "The benefit resulting to one lot or tract from an improvement cannot be set off in determining the compensation or damages due to the same owner for the taking or injuring of a separate and distinct, although contiguous, tract." This, we think, is so elementary that citation of further authority is unnecessary. It is, in principle, the same as where resulting damages are sought to a tract of land not a part of the tract from which appropriated land is taken. That is, in each case, it is only the tract of land physically invaded that is to be considered in assessing either damages or benefits. The real question, then, is: Do these lots constitute separate tracts, or are they one tract for the purpose of this case? Such questions arise in the levying of general taxes, special assessments, and in the determination of damages and benefits in eminent domain proceedings. The problem has been dealt with more frequently where the question turns upon the actual use and occupancy of the land than where unoccupied and unused land is involved. This court has had occasion to deal with the question of what constitutes a single tract in the following cases: *Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346; *Million v. Welts*, 29 Wash. 106, 69 Pac. 633; *Sultan W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *Seattle v. Atwood*, 59 Wash. 112, 109 Pac. 326; *Idaho & Western R. Co. v. Coey*, 73 Wash. 291, 131 Pac. 810. In the *Lockwood Case*, the views of the court would seem to lend support to appellants' contention, while the *Sultan W. & P. Co. Case*, viewed superficially, may be considered as lending support to the city's contention. However, when that decision is read critically, there is reason for assuming that the court there regarded the fractional parts of the section as one tract because they were used in common. The other decisions of this court do not aid us here.

There appear to be but few decisions of the courts dealing with the question where unoccupied, officially platted town or city lots

are involved. The most satisfactory solution of the problem when so presented is, we think, found in *Wilcox v. St. Paul & Northern Pacific Railway Co.*, 35 Minn. 439, 29 N. W. 148, where the court observed: "One of the questions presented on this appeal from the judgment is as to the propriety of allowing damages in respect to lots from 2 to 9, none of which were touched by the railroad. It may be deemed to have been settled by the decisions of this and other courts that a landowner, a part of whose property is taken under the law of eminent domain, is not entitled to compensation for consequential injuries resulting therefrom to his entire estate, however extensive that may be, and without regard to the purposes to which it has been appropriated, but that such right of compensation exists only in respect to the tract or parcel of land a part of which is taken. And even though the lands injuriously affected are contiguous to the lands taken, so that the whole may be said to be one body of land, yet the right to compensation may not exist in respect to the whole. If one own distinct, although contiguous, farms, from one only of which land is taken, he is not entitled to compensation for resulting injury to the other. *Minnesota Valley R. Co. v. Doran*, 15 Minn. 230 (Gil. 179); *St. Paul & Sioux City R. Co. v. Murphy*, 19 Minn. 500 (Gil. 433). And in numerous cases, involving contests of this kind, the use to which the property has been devoted has been deemed an important consideration in determining whether lands, being in one body, should be deemed one tract, or several distinct tracts, for the purposes of the assessment of compensation. *Winona & St. Peter R. Co. v. Denman*, 10 Minn. 267 (Gil. 208); *Minn. Valley R. Co. v. Doran*, supra; *St. Paul & Sioux City R. Co. v. Murphy*, supra; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 122; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 Minn. 127; *Wilmes v. Minneapolis & N. W. Ry. Co.*, 29 Minn. 242, 13 N. W. 39. In these, and in other like cases, such use, sometimes disputed, as in the cases of *Doran* and *Murphy*, supra, would have been unimportant, if the mere contiguity of the lands had been deemed enough to entitle the owner to compensation in respect to the whole. If the several lots of which this block consists had been actually appropriated to distinct uses, the owner would not have been entitled to compensation in respect to lots no part of which was taken. *Minn. Valley R. Co. v. Doran*, supra. It is more doubtful whether, the lands being unoccupied, he may recover compensation for the whole as one tract. It is perhaps impossible to establish any rule applicable to such cases which will not be subject to criticism. But in respect to city property, in fact unoccupied, but which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or

blocks, intended for use as such, and not as one entire tract. Prima facie that character has been given to it by the proprietor. Presumably the division or platting was with a view to the use of the property, or to its disposal and ultimate use, in such subdivisions as have been made; and if any facts exist which might be considered sufficient to rebut this presumption, they should be disclosed. We therefore, are of the opinion that the court below erred in allowing damages in respect to lots other than lots 1 and 10." It is true, in that case, that there was not involved a question of benefits. But the question of damages to a tract not physically invaded is, we think, determinable upon the same principle. This view also finds support in *Koerper v. St. P. & N. P. Ry. Co.*, 42 Minn. 340, 44 N. W. 195, and *Evansville & Richmond Ry. Co. v. Charlton*, 6 Ind. App. 56, 33 N. E. 129. An exhaustive note reviewing the decisions touching the question of what lands are deemed part of one tract in eminent domain proceedings is appended to *Sharpe v. U. S.*, 57 L. R. A. 932, the effect of plat lines in separating tracts being there noticed on page 938. Apparently the weight of authority supports the Minnesota view, which seems to be, in substance, that regularly platted, unoccupied lots are presumed to be, until shown to the contrary, separate tracts, and must be dealt with as such in eminent domain proceedings. We are of the opinion that the trial court erred in deciding, as a matter of law, that being the effect of its rulings, that lots 3 and 4 are one tract for the purpose of determining damages and benefits. Indeed, as the record now stands, it might well be argued that the court should have decided, as a matter of law, that they are separate tracts. This question, however, we need not now decide, since a new trial must be granted appellants Walds because of these rulings of the trial court.

[10] The question of when two adjoining lots or tracts shall be treated as one tract or as two tracts would become a question of fact, unless the conceded facts as to their use and situation were such as to leave no room for different views upon that question. What the proof may be touching such question upon a new trial we cannot now anticipate. We only decide that the learned trial court erred in deciding the question as a matter of law against the appellants' contention. It may, or may not, upon a new trial, become a question for the jury. That such question becomes one of fact ordinarily, to be submitted to a jury under proper instructions, is pointed out in the following decisions: *Charleston & Southern Bridge Co. v. Comstock*, 36 W. Va. 263, 15 S. E. 69; *Kossler v. Railway Co.*, 208 Pa. 50, 57 Atl. 66; *St. Paul & Sioux City Ry. Co. v. Murphy*, 19 Minn. 500 (Gil. 433); *Phillips v. St. Clair Inclined Plane Co.*, 166 Pa. 21, 31 Atl. 69, 71.

There was submitted to the jury interrogatories calling for special findings as to the amounts of both benefits and damages resulting to the several appellants. These the jury answered, and rendered a general verdict in conformity therewith by deducting the benefits so found by them from the damages so found by them. Appellants ask a ruling from this court which, in effect, would amount to the direction of entry of judgment by the trial court notwithstanding the verdict in their favor, by eliminating the amounts found as special benefits, and directing judgment for the total gross damages found. Aside from the observations we have already made, we may say that these contentions involve questions of fact only, and a careful review of all those portions of the evidence to which our attention has been directed convinces us that we would not be warranted in interfering with the verdicts so far as the sufficiency of the evidence is concerned.

Several other errors are assigned, but they are presented to us practically without argument. We feel justified in disposing of them in an equally summary manner by simply saying that an examination of the record convinces us that they are without merit.

The judgment awarding damages to Wald and wife is reversed, and they are granted a new trial because of the rulings of the trial court, holding, as a matter of law, that their lots 3 and 4 should be treated as one single tract. The other judgments are affirmed.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

WETTERNACH et ux. v. JONES-THOMPSON INV. CO.

(Supreme Court of Washington. Dec. 31, 1913.)

VENDOR AND PURCHASER (§ 114*)—BREACH OF COVENANTS—ACTION TO RESCIND—DISCRETION.

Where, in a purchaser's action to rescind a contract of sale of real estate on the ground that the title to the property sold was not in the vendor, it appeared that plaintiffs tendered a deed of the property before suit, and demanded a return of the price, with interest, and also the cost of improvements made by them while in possession after discovery of the want of title, that the defendant vendor had acted in good faith under a mistake, and that during the trial it made good title to the property, it was not an abuse of discretion to refuse a rescission, and dismiss the action, taxing costs against defendant.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 202-204; Dec. Dig. § 114.*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Theodore F. Wetternach and wife against the Jones-Thompson Investment Company, a corporation. From judgment for defendant, plaintiffs appeal. Affirmed.

Milmon & Houser and Geo. Friend, all of Seattle, for appellants. Douglas, Lane & Douglas, of Seattle, for respondent.

MOUNT, J. The plaintiffs brought this action to rescind a contract of sale of real estate upon the ground that title to the property sold was not in the defendant. On the trial of the case the court permitted the defendant to show that during the trial it had made good the title to the property which had been conveyed to the plaintiffs. The court thereupon dismissed the action, but taxed the costs against the defendant. The plaintiffs have appealed from that judgment.

There is no serious dispute in the facts, which are as follows: On December 19, 1907, the appellants purchased from the respondent lot 3 in block 27, and lot 8 in block 28, in Earlington Acre Tracts in King county, and agreed to pay therefor \$1,800; \$300 was paid in cash, and the remainder was paid in quarterly payments of \$60 each. These payments were all completed on the 20th day of October, 1909, when the respondent executed and delivered to the appellants a warranty deed to said lots, with the usual covenants. At the time the original contract was entered into the appellants were shown by the respondent a map, or plat, showing the size of the lots. This plat had been made by the respondent upon the supposition that it owned all of the land included therein. Lot 3 in block 27 was shown upon said plat as being on one side of Fourth street, and lot 8 in block 28 was shown as being on the other side of Fourth street. This street was shown upon the plat as a street 60 feet in width. The appellants purchased the property believing the plat to be correct, and that the respondent owned all the land included within the plat. After the execution of the deed in October, 1909, the appellants discovered that the strip of land between the two lots was owned by the Seattle-Tacoma Power Company, and that this company also owned a small fraction in the corner of lot 8 in block 28, which fraction amounted to about one-thirtieth of an acre. The appellants thereupon called the attention of the respondent to these facts, and the respondent set about obtaining a deed from the owner of the land upon which the street was located, and of the small tract at the corner of lot 8. The appellants, after this time, improved the lots by fencing them. They have been in the continuous possession of the lots since the date of the contract. They have cleared the lots of stumps and brush. Fourth street has for 20 years past been used as a public highway. The appellants, before the action was begun, tendered a deed to the respondent, and demanded the return of the purchase price, with interest, and also the cost of the improvements which they had placed upon the property. These improvements were claimed to be worth \$400. The respondent

declined to rescind the contract, and this action was brought.

The appellants claim that their rights became fixed when they tendered a deed of the property back to the respondent, and that they are entitled to rescind, and to recover back the money paid and the value of the improvements upon the lots. But we think this does not necessarily follow. In the case of *Thomas v. McCue*, 19 Wash. 287, 292, 53 Pac. 161, 163, this court said: "Rescission is a remedy which is not to be invoked as a matter of course or of absolute right; but, like specific performance, its exercise rests in the sound discretion of the court. 2 Warvelle, Vendors, p. 833. A court of equity, in rescinding a contract, proceeds upon the assumption that it can result in no injustice to place both parties in the position in which they were prior to the making of the contract, and this can only be fairly done, in cases of contracts in relation to land whose value is largely speculative and subject to sudden changes, soon after the contract is entered into. Before a party can justly claim a rescission, he must not only show that the opposite party is derelict, but that he himself is without fault, for the law permits no one to take advantage of his own wrong to terminate a contract which he has knowingly and voluntarily made. There is another principle adopted by the courts, and which is often a controlling one in cases like the present, and that is that, where one party to a contract intends to rescind it on account of a breach of it by the other, he must elect to do so speedily on the discovery of such breach. Delay in rescission is evidence of a waiver of the misconduct of the other party, and is itself deemed an election to treat the contract as valid and binding." A number of authorities are cited to support this rule.

The only complaint made by the appellants in this case is that they purchased the lots supposing that a street was between the lots, and that the lots were of the size represented on the plat. The trial court found that the plat was made in good faith, and that the respondent believed at the time it was made that it was the owner of all the property included within the plat, and that the street between these two lots was properly dedicated. Although the street had been occupied as a street for a period of 20 years, it was discovered that it had never been dedicated to public use. Upon learning this, the respondent set about obtaining a dedication of the street. This was concluded before judgment was entered in the case. The respondent also obtained a deed to the small fraction in the corner of lot 8, and tendered it to the appellants. In short, the appellants have obtained now all that their contract called for. We think it was within the discretion of the trial court to refuse a rescission under these circumstances, because rescission, as was said in *Thomas v. McCue*, is

not to be invoked as a matter of course or of absolute right, but rests in the sound discretion of the trial court. If the appellants intended to rescind, they should have done so at the time they discovered that the street had not been dedicated. They did not do so at that time, but afterwards placed improvements upon the property by constructing a fence thereon, and permitted the respondent to negotiate with the owner of the land upon which the street was located for the dedication of the street, and for a deed to the fractional corner. We think under these circumstances that it was no abuse of discretion on the part of the trial court to refuse a rescission.

The judgment is therefore affirmed.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

HENDRICKSON v. SIMPSON LOGGING CO.

(Supreme Court of Washington. Jan. 5, 1914.)
APPEAL AND ERROR (§ 1099*)—LAW OF THE CASE.

Where the Supreme Court, on appeal from a judgment of nonsuit, rendered at the close of plaintiff's evidence, decided that the evidence was sufficient to carry the case to the jury, a verdict for plaintiff on a subsequent trial will not be disturbed where it was not materially different from the evidence on the former trial, and where the evidence of defendant did not call for any different decision as a matter of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Emil Hendrickson against the Simpson Logging Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts and Chas. F. Munday, all of Seattle, for appellant. Frank E. Green and Brady & Rummen, all of Seattle, for respondent.

PARKER, J. The plaintiff seeks recovery of damages for personal injuries which he alleges resulted to him from the negligence of the defendant. The cause was before us upon a former appeal from a judgment of nonsuit in favor of the defendant rendered by the superior court upon a former trial at the close of the evidence introduced by the plaintiff. That judgment was reversed by this court, and the cause remanded for new trial. 69 Wash. 72, 124 Pac. 395. A new trial in the superior court resulted in verdict and judgment in favor of the plaintiff, from which the defendant appeals to this court.

The only question presented to us by counsel for appellant is as to the sufficiency of

the evidence to support the verdict and judgment, raised in the superior court by motion for instructed verdict at the close of the evidence, and by motions made thereafter for judgment notwithstanding the verdict, and, in the alternative, for new trial. Discussion of this question would be little else than a repetition of the views expressed and conclusion reached by us upon the former appeal. We are unable to see that the facts are materially different, so far as the evidence produced in behalf of respondent is concerned, from those shown upon the former trial, which we held were sufficient to carry the case to the jury; and the evidence produced in behalf of appellant upon the second trial does not call for any different decision as a matter of law.

The judgment is affirmed.

CROW, C. J., and MORRIS and FULLERTON, JJ., concur.

KELLY v. NAVY YARD ROUTE.

(Supreme Court of Washington. Dec. 31, 1913.)

1. CARRIERS (§ 280*)—DUTY TO PROTECT PASSENGER—ASSAULT BY FELLOW PASSENGER.

It is a carrier's duty to exercise the highest degree of care demanded by the circumstances in protecting a passenger from assault by a fellow passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1105, 1106, 1109, 1117; Dec. Dig. § 280.*]

2. CARRIERS (§ 320*)—INJURY TO PASSENGER—ASSAULT BY FELLOW PASSENGER—QUESTION FOR JURY.

Where the evidence, in a passenger's action for injuries from a second assault by a fellow passenger on a boat, showed that the assailant was a brutal man of unusual strength, under the influence of liquor, and that the steward stopped the first assault with difficulty, and then went on about his work, after telling a fireman to watch all concerned, the question whether defendant exercised that degree of diligence demanded under the circumstances, and whether it had reasonable ground to anticipate a recurrence of the assault, and should have guarded against the same, was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.*]

3. TRIAL (§ 296*)—INSTRUCTIONS—CURE OF ERROR.

In a passenger's action for injuries from a second assault by a fellow passenger on a boat, an erroneous instruction that, if the assault occurred, defendant was liable was harmless, where the court also specifically stated that plaintiff could not recover unless defendant had notice of the assailant's character, and reason to believe that he would renew the assault.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 706-718, 715, 716, 718; Dec. Dig. § 296.*]

4. CARRIERS (§ 319*)—ASSAULT BY FELLOW PASSENGER—EXCESSIVE RECOVERY.

A recovery of \$1,000 for injuries from an assault by a fellow passenger, resulting in se-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vere temporary injuries, humiliation, and loss of time, though large, was not excessive.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1338-1345; Dec. Dig. § 819.*]

Department 1. Appeal from Superior Court, King County; E. K. Pendergast, Judge.

Action by William Kelly against the Navy Yard Route, a corporation. From judgment for plaintiff, defendant appeals. Affirmed.

Ira Bronson, of Seattle, for appellant. Marion A. Butler and Robt. H. Lindsay, both of Seattle, for respondent.

CHADWICK, J. On the night of March 30, 1912, plaintiff took passage upon a boat belonging to the defendant en route to his home in the city of Bremerton. On the way he was assaulted and beaten by a fellow passenger named Moore. Another joined in the assault. The assault was without provocation or excuse. It was the act of a brutal and vicious man somewhat under the influence of liquor. As soon as it became known the steward of the boat having in charge the lower deck—the assault occurred in the smoking room, a compartment about 40 feet long—rushed to the assistance of the plaintiff. The steward was himself knocked down by Moore. Finally he induced Moore to go back into a cardroom, and plaintiff to go to another seat in the forward part of the compartment. Believing he had the aggressor quieted, and after telling one of the firemen to keep an eye on those concerned, the steward went on about his work. In about ten minutes Moore came out of the smoking room, and walked rapidly forward to the place where plaintiff was sitting, and again, and without provocation or excuse, struck and beat plaintiff in a most inhuman manner. Moore was a man of unusual size and strength, with the reputation among some of the passengers of being a dangerous man, and he seems to have so terrorized those present that no protection was given plaintiff by the passengers. The steward was called after the second assault, and again stopped Moore, and rendered plaintiff such assistance as seemed needful at the time. Plaintiff brought this action to recover compensation for his injuries, and, from a verdict and judgment for \$1,000, defendant has appealed.

The right to recover is based upon the second assault. It is contended that the evidence does not sustain the verdict, that it is affirmatively shown that defendant did all that it might have done to protect plaintiff, and that it had no reason to anticipate the second assault.

[1] A carrier is bound to exercise the highest degree of care demanded by the surrounding circumstances in protecting its passengers, and is answerable for the unlawful conduct of a fellow passenger, if, upon consideration of all the facts and circumstances, it

could, or might by the exercise of such diligence as the occasion demanded, have prevented an assault or injury at the hands of a fellow passenger. A passenger from the time he enters his vehicle has the right to claim the protection of the carrier from the insults and violence of others, and it is a duty the carrier owes to the passenger, when the circumstances known to it are such as to create a reasonable apprehension of disorderly conduct, to be vigilant and prompt to suppress it when it occurs, and to prevent its repetition. *Hutchinson on Carriers* (3d Ed.) §§ 980, 981.

[2] Whether defendant exercised that degree of diligence demanded under the circumstances, and whether it had reasonable grounds to anticipate a recurrence of the assault, and whether it should have taken effective means to guard against it, are deductions from the facts proper to be left to the jury.

[3] The following instruction is complained of: "The master has his duties and obligations to perform, for a breach of which he is responsible. Among his duties is that of enforcing his authority to protect both passengers and seamen from maltreatment while on board his ship. He is armed with absolute authority and corresponding responsibility. He has such authority and a like duty to protect the crew from the brutality of the officers. What he permits he justly is considered to commit, and he permits that which he does not by prompt exercise of his authority prevent."

Standing alone, this instruction would undoubtedly be called erroneous, for it practically tells the jury that, if the assault occurred, the defendant is liable, whereas, the rule is as hereinbefore stated; but the court called the particular attention of the jury to the real fact in issue, that is, that, in order to warrant a recovery, the jury must find that defendant had notice of the character of Moore, and reason to believe that he would renew the assault. The instruction, when considered with the instructions taken as a whole, will not be held to be prejudicial.

Other instructions are complained of. It is asserted that they have no relevancy to the issue, and are prejudicial. That they have no relevancy to the issue may be admitted; but they are not so glaringly inapplicable to the facts of the case and to the theory of either side that we are unwilling to say that the jury either considered them or might have been misled by them.

[4] Finally, it is contended that the verdict is excessive. The jury awarded the sum of \$1,000. Plaintiff was pretty badly beaten up. It is insisted that one of the elements of his claimed damages, namely, partial loss of hearing, is not in any degree sustained. Plaintiff was before the court and jury, and we feel that he would be un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

warranted in disturbing the verdict and the judgment of the trial judge who passed on the extent of his injuries upon the motion for a new trial. The verdict is substantial. It may be larger than any of us would have been willing to return, if we had been jurors. Passion and prejudice are not to be inferred from the mere size of the verdict. Where the injury is such that it affects only the earning capacity of the party, so that compensation can be in some degree measured, this court has sometimes made conditional reduction of judgments. Plaintiff suffered injuries which were severe at the time, and we are not prepared to say that the amount of compensation allowed for his injuries, when coupled with damages for humiliation and loss of time, is excessive.

Affirmed.

CROW, C. J., and MAIN, ELLIS, and GOSE, JJ., concur.

LOY v. NORTHERN PAC. RY. CO. et al.
(Supreme Court of Washington. Dec. 19, 1913.)

1. APPEAL AND ERROR (§ 1005*)—FINDINGS—CONCLUSIVENESS.

If there is substantial evidence to sustain the verdict, though conflicting, and the trial court has refused to set it aside, the Supreme Court will not grant a new trial because it may believe that the weight of the evidence is against the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3960; Dec. Dig. § 1005.*]

2. APPEAL AND ERROR (§ 671*)—STATEMENT OF FACTS.

Where alleged improper remarks of counsel were made in the presence of the court, they should have been certified by the court and made a part of the statement of facts, and the impropriety of such remarks cannot be reviewed if they were not so preserved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

3. TRIAL (§ 349*)—SPECIAL FINDINGS—DISCRETION OF COURT.

Whether interrogatories or special findings shall be submitted to the jury is entirely for the trial court's discretion.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

4. TRIAL (§ 315*)—VERDICT—VERDICT BY LOT.

If the jurors did not agree in advance to abide by the result arrived at by adding the amounts each juror thought plaintiff should receive and dividing the result by the number of jurors, a verdict so arrived at is not objectionable as being obtained by lot or chance.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 740-742; Dec. Dig. § 315.*]

Department 2. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by Michael Loy against the Northern Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Geo. T. Reid, J. W. Quick, and L. B. da Ponte, all of Tacoma, for appellants. Forney & Ponder, of Chehalis, for respondent.

MAIN, J. The purpose of this action was to recover damages alleged to have been sustained by the plaintiff while being wrongfully ejected from a train of the defendant company. The cause was formerly before this court, and the decision is reported in 68 Wash. 33, 122 Pac. 372. The facts will not here be stated except in so far as may be necessary to an understanding of the points to be considered. The cause was tried before the court and a jury. A verdict was returned in favor of the plaintiff in the sum of \$6,640.90. Thereafter a motion for new trial was made which was supported and opposed by affidavits. The motion was denied. Judgment was entered upon the verdict. The defendants have appealed.

The trial court submitted to the jury certain special interrogatories and refused to submit others. This ruling is complained of by the defendants as prejudicial. Error is also sought to be predicated upon the argument of plaintiff's counsel to the jury. It is claimed that this argument brought before the jury matters which the record did not justify, and that it was highly inflammatory and improper. The objectionable remarks were not taken down by the court reporter. They are sought to be shown by an affidavit by the attorney for the defendants in support of the motion for new trial. This affidavit is met by a counter affidavit on the part of counsel for the plaintiff. Both affidavits are embodied in the statement of facts. The court, however, does not certify as to the remarks actually made. The affidavits are in conflict.

It appears that the jury arrived at their verdict in the following manner: Eleven jurors voted favorably to the plaintiff, each specifying the amount that he considered the plaintiff should receive. W. S. Blanchard, the foreman, voted that the plaintiff was entitled to nothing. Thereupon the amounts were added together and divided by 11; the result being \$6,640.92. Thereupon the foreman stated: "All who are in favor of allowing the plaintiff the sum of \$6,640.92 will please say 'Yes,'" or words to that effect, and all of the jurors except the foreman answered, "Yes." The jury then returned into court and were asked by the court if they had agreed upon a verdict. The foreman answered that they had. The verdict was then handed to the clerk and by him read, and, when asked by the court if that was their verdict, 11 jurors answered that it was. The defendants contend that the verdict was arrived at by lot or chance and therefore is not legal.

The questions presented are: First, is the verdict sustained by the evidence; second, misconduct of counsel; third, did the trial

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court err either in refusing or in submitting interrogatories; fourth, did the jury arrive at their verdict by lot or chance; and, fifth, is the verdict excessive?

[1] I. From the statement of facts it appears that the evidence on the part of the plaintiff and the defendants, respectively, is in conflict in many material particulars. If, however, there is substantial evidence to sustain the verdict, and the trial court upon motion has refused to set it aside, this court cannot grant a new trial because it may believe that the weight of the evidence was against the verdict. *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960; *Bennett v. Seattle Elec. Co.*, 56 Wash. 407, 105 Pac. 825; *Kincaid v. Walla Walla Valley Tr. Co.*, 57 Wash. 334, 106 Pac. 918, 135 Am. St. Rep. 982; *Meador v. Northwestern Gas & Elec. Co.*, 55 Wash. 47, 103 Pac. 1107. In the case last cited it was said: "The weight and sufficiency of evidence is for the consideration of the jury; and their verdict must be sustained in the appellate court, when supported by substantial evidence, even though the court should be of the opinion that the weight of the evidence is against the verdict." We are unable to find that there was not substantial evidence which would support the verdict, and therefore, under the rule stated, the verdict cannot now be disturbed.

[2] II. On the question of the misconduct of counsel, it appears that the objectionable remarks were made in the presence of the court during the trial and might have been preserved, either by the stenographer or upon request the court itself might have reduced them to writing. This, however, was not done. Upon motion for new trial the defendant's counsel by affidavit set forth his version of the objectionable remarks. The plaintiff's counsel answered denying, and setting forth their version of the same. The trial judge has included both affidavits in the statement of facts but does not certify as to which, if either, correctly contains the substance of the language used. The language having been used in the presence of the court, it should have been certified to by the court and made a part of the statement of facts. To permit such facts to be presented by affidavits gives rise to an unseemly contest between counsel upon matters that occurred in open court during the progress of the trial, and in the interest of orderly procedure should not be tolerated. The objectionable language not having been preserved in the statement of facts, it cannot here be reviewed.

In *Maryland Casualty Company v. Seattle Electric Company*, 134 Pac. 1097, it was said: "It will be noted that some of the situations contemplated by the first three of the grounds for a new trial might arise upon matters occurring in open court during the progress of the trial and the facts would then appear as a part of the record. In such a case it is obvious that affidavits presenting

such facts would be unnecessary and improper. Other situations contemplated by any one of these four subdivisions might arise out of matter not occurring in open court during the progress of the trial and hence not appearing in the record. In such a case evidence allunde the record would be not only proper but necessary to any disclosure of the facts relied upon for a new trial."

In *Rayburn v. Central Iowa Ry. Co.*, 74 Iowa, 637, 35 N. W. 606, the court, speaking upon this question, used this language: "It is urged that the court below erred in not setting aside the verdict on account of the misconduct of plaintiff's counsel in presenting, in their arguments to the jury, inflammatory appeals and considerations which should not have been urged to influence the finding of the verdict. The substance and language of that part of counsel's argument to which the objection is made are set out in affidavits of defendant's counsel at the trial, and of others. Counter affidavits were filed by counsel on the other side. This contest of affidavits between members of the profession is unseemly and ought not to be tolerated. The law provides for perpetuating of record such matters by bills of exceptions by which the court below can show the facts, thus avoiding the necessity of resorting to affidavits. In view of the fact that usually a shorthand writer is in attendance upon the trial courts, his aid can be secured to take down the improper words of counsel, or the court, when objection is made thereto, can at the time reduce them to writing. In either case, they may be then or afterwards embodied in a bill of exceptions. This practice will involve no inconvenience and will secure greater accuracy in preserving the objectionable words of counsel than can be attained by resorting to affidavits and counter affidavits. We conclude that matters of this kind ought not to be made of record and brought here, except upon bills of exceptions. We have heretofore reviewed objections based upon like conduct of counsel which were shown by affidavits, but no objections were made on the ground that the facts and language brought in question were not preserved and embodied in the records by bills of exceptions. We doubt not that, had the objections been made, we would have refused to review the question of misbehavior of counsel; but, at all events, we are now satisfied that correct practice requires that the court below shall certify the facts and language complained of as amounting to misbehavior on the part of counsel." See, also, *Ford v. Easley*, 88 Iowa, 603, 55 N. W. 336; *Everett v. C. I. Ry.*, 73 Iowa, 442, 35 N. W. 609; *Smith v. Wilson*, 36 Minn. 334, 31 N. W. 176, 1 Am. St. Rep. 669.

[3] III. Whether interrogatories or special findings shall be submitted to the jury is a matter entirely within the discretion of the trial court. *Pencil v. Home Ins. Co.*, 3 Wash.

485, 28 Pac. 1031; *Bailey v. Tacoma Traction Co.*, 16 Wash. 48, 47 Pac. 241; *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Hart Lumber Co. v. Rucker*, 20 Wash. 383, 55 Pac. 320; *Matthews v. Spokane*, 50 Wash. 107, 96 Pac. 827. In the case last above cited it was said: "The refusal of the court to submit special findings or a special verdict to the jury is next assigned as error. Such matters rest entirely within the discretion of the trial court, and its rulings are not subject to review on appeal."

[4] IV. On the matter of the method by which the jury arrived at its verdict, it appears that 11 jurors voted favorably to the plaintiff; each specifying on a slip of paper the amount that he considered proper. Thereupon the amounts were added together and divided by 11; the result being \$6,640.92. The foreman then stated, "All who are in favor of allowing the plaintiff the sum of \$6,640.92 will please say 'Yes,'" or words to that effect, and all the jurors, except the foreman, answered "Yes." It does not appear that the jurors had agreed in advance to abide by the result. Where the jurors have not in advance agreed to abide by the result, and after a quotient has been arrived at by adding and dividing, the requisite number of jurors vote for a verdict in this sum, it is not subject to the objection that it was arrived at by lot or chance. *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899; *Stanley v. Stanley*, 32 Wash. 493, 73 Pac. 596; *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130; *Conover v. Neber*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; *Wiles v. N. P. Ry. Co.*, 66 Wash. 343, 119 Pac. 810.

In *Wiles v. N. P. Ry. Co.*, supra, it was said: "There was no statement that the jurors had agreed in advance to abide by the result. Such an agreement is the very essence of the misconduct charged. The burden of showing all the essential elements of the misconduct charged was upon the appellant. This court has often held that the taking of a quotient is not in itself misconduct unless it appears that the jury had agreed in advance to be bound by it, even though the verdict returned be exactly or nearly the amount of the quotient."

V. It is claimed that in any event the verdict was excessive. If the evidence introduced on behalf of the plaintiff is to be believed, there was substantial evidence to sustain the amount of the verdict. On the other hand, if the facts are as claimed by the defendants, the verdict would seem to be excessive. This presents a question for the jury to determine. We are unable to say that passion or prejudice actuated the jury in arriving at its verdict.

The judgment will therefore be affirmed.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

STATE v. JAKUBOWSKI.

(Supreme Court of Washington. Dec. 26, 1913.)

1. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY—LANGUAGE OF STATUTE.

An information charging the offense of larceny by a bailee is sufficient where it makes the charge in the words of the statute.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

2. EMBEZZLEMENT (§ 16*)—OFFENSE—WHAT CONSTITUTES.

Under Rem. & Bal. Code, § 2601, subd. 3, providing that every person, who with intent to deprive or defraud the owner, having any property in his possession as bailee or pledgee, shall secrete, withhold, or appropriate the same to his own use, steals such property and is guilty of larceny, accused, who accepted money from the complaining witness upon an agreement that he should redeliver it upon a release of bonds executed by accused, is guilty of larceny, where he failed and refused to deliver the money upon the release of the bonds.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 17, 18, 21; Dec. Dig. § 16.*]

3. EMBEZZLEMENT (§ 47*)—PROSECUTION—EVIDENCE.

In a prosecution for larceny by a pledgee, evidence of accused's guilt held sufficient to go to the jury.

[Ed. Note.—For other cases, see *Embezzlement*, Dec. Dig. § 47.*]

4. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW.

Where the evidence was sufficient to go to the jury, a conviction cannot be reversed because of a sharp conflict between the state's evidence and that introduced by accused in his own behalf, for the weight and credibility of such evidence is for the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

5. EMBEZZLEMENT (§ 5*)—PROSECUTION—GUILT.

In a prosecution for larceny by a pledgee, who failed to redeliver money which had been deposited with him as security for bonds he gave for the benefit of the complaining witness, the question of his guilt depended upon his good faith in appropriating the money to his own use.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 3; Dec. Dig. § 5.*]

6. CRIMINAL LAW (§ 1088*)—APPEAL—RECORD—QUESTIONS PRESENTED FOR REVIEW.

In a criminal prosecution, where the record did not contain alleged objectionable argument by the prosecutor, but merely set out an exception by accused, which was allowed, the certification of the record by the trial judge merely showed that the exception had been made and does not establish the objectionable nature of the argument.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2676, 2746-2751, 2757, 2766, 2782-2802, 2899; Dec. Dig. § 1088.*]

7. CRIMINAL LAW (§ 1088*)—RECORD—QUESTIONS PRESENTED—AFFIDAVITS.

The recital of matters occurring in the presence of the court, such as improper argument of counsel, in the affidavit submitted on motion for a new trial, is an insufficient preservation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the record for the purpose of reviewing the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2746-2751, 2757, 2766, 2782-2802, 2899; Dec. Dig. § 1088.*]

8. CRIMINAL LAW (§ 713*)—TRIAL—IMPROPER ARGUMENT OF COUNSEL.

In a prosecution for larceny by a pledgee to whom money had been delivered to secure him on bonds, argument by the prosecutor that the complaining witness had taken all steps to get the money from him, but that it had been unavailing, is not erroneous of itself and cannot be so held in the absence of a record showing the context.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1678; Dec. Dig. § 713.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Adam Jakubowski was convicted of grand larceny, and appeals. Affirmed.

Jay C. Allen, of Seattle, for appellant. John F. Murphy, Crawford E. White, and Reah M. Whitehead, all of Seattle, for respondent.

ELLIS, J. The defendant was charged with the crime of grand larceny. The information was based upon the provisions of section 2801, Rem. & Bal. Code, and alleged in substance that on June 15, 1912, the defendant, being authorized by agreement to hold \$300 belonging to one Jan Majeuski, as bailee and trustee, "did then and there willfully, unlawfully, fraudulently, and feloniously withhold and appropriate the same to his own use with intent to deprive and defraud the said Jan Majeuski thereof." The substantial facts, as developed in the state's evidence, were as follows: The prosecuting witness, Majeuski, in December, 1910, claimed to have lost three certificates of deposit for \$100 each, one issued to him by the Seattle National Bank of Seattle and two by the First National Bank of Seattle. The banks refused to pay him the \$300 represented by these certificates until he had furnished them indemnity bonds in double the amount deposited, executed by him and another acceptable bondsman. Majeuski was a Pole and had lived in this country only a few years. He was directed to the defendant, a fellow countryman, as one who might be willing to sign the bonds. The defendant finally agreed to sign the bonds and went to the banks with Majeuski, where his financial standing was investigated and found satisfactory, and on December 16 and 17, 1910, the bonds were executed by Majeuski and the defendant and delivered to the banks. The money represented by the lost certificates was paid by the banks to Majeuski, who turned it over to the defendant. The defendant, accompanied by Majeuski, took the money to another bank and deposited it in the defendant's name. Majeuski testified that, at the defendant's direction, he remained outside of the latter bank when the de-

posit was made and supposed that the defendant was depositing the money to his (Majeuski's) credit. He further testified that he paid the defendant \$5 for signing the bonds, and that the defendant told him that he (the defendant) would return the money in two or three months. On December 19th the two men went to the office of an attorney, Robert Welch, for the purpose of having some writing drawn up showing the terms upon which the defendant was to hold the money. Majeuski, who claimed to have little understanding of English, testified through an interpreter. He claimed that the attorney first prepared one paper, which was destroyed, and then prepared another in duplicate, which was executed by Majeuski and the defendant; one of the duplicates being delivered to each of them. The latter paper was introduced in evidence and reads as follows: "Seattle, Washington, December 19, 1910. Whereas John Majeuski has lost one certificate of deposit for the sum of two hundred dollars on the First National Bank of Seattle and a certificate for the sum of one hundred dollars on the Seattle National Bank of Seattle, and whereas Adam Jakubowski has this day given to the said banks his bond for the payment of the said sums of money: Now therefore the said Adam Jakubowski is to have and to hold the said sum of money, to wit, three hundred dollars, until such a time when the said banks release the said Adam Jakubowski on said bonds and when said bonds are so released then the said money, to wit, the sum of three hundred dollars, is to be delivered over and unto the said John Majeuski. Jan Majeuski. Adam Jakubowski. Witness: Robert Welch."

In January, 1911, Majeuski asked the defendant for some of the money, and the defendant refused to give it to him, threatening violence if he persisted in demanding it. On January 25, 1911, Majeuski brought a civil action against the defendant, demanding the \$300 and costs. The complaint alleged fraud on the part of the defendant and, in addition to the money demand, asked for a cancellation of the above agreement. In this civil action an amended complaint was filed on September 30, 1911, alleging that the bonds given to the banks had been canceled, and again asked for judgment for the \$300 and costs. At this time one of the bonds had not been canceled and it was admitted on the present trial that one of the bonds was not canceled until the day before the trial of the civil action. The attorney for Majeuski in the civil action testified that this was through an oversight, due to the fact that two bonds were given to one bank and the third to another, and that he, supposing that there were only two bonds, overlooked the fact that one of the two bonds given to one of the banks was not released, but that on the release of the one bond it was the inten-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—29

tion to release the defendant on both the bonds and on all liability to the bank. The civil action was tried in May, 1912, and resulted in a verdict and judgment for the plaintiff for \$288, being the \$300 less the costs, which were awarded to the defendant because one of the bonds had not been released when the action was instituted. The attorney for Majewski in the civil action testified that the defendant at first absolutely refused to pay this judgment, stating that he would never pay it; that afterwards, when execution was issued, he offered to pay the judgment in installments of \$50 each at intervals of 60 days, which arrangement the attorney refused to consider, and that no part of the judgment has been paid. Shortly after this the information in the present case was filed.

The evidence on behalf of the defendant was directed to the support of his contention that he received nothing for going on the bonds with the bank, but that he agreed to go on these bonds in consideration that he receive the money as a loan for a period of six years at 6 per cent. interest; that being the period for which he would be liable on the bonds. The defendant testified that he met the prosecuting witness in a certain saloon; that the prosecuting witness informed him of his predicament and requested the defendant to go upon his bonds in order to secure the money from the banks. As to what was verbally agreed to, he testified: "I says I am going to see a lawyer and fix a paper. Of course I don't want to sign your bond for \$600 at the bank if I have got no security. I says, 'I will tell you the bank will never release my bond for six years; you hear that?' He says, 'Yes.' I says, 'If I sign your surety bond they will give it to you, but I am the security.' He says, 'You give me that money just the same as the bank. If the bank after six years releases you, you pay my money back, and at any time if I want some \$5 or \$10, will you give it to me?' I says, 'Yes, I will do that.' I says, 'I will tell you, Majewski, if I take that money for six years I will use it and pay you 6 per cent. interest.' He says, 'All right, you give me that; it is better than for the bank because the bank will never pay me that money.' I says, 'All right, I will do that.' And I went with him to the bank and to the lawyer and fixed that agreement." He testified that on going to the attorney's office he first saw the attorney's stenographer and asked him to make a promissory note; that shortly afterward Mr. Welch, the attorney, came in and made out a promissory note for six years, but afterward explained that, if the defendant signed the promissory note and Majewski should transfer it to some third party, the defendant would be subject to a double liability by reason of his note and his bonds with the bank; that the note was then torn up and the attorney drew up the fore-

going agreement, which was executed by the prosecuting witness and the defendant in duplicate, one of the agreements being delivered to each. He further testified that Majewski was present when the defendant deposited the money in the bank in his own name, and that the agreement was drawn up and signed in the attorney's office before the bonds were signed and the money secured from the banks. In this he is contradicted both by the testimony of the prosecuting witness and by the dates of the papers themselves. He also testified that Majewski paid him nothing for signing the bonds. He admitted that he has paid no part of the money, stating that he is unable to do so, but that he has made many unavailing efforts, which he related in detail, to secure a loan with which to pay the money.

One Kalinowski testified that in December, 1910, in a conversation in a saloon, he heard the prosecuting witness tell the defendant he could use the money for six years until the banks released the bonds; the defendant to pay 6 per cent. a year for its use. As to what occurred in the attorney's office, the stenographer testified that some time in December, 1910, Majewski and the defendant came into Mr. Welch's office; that Majewski conversed in English, which he could speak, and seemed to understand very well; that the defendant told the witness that Majewski had agreed to let him have the money for five or six years, and that Majewski explained that he was willing to do so because the defendant had gone on his bonds; that Mr. Welch came in and explained to the defendant the danger of a double liability in case he gave a note while the bonds were still in the hands of the bank, and that the agreement above mentioned was then drawn up in duplicate.

Robert Welch, the attorney, testified that when he came to his office one morning, Majewski and the defendant were there with the stenographer; that he took them into his private room where Majewski explained that he had lost the certificates; that he was going to leave town and wanted the defendant to have the money and take care of it for him; that the witness made out a promissory note for \$300, running for six years, explaining to the parties that, under the statute of limitations, the defendant would be liable on the bonds for six years; that he then advised the defendant not to sign the note and explained to him the dangers of a double liability in case the certificates were presented to the bank and the note indorsed to some third person; that the note was then torn up and that the witness dictated the agreement as above quoted. He further testified that Majewski stated that he wanted the defendant to take care of the money for him, as he was afraid to leave it in the bank, and that Jakubowski could use the money for his own personal use, as he had loaned the money and wanted the defend-

ant to have it, but that he could not recall whether anything was said about interest or not; that he dictated the agreement according to his understanding from their conversation, in which they both said the defendant was to keep the money, and that he thought it would suit their purposes.

There was also introduced on behalf of the defendant an answer prepared for filing in the civil action, in which the matters as now claimed by the defendant were set up as a defense in the civil action; that answer having been prepared before the filing of the information in this action. The answer, though prepared, was never filed. At the close of the evidence on behalf of the state, the defendant challenged its sufficiency and moved for a dismissal, which was denied. The jury found the defendant guilty. Motions for a new trial and in arrest of judgment were overruled. Judgment and sentence were pronounced, and the defendant appealed.

The appellant assigns as error the overruling of the demurrer to the information, the overruling of the defendant's challenge to the sufficiency of the evidence, the giving of a certain instruction to the jury, the overruling of the motion in arrest of judgment, and the denial of a new trial. Under these assignments, the appellant presents and argues three questions: (1) Assuming the facts as claimed by the state to be true, did they constitute larceny under the statute, and did the court err in so instructing the jury? (2) Was the evidence sufficient to withstand the motion challenging the sufficiency of the evidence; the motion in arrest of judgment, and the motion for a new trial? (3) Should a new trial have been granted because of misconduct of counsel for the state?

[1, 2] 1. If the written agreement spoke the intention of the parties, it clearly constituted a contract of bailment by pledge and made the appellant a pledgee and trustee for the prosecuting witness. As to whether it did, in fact, speak the intention of the parties, the evidence was, as we have seen, sharply conflicting, but this phase of the argument proceeds upon the assumption that the facts, as claimed by the state, were true. The statute (Rem. & Bal. Code, § 2801, subd. 3) reads as follows: "Every person who, with intent to deprive or defraud the owner thereof, * * * (3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employé, trustee, executor, administrator, guardian or officer of any person, estate, association or corporation, or as a public officer, or a person authorized by agreement or by competent authority to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto, * * * steals such property and shall be guilty of larceny."

The information charged that the defendant was authorized by agreement to take and hold possession of the money as servant, agent, bailee, and trustee for Majeuski and willfully, unlawfully, fraudulently, and feloniously withheld and appropriated it to his own use with intent to deprive and defraud Majeuski thereof. No demurrer to the information appears in the record, but, in any event, the information, which charged the crime practically in the language of the statute, was sufficient. *State v. Turner*, 10 Wash. 94, 38 Pac. 864; *State v. Whiteman*, 9 Wash. 402, 37 Pac. 659; *State v. Whitworth*, 30 Wash. 47, 70 Pac. 254; *State v. Bogardus*, 38 Wash. 297, 78 Pac. 942.

The court instructed the jury: "If, however, you should find that the understanding and agreement between the defendant and the complaining witness was that the defendant should receive the said sum of \$300 and hold it to be redelivered to the complaining witness, Jan Majeuski, upon the release of the defendant from said bonds, and that there was no agreement or understanding between the said defendant and the said Jan Majeuski that the defendant should have the use of said money, then it would be the duty of the defendant to redeliver said money to the said complaining witness within a reasonable time after being informed that the defendant was released from said bonds, if you do find that he was so released, and failure so to do, if you should find against the defendant upon the other issues in the case, would constitute the offense of larceny." We find no error in this instruction. If, as assumed, the facts as to the agreement and intention of the parties were as claimed by the state, the instruction clearly stated the law applicable thereto.

[3, 4] 2. At the close of the state's case in chief, there was no evidence tending to show that the written agreement did not speak the intention of the parties. The testimony of the prosecuting witness that he paid the appellant \$5 for going on his bonds with the banks tended in some degree to prove that it did speak that intention. The institution of the civil action before the bonds had all been released, if unexplained, might have tended to show the contrary, but the attorney who represented the plaintiff in the civil action had explained that this was through a mere oversight. There was clear evidence that the appellant, after the bonds were all released and the claim reduced to judgment, refused to return the money. There was then no evidence that he claimed that the transaction constituted a loan. His reception of the money, the written agreement to return it on his release from the bonds, and his refusal to do so constituted competent evidence tending to establish every element of the crime charged. Its weight was for the jury, as was its credibility. The testimony that the defendant at

first said he would never pay the money but afterwards endeavored to make an arrangement to pay it in installments did not negative the criminal intent raised by the failure to pay it. On the contrary, it tended to prove that the appellant had appropriated the money to his own use, which, if he held the money as pledgee or bailee, was of the very essence of the crime. The motion challenging the sufficiency of the evidence at the close of the state's case was properly overruled.

At the close of all of the evidence the situation remained unchanged, except that a sharp conflict had been raised as to whether the written agreement spoke the actual intention of the parties. In our statement of the case we have detailed every salient feature of the evidence, and, while it appears to this court as persuasively negating a criminal intention on the appellant's part, its weight and the credibility of the appellant and his witnesses were for the jury. As we have seen, there was adduced by the state competent evidence tending to prove every element of the crime as charged. The trial court denied the appellant's motion in arrest of judgment and refused to grant a new trial upon conflicting evidence. In such a case, whatever our own opinion as to the weight or preponderance of the evidence, we cannot reverse the action of both the trial court and the jury. To do so would be to invade the province of both. It would be to substitute our judgment for that of the jury as to a question of fact upon conflicting evidence and our discretion for that reposed by statute in the trial court.

"This court has heretofore announced that it will not disturb verdicts of this character, on the ground of alleged insufficiency of evidence, where there is evidence to support the verdict, although it may not be of the most convincing kind. Both the jury and the trial court have the opportunity to hear and see the several witnesses, to note their manner as to apparent candor and truthfulness, and are therefore better prepared to pass upon the credibility of their testimony than is this court with only a bare record of the words spoken by the witnesses. The weight of the evidence having been first passed upon by the jury, and next by the trial judge in denying the motion for new trial, we shall not undertake to say that they were wrong." *State v. Ripley*, 32 Wash. 182, 184, 185, 72 Pac. 1036; *State v. Pacific American Fisheries*, 73 Wash. 37, 131 Pac. 452; *State v. Bailey*, 67 Wash. 336, 121 Pac. 821; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 878; *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *State v. Bailey*, 31 Wash. 89, 71 Pac. 715. The same general rule prevails in other jurisdictions. 12 Cyc. pp. 906, 907, 908; *Miller v. Territory*, 9 Ariz. 123, 80 Pac. 321; *People v. Fitzgerald*, 138 Cal. 39, 70

Pac. 1014; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *People v. Williams*, 133 Cal. 165, 65 Pac. 323.

[5] The crucial question upon the evidence was that of the good or bad faith of the appellant in appropriating the money to his own use. This was clearly a question for the jury. *State v. Buchanan*, 43 Wash. 400, 86 Pac. 650; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778; *State v. Maines*, 26 Wash. 160, 66 Pac. 431.

[6, 7] 3. It is earnestly claimed that a new trial should have been granted because of alleged improper statements of counsel for the state in his closing argument. No part of this argument is presented in the record. The only reference to it in the record of the trial is found in the following objection interposed by counsel for the appellant at the close of the argument: "Mr. Allen: If your honor please, counsel for the state has just stated to the jury in his closing remarks that the fact that this defendant is now before them is evidence to them that every step has been taken to get this money from him, and for that reason they should determine that the defendant would not pay this money. I except to this statement, and I ask the judge to charge the jury now in response to this statement, that the fact that the defendant is here is no evidence at all whether he is guilty or innocent. He is presumed to be innocent until proven guilty, and I ask the judge to so charge the jury. The Court: The stenographer will take down the exception." The same thing is in substance repeated in an affidavit of counsel for the appellant in support of the motion for a new trial. This objection is unavailing for two reasons. In the first place, the alleged objectionable remarks were made in the presence of the court. They could have been, and should have been, preserved in the record in context and certified by the trial court as actually having been made. As the record stands, the trial judge merely certified that counsel for appellant claimed that they were made and objected thereto. The recital of matters occurring in the presence of the court in the affidavit submitted on motion for a new trial was, as we have repeatedly held, an insufficient preservation of the record for the purposes of review.

"As to the objection raised by the appellant to the remarks alleged to have been made by the counsel of the prosecuting witness in his closing argument to the jury, this court is unable to determine from the record that such remarks were made. It is true there is an affidavit on file to that effect, and this affidavit is made a part of the statement of facts, but the certificate of the court of the statement of facts shows nothing more than that the affidavit was made: it does not attempt to settle the truthfulness or untruthfulness of the matters set forth in the affidavit." *State v. McGonigle*, 14 Wash.

594, 603, 45 Pac. 20, 23; *Maryland Casualty Co. v. Seattle Electric Co.*, 134 Pac. 1097; *Loy v. Northern Pacific Ry. Co.*, 137 Pac. 446. The same is true of counsel's objection at the close of the argument. In a case closely analogous we said: "Error is assigned on a statement made by the prosecuting attorney in his argument to the jury, but the only reference to such statement in the record is found in the following objection, interposed by counsel for appellant, at the close of the testimony: 'I wish to object to the statement by the prosecutor that the very fact that this case must go to the jury is a guaranty of the legal sufficiency of the evidence to convict this man.' The record does not show that any such statement was made by the prosecutor, or that the court's attention was otherwise directed to it if made. There is therefore no ruling of the court before us for review." *State v. Poyner*, 57 Wash. 489, 492, 107 Pac. 181, 183. See, also, *Lane v. State*, 59 Tex. Cr. R. 595, 129 S. W. 353, 360; *State v. Gruber*, 19 Idaho, 692, 115 Pac. 1, 7; *Holland v. State*, 61 Tex. Cr. R. 201, 134 S. W. 693, 694; *State v. Duncan*, 116 Mo. 288, 22 S. W. 699; *State v. Levy*, 126 Mo. 554, 29 S. W. 703.

[8] In the second place, the language attributed to counsel for the respondent was not objectionable per se. The context, if we had it before us, might show that the argument was entirely legitimate. If the jury believed that the written agreement was the agreement upon which the minds of the parties met when the money was turned over to the defendant, then the jury was at liberty to find that the contract was one of bailment. It was therefore legitimate argument to state that, if he, knowing that he had no right to use the money, had so disabled himself from returning it that he could not pay it and did not pay the judgment rendered for the money in the civil action, that would be strong evidence that he had, with fraudulent intent, appropriated the money to his own use.

Upon the whole record we find nothing which would warrant a reversal. The judgment is affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

ELLIS v. ELLIS.

(Supreme Court of Washington. Jan. 2, 1914.)

DIVORCE (§ 130*)—GROUNDS—EVIDENCE—SUFFICIENCY.

Where a husband seeks a divorce on the ground of cruelty, and the wife files a cross-complaint, but neither produces evidence sufficient to sustain the charge, but merely shows petty quarrels and bickerings over property matters, and that neither has any regard for the other, the court cannot grant a divorce to ei-

ther, on the theory that the interests of the state or the objects of society demand a divorce. [Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445; Dec. Dig. § 130.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Thomas R. Ellis against Clara B. Ellis. From a judgment for plaintiff, defendant appeals. Reversed.

Buck, Benson & Knutson, of Seattle, for appellant. Edwin H. Flick and C. E. Hughes, both of Seattle, for respondent.

MORRIS, J. The only error assigned is insufficiency of the evidence to support the judgment. We shall make no attempt to set forth the evidence. It can be summed up in a remark made by the trial court just before its conclusion: "There is nothing in this case but a property row." The lower court, however, concluded that it was best for the parties to separate, and that there was no possibility of their again living together. But, while so believing, the evidence did not impress the court with an opinion that the fault was with either party sufficiently to entitle the other to a decree, for each party is denied relief, and the decree is granted upon the conviction of the court "that the ends and objects of society and the state can best be subserved by dissolving the bonds of matrimony existing between said litigants."

The state is undoubtedly interested in any attempt to dissolve the marriage relation; but we believe that interest is because of a desire to preserve and not destroy, and we cannot agree with the trial court that the interests of the state or the "ends and objects of society" demand a dissolution of the marriage relation of a husband and wife who have lived together harmoniously for 20 years when they had practically nothing, but when prosperity came, and the wife had received a small inheritance, petty quarrels and bickerings over financial and property matters occasionally arose. Each party sought a decree against the other on the ground of cruelty. Neither party produced sufficient evidence to sustain such a charge, and the only result that should follow is a dismissal. Whatever may be the opinion of the individual judge as to the desirability of parties continuing in the marriage relation when they have lost that mutual respect and affection which is the basis of the relation, that relation can only be legally severed when one of the parties to it is guilty of such conduct toward the other as in law constitutes a ground for divorce. It is not enough that neither party has any regard for the other. *Luce v. Luce*, 15 Wash. 608, 47 Pac. 21. Nor can irascibility of temper nor a disposition to quarrel over trifles be regarded as cruelty within the meaning of that expression in divorce statutes. Bran-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

scheid v. Branscheid, 27 Wash. 368, 67 Pac. 812. Nor is it sufficient that the parties will no longer live together in peace and harmony. *McDougall v. McDougall*, 5 Wash. 802, 32 Pac. 749; *Colvin v. Colvin*, 15 Wash. 490, 46 Pac. 1029; *Stanley v. Stanley*, 24 Wash. 460, 64 Pac. 732; *Wheeler v. Wheeler*, 38 Wash. 491, 80 Pac. 762; *Bickford v. Bickford*, 57 Wash. 639, 107 Pac. 837; *Pierce v. Pierce*, 68 Wash. 415, 123 Pac. 598.

Unhappiness between husband and wife is to be deplored; but, when such a condition arises between them because of mutual neglect, the remedy is not the courts but reformation of individual conduct. The case being triable here de novo, this record has been read in the light of the complaints, and we cannot find evidence supporting the claims of either party to justify us in holding that a divorce should be granted against the other. Neither can we say that one party or the other is the cause of the situation in which we find them. The husband holds the wife blamable, and the wife accuses the husband. Neither produces any corroboration worth mentioning. We are therefore driven to hold, as the lower court, that neither has sustained a cause of divorce against the other. We differ with the lower court only in its announcement that under such circumstances the best interests of society and the state demand the annulment of this marriage.

The judgment is therefore reversed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

SCHREIBER v. ADVANCE THRESHER CO.

(Supreme Court of Washington. Jan. 6, 1914.)

APPEAL AND ERROR (§ 1011*)—FINDINGS—CONCLUSIVENESS.

A finding for defendant sustained by the preponderance of the evidence will not be disturbed on the appeal of plaintiff having the burden of proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Department 1. Appeal from Superior Court, Spokane County; John B. Yahey, Judge.

Action by F. H. Schreiber against the Advance Thresher Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Cornelius & Hooper, of Spokane, for appellant. Herbert L. Kimball, of Spokane, for respondent.

PER CURIAM. The Advance Thresher Company sold through the Schreiber Implement Company a threshing machine and engine to one Lee Corum. The Schreiber Implement Company was entitled to a commission of \$356.27, which was evidenced by

commission certificates. These certificates provided that they should be paid out of the moneys to be collected from Corum. Corum held a piece of land under an executory contract of sale. He afterwards became insolvent and assigned his interest in the contract to the land to the Advance Thresher Company to secure the payment of the amount due it and the Schreiber Implement Company. The contract was afterwards forfeited for nonpayment of interest. The Schreiber Implement Company assigned its claim to the plaintiff, who brings this action alleging that it was agreed by the Advance Thresher Company, acting through its general agent, one Humphrey, that it would look after the interest of both parties, care for the land, and meet the payments of principal and interest as they matured. The authority of the agent Humphrey is defined by a power of attorney which is in evidence. The court found that, if such promise were made, it was not binding upon the company for the reason that the agent had no power to guarantee any engagements that were collateral to the business carried on by the company, and further that plaintiff had not proven by a preponderance of the evidence that the Advance Thresher Company had engaged itself to look after the land and the payments upon the contract, but, on the contrary, subsequent dealings with Corum and with another to whom the land was rented after Corum had absconded were carried on principally by the plaintiff in this action.

We deem it unnecessary to detail the evidence. It is sufficient to say that we have read the record and believe with the trial judge that the plaintiff has not sustained the burden of proof, but, on the contrary, the evidence preponderates upon the main issue in favor of the defendant.

Affirmed.

LE VETTE v. HARDMAN ESTATE et al.

(Supreme Court of Washington. Jan. 8, 1914.)

1. LANDLORD AND TENANT (§ 166*)—INJURIES FROM DEFECTIVE OR DANGEROUS CONDITIONS—LIABILITY.

Plaintiff rented a part of the first floor of a building, the upper stories of which were used as a hotel. The lessee of the hotel vacated the premises before the expiration of the lease, and the water was turned off from that portion of the building. A dwelling on the rear of the lot was supplied with the same pipe as the hotel, and, this dwelling having been rented, the city was directed to turn on the water. When the water was turned on it flowed through the ceiling onto plaintiff's goods, and upon examination it was found that a washstand in the hotel had been torn from the wall and the pipes broken. A window had been broken, making an opening large enough for a person to enter the building, and it appeared that during the vacancy of the hotel the windows had been broken on prior occasions supposedly by boys going into the building. *Held*, that a provision of plaintiff's lease that he should hold the lessor

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

harmless from any damage done or occasioned by plumbing, gas, water, steam, or other pipes or by the bursting, leaking, or running of any washstand or wastepipe in or upon the building or premises did not relieve the lessor of liability, since such stipulations cannot be enlarged so as to include damage not expressly waived, and the cause of the damage in question was not an ordinary leak due to defective plumbing or usual wear, such as might be anticipated and thus be within the contemplation of the parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 647-655, 657-660; Dec. Dig. § 166.*]

2. LANDLORD AND TENANT (§ 166*)—INJURIES FROM DEFECTIVE OR DANGEROUS CONDITIONS—LIABILITY.

The lessor was liable to plaintiff for such damage, even conceding that it was under no legal obligation to repair, since it had possession and control of the vacant stories and was bound to keep them in a condition of reasonable safety so far as such a condition affected plaintiff, and therefore, being charged with notice that persons had broken in on prior occasions, it should have guarded against any recurrence of the breaking and the natural consequences thereof by protecting the premises or making an investigation.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 647-655, 657-660; Dec. Dig. § 166.*]

3. PRINCIPAL AND AGENT (§ 136*)—RIGHT OF ACTION AGAINST AGENT.

A lessee who dealt with a known owner and sought to enforce her cause of action for damages caused by the flooding of her premises against such owner could not hold the owner's rental agent also liable for the damages.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 447-450, 476-491; Dec. Dig. § 136.*]

Department 2. Appeal from Superior Court, King County; Boyd Tallman, Judge.

Action by Mabel Le Vette against the Hardman Estate and another. From an order of nonsuit and dismissal, plaintiff appeals. Affirmed in part, and reversed in part.

McCafferty, Robinson & Godfrey, of Seattle, for appellant. Reed & Hardman and Robt. F. Booth, all of Seattle, for respondents.

MORRIS, J. [1, 2] Appeal from an order of nonsuit and dismissal, in an action brought by a tenant to recover damages for injuries to her goods caused by leakage of water from an upper story. The facts, so far as they are pertinent to our inquiry, are about these: The Hardman Estate is the owner of a building on Yealer Way in Seattle, the lower portion of which is divided into storerooms, and the upper is used as a hotel. Appellant, who was engaged in the millinery business, occupied one of the storerooms under a written lease. Some time in August, 1911, the lessee of the hotel portion, although his lease had not expired, vacated the upper stories, and they continued vacant until after the damage complained of. This lessee not having paid his water rent, the city turned off the water from the hotel portion of

the building some time in September. This water service so turned off, it appears, did not affect the storeroom occupied by appellant. There was, however, a dwelling on the rear of the lot which was supplied with the same service pipe as the hotel and which had been vacated for some time. This vacant dwelling in the rear was rented on November 15th and orders given the city to turn on the water, which was done on November 16th. Soon after the water was turned on, it began to flow through the ceiling and into the room occupied by appellant, causing the damage complained of. An examination of the premises disclosed the fact that, in one of the rooms over the storeroom occupied by appellant, a washstand had been torn from the wall and the water pipes broken, making quite a hole through which the water was escaping. It was also discovered that a large rear window opening on the alley had been broken, making an opening large enough for a person to enter the building. It was also shown that, on three other occasions during the vacancy of the hotel portion, the windows on the alley had been broken, supposedly by boys getting into the building. The lease contained the following clause: "That the said lessee shall hold harmless the said lessor and the said lessor's agents from all damages of every kind or nature whatsoever that may occur by reason of any accident on said premises, and from any damage done or occasioned by or from plumbing, gas, water, steam, or other pipes or sewerage; or the bursting, leaking or running of any cistern, tank, washstand, or wastepipe in, above, upon or about said building or premises; and from any damage occasioned by water, snow, or ice being upon or coming through the roof, skylight, wall, trapdoor, or otherwise, and from damages arising from acts of neglect of cotenants or other occupants of the same building, or of any owners or occupants of the adjacent or contiguous property." This stipulation, in the judgment of the lower court, exempted the respondents from any responsibility in the matter and was the basis of the ruling complained of. Stipulations of this character cannot be enlarged upon to include any damage not expressly waived, and it is generally held that such a stipulation will not excuse an injury occasioned by the negligence of the landlord in the management and use of any part of the premises remaining under his control. *Levin v. Habicht*, 45 Misc. Rep. 381, 90 N. Y. Supp. 349; 1 *Thompson on Negligence*, § 1143. It has also been held that such stipulations cover only ordinary wear and tear, or sudden action of the elements which could not be guarded against, or negligent acts of other tenants. *Randolph v. Feist*, 23 Misc. Rep. 650, 52 N. Y. Supp. 109; *Worthington v. Parker*, 11 Daly (N. Y.) 545.

It is clear from the facts that the damage

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to appellant was not caused by any breaking of water pipes on the premises leased to her, nor was it due to any negligence of cotenants nor of owners or occupants of adjacent property, but was due to the bursting or breaking of water pipes on premises not covered by the lease but within the building, and falls within that clause of the waiver exempting damage occasioned by bursting or leaking of washstands in, above, upon, or about the building, or by water coming through the walls. We think it also is clear that the cause of the damage was not an ordinary leak due to defective plumbing or usual wear, such as might be anticipated in any building and thus be within the contemplation of the parties when entering into a stipulation of this character, but was an unusual and unexpected happening, due to other than natural and anticipated defects or lack of repair in any fixture forming part of the water system of the building. There was no evidence that the proximate cause of this damage was any act of the landlord, and, if appellant's cause must rest upon some positive act of the landlord, it must fail. Negligence, however, may be predicated upon the failure to act where the law imposes a duty, and as between the appellant and the landlord the occupancy and possession of the upper stories, with all the duties flowing from such a relation, were with the landlord. The landlord could not excuse itself from this duty to appellant because of the fact that, as between it and the lessee of the upper stories, the possession and occupancy was that of the latter. And this, we think, is so notwithstanding the tenant of the upper story had vacated within the term covered by the lease, and the legal right of possession still remained in him. This might be and doubtless was true as between the landlord and the upper tenant and as between them the upper tenant was still bound under his lease. But, whatever may have been the legal fiction, the facts were the upper tenant had vacated the premises and thus occasioned an actual, if not a legal, vacancy. Possession and control must rest somewhere, and as between the landlord and appellant, who was no party to the lease held by the upper tenant and not bound by any contract between this tenant and the landlord, this possession and control was, we think, with the landlord. It therefore seems to us, conceding the rule to be that the landlord is under no legal obligation to repair the demised premises, that it was the duty of the landlord to so control and preserve the upper stories as to keep them in a condition of reasonable safety in so far as such a condition affected the tenant of the lower story; that, if it negligently suffered the upper story to be out of repair to such an extent as to damage the tenant of the lower story, it must respond in damages; and that the ordinary rule we have just referred to does not cover

such condition as the facts here present. *Priest v. Nichols*, 116 Mass. 401.

So far as we can gather from the facts, the injury was caused by evilly disposed persons breaking into the building through the windows in the alley and outside of the premises covered by the lease to appellant. But the duty to guard the premises, so that such persons could not break into the building and injure the fixtures in the upper story, rested with the landlord and not with the appellant; and as it also appeared that these rear windows had been broken on three previous occasions, thus affording entrance to the upper stories, the landlord is chargeable with knowledge of the fact, and having knowledge it was its duty to guard against any recurrence and the natural consequences of such a trespass by either protecting the premises from such a breaking or investigating as to any harm that might have been occasioned thereby. The landlord also knew that the hotel section and the house in the rear were connected with the same water service pipe and, before the water was turned on, should have made an investigation of the upper floors to ascertain whether or not such an act could be done with safety to the premises occupied by appellant. Such failure to properly exercise superintendence over the upper story might, it seems to us, within the facts of this case, be held negligence. *Rosenfield v. Newman*, 59 Minn. 156, 60 N. W. 1085. At least we are not so clear it was not negligence as to say the question should not have been submitted to the jury. This disposes of the dismissal as to the *Hardman Estate*.

[3] *John Davis & Co.* was only the rental agent of the owner. Appellant, having dealt with a known owner and having sought to enforce her cause of action against the principal, cannot hold the agent, and as to this respondent the dismissal is sustained.

The judgment is affirmed as to *John Davis & Co.*, and reversed as to the *Hardman Estate*.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

VIERECK v. SULLIVAN et ux.

SAME v. NICHOLS et ux.

(Supreme Court of Washington. Jan. 8, 1914.)

HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD—DETERMINATION OF RIGHT.

In determining the right to the custody of a child as between one parent and a third person who has adopted it with the consent of the other parent, which adoption has been approved by the court in a divorce decree subsequently rendered, the wishes of the parent will be subordinated to the moral, intellectual, and material welfare of the child.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Applications by Elizabeth Minnie Viereck for writs of habeas corpus, one against C. J. Sullivan and wife, the other against A. F. Nichols and wife, for the possession of a minor child. From judgments for defendants, plaintiff appeals. Affirmed.

Jas. R. Chambers, of Seattle, for appellant. James Kiefer and Hastings & Stedman, all of Seattle, for respondents.

PER CURIAM. On the 23d day of June, 1906, one Joseph W. Spangler, by an instrument in writing, relinquished his right and claim to the custody and services of his two minor daughters, then of the ages of six years and five years, respectively, to the Washington Children's Home Society, a domestic corporation, and authorized it to secure their legal adoption. A short time thereafter, upon petition and with the consent of the society, orders were entered in the superior court of King county, whereby the respondents Sullivan adopted one of said children and the respondents Nichols adopted the other. In January, 1908, in a decree of divorce entered in the superior court of Whatcom county upon personal service, wherein Joseph W. Spangler was the plaintiff and the appellant was the defendant, the court approved and confirmed the relinquishment of the children theretofore made by the father. The respondents respectively have had the exclusive custody and control of the children since the summer of 1906. In April, 1913, the plaintiff, the natural mother of the children, sued out a writ of habeas corpus for the purpose of having the custody of the two girls, then of the ages of 13 and 12 years, respectively, restored to her. After a full hearing the court, among other things, determined that the welfare of the children required that they be left with their foster parents, and quashed the writ. The plaintiff has appealed.

The appellant assails: (1) The validity of the adoption proceedings; (2) that part of the decree in the divorce case confirming the surrender made by the father; and (3) the several findings of the court. As we view the case the first two questions need not be considered.

The appellant and Joseph W. Spangler, the mother and father of the children, separated in April, 1906. In January, 1908, they were divorced at his suit. In June, 1906, he, by an instrument in writing, surrendered the children to the Children's Home Society. Shortly thereafter they were placed, and have since remained, in the custody of the respondents, in obedience to the adoption proceedings. So far as the record discloses, the appellant has not seen the children since June, 1906.

In this, as in all other cases of the kind, the dominant question is the moral, intellectual, and material welfare of the children. The wishes of the parent are subordinated to these considerations which, by all the courts, are deemed paramount. *State ex rel. Collier v. Bell*, 58 Wash. 575, 109 Pac. 51; *In re Fields*, 56 Wash. 259, 105 Pac. 466; *Pierce v. Pierce*, 52 Wash. 679, 101 Pac. 358.

The character of the evidence is such that a discussion of it would serve no useful purpose. It suffices to say that, after reading it carefully, we are convinced that the judgment entered is promotive of the welfare of the children.

The judgment is therefore affirmed.

WELLS v. TIMES PRINTING CO.

(Supreme Court of Washington. Dec. 31, 1913.)

1. LIBEL AND SLANDER (§ 6*)—MATTER "LIBELOUS PER SE"—WHAT CONSTITUTES.

Matter "libelous per se" is any publication which falsely and maliciously tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

2. LIBEL AND SLANDER (§ 6*)—ACTIONABLE WORDS—WHAT CONSTITUTE.

A publication charging plaintiff with being a "man who reviled U. S. flag," "who denounced Old Glory as a dirty rag," a "red-tinted agitator," voicing "constructive sedition and treason," leaping "beyond the last border of unloyalty and indecency," and charging that he was so regarded to the extent of a public demand that the criminal laws be invoked against him, was libelous per se without allegation or proof of special damage.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 3-16; Dec. Dig. § 6.*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Hulet M. Wells against the Times Printing Company. From judgment for defendant, plaintiff appeals. Reversed.

Roney & Loveless, of Seattle, for appellant. Bausman & Kelleher, of Seattle, for respondent.

MORRIS, J. Appellant brought an action against respondent, charging it with libel in publishing certain articles of and concerning him. In the second amended complaint three causes of action, based upon three publications, were set forth. These articles were set forth in full as published, to which was added an allegation that they were wholly false and maliciously published for the purpose of injuring appellant in his reputation, and to expose him to public hatred, contempt, ridicule, and disgrace. A demurrer was interposed to this complaint, which was sustained upon the ground that the articles complained of were not libelous per se; appellant having failed to charge any special

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

damage. Appellant electing to stand upon his second amended complaint, judgment of dismissal was entered, and he appeals.

These articles were as follows:

(1) "Denouncing Flag as Dirty Rag May Cost Wells Citizenship.

"Chief Examiner of Naturalization Bureau Takes up Alleged Statements of Socialist Mayoralty Candidate.

"Having heard that Hulet M. Wells, candidate for the mayoralty of the Socialist ticket at the last municipal election, and at present a civil service employee of the city in the lighting plant, had been reported to say this morning that the Stars and Stripes was a dirty rag, and that his sympathies were all with the paraders of last evening, proceedings were begun today by Chief Examiner John Speed Smith, of the government naturalization bureau, to revoke his rights of citizenship, if it can be shown he is not a native-born citizen.

"Following close upon the declaration of fellow employees that he had made life almost unbearable at the lighting plant during the recent agitation over the red flag and that today, particularly, he had made numerous vicious statements concerning government and respect for law, formal complaint was registered with the naturalization bureau and investigation into his record begun.

"Complaints were registered both with the naturalization bureau and with the office of the United States marshal. After the evidence had been transferred to a special agent of the department of justice, he laid it before Chief Examiner Smith, with recommendation that Wells be prosecuted if it be found that the statements actually had been made by him.

"It is feared by the government that it will be impossible to reach him through the federal courts, inasmuch as it is believed that he is a native-born citizen. In that case it will be necessary to take the case into the state courts.

"Naturalization can only be revoked when an alien has been found guilty of sedition at the time he took his oath of allegiance, and no American-born citizen can be attacked in this way for expounding treasonable views.

"In case it is found that he is native-born, the evidence will be referred to Prosecuting Attorney John F. Murphy, with request on the part of the government that he be prosecuted by the state. Such action could be taken under the statute prohibiting insults to the Stars and Stripes.

"Wells at one time was a civil service employee of the United States in the postoffice. He is also known to have been at one time a student of the State University. At present he is under civil service working for the city; and if necessary to reach him,

formal complaint against him will be made to the Civil Service Commission by the government."

(2) "Needed Evidence Supplied Murphy.

"Hulet M. Wells, one-time candidate for the mayoralty on the Socialist ticket, former student at the State University and later employed for a time in the Seattle postoffice, will be the first to be prosecuted by the state for public disrespect of the American flag, if Prosecuting Attorney John Murphy fulfills his pledge to the people of Seattle, made Friday afternoon.

"Names of two witnesses, fellow-employees of Wells at the municipal lighting plant, who informed government officials Thursday of last week that his insults towards the flag had become unbearable, were obtained yesterday by Secretary Robert McCormick of the Spanish War Veterans in this city, and will be turned over to the prosecuting attorney tomorrow.

"This will be done in accordance with the request of Mr. Murphy to the veterans that all tangible evidence as to public acts against the American Flag be given to him for examination and prosecution. This request was conveyed in an interview between Murphy and McCormick Friday afternoon.

"At the time the matter was reported to United States Marshal J. R. H. Jacoby, and later to the department of justice and the government naturalization bureau, the employees stated that Wells had called the flag a 'dirty rag,' and that his taunts had become more than they could endure peaceably.

"The matter was immediately taken up by Chief Examiner John Speed Smith of the naturalization bureau, in order to deprive Wells, if possible, of his citizenship; but it was found that he had been born in Skagit county, and, being native-born is therefore beyond the reach of the United States officers so far as revocation of citizenship is concerned.

"The statute under which prosecution may be carried forward defines the public desecration or disrespect of the Stars and Stripes as a misdemeanor. The law was put into effect in 1909, and so far as is known has never been made the basis of prosecution in King county before."

(3) "\$10,000 Suit Brought Against Times by Man Who Reviled U. S. Flag.

"Hulet M. Wells, Who Denounced Old Glory as 'Dirty Rag,' Peeved by News Articles in this Paper.

"In an effort to capitalize notoriety achieved through revilement of the American flag, Hulet M. Wells, retdinted agitator and whilom socialist, yesterday brought suit against the Times Publishing Company for \$10,000, in which amount, he represents, he was damaged by news stories published in this newspaper. One of these published May 2 of this

year is headed 'Denouncing the Flag as Dirty Rag May Cost Wells Citizenship.' The other, published May 5, headed: 'Wells May Be First to Face Local Jury for Insulting Flag.' Both these articles Wells charges constitute libel.

"The incident responsible for the suit came up at the time The Times expressing the sentiment of an outraged American citizenship against I. W. W. outrages, and constructive sedition and treason, voiced in the rantings of characters of the Wells stripe, turned a drenching stream of publicity upon the fire of incipient revolution. This newspaper vigorously attacked the sources responsible for the menace to the city's and country's well being, and by confining the flames to the narrow confines of their origin and maintaining a relentless warfare upon them, stamped out the whole movement.

"The I. W. W. element was virtually kicked out of town through sheer force of public sentiment. A few of the Wells ilk and other opportunists seeing reputations as radical agitators took advantage of the opportunity to obtain some of the yellow publicity so important to the success of efforts to win leadership in the rag-tag forces they lead. They jumped into the fray and elbowed the I. W. W.'s aside so that some of the newspaper slaying might descend upon their own shoulders.

"Wells, in particular, made a spectacular show of himself. He outranted the I. W. W.'s and leaped beyond the last border of unloyalty and indecency they had established by denouncing Old Glory as a 'dirty rag.'

"This despicable act brought a cry of protest from all quarters, and citizens urged federal and county authorities to invoke the criminal laws against him.

"The Times printed the truth about the whole nasty affair, handling Wells without gloves.

"In the complaint of his suit, Wells declares the publications were 'malicious and with the purpose of injuring plaintiff, exposing him to the hatred and contempt of the people, and depriving him of the benefit of public confidence and social intercourse and bringing him into disrepute among his friends and neighbors and with others of the social organization and party and the people at large of the city of Seattle and the state of Washington.'

"Some Points Missing.

"The people' to whom Wells refers in his complaint, with inconsiderable exception, are Americans, every one of whom loves, honors, and respects the Stars and Stripes. How Wells possibly could figure that he possessed any 'public confidence' of these people which he might be deprived of, after he had wantonly insulted the symbol of a patriotic allegiance they treasured above all else, is not set forth.

"Among interesting observations of the complaint's preamble—interesting when the truth about the crooks and turns of the Wells character is known—are his declarations that he 'holds a prominent and influential place in the Socialist party.' As a matter of fact, the most active agents in the discrediting and denunciation of Wells at the present time are members of the Socialist party. They claim that he has been kicked out of the regular ranks of their organization.

"The two articles that Wells is using as the basis of his suit are republished in full herewith. The first publication in the Times of May 2, 1912, under the heading, 'Denouncing Flag as Dirty Rag May Cost Wells Citizenship.'

(Here follow the first and second articles as above quoted.)

[1] The respondent, by its demurrer, admitting the false and malicious character of the publications, it only remains for us to decide whether or not, in the absence of a plea of special damage, the words so published are actionable as libelous per se. In *Quinn v. Review Publishing Co.*, 55 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, matter libelous per se is defined as any publication which falsely and maliciously tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society, including whatever tends to injure the character of an individual, or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude, or reflects shame, or tends to put him without the pale of social intercourse. In *Lathrop v. Sundberg*, 55 Wash. 144, 104 Pac. 176, 25 L. R. A. (N. S.) 381, in defining matter libelous per se, it is said it is enough if the words are of such a nature that the court can presume as a matter of law that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule or contempt, or cause him to be shunned or avoided. In *Triggs v. Sun*, 179 N. Y. 144, 71 N. E. 739, 66 L. R. A. 612, 103 Am. St. Rep. 841, 1 Ann. Cas. 326, it is said any publication which exposes another to public hatred, contempt, scorn, obloquy, or shame is libelous per se. In *Riley v. Lee*, 88 Ky. 603, 11 S. W. 713, 21 Am. St. Rep. 358, matter libelous per se is said to be that which tends to render an individual odious, ridiculous, or contemptible in the estimation of the public, or brings him into public disgrace. Other citations will not be necessary to establish the correctness of these definitions. They are too well established in the law and have been recognized too long to be now doubted or questioned.

[2] We come, therefore, to the main question submitted by this appeal. Do these several publications as set forth in this second amended complaint fall within the rule stated? And in answering this question in

the affirmative, we confess our inability to understand the reasoning which holds they do not, for it seems to us these publications are so plainly libelous per se as to admit of no question. Respondent supports the ruling of the demurrer by contending that in none of the articles is there any direct accusation against appellant, that they merely purport to be the theories and proceedings of agents of the federal government in stating that certain things had been reported, and that an investigation was to be made, and if, upon such investigation, these reports were found to be true, certain proceedings might be had; and it is also contended that (1) there is no attack upon appellant in his business or profession, and (2) no charge against him of having committed an infamous crime. No case is cited, and we are confident none can be found, restricting matter libelous per se within these two last limitations. It might be that, if there was no allegation of express malice, the language of the first two articles might be construed as the publication of a news item, as what was contemplated by the public officials and the ground for their proposed action, and thus bring the case within the rule of *McClure v. Review Publishing Co.*, 38 Wash. 160, 80 Pac. 303, in which the article there published was held to be not libelous per se because of its lack of statement of whether or not the plaintiff was guilty of the crime with which she was charged, and purported only to be a statement of the acts and representations of the peace officers in relation to the pursuit, arrest, trial, and acquittal of the plaintiff; it being there said that, while certain of the expressions there used, if construed without reference to the whole publication, might be held to be libelous per se, yet, when read as a whole, there being no charge of malice nor anything in the articles themselves or in the circumstances surrounding the publication to indicate malice, the libelous character of the publication could not be established. It will not be necessary to here determine whether, as applied to these first two publications, if standing alone, this rule could be invoked to sustain the demurrer, for the publication of the third article with the reproduction of the first two, and its evident purpose and intent as plainly indicated as it is possible for language to express, robs the *McClure* Case of any application to the question before us. For in this third publication, as distinguished from the *McClure* Case, is found a direct charge of guilt of the offense referred to in the second publication. Not only referred to, but the second publication goes further, in giving the names of the witnesses by whom the offense can be established, and making special reference to the statute which defines it to be a crime. Whatever, then, may have been the purpose of the first two articles, the third is a direct personal charge against appellant

as a "man who reviled U. S. flag," "who denounced Old Glory as a dirty rag," a "redtinted agitator," voicing "constructive sedition and treason," leaping "beyond the last border of unloyalty and indecency" by "denouncing Old Glory as a dirty rag," and "wantonly insulted the symbol of a patriotic allegiance." Such language requires no inuendo to construe its meaning as intending to bring the individual of whom it is written into public hatred, contempt, and ridicule, expose him to public obloquy, scorn, and shame, and cause him to be shunned and avoided by his fellows. The third article leaves no room for any doubt as to its purpose to so characterize the appellant and his acts and the effect produced upon the public mind, for it says, "This despicable act brought a cry of protest from all quarters, and citizens urged federal and county authorities to invoke the criminal laws against him." What else need be said as to the effect upon the public mind of the publications complained of, when the publication itself refers to the public as so inflamed against appellant that citizens from all quarters urged the public authorities to invoke the criminal laws against him? thus not leaving to inference or presumption that the ordinary effect of the language used in the publications would hold appellant up to public hatred, contempt, scorn, and shame, but expressly charging that appellant was so regarded to the extent of a public demand that criminal laws be invoked against him.

Respondent justifies the judgment further by referring to *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747, where it was said that to call one a hog is not libelous per se, as such language does not expose the one of whom it was spoken "to public hatred or contempt in the sense or to the degree required by the law of libel." There is no comparison between the language used in the *Urban* Case and that used in the articles under discussion, and, conceding that that case binds us to the rule there announced as applicable to the language there used, we cannot extend such immunity to the language here used. Nor is *Velikanje v. Millichamp*, 67 Wash. 138, 120 Pac. 876, also relied upon by respondent, an authority for its contention. The language there used was: "You will kindly excuse delay, caused by one Velikanje presenting us with forged receipts purporting to be from our agent at your city, and trying to collect your money on them." It was held that this language did not charge the crime of forgery, or of uttering a forged instrument, because it imputed neither criminal intent nor guilty knowledge. It is evident that the meaning of the language there used is that one can innocently make use of a forged instrument, and the mere fact of use does not imply that the use was made with a guilty knowledge of the character of the paper, nor with the intent to commit a crime,

nor would the law presume guilty knowledge or criminal intent in the absence of any language from which it could be legally inferred. As applied to the case before us, that rule would mean that we will not presume the language used in these articles complained of has a tendency to so expose plaintiff to public ridicule, contempt, hatred, scorn, and shame as to make them libelous per se in the absence of language plainly indicating such tendency, or when the words used could be so used without any such effect. It is possible to pass a forged instrument without criminal intent or guilty knowledge; but it is not possible to use the language here complained of without subjecting the one of whom it is written to public hatred, contempt, and scorn, or avoiding the belief that such was the very purpose of the publication. And herein lies the manifest distinction between the two cases.

If we are to decide the question before us with reference alone to our own decisions, without any reliance upon the legal principles involved, reference might be made to *Byrne v. Funk*, 38 Wash. 507, 80 Pac. 772, 3 Ann. Cas. 647, where it was held that a publication calling a county commissioner "a liar and poltroon" was libelous per se. Also *Quinn v. Review Publishing Co.*, 55 Wash. 69, 104 Pac. 181, 133 Am. St. Rep. 1016, 19 Ann. Cas. 1077, where an article charging one with being party to a system of municipal jobbery and graft was held libelous per se; and *Lathrop v. Sundberg*, where a letter insinuating that a physician was not a reputable physician, and classing him with criminal practitioners, patent medicine fakirs, and quacks, was held actionable without any charge of special damage. True, in each of those cases it might be said the charge was made concerning an individual in his official or professional capacity, and that words so used might be held to be libelous per se when they would not be so held if written of one in his individual capacity. Conceding such a rule, those cases more than support our view that the language here used is actionable without allegation or proof of special damages. We cannot escape the conviction that the respondent's demurrer should have been overruled.

The judgment is reversed.

CROW, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

GERMAN-AMERICAN STATE BANK v. SOAP LAKE SALTS REMEDY CO.
et al.

(Supreme Court of Washington. Jan. 8, 1914.)

1. CORPORATIONS (§ 228*)—LIABILITY OF STOCKHOLDERS—UNPAID STOCK SUBSCRIPTION.

Where subscribers to the capital stock of a corporation acquired it for a nominal con-

sideration, on its insolvency they were liable to its creditors on their unpaid subscriptions.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 874, 878; Dec. Dig. § 228.*]

2. BANKS AND BANKING (§ 116*)—KNOWLEDGE OF OFFICERS—ACTION ON UNPAID STOCK SUBSCRIPTION OF DEBTOR CORPORATION.

Where the president and cashier of a bank were stockholders of a corporation when the bank permitted the corporation to overdraw, the bank was not chargeable with the knowledge of such officers that corporate stock in the hands of stockholders had not been paid for, so as to deprive it of its right to enforce the statutory liability of such stockholders.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 282-287; Dec. Dig. § 116.*]

Department 1. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action by the German-American State Bank, a corporation, against the Soap Lake Salts Remedy Company, a corporation, and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Voorhees & Canfield, of Spokane, for appellant. Vanderveer & Cummings and H. McC. Billingsley, all of Seattle, for respondents.

CROW, C. J. Action by the German-American State Bank, a corporation, upon two promissory notes executed by the Soap Lake Salts Remedy Company, a corporation, and to recover from C. H. Clodius, A. O. Kuck, J. W. McBurney, and H. E. Christensen their unpaid subscription to the capital stock of the defendant corporation. The defendant corporation interposed a demurrer to the complaint, which was overruled, and, after its failure to further plead, plaintiff claimed a default. The remaining defendants answered separately. At the close of plaintiff's evidence a nonsuit was entered as to each and all of the defendants. The plaintiff has appealed.

Pending the appeal, H. E. Christensen died testate, and J. W. McBurney, his executor, has been substituted as respondent. As McBurney is a respondent in his personal capacity, we will refer to Christensen as a respondent in all matters which prior to his decease affected him.

[1] About June, 1907, a corporation known as the Soap Lake Salts & Oil Company, hereafter called the oil company, was organized with a capital stock of \$50,000; respondents J. W. McBurney, C. H. Clodius, A. O. Kuck, and H. E. Christensen being a portion of the stockholders. After continuing for about a year, it proved an unprofitable concern, doing a business of about \$500 a month, with operating expenses largely in excess thereof. It incurred a number of liabilities which it could not pay, including an indebtedness of about \$1,500 to the appellant bank in the form of an overdraft. The stockholders and trustees thereupon determined to or-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ganize a new corporation, to be known as the Soap Lake Salts Remedy Company, hereafter called the remedy company, one of the respondents herein. The remedy company was incorporated for \$200,000, and one Miss M. E. Wagner, a stenographer and employé of one of the respondents, subscribed for its entire capital stock, with the exception of about six shares, which were subscribed by the incorporators. All assets of the oil company were conveyed to Miss Wagner, who forthwith conveyed the same to the remedy company in full payment of her stock subscription. Stockholders in the oil company thereupon surrendered their stock in that company to Miss Wagner and received in exchange a proportionate amount of stock in the remedy company. Respondents Clodius and Christensen, president and cashier of the appellant bank, as such extended credit to the oil company by permitting the overdraft above mentioned. This overdraft seems to have been assumed by the remedy company, which increased it until it reached \$2,104.08. On November 24, 1908, the remedy company, to decrease this overdraft, executed and delivered to the appellant bank its promissory note for \$2,000; the same being one of the notes upon which this action is based. Thereafter the remedy company again overdrew its account with the appellant bank, and on December 10, 1909, in settlement, executed and delivered to the appellant its second promissory note for \$1,840.55; the same being the second note upon which this action is based. The assets which the oil company conveyed to Miss Wagner, and which she in turn conveyed to the remedy company, included 153 acres of land in Grant county of the value of about \$6,000, subject to an unpaid purchase-money mortgage for \$5,000, and further consisted of certain personal property of a total value not exceeding \$500. It is conceded that the remedy company has ceased doing business; that it has lost the real estate in a foreclosure proceeding; that its other assets are practically valueless; that it is insolvent; and that appellant cannot recover on its notes, unless it can recover from the respondent stockholders, on their unpaid stock subscriptions. It is not necessary to enter upon a minute statement of the facts or detail the number of shares of stock held by each respondent in the remedy company. It may be mentioned that stock of the face value of about \$76,000 was turned into the treasury of the remedy company to be held and sold as treasury stock. We are satisfied the evidence was sufficient to show that respondents were subscribers to their stock; that they acquired the same with full knowledge of all the transactions and dealings involved in the organization of the remedy company; and that nothing more than a nominal consideration was paid by them for the stock which they now hold. Their liability to creditors of the insolvent corporation,

upon their unpaid stock subscriptions, is well established by former rulings of this court. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833; *Grady v. Graham*, 64 Wash. 436, 116 Pac. 1098, 36 L. R. A. (N. S.) 177; *Lantz v. Moeller*, 136 Pac. 687.

The evidence in this case convinces us that the subscribed capital stock now held by respondents has never been paid either in cash or in property of an equivalent value.

In the *Adamant Manufacturing Co. Case*, supra, the late Chief Justice Dunbar said: "It must necessarily follow, for the protection of creditors who dealt with these corporations, that the stock subscribed for must be paid in cash or in property of an equivalent value. In other words, the corporation must be in the actual condition which it represents itself to be in financially. If it were allowed to hold itself out as having a capital stock of \$100,000, when in reality the capital stock, which is and must be, under the theory of the law, assets in the hands of the corporation, is worth only one-half that amount, the corporation is to that extent doing business under false colors and is obtaining credit upon the faith of an asserted estate which is purely fictitious. And where, by any arrangement between the shareholders and the corporation, the stock is issued as fully paid up when in fact it has not been paid to the full amount of its face value, but has been paid in property of a fictitious or inflated value, a court of equity will compel a payment by the stockholder for the benefit of the creditor who has dealt with the corporation relying upon the asserted value of its assets to the full amount or face value of the stock. Such is almost the universal holding of the courts of the present day. See *First National Bank v. Gustin, etc.*, *Mining Co.*, 42 Minn. 327, 44 N. W. 198, 6 L. R. A. 676, 18 Am. St. Rep. 510; *Taylor, Private Corporations*, § 702. The latter authority lays down the rule as follows: 'To issue shares as fully paid up for property known to the corporation and the shareholder receiving them to be materially below their par value is a fraud on creditors, for whose benefit the shareholder, to whom the shares are issued, may be compelled to make up the difference.'"

In view of the respondents' statements, we find it unnecessary to discuss their liability under the facts shown. In their answering brief they say: "Now it is not contended here, nor has it ever been contended, that Miss Wagner paid the full face value of her stock. It is not contended here, nor has it ever been contended, that the assets of the old company were worth \$200,000, or anything like such sum. The trade-marks, the patents, and the good will had a purely speculative value, and it was the hope of the stockholders in the old company that the sale of the 76,000 shares of treasury stock would

give the new company a working capital to carry its enterprise to success. It is not contended here, nor has it ever been contended, that the property transferred to the new company had a present worth of \$200,000; but it is contended that no fraud was intended or accomplished upon any of the creditors of the Soap Lake Salts Remedy Company, and particularly the appellant bank."

[2] It is conceded that the respondents Clodius and Christensen were respectively president and cashier of the appellant bank. As they were also stockholders in the remedy company, the respondents contend that they had full knowledge of its organization, history, and assets and condition; that through them the appellant bank had such knowledge, as their knowledge was that of the bank; that the bank did not rely upon the stock subscriptions in extending credit; that it has not been defrauded; and that it cannot recover in this action. In their brief respondents say: "The respondents' answer frankly stated that the old company could not meet its obligations, and that the sole object of the new organization was to obtain funds from the sale of stock to pay off the debts of the old company and continue the business. The entire method, the objects, and purposes of the new organization were given in detail. The sole defense urged was that the appellant in extending credit to the new company had full knowledge of all the facts and had not only consented to the reorganization and consented to look to the new company for the indebtedness of the old, but that in extending credit to the new company it had agreed to rely 'entirely upon the real and existing assets, and upon the prospects of the Soap Lake Salts Remedy Company, and not upon any contingent liability, real or supposed of the stockholders of the Soap Lake Salts & Oil Company, who had accepted the stock of the Soap Lake Salts Remedy Company under the circumstances hereinbefore mentioned and described.'" Respondents rely on the rule that if a person, in dealing with a corporation, extends credit to it, knowing that its capital stock has been issued in exchange for property of less than its par value, he cannot thereafter recover from the individual stockholders.

Appellant, while conceding the rule that whatever is known to the managing officers of the corporation is known to the corporation itself, insists upon an exception, which it now invokes to the effect that when an officer of a corporation is engaged in perpetrating a fraud on his corporation, or is dealing with it for his own personal profit or interest, the knowledge which he possesses will not be imputed to the corporation. There was evidence sufficient to show that Clodius and Christensen were active participants in the organization of the remedy company; that they knew all transactions by which its stock was issued in exchange for

the comparatively worthless assets of the old corporation; that having thus participated, and having such knowledge, they became stockholders in the remedy company and continued at all times to hold their stock; that they were stockholders in the old company; and that they, as president and cashier of the appellant bank, permitted the overdrafts. There was also evidence that the bank had seven other trustees; two of whom testified that they had no knowledge of the overdraft or the notes of the remedy company. No showing was made as to what knowledge, if any, the other trustees had, nor is there any evidence that any of the trustees other than Clodius and Christensen knew whether the stock subscriptions of the remedy company were paid or unpaid. It is difficult to conceive that any board of trustees would have approved or ratified the overdraft had they been familiar with the financial condition of the remedy company. Clodius and Christensen were interested in securing funds for the remedy company to insure its continuance in business. Being thus interested, their conduct as president and cashier of the bank, in permitting the overdraft, cannot now be taken advantage of by themselves or other stockholders of the remedy company without further proof of knowledge on the part of the bank than is disclosed by the record. Upon the facts shown, their knowledge, which they obtained as interested parties and stockholders in the remedy company, will not be imputed to the appellant bank or deprive it of the right to seek relief by enforcing the statutory liability of the subscribing stockholders of the remedy company.

Although the facts involved are not entirely similar, we regard the announcement of this court in *Mooney v. Mooney Co.*, 71 Wash. 258, 128 Pac. 225, as applicable to this case. We there said: "The respondent will be presumed to know that an officer in a corporation, however extensive his apparent authority may be, may not bind his principal in a matter in which he is adversely interested. *Mooney* could not at the same time act for himself and for his principal without the full knowledge and free consent of the principal. *O'Conner Min., etc., Co. v. Coosa Furnace Co.*, 95 Ala. 614, 19 South. 290, 36 Am. St. Rep. 251; *Gallery v. National Ex. Bank*, 41 Mich. 169, 2 N. W. 193, 32 Am. Rep. 149. An officer who receives the note or other obligation of a corporation in payment of the personal debt of an officer with whom he deals does so at his peril. The reason is that such a transaction is not in the regular course but is presumptively ultra vires."

We are not unmindful of the fact that the overdrafts continuously appeared on the bank books, that the trustees had access to these books, that all of the trustees did not testify, and that only two did testify, denying knowledge of the affairs of the remedy

company; yet there is no evidence that Clodius and Christensen communicated to the bank, or any of its officers, the knowledge which they possessed. On the contrary, the indications seem to be, and the natural presumption under the circumstances would be, that they did not do so, and that the other officers of the bank, if they had notice of the overdrafts, were relying on the \$200,000 subscribed capital stock of the remedy company as a trust fund to secure all of its liabilities.

Upon the record, we hold there was sufficient evidence to sustain a recovery against the respondent stockholders, in the absence of any defense or evidence to the contrary.

The motion for a nonsuit should have been denied as to each and all of the defendants. The judgment is reversed, and the cause is remanded for a new trial.

MOUNT, CHADWICK, GOSE, and PARKER, JJ., concur.

DAVIS v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. Jan. 2, 1914.)

1. CARRIERS (§ 155*)—LIMITED LIABILITY—CONTRACTS—VALIDITY.

A shipper who signs a contract limiting the carrier's liability, after seeing that the goods were properly described therein, but without reading the entire contract, is bound thereby in the absence of any fraud practiced by the carrier's agent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 677, 679, 682-685, 691-696; Dec. Dig. § 155.*]

2. CARRIERS (§ 154*)—LIMITED LIABILITY—CONTRACTS—VALIDITY.

A shipper who is bound by a limited liability clause in a contract of shipment, made in consequence of a lower rate, is chargeable with notice that the limited liability clause was executed in consideration of the charge of the lower rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 641-645, 667; Dec. Dig. § 154.*]

3. CARRIERS (§ 151*)—CARRIAGE OF FREIGHT—CONTRACTS.

Where a shipper of freight under a limited liability contract, made, while the freight was in the possession of a carrier, a contract for the transportation of the freight from one destination to another, the new contract was only ancillary to the original contract, and did not affect the limited liability therein provided for.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 672, 673, 674-676, 680, 681, 687-690; Dec. Dig. § 151.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by F. L. Davis against the Northern Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

O. E. Sauter and Edward Judd, both of Seattle, for appellant. C. H. Winders, of Seattle, for respondent.

CHADWICK, J. On June 18, 1909, plaintiff tendered some boxes and one bundle of

goods to the agent of the defendant at McMurray, Wash., for shipment to Willow City, N. D., a place on the line of the Great Northern Railway Company; it being a connecting carrier. The agent could not give the through rate on the goods. These he had to obtain by wire from headquarters. Some delay followed, and, pending notice of the rate, plaintiff signed a limited liability contract, releasing the goods to a valuation of \$5 per 100 pounds' weight. He then went on his way, leaving the goods to follow. The goods were shipped in a few days to Everett, but were not received by the Great Northern Railway Company for the reason that the freight had not been prepaid. Plaintiff afterwards ordered the goods held pending his decision as to forwarding the goods to another place. Thereafter he went to St. Paul, and through the proper agents of the defendant prepaid the freight charges, and ordered the goods forwarded to Greensburg, Ind. Plaintiff was given the following receipt: "St. Paul, Minn., Oct. 20th, 1909. \$53.72. Received of F. L. Davis fifty-three 72/100 dollars to cover charges now against shipment H. H. Gds held at Everett, Wash.—also prepayment for forwarding to Greensburg, Ind. and original shipping receipt with order to forward to Greensburg, Ind. Shipment as per receipt consists of 4 Bxs H. H. Gds, 1 Tool Chest Ctd, and 1 Bdl. Mattresses Wpd. J. F. Horrigan, Freight Claim Agent." One box failed to arrive at its destination, and this action was brought to recover the alleged value of its contents. The court found that the lost package did not weigh to exceed 300 pounds, and entered judgment in the sum of \$15, as provided in the release contract. Plaintiff has appealed.

It is insisted that plaintiff is entitled to recover upon two grounds: First, that the contract was not "fairly made" or "fairly agreed upon," in that appellant did not know that he was releasing the value of his goods when he signed the contract, and that the contract is wanting in mutuality; and, second, that appellant did not know that there were two rates, and that he might have shipped at a higher rate without releasing the value of the goods.

[1] 1. Appellant relies upon the case of Hill v. Northern Pacific Railway Co., 33 Wash. 697, 74 Pac. 1054. He insists that he has brought the case within the exception recognized in that case. The court there said that the contract must be "fairly made" or "fairly agreed upon." Appellant admits that he made himself sufficiently familiar with the shipping bill and the release to know that they accurately described his goods, and he then signed them. The evidence shows that he did not lack for time to read and understand the papers. No fraud or deceit was practiced by the agent. "Q. Now, at the time you delivered those goods at the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

depot at McMurray, tell the court, in your own way, what occurred between you and the station agent. If there was more than one interview, tell what it was, and what was said at each interview. (Objection) * * * Now, go on and state to the court what occurred between you and the agent, and if there was more than one interview, state how many, and what occurred at each one. A. I had decided to ship the goods to Willow City, N. D. I went down to the depot and told the agent, and I asked him, the agent, what the rate was, and he told me he didn't have it, but he would get it within a few hours. All he had to do was to wire to Tacoma. That afternoon or evening I went down, and he says: 'I haven't got the rate, but I will surely have it in the morning.' I went home and boxed up my goods and took them to the depot the next morning. He had not yet received the rate, but thought he surely would, and he did some growling at that time, and afterwards, because they had not paid any attention to his correspondence. It ran along that day, and I went down the next morning, and he had not yet received the rate, holding me there two or three days. That evening after supper I and my son, who worked with me, before I turned the job over to him, who went down and went into the depot, and he says: 'I haven't got those rates, but I won't keep you any longer, I will give you a rate for the goods, and let you go.' He wrote out the receipt and everything was blank with the exception of the stipulation (description) on the goods. I saw that he had the goods described right, and I went home and left the next morning. Q. Was there any conversation between you and him at that time as to the contents of the agreement? A. Not a word. * * * Q. Did you, at that time, read the upper portions of that receipt, or bill of lading? * * * A. No, I did not." Appellant's son testified substantially as follows: "I and father went down to the depot to see about the rates, and the agent said he didn't have any rates for the goods; told him he would give him a release, not hold them any longer, so he could take up his journey and leave, and ship them; said he would get the rates later on. * * * Q. Was that all that was discussed between your father and him about what the rate would be? A. Yes, sir."

To permit plaintiff to say now that he was misled into signing a release, or that he was induced to do so by the agent, would be to fly in the teeth of the case of *Pierson v. Northern Pacific Railway Co.*, 61 Wash. 450, 112 Pac. 509. In that case we said: "The fact that the contract was not read or explained to the shipper, or that he was asked no questions, or that the contract was signed hurriedly, cannot be permitted to relieve the respondents from its obligations. Written contracts will prove of little avail if parties can avoid the burdens imposed by signing in

haste and closing their eyes to their contents." Courts must rely upon men to make their own contracts, and when it is insisted that a writing has not been fairly made or agreed upon, the testimony to overcome it should be cogent and convincing. We find nothing in the record suggesting that plaintiff did not know, or, having the opportunity, might not have known, all the terms and conditions of the contract signed by him. We are satisfied with the rule declared in the *Pierson Case* and adhere to it.

[2] 2. It would seem that our holding on the first proposition disposes of the second one also, for if appellant had notice of the release clause, he was bound to know that there was more than one rate, for the release is executed in consideration of the charge of the lower rate. This phase of the case is also covered by authority. The Supreme Court of the United States, in the case of *Kansas Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, has passed squarely upon every question raised by appellant. In the *Carl Case* the plaintiff testified that, though he could read and write and had signed the release and had received the bill of lading, he had not read or asked any question about them, and had not been given any information as to the contents of either document, and had no knowledge of the existence of the two rates, and if he had known of such difference and the effect of accepting the lower, he would have paid the higher rate. There was no evidence tending to show any misrepresentation, fraud, or deceit, unless it can be inferred from the fact that the company made no explanation of the rates or the contents of either the bill of lading or the release. The shipper, as in this case, said that the bill of lading was handed to him with the release, which he was asked to sign. The court, speaking through Justice Lurton, reviewed the former decisions of the court, and held that such contracts were not contracts exempting the shipper from damages resulting by reason of its own negligence, and further: "The valuation declared or agreed upon, as evidenced by the contract of shipment, upon which the published tariff rate is applied, must be conclusive in an action to recover, for loss or damage, a greater sum. In saying this we lay on one side, as not here involved, every question which might arise when it is shown that the carrier intentionally connived with the shipper to give him an illegal rate, thereby causing a discrimination or preference forbidden by the positive terms of the act of Congress and made punishable as a crime. To permit such a declared valuation to be overthrown by evidence allunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations, and bring about preferences

and discriminations forbidden by the law. Such a result would neither be just nor conducive to sound morals or wise policies. The valuation the shipper declares determines the legal rate where there are two rates based upon valuation. He must take notice of the rate applicable, and actual want of knowledge is no excuse. The rate, when made out and filed, is notice, and its effect is not lost, although it is not actually posted in the station. *Texas & Pacific Railway v. Mugg*, 202 U. S. 242 [26 Sup. Ct. 628, 50 L. Ed. 1011]; *Chicago & A. Railway v. Kirby*, 225 U. S. 155 [32 Sup. Ct. 648, 56 L. Ed. 1033]."

[3] These authorities are decisive of this case unless we are to hold that the payment of the freight at St. Paul and the receipt herebefore set out are to be held as a new or an original contract. We are satisfied that a new contract was not within the contemplation of the parties. The goods had been shipped and were in legal effect in transit. The receipt was not a new contract, but was ancillary to and made in an acknowledgment of the old contract. The goods were held because the freight had not been prepaid, and because plaintiff ordered them held for a time. The legal effect of the St. Paul incident was a diversion of the goods from one destination to another. It would be highly technical to hold otherwise, especially so when appellant might, had the goods all arrived at Greensburg, have resisted any claim for an increased freight charge by referring to his original contract. No court would have denied him relief under the facts disclosed in this case, nor do we think that any court would grant him relief if the conditions were reversed as they are in this case. Affirmed.

CROW, C. J., and MAIN, ELLIS, and GOSE, JJ., concur.

PORTER v. YAKIMA COUNTY et al.
(Supreme Court of Washington. Jan. 7, 1914.)

1. TAXATION (§ 507*)—LIEN.

Under Rem. & Bal. Code, § 9235, providing that taxes from personal property shall be a lien upon all of the property of the person assessed, and section 9223 providing that on default the county treasurer shall distrain sufficient goods and chattels of the person assessed to pay the taxes, taxes for personal property are a lien on all of the property of the taxpayer, regardless of the property for which they were assessed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 937-941; Dec. Dig. § 507.*]

2. TAXATION (§ 261*)—ASSESSMENT—"FARM."

Where the owner resided in a different county from that in which he leased land to graze his sheep, the taxes upon the sheep should be assessed in the county in which the land on which they were grazed was located, under Rem. & Bal. Code, § 9125, providing that, when the owner of live stock does not reside on his farm, the property shall be assessed in the county in which the farm is sit-

uated; the expression "farm" being used in its generic sense and being as applicable to a stock farm as to one where grain is raised.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 435; Dec. Dig. § 261.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2695-2698.]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Bill by Charles Porter against the County of Yakima and others. From a decree for complainant, defendants appeal. Affirmed.

Englehart & Rigg, of North Yakima, for appellants. Harold B. Gilbert and Sydney Livesay, both of North Yakima, for respondent.

GOSE, J. This is a bill in equity to enjoin the sale of certain sheep distrained by the defendants for the purpose of enforcing the collection of taxes. The defendants jointly demurred to the bill on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, the defendants having elected to rest their case upon the record, decree was entered permanently enjoining the sale and directing the cancellation of the taxes upon the treasurer's tax rolls. The defendants have appealed.

[1] The complaint alleges that the sheep distrained are not the sheep, nor any part of the band of sheep, upon which the taxes sought to be collected were assessed. The statute (Rem. & Bal. Code, § 9235) provides that: "The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property." Section 9223 provides that if personal property taxes are not paid within the time therein provided, after the requisite notice has been given, the county treasurer "shall distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the same," together with costs and interest. The first section extends the lien to all real and personal property owned by the person assessed at the date of the assessment. Whether it expands or extends the lien to personal property not assessed, but acquired subsequent to the assessment, is not presented by the bill. The two sections, when read together, make it clear that taxes upon personal property are treated as the debt of the person assessed. Section 9223 empowers the county treasurer to distrain any of the goods and chattels belonging to the person "charged" with the taxes, sufficient in quantity to pay the same. In making the distraint the treasurer is not limited to the property assessed but may distrain

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any personal property belonging to the tax debtor within the county, sufficient in amount to meet the taxes, together with costs and interest.

[2] The complaint further alleges that, during all the year 1911, the respondent, a married man, with his family, resided at North Yakima in Yakima county; that he and his family had no other residence or domicile during that year; that during that year he had leased in Benton county, this state, certain farm and grazing lands, to the extent of 20,000 acres, which he occupied and used during all of that year as a stock farm; that he ran thereon and in connection therewith a band of 2,300 head of ewes; that the sheep were there fed, lambled, and sheared; that the farm was devoted exclusively to raising and caring for the sheep; that they were kept upon said lands during all the year 1911, except during the summer, when they were ranged in the high mountains for about 120 days; that the farm was the headquarters for the sheep and packing outfits used in connection therewith; and that the sheep were not connected with any other farm. It is further alleged that, during the year 1911, the assessor of Benton county duly assessed the sheep; that the tax so assessed was \$142.08, which the respondent paid to the county treasurer of Benton county; that during the same year the assessor of Yakima county assessed the sheep in Yakima county; that thereafter a tax was levied against the sheep in that county for 1911, amounting to \$168.02; and that the respondent did not know of the assessment or levy of the tax until after the tax had become delinquent. The complaint further shows that the officers of Yakima county distrained 100 sheep in that county, belonging to the respondent, and that they were proceeding to sell them to satisfy the 1911 assessment made in Yakima county upon the sheep which were running and assessed in Benton county.

The applicable provisions of our statute are sections 9121 and 9125. The former section provides that personal property, "except such as is required in this chapter to be listed and assessed otherwise, shall be listed and assessed in the county where the owner or agent resides." The latter section provides: "When the owner of live stock or other personal property connected with a farm does not reside thereon, the property shall be listed and assessed in the county or place where the farm is situated; if not listed in such county, then to be taxed where found."

The respondent did not reside on the Benton county farm in 1911. The question to be determined is: What did the Legislature mean by "farm"? Clearly it was used in a generic rather than a restricted sense. The meaning to be ascribed to this word is that, where live stock has a home at a farm

and the owner does not reside there, it shall be assessed in its home county. Where a tract of land, whether large or small, lying wholly within a single county, is used as a unit for the breeding, rearing, and feeding of stock, and the stock are there kept during the larger part of the year, as these sheep were kept in Benton county, the tract is a farm and the stock is "connected with a farm," within the meaning of the statute. A tract of land devoted to the breeding, grazing, shearing, and lambing of sheep is a farm as much as a tract that is devoted to the growing of grain or to diversified farming. In short, a tract may be a farm without the aid of a plow. In common parlance the words "farm" and "ranch" are used interchangeably. In Webster's New International Dictionary a farm is defined as a "plot or tract of land devoted to the raising of domestic or other animals; as, a chicken farm; a fox farm." In *Rogers v. Caldwell*, 142 Ill. 434, 32 N. E. 691, the word "farm" in a like statute is defined as "a body of land, usually under one ownership, devoted to agriculture, either to raising of crops or pasturage, or both." See, also, *Murdock v. Murdock*, 38 Utah, 373, 113 Pac. 330; *Morse v. Stanley County*, 26 S. D. 313, 128 N. W. 153; *People v. Scheffley*, 252 Ill. 486, 96 N. E. 891. The obvious intention of the lawmakers was that live stock should be taxed at the home of the stock, thus recognizing the equity of the home county to have the tax.

The appellant cites *In re Drake* (D. C.) 114 Fed. 229, and *Commonwealth v. Carmalt*, 2 Bin. (Pa.) 235. In the *Drake* Case the question before the court was whether *Drake* was a person "engaged chiefly in farming," within the meaning of the exemption clause in the bankruptcy statute. The court defined a farm as "a tract devoted to cultivation under a single control, whether it be large or small, isolated, or made up of many parcels." In the *Carmalt* Case the court said: "By a farm we mean an indefinite quantity of land, some of which is cultivated. Most farms contain parcels of land applied to different purposes. Some are used for the cultivation of grass, some of grain, and some remain in wood."

These definitions we apprehend were intended to be illustrative rather than comprehensive. The word "farm," when construed with reference to its context in our statute and so as to effectuate the manifest intention of the lawmakers, must be held to embrace a farm devoted exclusively to the breeding of stock. This view makes it unnecessary and, in the opinion of the majority of the court, improper to consider the other questions suggested.

The judgment is affirmed.

CROW, C. J., and CHADWICK, ELLIS, and MAIN, JJ., concur.

SCHANEN-BLAIR CO. MARBLE & GRANITE WORKS v. SISTERS OF CHARITY OF HOUSE OF PROVIDENCE et al. (HEINTZ et al., Interveners).

(Supreme Court of Washington. Jan. 2, 1914.)

1. PRINCIPAL AND AGENT (§ 101*)—AUTHORITY OF AGENT—ARCHITECT SUPERVISING BUILDING CONSTRUCTION.

An architect who draws plans for a building and supervises its construction for the owner has no authority, express or implied, to make contracts with a subcontractor binding the owner, unless the owner has conferred on him such authority.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 255, 256, 330, 346; Dec. Dig. § 101.*]

2. PRINCIPAL AND AGENT (§ 101*)—AUTHORITY.

Where a subcontractor, with knowledge of the default of the principal contractor, supplied materials and rendered services on the reliance of the statement of the architect who supervised the work for the owner that no legal remedy would be lost if the subcontractor performed his contract with the principal contractor, the subcontractor, performing his contract, could not rely thereon as a new contract with the owner made with the architect as agent of the owner; the latter having no notice of any alleged new contract.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 255, 256, 330, 346; Dec. Dig. § 101.*]

Department 1. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by the Schanen-Blair Company Marble & Granite Works against the Sisters of Charity of the House of Providence in the Territory, now State, of Washington and others, in which O. E. Heintz and others intervene. From a judgment denying relief to intervener O. E. Heintz, he appeals. Affirmed.

E. V. Littlefield and Huntington & Wilson, all of Portland, Or., for appellant. Connor & Alken and Miller, Crass & Wilkinson, all of Vancouver, for respondent.

CHADWICK, J. The appellant O. E. Heintz brought an action to foreclose a subcontractor's lien upon a certain building constructed at Vancouver, Wash., by the respondent Sisters of Charity of the House of Providence, a corporation. The principal contractors, Moore & Hardin, defaulted while the work was going on. Appellant performed his contract and filed a lien for the balance of the amount due him under the contract. It appeared upon the trial that plaintiff had not given the notice required by statute, and for that reason his lien failed under the authority of the following cases: *Hallett v. Phillips*, 73 Wash. 457, 132 Pac. 51; *Finley v. Tagholm*, 62 Wash. 341, 113 Pac. 1083. Appellant has not appealed from this ruling of the court but does insist that he is entitled to a personal judgment against the corporation Sisters of Charity of the House of Provi-

dence under section 1141, Rem. & Bal. Code, and the following cases: *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 397; *Pacific Iron & Steel Works v. Goering*, 55 Wash. 149, 104 Pac. 151; *Dolan v. Cain*, 59 Wash. 261, 109 Pac. 1009; *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177.

[1] The right to recover is based upon the testimony of appellant, who says: "I got one payment from Moore & Hardin in May, 1910, and we didn't receive any more, so that in the fall of that same year the architect called me up and asked me why we didn't deliver the balance of the iron work. I remember particularly what he referred to, the window gratings and the area gratings around the building, and I told him I had heard Moore & Hardin were in financial distress and I didn't know whether to go ahead, and he said, 'I am holding back enough money to protect the subcontractors;' he said \$20,000 he was holding back; that was along in December, the last part, I think, or some time during the month of December. Q. He said he was holding back \$20,000 to protect the subcontractors? A. Yes, he said he was holding back \$20,000 to protect the subcontractors. Q. State whether or not he requested you to go ahead. A. Yes, he said, 'Go ahead and finish the work;' and he was holding back that amount of money to protect us. Q. And did you go ahead on the strength of that? A. Yes, we went ahead on the strength of that." And the testimony of two other subcontractors who testified to the same circumstance; one of them saying: "Q. Did you ever have any contract with the architects, or either of them, or with Sister John, with regard to your continuing the work? * * * A. I don't know what you would call a contract. I had a conversation with them in regard to continuing work; in fact, I intended to quit work because I couldn't get any money to carry it on and I spoke to the Sisters and to the architect in regard to it, to carrying on the work, and they told me to go ahead; that all contracts and subcontracts would be paid in full."

A judgment of nonsuit was entered upon the motion of the defendant the Sisters of Charity of the House of Providence. The court below held, and we believe properly, that the showing was wholly insufficient to hold the respondent to an original promise. It had contracted for all the work, and appellant had become a subcontractor, having within his power and within his means remedies to protect himself and secure the payment of his demand. He had notice of the default of the principal contractors, and, if he had intended to rely upon a contract with the respondent, it would seem that he would have contracted with it direct rather than continue and rely upon his lien as he did even up to the time of trial.

The authority of an architect is not abso-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lute. He is bound by the general rules of agency. It is nowhere made to appear in the record that the architect had any authority to bind the respondent beyond the terms of its contract with the principal contractors. "The mere fact that a person is employed as an architect does not constitute such person a general agent of his employer; his powers as agent being limited by the contract entered into between them. Thus, unless specially authorized, he is not entitled to change, alter, or modify the contract entered into by the builder and his employer; nor has he any authority to bind the owner by contracts for any work done upon or materials furnished for the structures concerning which he is employed; nor is he entitled to receive notice of an assignment of payments accruing on the contract so as to charge the owner with notice thereof." 6 Cyc. 29: 4 Elliott on Contracts, § 3614; Lloyd, Law of Building (2d Ed.) §§ 11, 12.

In the absence of an express contract or compelling facts, it is never held as a matter of law that an architect has any implied power to purchase materials or to enter into a contract for or on behalf of the owner. His duties are well defined and well understood, and there is nothing pertaining to his engagement that is calculated to mislead any one dealing with him.

In *Campbell v. Day*, 90 Ill. 363, one Day entered into a contract to furnish material for erecting and finishing a certain building. The plans had been prepared by an architect. The work was to be paid for from time to time as the work progressed. The principal contractor let a subcontract to do all the cut stone work. The subcontractors did certain work that was not within the terms of their contract. It was contended that the architect had directed the work to be done; that the owner knew of the change and made no objection thereto. It was held that a contract having been let to complete the building, the architect had no authority to bind the owner by any promise express or implied. His duty was limited to supervision and direction of the work to be done by the contractor or those acting under him.

[2] It is not shown that appellant ever took the matter up with the respondent, which, it will be remembered, is a private corporation, and it is not shown that it had a manager or overseer about the work, or that notice of the alleged new contract came directly or indirectly to those in authority, nor is appellant in a position to claim that he was without notice of the fact that the work he was doing had been contracted to another, and that until notice was brought to the respondent it had a lawful right to rest upon its original contract.

Ringel v. Newman, 69 Wash. 583, 125 Pac. 943, and *Architectural Decorating Co. v. Nicklason*, supra, are not in disharmony with the rule laid down in this case. In the *Rin-*

gel Case the agency could not be disputed. The son of the defendant had the construction of a building in charge for his mother, who was the owner. He was acting for her with full power. In the *Nicklason* Case the court held that, where the owner contracts directly for material, he cannot set up as a defense, the fact that duplicate statements of all the materials furnished for the building were not sent or delivered to him. The authority of an architect and the scope of his agency were not discussed in either case.

In the case at bar, although the architect may have said all that the witnesses say he said, it could not be tortured into a personal promise on the part of the respondent. The architect went no further than to say, in terms or by fair implication, that no legal remedy would be lost if appellant performed his contract with the principal contractors. He did not make a new contract for the payment of money or promise a way to reach the money due on the main contract that was not already possessed by appellant. So far as the present record goes, respondent is still bound under its contract to pay *Moore & Hardin*.

There being no lien and no personal promise, express or implied, it follows that the judgment of the lower court is affirmed.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

OLDFIELD v. ANGELES BREWING & MALTING CO.

(Supreme Court of Washington. Dec. 31, 1913.)

1. ACTION (§ 38*)—LANDLORD AND TENANT (§ 49*)—CONTRACT TO LEASE—BREACH—MEASURE OF DAMAGES.

Where defendant contracted to lease a building, which plaintiff was to erect, for a term of five years from the date of its completion, at a specified rental, and on completion thereof defendant refused to accept the lease, there was a single breach of contract, for which plaintiff was entitled to recover in a single action the difference between the rental fixed in the contract and the rental value of the premises for the term.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 549, 565; Dec. Dig. § 38;* *Landlord and Tenant*, Cent. Dig. §§ 117-119; Dec. Dig. § 49.*]

2. LANDLORD AND TENANT (§ 49*)—CONTRACT TO LEASE—BREACH—RENTAL VALUE OF PREMISES.

In an action for breach of a contract to accept a lease of a building for a certain term, the value of the lease for the term at the time of the breach must be measured by limitations imposed that the lessee should not use or permit the premises to be used for any illegal or immoral purpose, and Laws 1909, c. 134, § 62, declaring that no municipal corporation shall grant or renew a license to sell intoxicating liquors within 300 feet of any armory, etc.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 117-119; Dec. Dig. § 49.*]

3. LANDLORD AND TENANT (§ 49*)—CONTRACT TO LEASE—BREACH—VALUE OF TERM—EVIDENCE.

In an action for breach of a contract to accept a lease of plaintiff's building for five years, plaintiff, in order to show the rental value of the premises, was not entitled to offer testimony of such value from period to period during the term, *e. g.* from April, 1909, to April, 1910, indicating that the rental value had depreciated from year to year.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 117-119; Dec. Dig. § 49.*]

4. CORPORATIONS (§ 455*) — WRITTEN CONTRACTS—EXECUTION—AUTHORITY OF OFFICERS.

Where the authority of a corporation's president and secretary to execute a lease on its behalf was denied, and the instrument was not attested by the corporate seal, it was not admissible without evidence that such officers had such authority, or that their act had been ratified by the corporation's trustee, or that they were estopped to deny such authority.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1801-1803; Dec. Dig. § 455.*]

5. CONSTITUTIONAL LAW (§ 310*) — COMPLAINT—AMENDMENT—DUE PROCESS OF LAW.

Where, on breach of a contract to accept a lease, plaintiff erroneously sued for rent up to the commencement of the action, but it was held that he could only recover damages for the breach, an amendment of the complaint, after reversal on appeal, so as to allege a cause of action for such breach, was not objectionable as depriving defendant of its property without due process of law.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 931; Dec. Dig. § 310.*]

6. APPEAL AND ERROR (§ 1195*)—DECISION ON PRIOR APPEAL—LAW OF CASE.

A decision on a prior appeal, in an action for breach of contract to accept a lease, that plaintiff had but one cause of action—to recover the difference between the rent reserved and the rental value of the premises for the term—constituted the law of the case on retrial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by James Oldfield against the Angeles Brewing & Malting Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions to grant a new trial.

Willett & Oleson, of Seattle, for appellant. Charles F. Munday, Walter S. Fulton, and R. L. Blewett, all of Seattle, for respondent.

GOSE, J. [1] This is an action for damages flowing from an alleged breach of a lease. There was a verdict and judgment in favor of the plaintiff. The defendant has appealed. This is the third appeal. See *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 630, 35 L. R. A. (N. S.) 426, Ann. Cas. 1912C, 1050, and *Id.*, 72 Wash.

168, 129 Pac. 1008. A history of the litigation may be found in these cases. On September 24, 1908, the respondent agreed to erect a building upon certain described property in the city of Seattle, and to lease it to the appellant for the term of five years, commencing upon the day of the completion of the building, at a monthly rental of \$350, payable in advance. The appellant refused to accept the lease. In the first suit the respondent sought to recover the rental stipulated in the lease up to the time of commencing his action. Upon the first appeal we held that the measure of damages flowing from the appellant's repudiation of the lease was the difference between the rent reserved for the term and the reasonable rental value of the premises during the same period, saying, "There is but one breach, and there should be but one recovery for that breach." and that when the appellant refused to take possession of the building and pay rent, a cause of action "immediately arose, and the measure of damages was not the rent reserved in the contract, as held by the trial court, but the difference between that sum and the rental value of the premises for the five years fixed in the agreement." On the second appeal we again said that there was "but one breach, and that was complete and final, going to the whole contract. It was made by the refusal to accept the building. In such a case the cause of action is entire, and the measure of damages is the loss suffered, viz., the difference between the entire rent reserved and the entire rental value for the term."

In keeping with these views the question to be tried was this, was the rental value of the premises for the term—that is for five years—in April, 1909, of greater or less value than the rent reserved in the lease? If the former, the respondent was not damaged; if the latter, his damage was the difference between the two amounts to be fixed at the time the breach occurred. That this is the true measure of damages is the logic of both of these cases. It is also the rule supported by the great weight of authority. *Greene v. Williams*, 45 Ill. 207; *Snodgrass, etc., v. Reynolds*, 79 Ala. 452, 58 Am. Rep. 601; *Tyson v. Chestnut*, 118 Ala. 387, 24 South. 73; *Minneapolis Base Ball Club v. City Bank*, 74 Minn. 98, 76 N. W. 1024; *James v. Kibler's Adm'r*, 94 Va. 165, 26 S. E. 417. In *Greene v. Williams and Snodgrass, etc., v. Reynolds*, this rule was announced in a suit by the lessee against the lessor for the refusal of the latter to put the former in possession. In *Tyson v. Chestnut* the same rule was announced, where the lessee had been evicted by the holder of the paramount title. In *Minneapolis, etc., v. City Bank and James v. Kibler's Adm'r*, the same rule was declared in a suit by the lessor for the breach of the lease by the lessee. In the leading case of *Masterton v. Mayor of*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, a suit to recover damages for a breach of contract to receive and pay for an article of personal property, the rule was thus stated: "Where the contract, as in this case, is broken before the arrival of the time for full performance, and the opposite party elects to consider it in that light, the market price on the day of the breach is to govern in the assessment of damages. In other words, the damages are to be settled and ascertained according to the existing state of the market at the time the cause of action arose, and not at the time fixed for full performance." In *Hopkins v. Lee*, 6 Wheat. 109, 5 L. Ed. 218, a suit by the vendee for damages for the refusal of the vendor to carry out his executory contract for the sale of land, the same rule was announced in the following language: "The rule is settled in this court that, in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price at the time of the breach." The same principle was announced in the following cases: *Kempner v. Cohn*, 47 Ark. 519, 1 S. W. 869, 58 Am. Rep. 775; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280, 33 N. E. 808, 34 N. E. 611; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677; *Hawk v. Pine Lumber Co.*, 149 N. C. 10, 62 S. E. 752.

This doctrine is in harmony with the expressions of this court upon kindred questions. In *trover* we have held that the measure of damages is the market value of the article at the time and place of conversion, with legal interest. *McSorley v. Bullock*, 62 Wash. 140, 113 Pac. 279; *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363; *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364.

[2] It seems proper to observe that the lease provides that "the lessee shall not conduct or carry on on said premises or suffer or permit to be carried on thereon any illegal or immoral business, or suffer or permit said premises to be used for any illegal or immoral purposes." Section 62, p. 467, *Laws of 1909*, provides that no municipal corporation shall grant or renew a license to any one for the sale of intoxicating or spirituous liquors or beverages within a distance of 300 feet from any armory, etc. If this property is within 300 feet from an armory, the limitation applies, and that fact may be shown. In short, the question is the value of the lease for the term at the time of the alleged breach, measured by these limitations.

[3] The respondent, over the objection of the appellant, was permitted to offer testimony as to the rental value of the premises from period to period during the term—that is, from April, 1909, to April, 1910, and so on during the continuance of the leasehold term—which tended to show that such value had depreciated from year to year. This was error.

[4] The lease was admitted in evidence over the objection of the appellant. It was stipulated that it was executed in the name of the appellant by its president and secretary, but the appellant denied their authority to execute it. *The corporate seal was not attached.* There is no evidence tending to show either that these officers had been given express authority to execute the contract, or that they had been clothed with apparent authority, or that they had theretofore executed such instruments, or that they had been held out by the appellant as having such authority, or that their acts had been ratified. In short, as the record now stands, the contract was executed in the name of the appellant by its president and secretary, without authority, express or implied, *without the attestation of the corporate seal*, and without any evidence tending to show ratification or estoppel. This did not make a *prima facie* case. *Clarke & Marshall on Corporations*, p. 2132 et seq.; *A. S. & L. A. v. Smith*, 122 Ala. 502, 27 South. 919; *City Elec. St. Ry. Co. v. First Natl. Bank*, 62 Ark. 33, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. Rep. 282; *Cushman v. C. C. & M. Co.*, 170 Ind. 402, 84 N. E. 759, 16 L. R. A. (N. S.) 1078, 127 Am. St. Rep. 391. Our statute, *Rem. & Bal. Code*, § 3086, provides that the corporate powers of a corporation shall be exercised by a board of trustees. In the light of this provision, and *in the absence of the corporate seal*, some evidence was required of the authority of the president and secretary, express or implied, other than the fact of the execution of the instrument. The respondent contends that the lease was admissible as evidence, and cites *McKinley v. Mineral, etc., Min. Co.*, 46 Wash. 162, 89 Pac. 495; *Rowland v. Carroll Loan, etc., Co.*, 44 Wash. 413, 87 Pac. 482; *Harvey v. Sparks Bros.*, 45 Wash. 578, 88 Pac. 1108; *Carrigan v. Inv. Co.*, 6 Wash. 590, 34 Pac. 148, and kindred cases. In the case first cited it was said that the evidence showed that the note in suit was executed by the president and general manager of the corporation "in the presence of the secretary and other officers of the company, * * * that the corporation had received the benefits by way of money loaned or advanced by respondent, and by way of his labor and services," and it was held that, where a corporation "allows a person in a large measure to control its business transactions," it must be held to be responsible for his acts in the name of the corporation. In the second case cited the corporation had by its acts and acquiescence clothed the president with authority to act for it, and had received the benefit of the services for which compensation was allowed. In the third case cited the corporation had held out the party whose authority was denied as its managing agent, and the corporation had received the benefits of the contract. In the fourth case cited it was held that, where a corporation

named some person as its manager, and as such allows him in a large measure to control all its business transactions, "It is responsible for his acts performed as manager in the name of the company." In the other cases cited from this court there were elements of estoppel, such as knowledge and acquiescence, or the acceptance and retention of benefits flowing from the contract of the officer who assumed to act for the corporation. None of these elements was present in this case.

On the last appeal we said that there was no merit in the claim that the evidence was not sufficient to establish the execution of the contract of lease. In both of the former appeals sufficient evidence had been offered of the execution of the lease, but that evidence was not presented in this case.

The appellant also contends that the instrument sued on is void on its face. We held otherwise on the first appeal, where we said that, whether called a lease or a contract for a lease, or by whatever name the instrument was called, it is the "bounden contract" of the appellant, and that an action would lie for its breach. We still adhere to that view.

[8] As we have suggested, the first suit was brought to recover the rent stipulated in the lease up to the time the action was commenced. On the second trial there was no change of pleadings, and for this reason the judgment was again reversed. We there said: "The cause of action being the same breach of contract declared upon in the original complaint, there can be no question as to the right to amend so as to present issuable facts showing damage." In harmony with this expression an amended complaint was filed, seeking to recover damages for the breach of the contract. The appellant contends that the amended complaint so changes the cause of action as to deprive it of its property without due process of law, in contravention of the fourteenth amendment of the federal Constitution. The contention seems to us too wanting in merit to require discussion.

[8] The respondent contends that he had a right to stand upon his contract and hold the appellant for the full amount of the rent, and that the rule for measuring damages was incorrectly announced on the first appeal. The appellant insists that in certain respects it is not bound by the law of the case as announced on the first appeal. These two contentions may be met together. In passing upon a similar situation in *Seattle v. Northern Pacific Ry. Co.*, 63 Wash. 129, 114 Pac. 1038, we said: "It is urged with great earnestness that the law of the case was not correctly announced upon the former hearing. * * * We are disposed, however, to treat the conclusion reached on the former hearing as the law of the case. We are aware that this rule is not an inflex-

ible one. * * * It is, however, fair to the litigants and the trial court, conducive to orderly procedure, and withal sound judicial policy. We have so ruled in many cases" (citing them). The motions for a nonsuit and directed verdict and for a judgment non obstante were properly denied. The respondent's counsel asked one of his witnesses whether the rental value of the property "at any time since this lease was entered into" was equal to \$150 a month, and the witness answered that it never exceeded that sum.

To summarize: The law of the case is that the contract, if properly executed, is the "bounden contract" of the appellant; that the measure of damages is the difference between the rental value of the property at the time of the alleged breach in April, 1909, for the term, measured by the limitations in the lease, and the rent reserved for the entire term. That is, the rent reserved for the term was \$21,000; if the rental value of the property at the time of the breach in April, 1909, measured by the limitations in the lease, was less than \$21,000, the respondent may recover the difference; but the rental value for the full term must be fixed as of the time of the breach of the contract.

The motion for a new trial, however, should have been granted. The error in measuring damages from period to period pervades the entire record. The judgment is reversed, with directions to grant a new trial.

CROW, C. J., and ELLIS, CHADWICK, and MAIN, JJ., concur.

BOUGAS v. ESCHBACH-BRUCE CO.

(Supreme Court of Washington. Jan. 8, 1914.)

MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCE—ASSUMED RISK.

Plaintiff was injured while in defendant's employ as a pitman connected with the operation of defendant's steam shovel. It was his particular duty to attach an iron or steel clamp to the steel rail of the track on which the car containing the steam shovel was operated, and to remove it when the car was moved. The clamp was similar to an ordinary clevis, and was held in place by a key inserted through its eyes, beneath the rail. Defendant's smith in repairing the key had welded a piece of hard, brittle steel into the small end without plaintiff's knowledge, and while plaintiff was driving the key into place, a part of the hard steel flew into his eye and injured him. *Held*, that the clamp was but an ordinary tool, concerning the safety of which plaintiff had equal knowledge with defendant, and plaintiff, being an adult employé of ordinary capacity, assumed the ordinary risk incident to using it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Department 1. Appeal from Superior Court, Yakima County; Thos. B. Grady, Judge.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Spiros Bougas against the Eschbach-Bruce Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wm. B. Clark, of North Yakima, for appellant. Thos. H. Wilson, of North Yakima, for respondent.

GOSE, J. This action is founded on the alleged negligence of the defendant in failing to use reasonable care in repairing a clamp key. Verdict and judgment for plaintiff. The defendant has appealed.

The appellant was operating a steam shovel in Umatilla county, in the state of Oregon, at the time respondent sustained the injury complained of. The respondent was in his employ as one of the pitmen. His particular duties were to attach an iron or steel clamp to the steel rail of the track upon which the car containing the steam shovel was operated, and to remove it when the car eased off for the purpose of moving. When the car was at the desired place, its wheels were blocked by a railroad tie placed against the clamp. The clamp, while larger, was similar to an ordinary clevis. It rested upon the rail, and was held in place by a key inserted through its eyes beneath the rail. The clamp was attached when the car was stationary, and removed when the car eased off, preparatory to moving, and was reattached when the car again became stationary. The key was driven in and out by means of a small sledge hammer. The clamp and key were made by a smith employed by the appellant. Respondent was 27 years of age, and had been engaged in the particular work about 58 days, when, in driving out the key, a small piece of metal broke from the key and penetrated and destroyed his eye. The complaint alleges that the key was originally made of soft steel, that it spread at the end from constant hammering, and that a blacksmith in the employ of the appellant, in reshaping it, and without the knowledge of the respondent, welded a piece of hard, brittle steel into the small end. The respondent used the key in the usual way for two or three days after the last repair before he met his injury.

The only negligence charged or sought to be proven is in the repair of the key. There is no charge that the smith was incompetent. The witnesses agree that such a key should be made of mild or soft steel. The respondent testified that, from time to time as the key became blunt from use, he reported the fact to the engineer, who in turn directed him to take it to the smith for repair. He said he had it repaired many times. He also said that he always used the same clevis and key. He further testified that, after the injury, he noticed that the small end of the key had a blue color, and that he then observed that, in repairing it the last time, hard steel had

been welded in the small end. The key was not produced at the trial.

The respondent invokes the rule that it is the duty of the master to use reasonable care to keep the instrumentalities used in the work in a reasonably safe condition. He argues that this duty is nondelegable, and that the facts stated support the verdict. On the other hand, the appellant, while conceding the rule in proper cases, insists that, in cases of simple tools, the master is exempt from the duty to inspect for the purpose of ascertaining the development of defects or disrepair in the course of their use, because such conditions are as much within the observation of the employé as the master. Hence it is said that no liability rested on the master for the ordinary perils resulting from latent and unusual defects which, from the simple nature of the appliance, are known to all men alike.

In keeping with these views, the appellant seasonably moved for a nonsuit, and directed verdict and a judgment non obstante. As applied to experienced adults, where the tool is simple and in the exclusive use of the employé, the courts are practically a unit in holding that the employé assumes the usual and ordinary risks incident to their use. *Cole v. Spokane Gas & Fuel Co.*, 66 Wash. 393, 119 Pac. 831; *Stork v. Cooperage Co.*, 127 Wis. 318, 106 N. W. 841, 7 Ann. Cas. 339; *Borden v. Dausy Roller Mill Co.*, 98 Wis. 407, 74 N. W. 91, 67 Am. St. Rep. 816; *Garnett v. Phoenix Bridge Co. (C. C.)* 98 Fed. 192; *Louisville, etc., v. Allen*, 47 Ill. App. 465; *Martin v. Highland Park Mfg. Co.*, 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671; *Vanderpool v. Partridge*, 79 Neb. 165, 112 N. W. 318, 13 L. R. A. (N. S.) 668, and footnote; *Lynn v. Glucose, etc., Co.*, 128 Iowa, 501, 104 N. W. 577. In the *Cole* Case the plaintiff was carrying coke in an iron pan with two handles projecting lengthwise from the ends, so that a man could walk between them. One of the handles slipped in his hand and fell, causing the injury complained of. In holding that there was no negligence, the court said: "The rule seems well established that an instrument of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument, and brought in daily contact with it, should not be chargeable, equally with the master, with a knowledge of its defects" (citing numerous cases). In the *Vanderpool* Case the plaintiff, while cutting holes in a brick wall with a two-pound hammer and a chisel made from an old rasp, was struck in the eye with a chip or sliver from the end of the rasp, causing the loss of the eye. He had been using a cold chisel and took the rasp at the instance of the foreman. After reviewing

the authorities, the court said: "From these cases, and the many citations therein contained it is apparent that the master is not liable for injuries resulting from latent defects in simple tools or appliances, such as a hammer, saw, chisel, and the like. The reason for the rule is that any defect in such simple tools or appliances would be as obvious to the servant as to the master, and the underlying reason in all the cases for holding the master accountable for injuries resulting from imperfect or defective tools and appliances is that the servant is ordinarily presumed to have no knowledge of the dangers incident to their use. But, as we have seen, the rule has no application to the simpler tools and appliances."

The following have been held to be simple tools within the rule stated: A backing hammer, a buffer, chisels, claw bars, crow-bars, driftpins, dolly bars, a fork used in a dyehouse, a hook with a short handle, used for moving timbers in a sawmill, lifting jacks, machine hammers, mauls, monkey-wrenches, pinch bars, prize poles, punches, rivet hammers, snap hammers, soft heads, and wrenches. 13 L. R. A. (N. S.) footnote, 670. The clamp and key do not differ from the ordinary tools and implements used upon the farm, such as lines, tugs, neck yokes, double-trees, lead bars, lead chains, clevises, hammers, nails, axes, wire stretchers, brake rods, and many other simple tools in daily use upon the farm. In the use of such simple tools the employer has a right to assume that the experienced adult employé who is constantly handling them will observe and report any disrepair that may occur in their use; and, if repair becomes necessary, the master has discharged his full duty when he has had them repaired by a competent workman.

The respondent cites *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016. In that case a wheel dropped from a heavily loaded truck which the plaintiff and another were wheeling. Using the truck was only an incident to the plaintiff's general work as a mechanic. There were five or six trucks furnished and used indiscriminately by the employes, each employé using the one that happened to be convenient. Upon these facts it was held that the jury were justified in finding that the duty of inspection was not cast upon the plaintiff. The respondent also cites *Johnson v. Missouri Pacific Ry. Co.*, 96 Mo. 340, 9 S. W. 790, 9 Am. St. Rep. 351. In that case the injured party testified that he examined the tool after its repair, and that it appeared well dressed and in good shape. In the case at bar the respondent testified that he examined the key after he met his injury; that he then observed that the color of the small end was different from the color of the other part of the key, and that he then discovered that a piece of steel

had been welded into the small end. He does not testify that he made any examination before he was injured. However, the Missouri case as applied to the facts at bar stands practically alone. Cases may be found where the rule we are announcing has not been extended to infants, inexperienced young men, and employes who were using the tool for the first time in obedience to the direction of the master. This court has been exceedingly liberal in holding to the rule that ordinarily the duty of the master to furnish a safe place and safe tools for its employes is a nondelegable duty. The rule, however, is rested upon the ground that the knowledge of the master is superior to that of the employé, and when the reason for the rule falls, the rule itself must fail.

We think upon the evidence the court should have directed a judgment for the appellant. The judgment is reversed, with directions to dismiss.

CROW, C. J., and CHADWICK, ELLIS, and MAIN, JJ., concur.

HAY v. BOGGS et al.

(Supreme Court of Washington. Jan. 8, 1914.)

1. DIVORCE (§ 321½*)—PROPERTY RIGHTS — EXTENT OF RELIEF.

Plaintiff obtained a divorce September 2, 1911; the decree granting to her all property then owned or possessed, both real and personal, by her husband. In August, 1904, during the marriage, the husband purchased a 40-acre tract from a railroad company and in 1907 assigned the contract for the same to his aunt, representing himself as unmarried. In July, 1908, all payments having been made, the railroad company deeded the land to the aunt, and thereafter plaintiff sued the aunt to recover it on the ground that the assignment was fraudulent, and that she held the land in trust for plaintiff's former husband. During the trial it appeared for the first time that 25 acres of the land had been exchanged by the aunt with an innocent third person for certain other property. *Held* that, although there was no issue made in the pleadings as to such part of the land, but only as to the rights of the parties in the entire tract, the whole controversy was properly submitted to the court, and hence it was error to award plaintiff judgment only for the 15 acres remaining on finding that the assignment was fraudulent; she being entitled in addition to judgment against the aunt for the reasonable value of the land conveyed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 808; Dec. Dig. § 321½.*]

2. EVIDENCE (§ 113*) — REAL PROPERTY — VALUE.

On an issue as to the value of certain real property exchanged, evidence that the land was valued in such exchange at \$4,450 was insufficient to warrant a finding that that was its reasonable value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.*]

Department 2. Appeal from Superior Court, Clarke County; Donald McMaster, Judge.

Action by Laura F. Hay against Esther C.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Boggs and others. Judgment for plaintiff for less than the relief demanded, and she appeals. Judgment set aside and cause remanded, with directions.

Charles R. Crouch, of Seattle, for appellant. W. W. Sparks and Miller, Crass & Wilkinson, all of Vancouver, for respondents.

MORRIS, J. [1] Prior to September 2, 1911, appellant and Aaron Hay were husband and wife. On that day a decree of divorce was granted appellant, in which all of the property, both real and personal, then owned or possessed by Aaron Hay, was awarded to appellant. So far as this record goes, the only property affected by this decree was 40 acres of land in Clarke county, for which Aaron Hay had obtained a contract of purchase from the Northern Pacific Railway Company, on August 5, 1904, and while he and appellant were husband and wife. This tract was on August 24, 1907, assigned by Hay, representing himself as an unmarried man, to Esther C. Boggs, his aunt. On July 2, 1908, all payments having been made, the land was deeded by the railway company to Mrs. Boggs. In 1912 appellant commenced this action in which, alleging that the assignment and deed to Mrs. Boggs were fraudulent as to her and were for the use and benefit of Aaron Hay, she prayed that the land be conveyed to her, and her title quieted as against Aaron Hay and Mrs. Boggs. Aaron Hay defaulted, and Mrs. Boggs answered, denying the fraudulent character of the transfer, and alleging she was a purchaser for value. On the trial it appeared for the first time that 25 acres of the land had been exchanged by Mrs. Boggs for 18 lots at Klamath Falls, Or.; the person with whom such exchange was made and who now holds title to the 25 acres being, so far as is here shown, an innocent purchaser. The lower court in deciding the issues gave it as his opinion that the assignment and deed to Mrs. Boggs were collusive and in fraud of appellant's rights, and that she should be awarded the property, holding that Mrs. Boggs was a trustee for the Hays for the 40 acres, and that appellant was entitled to a conveyance of the 15 acres, and ordered the same to be made within 30 days, but made no reference to the 40 acres further than to find it had been sold by Mrs. Boggs. Appellant asked the lower court to award her a judgment against Mrs. Boggs for the sum of \$4,450, as the value of the 25 acres, which being refused, she appeals.

[2] The lower court should have made and entered a decree affecting the entire 40 acres,

for it is manifest from the findings, which are supported by the evidence, that appellant obtained the same rights to the 25 acres as she did to the 15 acres. The fact that the 25 acres was in the ownership of an innocent purchaser might have affected appellant's remedy so far as the land itself was concerned, but, if the court believed it had been sold to an innocent purchaser, appellant should have been awarded its value. The record before us is not sufficient for us to make a finding as to the value of this 25 acres. The only reference to value is found in the testimony of the purchaser, who says he exchanged lands which he valued at \$4,450, and in the exchange the 25 acres was valued at the same sum. This is not sufficient evidence of value for us to find what the real value was, which is what appellant is entitled to, not a fictitious value fixed by the parties upon their respective lands in effecting an exchange. We think we may rightfully assume that such a value is oftentimes far from the real value. Counsel for appellant should have introduced some evidence of the value of this 25 acres, if he intended requesting the court to make such a finding. Notwithstanding the evidence is in such an incomplete condition, it being the duty of the court after reaching the conclusion it announced to have disposed of the whole issue, it should have requested evidence upon which to base a value and complete the decree, and not leave the case disposed of as to the 15 acres but undisposed of as to the 25 acres. Respondents contend that no issue was made as to the 25 acres, and no reference to its sale was made in any pleadings. That is immaterial. Issue was raised as to the rights of the parties in and to the entire tract, and each party prayed for a decree adjudging such issue, thus submitting the whole controversy to the court; and, when the court found with appellant upon the facts and law, its decree should have given her all the relief to which it had found her entitled.

The decree is correct so far as it goes, but it does not go far enough. It is therefore set aside, and the cause remanded, with instructions to the lower court to take evidence as to the value of the 25 acres at the time of its sale or exchange, and then enter a decree directing conveyance of the 15 acres to appellant and awarding her judgment in the sum found as the value of the 25 acres at the time indicated.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

MORGAN v. WILLIAMS et al.

(Supreme Court of Washington. Jan. 8, 1914.)

1. JUDGMENT (§ 354*)—OPENING OR VACATING—ERRORS OF LAW.

A judgment which was not void but merely erroneous in that the court failed to correctly apply the law to the facts could not be vacated by the trial court on motion, as the power to vacate judgments on motion is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the regularity of the proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 691, 703, 704; Dec. Dig. § 354.*]

2. APPEAL AND ERROR (§ 1180*)—EFFECT OF REVERSAL IN PART—"NECESSITY OF CASE."

Under Rem. & Bal. Code, § 1720, providing that any party who does not join in an appeal shall not derive any benefit from the appeal unless from the necessity of the case, in an action for damages against a sheriff and his surety in which plaintiff recovered a judgment against both defendants, the reversal of the judgment on an appeal by the surety alone did not entitle the sheriff to have the judgment against him vacated, since the necessity of the case contemplated by the statute is an absolute necessity arising from the inherent nature of the case in that no judgment rendered could, under any circumstances, be valid as to one of the parties and not as to the others.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626-4631, 4658, 4659; Dec. Dig. § 1180.*]

Department 1. Appeal from Superior Court, Whatcom County; Wm. H. Pemberton, Judge.

Action by Mary E. Morgan against Andrew Williams, as sheriff, and another. From an order overruling a motion to vacate a judgment for plaintiff, the defendant named appeals. Affirmed.

C. A. Swartz, of Bellingham, for appellant.

ELLIS, J. [1] This is an appeal from an order overruling a motion to vacate a judgment. The action was brought by Mary E. Morgan, as plaintiff, against Andrew Williams, as sheriff of Whatcom county, and the Fidelity & Deposit Company of Maryland, as surety on his official bond, to recover damages for an alleged false return of service upon Mary E. Morgan of a summons and complaint in an action for divorce brought by her former husband. The defendant Williams demurred generally to the complaint, and the demurrer was overruled. Separate answers were filed by the defendants, and, on issue joined, the jury returned a verdict against both defendants for the sum of \$1,700. Judgment was entered thereon on the 24th day of March, 1911. The defendant Williams moved to set aside the verdict and for a new trial. Both motions were overruled. The defendant Fidelity & Deposit Company of Maryland appealed to this court, but the defendant Williams neither appealed separately nor joined in the appeal of his co-

defendant. On that appeal this court, in an opinion filed January 19, 1912, and reported in 66 Wash. at page 649, 120 Pac. 106, 36 L. R. A. (N. S.) 292, reversed the judgment against the deposit company and remanded the cause, with direction to enter a judgment in favor of that company.

The defendant Williams on March 23, 1912, moved to vacate and set aside the judgment against him on the grounds: (1) That the judgment was irregularly obtained and without warrant of law; (2) that the judgment was obtained through fraud, misrepresentation, and wrong of the plaintiff; (3) that the complaint did not state a cause of action. From the order of the trial court overruling this motion, the defendant Williams now appeals.

On the former appeal we held that the demurrer of the Fidelity & Deposit Company of Maryland to the complaint on the ground that it did not state a cause of action, aided by the evidence, which established an estoppel as against the plaintiff to question the validity of the decree of divorce, demonstrated that the plaintiff had mistaken her remedy; and that her proper remedy, under the allegations of her complaint, as aided by her own evidence, was to be found in an action against her former husband on his agreement to pay a greater amount than that fixed for the family allowance in the decree of divorce.

It is manifest, therefore, that the judgment against the surety company was reversed for error of law on the part of the trial court; that is, error in applying the law to the facts as pleaded and established. The judgment was not held void but was reversed for error of law. It is this same error of law which is now urged as a ground for vacating the judgment as to the defendant Williams, appellant here. This is manifest from the fact that our decision on the appeal of the surety company is urged as the real ground for the vacation of the judgment as against this appellant Williams. The case thus falls squarely within the rule announced in *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725, and *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182. In the first of those cases it is said: "The final judgment pronounced upon a hearing upon the merits cannot be set aside by the petition under the statute for mere error into which the court may have fallen." In *Kuhn v. Mason* it is said: "The right to a vacation of judgments, while it existed at common law for certain specific reasons, viz., fraud and collusion, is in this state statutory; and, if appellant brings himself within the statute at all, it is within the provisions of subdivision 3 of section 1, c. 17, tit. 28, Bal. Code (Rem. & Bal. Code, § 464, subd. 3), which provides for the vacation of a judgment for mistakes, neglect, or omission of the clerk or irregularity in obtaining the judgment or order. There is no mistake, neglect, or omis-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sion of the clerk alleged, but it is alleged that the judgment was irregularly obtained. But the irregularity provided for by the statute does not mean an irregularity such as is shown by the petition in this case, viz., that the court misconstrued the law. Irregularities which are generally invoked for the purpose of vacating a judgment, and which will justify a vacation of the judgment after term time, are where a judgment was entered in favor of the plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character." This same rule is reannounced, and the foregoing language from *Kuhn v. Mason* is quoted with approval, in *Warren v. Hershberg*, 52 Wash. 38, 100 Pac. 149.

To hold that the trial court should have entertained this motion and vacated this judgment would be in effect to permit the trial court to entertain upon motion an appeal from its own judgment, review the law of the case, and reverse itself for error of law. The statute under which the motion was made was never intended to have that effect. "The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings. It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen. That a judgment is erroneous as a matter of law is ground for an appeal, writ of error, or certiorari, according to the case, but it is no ground for setting aside the judgment on motion." 1 Black on Judgments (2d Ed.) § 329.

The appellant, Williams, having failed to appeal from a judgment neither void upon its face nor void in fact, but merely erroneous, has lost his right to have that judgment reversed or set aside, either in this court or in the trial court.

[2] We are not impressed with the appellant's contention that he must "from the necessity of the case" profit by the successful appeal of his codefendant in which he did not join, under the provisions of Rem. & Bal. Code, § 1720. That section provides in effect that any party who does not join in the appeal nor prosecute an independent appeal from a final judgment shall not derive any benefit from the appeal unless from the necessity of the case. The necessity of the case contemplated by that statute is an absolute necessity; that is to say, one arising from the inherent nature of the case in that no judgment rendered could, under any circumstances, be valid as to one of the parties and not as to the others. Obviously this is not such a case. We find no error in the

refusal of the trial court to vacate the judgment.

The order is affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

WOHLFORTH v. KUPPLER.

(Supreme Court of Washington. Jan. 8, 1914.)

1. CONTRACTS (§ 303*) — PUBLIC IMPROVEMENTS — SUBCONTRACT — VALIDITY — PROVISIONS AGAINST ASSIGNMENT.

Where defendant employed plaintiff to do the plastering in the construction of a school building, and afterwards refused to permit plaintiff to perform his contract it was no answer to an action for breach that defendant's contract for the construction of the building provided that the contractor should not assign or sublet the whole or any part of the contract without the written consent of the architects, in the absence of any showing that defendant had applied for permission to make the contract with plaintiff, and had been refused, or that consent would have been refused had an application been made therefor.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1409-1443; Dec. Dig. § 303.*]

2. WITNESSES (§ 29*)—MILEAGE—RESIDENCE.

Where the business interests of a witness were located in another state and he was compelled to come therefrom to testify, he was entitled to mileage from the state line, though his residence was within the state.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 67-69; Dec. Dig. § 29.*]

Department 2. Appeal from Superior Court, King County; Kenneth MacIntosh, Judge.

Action by W. D. Wohlforth against Christ Kuppler. Judgment for plaintiff, and defendant appeals. Affirmed.

Van Nuys & Hunter, of Seattle, for appellant. John W. Roberts and George L. Spirik, both of Seattle, for respondent.

PARKER, J. The plaintiff seeks recovery of damages which he alleges resulted to him from the failure of the defendant to permit him to do the plastering in the construction of a school building at Port Angeles, in pursuance of a contract entered into between them. The plaintiff claims damages, measured by the loss of profit he would have made had he been permitted to proceed with his contract for the plastering. The defendant had the contract for the construction of the entire building. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff for \$400, from which the defendant has appealed.

[1] It is first contended by counsel for appellant that the trial court erred in denying their motion for judgment upon the pleadings made at the commencement of the trial. This motion was rested principally upon the alleged insufficiency of respondent's reply to the new matter set up in appellant's answer. In answer to this contention, we think it is sufficient to say that we regard

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the new matter alleged in appellant's answer as amounting to little more, in legal effect, than a denial of the facts alleged in respondent's complaint. It does little else than set up appellant's version of the dealings between him and respondent, which only negatives the allegations of the complaint. Under such circumstances, the reply is of but little consequence. It may be well doubted that a reply was necessary at all in this case. In any event, it denied all new matter in the answer which called for denial by reply. *Davidson Fruit Co. v. Produce Distributors Co.*, 74 Wash. 551, 134 Pac. 510; *Smith Sand & Gravel Co. v. Corbin*, 75 Wash. —, 135 Pac. 472. We think there was clearly no error in denying the motion for judgment on the pleadings.

The specifications for the construction of the building, which were a part of the contract between appellant and the school board, provided that "the contractor shall not assign or sublet the whole or any part of his contract work without the written consent of the architects." Counsel upon both sides assume that no such written consent was ever given as to the contract between the parties here. The record is absolutely silent as to whether such consent was ever asked for, or whether it would have been denied if asked for. It seems, from the record, that it is fair to assume that there was no occasion to ask for such consent, since it is plain that respondent was prevented by appellant from proceeding with the plastering of the building. It is contended on behalf of appellant that the contract was illegal, and therefore no contract, because made, if at all, in violation of this provision of the specifications in the original contract. If it affirmatively appeared that the consent of the architects to this contract had been refused, or that it could, in no event, have been procured, there would be some merit in the contention of counsel for appellant, in view of the fact that respondent knew of this provision in the original specifications, upon which he figured. But it is not claimed, nor even hinted in this record, that appellant could not have procured the consent of the architects to respondent's plastering the building. It seems to us that appellant cannot be heard to deny the binding force of the contract, in the absence of any showing whatever on the question of the architects' consent. It was at least appellant's duty to request such consent. He was the one who was dealing directly with the architects and the school authorities; and, while it might not be said that he guaranteed the consent of the architects when he entered into the contract with respondent, he at least should have made some effort looking to the procuring of the architects' consent. Counsel for appellant

rely principally upon *Tribou v. School District*, 66 Wash. 703, 119 Pac. 838, in support of their contention that the contract is illegal and unenforceable. In that case, however, the question of the validity and binding force of the subcontract was involved in a controversy as to the rights of the school district, which knew nothing of the subcontract. We are of the opinion that, this being a controversy between the contractor and the subcontractor, that case is in no wise controlling. There is nothing before us to indicate that the contract here involved was illegal or unenforceable as between these parties. That it may have been rendered so for want of consent of the architects does not argue against its validity and binding force, in the absence of any showing whatever touching the procuring of the architects' consent.

[2] It is contended that the trial court erred in denying appellant's motion to re-tax costs by striking therefrom an item of \$32 for mileage of a witness, coming from Oregon to attend the trial to testify in behalf of respondent. This contention is rested upon the theory that, because the witness was a resident of Seattle, he was not entitled to mileage from the state line, in coming to attend the trial. The record shows that, while this witness had his home in Seattle, he had, for the previous several months, been in Portland, in the state of Oregon, where his entire business interests are located. We think, under such circumstances, he was entitled to mileage the same as if he were a permanent resident of the state of Oregon. We think the spirit of the law does not require a witness to come from a distance, where his business is permanently located, to attend a trial, without the usual mileage fees, any more than as if his residence were at such place. Had his home been there, he would, of course, have been entitled to mileage as a witness. *Carlson Bros. & Co. v. Van De Vanter*, 19 Wash. 32, 52 Pac. 323.

It is strenuously argued that the trial court erred in declining to take the case from the jury and decide it in favor of appellant as a matter of law upon the conclusion of the evidence, when the sufficiency of the evidence was challenged by respondent. This contention involves only questions of fact, touching the question of the making of the contract here involved. We deem it sufficient to say that we have read all the evidence brought here, and conclude that it is ample to support the verdict, which included the finding by the jury that the contract was actually entered into.

The judgment is affirmed.

CROW, C. J., and MOUNT, MORRIS, and FULLERTON, JJ., concur.

McCLANAHAN v. McCLANAHAN et al.

(Supreme Court of Washington. Dec. 31, 1913.)

1. WILLS (§ 64*)—ORAL CONTRACT TO BEQUEATH—RIGHT TO ENFORCE.

Where a husband and wife verbally contracted each to bequeath his or her property to the other, and executed wills pursuant thereto, the execution of a new will by the husband invalidated the oral contract, and precluded its specific enforcement by the wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 169, 170; Dec. Dig. § 64.*]

2. FRAUDS, STATUTE OF (§ 129*)—ORAL CONTRACT TO BEQUEATH—EXECUTION OF WILL.

The execution of a will is not such part performance of an oral contract to bequeath property as will take the contract out of the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 311, 314, 318-320, 322, 325, 326; Dec. Dig. § 129.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Viola McClanahan against Pearl Eunice McClanahan and others. From judgment for defendants, plaintiff appeals. Affirmed.

Tucker & Hyland, of Seattle, for appellant. Reynolds, Ballinger & Hutson, of Seattle, for respondents.

MOUNT, J. This action was brought by the plaintiff to specifically enforce an alleged oral contract entered into between the plaintiff and her husband during his lifetime. The complaint alleged, in substance, that on the 14th day of March, 1891, the plaintiff and Enoch C. McClanahan intermarried and remained husband and wife until the death of Enoch C. McClanahan on the 15th day of May, 1912; that up to the time of his death the plaintiff resided with the deceased as his wife; that the plaintiff at the time of her marriage to the deceased was possessed of separate estate consisting of approximately \$6,000; that the deceased did not possess any estate excepting an expectancy from the estate of one Jane Harmon, deceased; that on the 11th day of September, 1891, six months after the marriage, as above stated, a verbal contract was entered into between the plaintiff and the deceased, by which each of them agreed to make, execute, and deliver to the other a last will and testament, devising to each other any and all property that either should have at the time of his or her death, and providing further that all the separate property of the parties should be used for the benefit of the community; that Enoch C. McClanahan at that time had three children by a former marriage; that wills were duly made which were exact duplicates, with the exception of the names, and that in the will of Enoch C. McClanahan his children were mentioned, and \$10 given to each of them; that the wills were witnessed by the same persons, and provided for the appointment of the other as

sole executor without bonds, and devised all of the property to the survivor; that while the plaintiff and Enoch C. McClanahan were living together, on or about September 1, 1894, the plaintiff received the sum of \$800 from her separate estate, and delivered the same to her husband, which money was used by him in the payment of debts against his separate estate; that the contract was lived up to by both parties until four days prior to his death, when he made, executed, and published a will devising to the plaintiff only a life estate in the real estate, leaving the fee-simple title thereof to his children. Copies of these wills are attached to the complaint. After this complaint was served upon the defendants, who are the children of Enoch C. McClanahan by a former wife, two of these children appeared by their attorneys and filed an answer, denying the material allegations of the complaint, and alleging as an affirmative defense the fact of the death of Enoch C. McClanahan, and setting forth that he executed a last will on the 8th day of May, 1912, and that the same was made and published with the knowledge of the plaintiff, which fact was admitted by the reply. Thereupon the defendants filed a motion for judgment upon the pleadings and for a dismissal of the action. The court granted this motion, on the ground that the plaintiff has a complete remedy in the probate court to determine the validity of the will of Enoch C. McClanahan dated September 11, 1891, and the will dated May 8, 1912; and for that reason dismissed the complaint without prejudice to the rights of the parties to have determined the validity of either of the wills. The plaintiff has appealed from that order.

[1, 2] The appellant states that "the sole question to be determined upon the appeal is whether the contract that was made by the appellant and the decedent is such a contract as equity will specifically enforce, and whether or not the execution of a new will by the decedent prior to his death effectually invalidated the contract of the parties." No other question is presented or discussed in either the brief of the appellant or the respondents. We shall therefore proceed at once to a determination of this question.

Two cases almost identical with this case have been presented to this court, which we think are determinative of the question now presented.

The case of Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796, was a case where Orley Hull made a parol agreement to the effect that in consideration that Eva Swash and her sister would waive the right of an appeal in litigation which was then pending between Orley Hull and his daughters, the said Orley Hull would devise to Eva Swash one-fourth of his estate at the time of his death. Eva Swash consented to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this and waived the right of appeal. Afterwards her father died, leaving a will in which he bequeathed to her the sum of \$500. The value of the estate at that time was \$40,000 or more. In that case, after reviewing numerous authorities, this court said: "The cases cited that do support the plaintiff's contention are overborne by the weight of authority, and the rule seems to be well settled that to enforce a parol contract to make a will, there must have been at least some substantial thing done by the testator in his lifetime in pursuance of that contract. This seems to be required for the purpose of placing the proof of the contract beyond all legitimate controversy, and bears directly upon the question of the proof. The fraud to be prevented is the danger of the fraudulent establishment of such contracts, and this is the purpose of the provision of the statute; and the cases which hold that a performance upon the part of one party alone is sufficient seem to lose sight of this fact, and assume that the contract can as well be established by the acts of one party alone, against the statute." Further along in the case (14 Wash. at page 437, 44 Pac. at page 865, 32 L. R. A. 796), this court said: "If the making of a previous will in pursuance of the contract would not have been a sufficient part performance by Hull, then the nature of this contract was such that it would not admit of a sufficient part performance to make it valid, for there was nothing else for him to do in the premises. Conceding all that the plaintiff claims with reference to the proof, we are still forced to the conclusion, under the authorities, that she is not entitled to a decree for a specific performance, for we are not disposed to add to or extend the exceptions to the rule established by the statute to meet the seeming hardships of a particular case. The fault rests with the parties in not putting their contracts in writing. The rule should not be infringed as freely after the death of one of the parties as in cases where the contract was to be performed during his lifetime. If a period of years had been fixed by the contract for the conveyance of this property by Hull to the plaintiff, instead of a devise, and the parties were all living, under the overwhelming weight of authority there was not a sufficient part performance to authorize its specific enforcement." This case, it seems to us, is a complete answer to the question presented upon this appeal.

The case of *Edwall v. Jessep*, 134 Pac. 1041, was, "in substance, an action to enforce specific performance of an alleged contract entered into between Ida Edwall and her deceased husband, by which they agreed to make mutual wills, and in pursuance of which contract they each executed wills on July 3, 1909." Thereafter on July 9, 1910, Peter Edwall executed another will, wherein he expressly revoked all former wills by him executed, and devised his estate to Ward Jes-

seph in trust, so that his wife would receive during her lifetime the larger portion of the income therefrom, upon her death his estate to be distributed among certain of his relatives, naming them. In that case we held that the oral agreement was within the statute of frauds, and was void, and that there was no part performance, and therefore affirmed the judgment of the lower court. The wills executed in the *Edwall* Case are in all respects similar to the wills executed in this case, and the question presented in the *Edwall* Case is the same as is presented in this case. After reviewing many authorities cited in the appellant's brief, and others not cited, we said: "We are of the opinion that these wills do not, of themselves, prove the making of any contract of mutuality on the part of the testators, nor that one was made in consideration of the other, though upon their face they appear to have been simultaneously executed before the same witnesses, and were, as the evidence shows, placed for safe-keeping together in the hands of a third person. So far as any written evidence such as is required by the statute of frauds shows, these are individual wills of the simplest possible character, and there is no competent written evidence in this record tending to show that they were made in pursuance of any contract between the respective testators which would, in the least, impair their power of revocation. It follows that the making of the will of July 9, 1910, by Peter Edwall constituted an effectual revocation of his will of July 3, 1909, unless the effect of the statute of frauds was avoided by part performance of the alleged contract." In that case we quoted from *Edson v. Parsons*, 155 N. Y. 555, 50 N. E. 265, as follows: "A general maxim, which equity recognizes, is that a testator's will is ambulatory until his death. It is a disposition of property which neither can, nor is supposed to, take effect until after death. I think it needs no further argument to show that to attribute to a will the quality of irrevocability demands the most indisputable evidence of the agreement which is relied upon to change its ambulatory nature, and that the presumptions will not, and should not, take the place of proof." Then, in the *Edwall* Case, after considering the claim of the appellant that there had been a part performance of the contract relied upon, we held that the making of a will, in pursuance of a contract required by the statute of frauds to be evidenced by a writing, did not constitute a part performance of such contract so as to render the same enforceable, and concluded by saying: "We are unable to find in this record any evidence in writing of the existence of a contract between appellant and the deceased, in pursuance of which the wills of July 3, 1909, were made by them, and we are not permitted by law to look to parol proof of the existence of such a contract, any more than we are

permitted to look to parol proof of the conveyance of land. It follows that each of those wills was revocable at the pleasure of its maker, without notice to the other, and that the one executed by Peter Edwall was effectively revoked by his will of July 9, 1910."

These cases seem to us to be directly in point upon the question presented here and decisive of it.

The judgment appealed from is therefore affirmed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

CRAIB v. PETERSON.

(Supreme Court of Washington. Jan. 8, 1914.)

1. CONTRACTS (§ 229*)—CONSTRUCTION—PROFITS.

Plaintiff, having secured judgment against K., who was a member of a firm, was endeavoring to collect the same, when it appeared that the firm had a number of teams which P. had contracted to use in the performance of a city employment contract, and, the firm being indebted to a bank which held a mortgage on the teams, it was agreed that plaintiff should delay enforcement of his claim for five months, and that P. should work about 25 of the teams at \$3.50 a day, and, after deducting \$40 a month per team and interest on the amount due the bank, P. should pay to plaintiff one-half the net profits of the teams, less \$75 per month, to be paid to K., and K. agreed, in consideration of the extension of time, that one-half the net profits earned by the teams, less the sums so specified, to the extent of \$1,350 should be paid to plaintiff. *Held*, that the word "profits," as used in the contract, meant the balance remaining after deducting the expenses of the teams at \$40 per month per team, the \$75 per month for K., and the interest on the bank's debt.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1045-1057, 1059-1066, 1070, 1077; Dec. Dig. § 229.*]

2. ACTION (§ 62*)—CAUSE OF ACTION—SUSPENSION—TIME.

Where, in consideration of plaintiff's suspending proceedings to collect a judgment against K. for five months, defendant P. and K. agreed to pay one-half the net profits of the use of certain teams by P. in the performance of a city contract to plaintiff until his debt was paid, plaintiff's suit for an accounting under the contract, not brought until after the five months had expired, was not premature because at that time the contract with the city had not been completed.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 718-721, 723; Dec. Dig. § 62.*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by John L. Craib against Andrew Peterson. Judgment for plaintiff, and defendant appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts and R. W. Capps, all of Seattle, for appellant. Byers & Byers, of Seattle, for respondent.

MOUNT, J. The plaintiff brought this action for an accounting under a contract entered into between the plaintiff and the de-

fendant and John Kalberg. It was alleged in the complaint that there was a sum of money due the plaintiff under the contract, and that the defendant had failed to account therefor. The defendant admitted the execution of the contract, but denied that there was any money due thereunder, and alleged another contract executed on the same day between the defendant and a copartnership, known as Kalberg & Brandon, which was part of the same transaction; that the plaintiff had notice and knowledge of the latter contract, and was bound thereby. Upon the trial of the case the lower court found in favor of the plaintiff, and ordered an accounting. The defendant has appealed from that judgment.

The contract under which the plaintiff claims an accounting is admitted. It is as follows: "Memorandum of agreement, between John L. Craib, party of the first part, John Kalberg, party of the second part, and Andrew Peterson, party of the third part, witnesseth: That whereas the said party of the first part has a claim against the party of the second part for \$1,350 besides interest, and the said party of the second part and his partner Brandon are owners of certain teams and outfit and operate under the name of Kalberg & Brandon, and the said party of the third part has a contract from the city of Seattle for grading and curbing 26th avenue, south, in the city of Seattle under ordinance No. 26830, district 2480, and it has been agreed by the parties hereto that said first party shall waive his right to enforce the collection of his claim at the present time and to extend the time for payment to on or before five months from date hereof, and said party of the third part shall work the teams and outfit of Kalberg & Brandon on his said job, working as many of the teams and as much of the time as it is practicable to work, at the daily wage of \$3.50 per team and after deducting the keep of said teams not exceeding, however, the sum of \$40 per month per team, and interest on amount due the State Bank of Seattle, said third party shall pay to the said first party one-half the net profits of said teams and outfit less the sum of \$75 per month to be paid to the said Kalberg: Therefore, in consideration thereof and in payment of the portion of the profits and moneys the said first party hereby agrees and hereby does extend the time of the payment of his claim against the said second party, John Kalberg, to on or about five months from date hereof, said claim to bear interest from date to the maturity thereof at the legal rate. Said second party hereby authorizes and directs the said third party to pay to the said John L. Craib, one-half the net profits earned on the said 26th avenue, south, job by the teams and outfit of Kalberg & Brandon less the sum of \$75 per month to be paid to the said party of the second part, and said second party hereby sells,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—31

assigns and transfers to the said first party one-half the net profits earned on the said 26th avenue, south, job by the teams and outfit of Kalberg & Brandon less the sum of \$75 per month to be paid by the said second party, but the amount to be paid out of said net profits to said first party shall not exceed the sum of \$1,350 and interest at the legal rate from the time the claim against said second party in favor of said first party matured. Said third party hereby agrees that he will work the teams and outfit of Kalberg & Brandon on said job whenever work is practicable and shall work as many teams as it is practicable to work and that he will pay one-half the net amount that is earned on said job by said teams and outfit less the sum of \$75 per month, to the said first party not exceeding the sum of \$1,350 and interest from the date of maturity of the claim against said second party and further agrees that the amounts to be deducted from the earnings of said team and outfit at the rate of \$3.50 per day per team shall be the keep of said teams, not to exceed, however, \$40 per month per team and interest on the loan of the State Bank of Seattle, which loan shall not exceed the sum of \$18,000; and further agrees that one-half the net profits on said teams and outfit less the sum of \$75 per month and not exceeding the sum of \$1,350 and interest shall be held by said third party until the completion of said contract, but the date of such completion shall not extend beyond the period of five months from the date hereof, and that at the completion of said contract the said portion of said profits shall be paid to said first party, but the sum so paid to said first party shall not exceed the sum of \$1,350 and interest. Dated at Seattle, Washington, February 26th, 1912."

It is argued by the appellant that the action was prematurely brought; that the respondent was not entitled by virtue of his contract and his knowledge of the contract between the appellant and Kalberg & Brandon, to an accounting, except out of the net profits of the work which was to be done under the latter contract. Upon the trial of the case the court was of the opinion that the contract sued upon was ambiguous, and therefore admitted oral evidence of the circumstances which gave rise to the contracts at the time they were entered into, for the purpose of determining the meaning of the contract sued upon.

It will be noticed that the contract above set out is between three independent parties. It appears from the evidence that at the time these contracts were entered into, the respondent had secured a judgment against John Kalberg of the partnership of Kalberg & Brandon, and was endeavoring to enforce collection thereof. All the property of Kalberg was held under a mortgage by the State Bank of Seattle. This property was of the value of about \$40,000, and the bank's mortgage amounted to about \$18,000. There

were other creditors, and it was agreed between the parties to the contract that if the respondent would cease endeavoring to force collection of the judgment against Kalberg, the appellant Peterson would assume the obligation. Consequently this contract was entered into. The respondent was named as party of the first part, Kalberg as party of the second part, and Peterson, the appellant, party of the third part. By the terms of the contract the respondent, in consideration of waiving his right to enforce the collection of his claim and extending the time for payment five months from the date of the contract, agreed that Peterson should work certain teams, about 25 in number, belonging to the copartnership of Kalberg & Brandon, at \$3.50 per day per team, and, after deducting the sum of \$40 per month per team and interest on the amount due the State Bank, that Peterson should pay to the respondent "one-half the net profits of said teams and outfit less the sum of \$75 per month to be paid to the said Kalberg." Second party, Kalberg, agreed, in consideration of the extension of the time, that "one-half the net profits" earned by the teams, less the sums above mentioned, to the extent of \$1,350, should be paid to the respondent. The appellant in this case under the terms of the contract agreed that he would work the teams, and would pay "one-half the net amount that is earned on said job by said teams and outfit less the sum of \$75 per month, to the said first party not exceeding the sum of \$1,350 and interest from the date of maturity of the claim against said second party and further agrees that the amounts to be deducted from the earnings of said teams and outfit at the rate of \$3.50 per day per team shall be the keep of said teams, not to exceed, however, \$40 per month per team and interest on the loan of the State Bank of Seattle, which loan shall not exceed the sum of \$18,000; and further agrees that one-half the net profits on said teams and outfit less the sum of \$75 per month and not exceeding the sum of \$1,350 and interest shall be held by said third party until the completion of said contract, but the date of such completion shall not extend beyond the period of five months from the date hereof. * * *

[1] Because of the use of the word "profits" in this contract the trial court was evidently of the opinion that the contract was ambiguous, and therefore heard oral evidence to determine the real intention of the parties. The court concluded after hearing the evidence that the appellant by the terms of this contract had agreed to pay to the respondent one-half of the net profits on said teams which was earned by them, less the expenses thereof, not exceeding the sum of \$1,350 and interest, and that this was payable, in any event, at the expiration of five months from the date of the contract. We are satisfied that the trial court decided correctly upon that question, whether we take

the contract as it appears upon its face, or whether it is considered in connection with the evidence in the case. While the contract uses the words, "one-half the net profits," it is plain we think that the net profits there referred to is the balance left after deducting the expenses of the teams at \$40 per month per team and the \$75 per month for Kalberg and the interest on the debt due to the State Bank. There is no reference in this contract to any other contract, and it is not claimed that the respondent signed any other contract. It is true that on the same day another contract was entered into between Kalberg & Brandon and the appellant. That contract was one wherein Peterson took over a contract which had theretofore been entered into between the city of Seattle and Kalberg & Brandon, as copartners, wherein it was agreed that the appellant should use the teams of Kalberg & Brandon in performing work under the contract for the city. And it was agreed in that contract that \$3.50 per day should be allowed for each team for each day's work, and that there should be deductions of \$75 per month for Kalberg and interest on the money due the bank, and that the proceeds of the work of these teams should be held by the appellant until the contract was finally completed. And it was "further agreed and understood that if said contract does not make sufficient money to pay the parties for the teamwork as herein mentioned, that then neither of the parties hereto shall receive any compensation for such team hire except such compensation as they may receive out of the profits of said contract after the payment of all other expenses." But the respondent testified that he did not know the terms of that contract, and was not interested therein; that he agreed to extend the time of payment of the debt owing to him by Kalberg for five months, in consideration that Peterson would pay one-half of the net profits of the use of the teams upon his contract during that time. In other words, the respondent made it possible for the appellant to use the teams upon the work for that period of time, in consideration that the appellant would pay the amount of his claim.

[2] It is argued by the appellant that because the work under the contract with the city has not yet been completed, therefore the action was prematurely brought. But the contract sued upon, by which Peterson agrees to pay, provides that the date of such completion of the contract shall not extend beyond the period of five months from the date thereof, which can mean nothing less than that Peterson agreed to pay whatever the net profits of the teams were at that date, notwithstanding the contract with the city had not been completed. The five-month period had expired before the action was begun.

We are of the opinion that the contract itself is sufficient to sustain the order of the trial court. If the contract is ambiguous, the evidence in the case leads to the same conclusion. The cause therefore was not prematurely brought.

The judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

PACIFIC COAST BISCUIT CO. v. OSWALD (PERRY, Garnishee).

(Supreme Court of Washington. Jan. 8, 1914.)

1. CHATTEL MORTGAGES (§ 196*)—RECORDING—CREDITORS.

While an unrecorded mortgage, under the express provisions of Rem. & Bal. Code, § 3680, is void as to creditors between the date of its execution and the time of recording, upon being recorded it immediately becomes effective the same as though executed on that date, and creates a lien superior to the claims of creditors having no specific liens.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 429, 438-441; Dec. Dig. § 196.*]

2. FRAUDULENT CONVEYANCES (§ 115*)—RIGHT TO PREFER CREDITOR.

A debtor may prefer a creditor except in cases of insolvency.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 370, 375-377; Dec. Dig. § 115.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by the Pacific Coast Biscuit Company, a corporation, against William Oswald, defendant, and I. D. Perry, garnishee. From a judgment for plaintiff, the garnishee appeals. Reversed, and garnishment proceedings ordered dismissed.

Jas. C. McKnight, of Seattle, for appellant.

MOUNT, J. The appellant is a garnishee defendant in the case of Pacific Coast Biscuit Company v. William Oswald. This appeal is prosecuted from a judgment of the superior court for King county, finding that certain property in the possession of the appellant was the property of William Oswald.

The respondent appeared in this court and moved to dismiss the appeal. This motion was denied. The respondent has filed no brief on the merits, so that we are not advised of his position except as stated by the appellant.

The facts in the case were stipulated. There is no dispute upon the facts. It appears from the stipulation that in April, 1911, William Oswald was indebted to the appellant, I. D. Perry, in the sum of \$450. On that date Mr. Oswald, in order to secure the payment of this indebtedness, executed a chattel mortgage upon a certain stock of goods and fixtures belonging to him. The mortgage was made in good faith and with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

out any desire to hinder or delay creditors. The mortgage was properly acknowledged and verified and delivered to the mortgagee, Mr. Perry. It was not filed for record until September 7, 1911. Between the date of the execution of the mortgage and the date it was filed, several persons became creditors of Mr. Oswald. On the day the mortgage was filed, viz., September 7, 1911, Mr. Perry proceeded to foreclose the same by notice and sale under the statute. The sheriff took possession of the stock of goods and fixtures, and thereafter regularly sold the same. At the sheriff's sale Mr. Perry became the purchaser for the sum of \$362.92, which it is agreed was the reasonable value thereof. Mr. Perry has ever since been in possession of the goods, selling and replacing the same with other goods. Thereafter, on the 6th day of November, 1911, the Pacific Coast Biscuit Company secured a judgment against Mr. Oswald upon debts that were contracted between the month of April and the month of September, 1911. After this judgment was obtained, a writ of garnishment was served upon Mr. Perry. This writ was based upon an affidavit that Mr. Perry was indebted to Mr. Oswald, or had property in his possession belonging to Mr. Oswald. Mr. Perry thereupon denied that he was indebted to Mr. Oswald, or that he had any property in his possession belonging to Mr. Oswald. Upon these facts the trial court concluded that the chattel mortgage executed in April and filed in September, 1911, was void as to creditors between those dates, and therefore the mortgage foreclosure was void and the property obtained by Mr. Perry under the foreclosure was the property of Mr. Oswald, and a judgment was thereupon entered ordering the property in the possession of Mr. Perry to be turned over to the sheriff to satisfy the judgment obtained by the Pacific Coast Biscuit Company against Mr. Oswald.

Apparently the respondent and the trial court reply upon the case of *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190, 40 Pac. 729. That was a case where a chattel mortgage had been given on December 22, 1893, and was not recorded until May 4, 1894. In the meantime an action was instituted by other creditors of the mortgagor, and on May 7th a receiver was appointed and took possession of the property of the mortgagor. The court in that case construed the provisions of section 3660, Rem. & Bal. Code, and held that an unrecorded chattel mortgage was void as to creditors between the date of its execution and the time of recording, whether the creditors acquired a specific lien against the property or not. The logic of that case undoubtedly supports the judgment appealed from in this case. But the court in that case appears not to have carefully considered the question whether such mortgage, after being filed for

record, became valid as of the time it was filed.

[1] There can be no doubt under the statute that a mortgage of personal property is void as against creditors unless it is recorded in the same manner as is required by law for conveyances of real property, because the statute so states. But we are satisfied that this statute does not mean that an unrecorded mortgage may not thereafter be recorded in compliance with the statute, and become effective after the date of such recording as to all creditors, both prior and subsequent.

[2] There is no doubt that a debtor in this state has a right to prefer a creditor, except in cases of insolvency. If this mortgage had been recorded immediately after it was given, it would have been a valid mortgage as against all persons not having a prior lien. But not having been recorded, the mortgage became void as to creditors and as to subsequent incumbrancers for value and in good faith. It was clearly within the power of the debtor to make a new mortgage on September 7, 1911, which mortgage would have been valid as against creditors from the time of making and filing for record. Instead of making a new mortgage, the appellant filed his old mortgage for record. There were at that time other creditors, but they were simply general creditors. They had no lien upon any specific property. When the mortgage was filed for record it became immediately effective as of the date it was filed, the same as a mortgage made on that date. It seems to us that there can be no escape from this conclusion. In *Heal v. Evans Creek Coal & Coke Co.*, 71 Wash. 225, 123 Pac. 211, we said: "Whether properly recorded or not, the mortgage was valid as between the mortgagor and mortgagee, and it is only creditors who have acquired some form of lien upon the mortgaged property that can question the right of the mortgagee to foreclose against such mortgaged property." This is the general rule.

The conceded facts in this case show that the Pacific Coast Biscuit Company had no specific lien upon any property of the mortgagor at the time the mortgage was filed for record on September 7, 1911. Up to that time, under many decisions of this court, the mortgage was void as to creditors. But when it was filed for record, and when the mortgagee took possession of the property, as he did in this case, his lien became perfect and superior to the claim of the other creditors having no specific lien. We think there can be no doubt of the correctness of this position under the statute.

In so far as the case of *Willamette Casket Co. v. Cross Undertaking Co.*, supra, may be said to hold that an unrecorded mortgage is absolutely void, and may not become valid when properly filed, that case must be overruled. Under the conceded facts in this case, we think it is clear that the appellant, by reason of recording his mortgage prior to

the judgment of the Pacific Coast Biscuit Company, obtained a first lien upon the property covered by the mortgage, and the sale thereof under his mortgage, being regular, passed title to the appellant, and that Oswald had no further interest in the property.

The judgment is therefore reversed, and the garnishment proceedings ordered dismissed.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

MAGNUSON v. MacADAM et al.

(Supreme Court of Washington. Jan. 7, 1914.)

1. APPEAL AND ERROR (§ 767*)—RECORDS—MOTION TO STRIKE ANSWERING BRIEF.

Though the answering brief was not served and filed until 59 days after the service of appellant's brief, instead of in 30 days as required, but it was served and filed before the motion to strike was interposed, and no delay in placing the cause on the calendar resulted, and appellants had ample time to prepare and file their reply brief prior to the hearing of argument on appeal, the motion to strike for failure to file in time would be denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3102; Dec. Dig. § 767.*]

2. MASTER AND SERVANT (§ 222*)—ASSUMPTION OF RISK—RELIANCE UPON CARE OF FOREMAN.

A servant of a contractor, who had no knowledge as to a heavy machine known as a concrete mixer and did not know the danger of attempting to hold the tongue in front when steam was applied, had a right to rely upon the superior knowledge and upon the direction of the foreman whose duty it was to look after his safety, and hence did not assume the risk of injury from the tongue's violent swing.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.*]

3. MASTER AND SERVANT (§ 289*)—ACTIONS FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

On evidence in a servant's action for injury from the violent swing of the tongue of a heavy concrete mixer operated by steam which his foreman had directed him to hold when steam was applied, *held*, that his contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EXPERT TESTIMONY.

In a servant's action for injury from the violent swing of the tongue of a heavy concrete mixer operated by steam, the admission of expert evidence to show the force with which the tongue would swing so as to show whether it was possible for plaintiff to hold the tongue and guide the machine as directed by the foreman, where the amount of steam applied was not shown, if erroneous, was not prejudicial, as the expert undoubtedly took all conditions into consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.*]

5. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES—INJURY TO FOOT.

A verdict of \$4,500 for a severe sprain in a servant's left ankle and a breaking down of the instep, causing what is ordinarily known as flat foot, at times swelling so as to prevent work at hard labor, was excessive, so as to require a reduction to \$2,500.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Martin Magnuson against J. V. MacAdam and another, copartners. From a judgment for plaintiff for \$4,500, defendants appeal. Affirmed on condition that plaintiff accept a reduction to the sum of \$2,500, with interest from the date of trial.

Alex. Dickinson of Seattle, for appellants. Martin J. Lund, of Seattle, for respondent.

CROW, C. J. Action by Martin Magnuson against J. V. MacAdam and Vincent L. MacAdam, copartners, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, defendants have appealed.

[1] Appellants have moved this court to strike respondent's answering brief for the reason that it was not served and filed within 30 days after the service of appellants' opening brief. While it is true that the answering brief was served and filed about 59 days after service of appellants' opening brief, the record shows that it was served and filed before the motion to strike was interposed; that no delay in placing the cause on the calendar resulted; and that appellants had ample time within which to prepare, serve, and file their reply brief prior to the hearing of the argument on appeal. Under these circumstances the motion to strike will be denied.

Appellants' principal assignment is that the trial court erred in denying their motions for a nonsuit, for a directed verdict, and for judgment notwithstanding the verdict. Respondent was a common laborer employed by appellants, who, as contractors, were engaged in grading and paving certain streets in the city of Seattle. Appellants brought to the work, for use thereon, a machine known as a concrete mixer, which weighed several tons, was operated by steam, and was supposed to have been so constructed that it might be propelled by its own motive power, although it was not equipped with any steering apparatus or appliances. The machine was mounted on wheels; the two hind wheels being on a stationary axle, while the front wheels were on an axle which worked upon a pivot. A tongue, to which horses might be hitched, was attached to the front axle in such a manner that it would move sideways only as the front axle was turned or moved. Respondent's evidence and that of his witnesses shows that on the day of the accident appellants' foreman de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sired to have the concrete mixer moved by its own power; that it was located on a concrete base of the unfinished street, which was somewhat rough or uneven; that the foreman ordered respondent and one other employé to take hold of the tongue and guide the machine while it was being moved; that respondent, who was unaware of the danger which he would thus incur, obeyed the order; that, when the steam power was applied, the machine refused to move forward; that it went backward for a few inches, striking a pebble or some other obstruction, which caused the tongue to swing around and strike respondent with great violence, throwing him down and inflicting the injuries of which he complains; and that the force with which he was struck was greater than he could resist.

Respondent insists that appellant was negligent in failing to provide him with safe appliances and a safe place in which to work, while appellants, in support of their motions, contend that all dangers incident to respondent's employment were open and obvious, or by the exercise of ordinary care and prudence could have been known to him, and that he assumed the risk of such dangers.

There was evidence that respondent had no knowledge of machinery, and that he did not know or appreciate the danger of the work in which he was engaged. Appellants were of the opinion that the mixer could be moved by its own power, but were mistaken. It was their duty to know the functions and fitness of the machine and to appreciate the dangers to which its ordinary operation and use might subject their employes. The evidence, without contradiction, shows that the machine could only be moved by using a team of horses, and that the force applied to the tongue when the front wheels turned would be so great as to render it impossible for the respondent and his fellow servant to hold, control, or guide it.

[2, 3] Respondent had a right to rely upon the orders and superior knowledge of the foreman, who represented appellants. In *Knudsen v. Moe Bros.*, 86 Wash. 118, 119 Pac. 27, we said: "As an employé, it was appellant's duty to obey the foreman's orders, unless they were so manifestly dangerous that a prudent man in the exercise of due caution would refuse to obey. A servant's obedience to the master's orders is an absolute necessity to the successful conduct of any industrial occupation. His refusal might deprive him of employment and means of livelihood. Ordinarily a servant yields his judgment to the superior judgment and discretion of the master. If he does, and is injured by reason of his obedience to the master's orders, it will ordinarily become a question for determination by the jury, in such an action as this, whether the danger of obeying the order was so imminent and hazardous as to charge the servant with contributory negligence and preclude him from recovering damages."

The evidence shows that the attempt to move the machine by its own motive power was under the immediate supervision of appellants' foreman, and that respondent acted in obedience to his specific orders. It was the foreman's duty to look after respondent's safety. This being true, respondent did not assume the risk, nor can he be held guilty of contributory negligence as a matter of law. *Etheridge v. Gordon Construction Co.*, 62 Wash. 256, 113 Pac. 639; *Nelson v. Ballard Lumber Co.*, 60 Wash. 690, 111 Pac. 882; *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900. The trial court committed no error in denying appellants' motions for a nonsuit, an instructed verdict, or judgment notwithstanding the verdict.

[4] Appellants further contend that the trial court erred in admitting the expert evidence of a mechanical engineer, for the purpose of showing the force with which the tongue of the machine would move from side to side. The purpose of this evidence was to show whether it would be possible for respondent to hold the tongue and guide the machine as directed by the foreman. No question was raised as to the competency of the witness. Appellants now insist that the amount of steam applied to the engine was not shown, and that the expert should not have been permitted to testify to the force which would be exerted without considering the amount of steam involved. This objection was not raised at the trial but is presented for the first time in this court. The expert undoubtedly took all controlling conditions into consideration. We conclude that no prejudicial error was committed in admitting his testimony. Some objections are raised to instructions given and refused, which we find to be without merit. The instructions given fully and accurately stated the law applicable to the issues and evidence.

[5] By their remaining assignment of error, appellants contend that the verdict is excessive. This contention must be sustained. Respondent contended that, when he was thrown down, he received a severe sprain in his left ankle, and that the arch or instep of his left foot was also injured. There was evidence showing that he continued work for some days. He insists that the work he then did was of a very light character. There was also evidence to the effect that he now suffers with what is ordinarily known as a flat foot. In other words, that the instep of his left foot is broken down, and much weakened, and that at times it becomes swollen so as to prevent respondent from working at hard labor. Although the evidence as to the extent of his injury and his chances for a recovery was conflicting, we are nevertheless of the opinion that the verdict was excessive. At the time of passing upon appellants' motions for a new trial and for judgment non obstante, the trial judge was informed by appellants that they would appeal this case in any event, if their motions were denied.

Thereupon the trial judge in substance stated that he would not pass upon the amount of the verdict to determine whether it was excessive but would permit that question to come before this court in connection with other questions that might be raised on an appeal. It was the duty of the trial judge to pass upon appellants' contention that the verdict was excessive. His position indicates an impression or belief on his part that the verdict was excessive. We are convinced that it was, and conclude that the respondent must either consent to a reduction or submit to a new trial.

It is ordered that if, within 30 days after the filing of the remittitur herein, the respondent shall file his written consent to accept a judgment in the sum of \$2,500, with interest from the date of trial, that judgment for that amount be entered in his favor against appellants and the surety in the supersedeas bond. It is further ordered that, in the event of his failure to make such an election within the time named, a new trial be granted. Appellants will recover their costs in this court.

GOSE, MOUNT, PARKER, and OHADWICK, JJ., concur.

CHILBERG et al. v. BOYD et al.

(Supreme Court of Washington. Jan. 2, 1914.)

1. DEEDS (§ 70*)—FRAUD—ACTS CONSTITUTING.

Where a defendant, who obtained a deed from plaintiff, knew of the existence of a discrepancy between two surveys, and believed that plaintiff had title to an acre by reason of the discrepancy, and knew that plaintiff was not aware of that fact, and plaintiff made the conveyance for a nominal consideration, while the property conveyed was worth from \$2,000 to \$5,000, defendant was guilty of fraud justifying the setting aside of the deed, though defendant was purchasing and plaintiff was conveying a contingent claim.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. § 70.*]

2. CANCELLATION OF INSTRUMENTS (§ 34*)—FRAUD—ESTOPPEL—LACHES.

Where a grantee fraudulently obtained a deed from the grantor by representing that he desired the deed to settle a dispute and prevent litigation involving a boundary, while he obtained the deed to promote litigation, and the grantor did not learn of the fraud until a suit between the grantee and a third person, involving the disputed boundary, was in progress, the right of the grantor to a decree setting aside the deed on the ground of the fraud was not defeated by laches based on his failure to assert his claim before the grantee established the grantor's title in the litigation.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49-64; Dec. Dig. § 34.*]

Department 1. Appeal from Superior Court, King County; Everett Smith, Judge.

Action by Nelson Chilberg and another against William F. Boyd and others. From

a judgment for plaintiffs, defendants George W. Aiken and his wife appeal. Affirmed.

Peters & Powell, of Seattle, for appellants. T. F. Bevington, of Seattle, for respondents.

ELLIS, J. This action was brought in July, 1910, by the plaintiffs Chilberg to procure the cancellation of a quitclaim deed executed by them to the defendant George W. Aiken, alleging fraud in its procurement, and to quiet title against the defendant Boyd to the lands described in the deed. This case grows out of the same general transaction involved in the case of Aiken v. Boyd, 55 Wash. 696, 104 Pac. 1101, the transcript of the evidence in which case was, by stipulation, made evidence in this. A brief review of that case will facilitate the statement of the issues in this.

That case arose from a dispute between Aiken and Boyd as to the true location of the south boundary line of a five-acre tract of land which Aiken had purchased from Boyd. That boundary admittedly coincided with the east and west center line of section 15, township 24 N., range 8 E. W. M.; the dispute being as to the true location of that center line. Lying to the south of this five-acre tract, was a tract of land which had been platted as Chilberg's addition by Nelson Chilberg and wife, the plaintiffs in the present action. Along the north side, and as a part of this addition, was platted a street known as Smith street, or West Andover street. The dividing line between Chilberg's land and Boyd's was the above-mentioned east and west center line of section 15. Owing to a mistake in the survey upon which it was based, Chilberg's addition as platted did not extend to this line, but left a strip or gore between the north boundary of Chilberg's addition (the north marginal line of West Andover street) and the east and west center line of section 15. This strip or gore belonged to Chilberg, but was not included in his plat. The defendant Boyd claimed, in the former action, and also by his cross-complaint in this action, that this strip or gore belonged to him, claiming, among other things, that, as between him and Chilberg, the east and west center line of the section is the north marginal line of West Andover street, and coincides with the north marginal line of Chilberg's addition, because it had been so determined by a survey of one Anderson, upon which both had subsequently relied and acted. In Aiken v. Boyd, supra, we held that the south boundary line of the tract which Aiken bought of Boyd was the east and west center line of the section as established by the survey of one Gardner. The strip left between that line and Chilberg's addition is approximately 39 feet in width at one end and 18 feet at the other. That decision, in effect, fixed Aiken's north line an equal distance further north than

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Boyd claimed it was. Aiken, acting upon the Gardner survey, had insisted that the north fence of his five-acre tract should remain that distance north of where Boyd claimed the fence should be; Aiken asserting that his five acres extend only to the center section line as fixed by the Gardner survey, Boyd that it extended to the line as fixed by the Anderson survey. It was to enjoin Boyd from interfering with this fence that Aiken brought the former action. Before the commencement of that action, and while Aiken and Boyd were in dispute as to the true south boundary line, and, in consequence, also as to the true north boundary line of Aiken's five-acre tract, each of them approached Chilberg, endeavoring to procure from him a quitclaim deed of whatever land lay between Chilberg's addition and the east and west center line of the section. If Boyd's contention were correct, there would, of course, be no such strip. If Aiken's contention were correct, there would be a strip varying from over 18 feet at one end to over 39 feet at the other. The evidence in both cases we think convincing that both Boyd and Aiken knew that, if there was in fact any strip owned by Chilberg, these were its dimensions, and that they knew that Chilberg did not know that fact. That both Boyd and Aiken knew the extent of the mooted discrepancy was conclusively shown by the fact that Aiken claimed his north fence must remain that distance further north than it otherwise should have been, and that they were on the verge of a lawsuit about it. Chilberg, up to this time, had no idea that he owned any land lying north of Chilberg's addition. Boyd first approached Chilberg, stating that he wanted the quitclaim deed merely to settle a dispute between him and Aiken, and that it made no difference to which he gave the deed. Chilberg testified positively that Boyd told him the strip in dispute was only about 3 feet wide. Afterwards Aiken, through his father-in-law, one Warmouth, approached Chilberg for a deed, also stating, as Chilberg testified, that it was desired merely to settle a dispute between Boyd and Aiken, and Chilberg further testified that he had sketched on a piece of paper, which he showed to Chilberg, a diagram of this strip, and said that at one end it was 3 feet wide, and ran almost to a point at the other; that Chilberg then told Warmouth that, if it was only 3 feet, it did not amount to much, and that he would give the deed, but would not do so if it would make any trouble between Aiken and Boyd. Being assured that it was to settle the dispute, Chilberg, for \$20, gave Aiken the deed prepared by Aiken, describing the strip as follows: "Commencing at Geo. W. Aiken's S. E. corner and N. E. corner of N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 15, township 24 N., R. 3 east; thence south 3 feet more or less to Smith street as platted and of record of Chilberg's

addition to West Seattle (now known as West Andover street of the city of Seattle); thence west to the meander line of Puget Sound; thence northwesterly with the meander line of Puget Sound to a point due west of the place of beginning; thence east to the place of beginning. All land lying between Geo. W. Aiken, south line, and north line of Smith street or West Andover St."

Thereafter Aiken, refusing to treat this deed as a settlement of his difference with Boyd, litigated with Boyd the question as to the true division line between Boyd's and Chilberg's land, as determinative of the correct location of Aiken's north line, with the result above noted. Aiken thus secured for \$20 a strip of land over 18 feet wide at one end and nearly 40 feet at the other, containing about one acre, and estimated by the witnesses at from \$2,000 to \$5,000 in value. Boyd admitted that he told Chilberg that the quitclaim deed was desired to settle the dispute, but claimed that he told Chilberg that the disputed strip was 33 feet wide. Warmouth claimed that he went to Chilberg in response to a request from him by telephone, but admitted, in effect, that Chilberg told him Boyd had been bothering him for a deed, and that he (Chilberg) wanted to know the facts, and that Warmouth then told him that one White, who, it seems, at one time made some sort of a survey, said that there was a fraction there, he thought, about 9 feet wide on the hill, and 3 feet at the bay. Warmouth also claimed that he knew nothing definite about the larger tract shown by the Gardner survey, upon which Aiken was relying, though he admitted that he knew of the Gardner survey, and that, before closing the transaction, he went back to Aiken, told him what arrangements he had made with Chilberg, and that Aiken then, in his own handwriting, prepared the deed, describing the land as 3 feet wide "more or less." It is clear that Aiken knew, when he prepared this deed, that Chilberg was acting under a decided misapprehension. It is worthy of notice that Aiken so drew the description, with a final blanket clause that would convey the larger tract, and yet not deceive Chilberg. Aiken reluctantly admitted that at that time he knew just where the Gardner survey placed the true line, and that, if there was any strip owned by Chilberg, it was over 18 feet wide at one end and over 39 feet at the other. Chilberg testified that, had he known the extent of the discrepancy, or that the deed was not intended to settle the dispute between Boyd and Aiken, he never would have signed the deed.

Chilberg was a witness in the other suit, and it may fairly be inferred that during the progress of that suit he discovered the extent of the strip or gore which he had quitclaimed to Aiken for the small consideration of \$20, and that he, about that time, taxed both Boyd and Warmouth with having de-

ceived him. It is admitted that, before bringing the present suit, Chilberg tendered to Aiken the \$20 and the amount of taxes paid by Aiken on the land, and demanded a reconveyance, which was refused. The trial court found that Aiken procured the deed by fraud, in that it was falsely represented on his behalf, and with his knowledge, and for his benefit, that the land in controversy was only a strip 3 feet wide, and that the deed was desired merely for the purpose of settling a dispute between Boyd and Aiken. Decree was entered accordingly. The defendants Aiken have appealed.

[1] This seems to us one of those cases in which the facts speak the law. A careful reading of the record leads us to a clear conviction that the findings of the trial court are supported by a decided preponderance of the evidence. It is true, as appellant contends, that Aiken was buying and Chilberg was selling a contingent claim; but it is just as true that Aiken knew the magnitude of that contingency, and knew that Chilberg did not know it. The evidence makes it too plain for cavil that Chilberg never intended to sell even a contingent claim to an acre of ground, and that Aiken knew that he had no such intention. When Warmouth reported to Aiken the result of his first interview with Chilberg, Aiken knew that Warmouth, his father-in-law and agent, had either wittingly or unwittingly deceived Chilberg as to the true extent of the disputed strip. We know of no rule of law or principle of equity which would countenance misrepresentation or deceit as to the extent of the subject-matter where the title to that subject-matter is contingent any more than where the title is certain. In either event, if the deception is intended to and does result in the giving of an unconscionable advantage, and in the making of a conveyance which otherwise would not be made, the culpability is the same. Aiken, knowing the extent of the discrepancy between the two surveys, and believing that Chilberg had title to an acre of ground, and knowing that Chilberg was not aware of that fact, took an unfair advantage of his ignorance of the true situation, and secured a conveyance which he could not have secured by speaking the truth. To permit him to retain the fruits of his duplicity would be a reproach to our jurisprudence.

[2] We find no merit in the appellants' claim of an estoppel by laches in that the respondents did not assert their claim until the appellants had established the title by litigation. It is undisputed that the litigation was in progress before the respondents learned of the fraud. Moreover, the court found, on what we deem sufficient evidence, that the appellant Aiken, through his agent, Warmouth, represented that the quitclaim deed was desired for the very purpose of settling the dispute and preventing litigation. It

seems clear that, if the respondents had known that it would not be used for that purpose, but to promote litigation, they would never have given the deed. That representation was thus one of the moving considerations for the deed. The consideration to that extent has failed. The intended litigation on Aiken's part was therefore but an element in, and its prosecution a furtherance of, his original fraud. Under the circumstances, Aiken himself should not be heard to assert that litigation is a reason for condoning his fraud.

No authority has been cited in either brief, and we deem none necessary to this opinion. The questions of fact having been correctly solved by the court, the rights of the parties here are solvable on principles of elementary good faith.

The judgment is affirmed.

CROW, C. J., and MAIN, GOSE, and CHADWICK, JJ., concur.

AUDITORIUM THEATRE CO. et al. v. OREGON-WASHINGTON R. & NAVIGATION CO.

(Supreme Court of Washington. Jan. 6, 1914.)

1. CARRIERS (§ 47*)—CONTRACTS FOR TRANSPORTATION—VALIDITY.

Though a carrier contracting to move freight by its scheduled trains is not liable for delay not attributable to its negligence, the agent of a carrier may make a special contract for carriage by special train, where it is doubtful whether the regular train will arrive in time for the shipper's demands.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 107, 108, 134-141, 204; Dec. Dig. § 47.*]

2. CARRIERS (§ 106*)—CARRIAGE OF FREIGHT—CONTRACTS—QUESTION FOR JURY.

Where a shipper inquired of an agent about the movement of the regular trains and the possibility of their arriving late, and impressed on the agent the necessity of transportation on schedule time and the liability of loss in the event of a delay, and that if it were likely that a delay would occur, he would pay the expense of running a special train carrying freight, but the agent assured the shipper that the train would not be late, whereupon the shipper paid the charge for moving the freight by the regular scheduled trains, the question whether there was a contract binding the carrier to move the freight on schedule time was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 448-450; Dec. Dig. § 106.*]

3. EVIDENCE (§ 471*)—OPINION EVIDENCE.

Where the advance agent for a theatrical show made an arrangement with the railroad agent at Spokane for the transportation of the scenery on schedule time from Wallace, Idaho, to Spokane, and subsequently the traveling manager of the show called on the agent at Wallace and discussed the advisability of shipping the scenery by special train instead of by the scheduled trains, which might run late and cause loss, the statement of the traveling manager that the advance agent's work was subject to the change of the manager, and that the arrangement made by the carrier with the advance agent was merged in the contract made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the manager, was objectionable as calling for a conclusion of the manager on a question for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.*]

4. EVIDENCE (§ 244*)—DECLARATIONS OF AGENTS—ADMISSIBILITY.

The testimony of a shipper of freight that the agent of the railroad company admitted that a delay in transportation was due to the carrier's fault was inadmissible as hearsay as against the carrier, in the absence of proof of the authority of the agent to speak for the carrier.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.*]

Department 1. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by the Auditorium Theatre Company and others against the Oregon-Washington Railroad & Navigation Company. From a judgment for plaintiffs, defendant appeals. Reversed, and remanded for new trial.

Hamblen & Gilbert, of Spokane, and A. O. Spencer, of Portland, Or., for appellant. Cohn, Rosenhaupt & Grant, of Spokane, for respondents.

CHADWICK, J. Plaintiffs brought this action against the defendant to recover damages for a breach of a contract of carriage. Plaintiffs Maxon and De Milt are engaged in the theatrical business, and in November, 1911, were putting on a road show called "Checkers." The troupe carried its own scenery and the show could not be given without it. About November 1st Maxon, who was advance agent for the show, made arrangements with the agent of the defendant at Spokane to transport the car of scenery which the show carried, from Wallace, Idaho, to Spokane, Wash. It was understood that the car would be moved on the regular scheduled trains, and would arrive in Spokane on the evening of the 12th. The show was put on at Wallace on the evening of the 11th. At that time De Milt, who was the traveling manager of the show, called on the local agent of defendant at Wallace. He says that he made inquiry about the movement of the trains and discussed the possibility of the train running late; that he impressed the fact upon the mind of the agent that if the train were to run late it might interrupt or prevent the evening performance and entail considerable loss; that if it were at all likely, he would prefer to and was prepared to pay the extra expense of running a special train in from Tekoa; that upon the agent's assurance that the connecting train was a local train made up at Pendleton and could not be late, he paid the charge for moving the car by the regular scheduled trains. He was given the following receipt: "Wallace, Idaho. 11/11/11. Received from manager, Checkers Company, \$20.00 for movement baggage car Harrison, Idaho, to Spo-

kane, Washington, trains seventeen and eight. November 12th, 1911. \$20.00. H. A. Bard, Agent, O.-W. R. & N. Co." The agent of defendant at Wallace does not seriously contradict the testimony of the manager. The train arrived late, and the performance advertised for November 12th was abandoned. The case was tried, and from a verdict and judgment in favor of plaintiffs, defendant has appealed.

[1, 2] Appellant insists that its contract was to move the car by its scheduled trains, and for any delay not attributable to its negligence, and none is shown in this case, it is not liable. This we understand to be the law, but we still think that it is within the power of the manager of the company to make a new contract for carriage by special train if, upon further inquiry, it seemed doubtful or uncertain whether the regular train would arrive in season. He says he did not do so because of the assurance of the agent. This makes a question for the jury. We are not unmindful of the contention of counsel that an assurance on the part of the agent that the train would not be late was a mere guess upon a question which the manager could hazard an opinion as well as the local agent. This may be true, but it is nevertheless a circumstance to be considered by a jury, and cannot, upon this record, be accepted as controlling by the court. Whether a new contract was made at Wallace under circumstances which would warrant a jury in finding that there was a promise to move the scheduled trains on time was for the jury, and the motion for a nonsuit and directed verdict were properly overruled.

[3] When De Milt was upon the witness stand he was questioned and answered as follows:

"Q. An advance agent's work is generally 'known to be always subject to the revision or change' of the manager of the show? A. Yes. Q. That is a universal proposition, isn't it? A. Yes. Q. And whatever arrangements had been made prior to that with the defendant, if any had been made, it was merged into the contract that you made with the railroad company's agent at Wallace and here in Spokane?

"Your Honor, I objected to that on the ground that it was calling for a conclusion of the witness.

"The Court: I do not think so. The objection will be overruled." (Exception.)

"A. Yes."

This was error. Whether the contract which was made at Spokane by the advance agent was merged into the one made at Wallace, if one was made, was clearly a question to be resolved by the jury. The conclusion of the witness, who assumed to speak as one having an expert knowledge of the ways of theatrical agents, must necessarily have tended to deprive the defendant of the pro-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bative force of the first contract which was admitted by plaintiffs.

[4] De Milt was asked on cross-examination if he had had a conversation with a Mr. Munson, an agent of the defendant, on the 13th of November. He answered that he had, and fixed the place. On redirect examination he was asked and allowed to answer over the objection of the defendant that Mr. Munson voluntarily agreed with him that the company was to blame for the car not being on time, and that if the manager wanted to run a special it was up to the railroad company to bring the car in on a special. This is assigned as error. Counsel say that a motion to strike the testimony was made. That it was prejudicial and should have been stricken seems clear, but as we read the record no motion to strike the objectionable testimony was made. The testimony as given was improperly received, but the record is not sufficiently clear to warrant us in holding its admission to be error. It would have been proper to have asked De Milt these questions upon direct examination, provided, of course, that a showing of the authority of the agent Munson to speak for the company had been made. Otherwise the testimony would be hearsay. Counsel say in their brief that an amendment was stipulated, to the effect that Munson was the general agent of the railroad company at Spokane. It is not in the pleadings as certified to this court, nor do we find anything in the statement of fact with reference to it. Assuming that the pleadings were so amended, there is no evidence to sustain the allegation.

For the error found, the case will be reversed and remanded for a new trial.

Reversed.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

MILLER et ux. v. MOULTON et al.

(Supreme Court of Washington. Jan. 8, 1914.)

1. ASSIGNMENTS (§ 88*)—CONTRACTS—CONSTRUCTION.

Plaintiffs and defendants contracted for the sale and purchase of 80 acres of land, payments to be made in installments. The contract provided that, in case of the purchasers' default, they should forfeit all payments, and further provided that as part of the consideration, and as security for the performance, the purchasers did assign to the vendors a contract for the purchase of other lands. The purchasers made default, and the vendors forfeited the contract. *Held*, that the contract for the purchase of other land was assigned merely as security, and the vendors were not entitled to take it, having elected to rescind the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 135, 136; Dec. Dig. § 88.*]

2. DAMAGES (§ 81*)—CONTRACTS—CONSTRUCTION—LIQUIDATED DAMAGES OR PENALTY.

Where the purchasers of land on installments who were required to maintain the premises and orchard and pay taxes, assigned and

set over to the vendor their rights under another contract for the purchase of land, agreeing that in case they became entitled to a deed it should be made out in favor of the vendors, and that, in case of default, all their rights under the contract might be forfeited, the assignment of the second contract will be considered as a penalty and not as liquidated damages, for if the principal agreement contains provisions for the performance of several acts of different degrees of importance, and the stipulated sum to be paid will in some instances be too late, the stipulation will be considered as a penalty.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 177; Dec. Dig. § 81.*]

Department 2. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by J. H. Miller and wife against Noyes Moulton and wife. From the judgment, plaintiffs appeal. *Affirmed*.

Reneau, Thomas & Hannan, of Wenatchee, for appellants. John E. Porter and Reeves, Crollard & Reeves, all of Wenatchee, for respondents.

MORRIS, J. In July, 1910, J. H. Miller and Noyes Moulton, with their respective wives, entered into a contract for the sale and purchase of 80 acres of land in Chelan county for \$10,000, \$1 of which was paid on the day the contract bears date, and the balance was payable on or before three years, with semiannual interest on deferred payments at 8 per cent. Time was made of the essence of the contract. It was provided that, in case of the vendees' default, they should forfeit all payments made under the contract. The Moultons were on this date the holders of a contract for the purchase of 160 acres of land in Douglas county, known in the record as the Underwood contract, and the contract for the Chelan county lands provided that the Moultons, "as part of the consideration of this contract and as security for the performance of the same, hereby assign, sell and set over to said parties of the first part [appellants] that certain contract from Julia A. Underwood," etc. Respondents made default in the fourth interest installment, and appellants, electing to forfeit the Chelan county contract, served notice of such forfeiture and began this action to obtain a decree of forfeiture. Respondents answered, admitting the default in the payment of interest and receipt of the notice of forfeiture, and alleged the Underwood contract was pledged only as security for the performance of the Chelan county contract, and that appellants, having elected to forfeit the Chelan county contract, had rescinded the same and thus lost their right and interest in the Underwood contract, and prayed for a decree returning the same to them. The cause coming on to be heard, both parties announced they had no evidence to offer but relied for judgment on the admissions in the pleadings. The court, after hearing respective counsel, then entered its

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

decree, granting to appellants full relief as to the Chelan county lands but denying them any relief as to the Underwood contract, and decreed a return thereof to respondents. This appeal followed.

[1] The land described in the Underwood contract was valued by the parties at \$7,500, and it was one of the stipulations in the Chelan county contract that the Moultons might at any time sell the land covered by the Underwood contract at not less than \$7,500, in which case the proceeds of such sale were to be applied as payment upon the Chelan county contract. It was also provided that, in case respondents should become entitled to a deed to the land described in the Underwood contract prior to the full performance of the Chelan county contract, such deed should issue to appellants. It is clear to us that it was the intent of both parties that the Underwood contract was turned over merely as security for the full performance of the Chelan county contract, for, had it been intended otherwise, we fail to see how appellants could claim a default in the payment of interest upon \$9,999 as then being due upon the Chelan county contract. The Chelan county contract would, in this view, have also recited a receipt for more than the \$1 at the time of its execution, for, whether \$7,500 was or was not the true value of the Underwood contract, it had some value, and, had it been given and received as part payment, such value would have been expressed in the consideration paid at the time of entering into the Chelan county contract. It is also clear that if, as provided in the Chelan county contract, the respondents had become entitled to a deed under the Underwood contract and said deed had issued to appellants as stipulated in such case, appellants would have been entitled to receive \$17,500 for the Chelan county land instead of \$10,000, the price fixed. This provision alone is a clear indication that the parties regarded the Underwood contract as security only, since no provision is made for applying it in any way to the amount due upon the Chelan county land. Appellants, having elected to rescind the Chelan county contract for a failure of part performance, cannot retain that which was given to them as security for full performance. Appellants cannot repudiate the contract and at the same time profit by insisting upon the performance of conditions which were not fully matured. Nor can they be permitted to retain the security for the performance of the contract while insisting upon its rescission, since by so doing they would demand an enforcement of all rights given them under the contract while denying any rights to the vendee.

[2] It is equally clear that, if the Underwood contract be not regarded as security, the stipulations from which it is to be determined, whether it is to be treated as

liquidated damages or a penalty, are uncertain and ambiguous. Under the contract the respondents are required to do many things, such as to keep up and care for the premises, to maintain the fruit orchard, pay all taxes and assessments that may be levied both upon the Chelan and Douglas county lands, and pay interest semiannually, thus bringing the case within the rule announced in *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1, where it is said: "If the principal agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and the stipulated sum is to be paid on the violation of any or all of them, and the sum will in some instances be too large, or if, from an examination of the written agreement, it is uncertain whether it was the intent of the parties that the stipulation was intended as liquidated damages or as a penalty, it should be treated as a penalty." Applying this rule, we must treat the Underwood contract as a penalty, and the same result would be reached as if we regarded it as security only.

For these reasons the judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

NICHOLSON v. NEARY.

(Supreme Court of Washington. Jan. 7, 1914.)

1. CONTRACTS (§ 72*)—"CONSIDERATION"—"LEGAL RIGHT."

"Consideration" means not so much that one party is profiting as that the other abandons some legal right in the present; the term "legal right" in such case meaning a right that may be enforced in a civil action (citing *Words and Phrases*, vol. 5, p. 4080. See, also, vol. 8, p. 7704; vol. 2, pp. 1444-1449; vol. 8, p. 7612).

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 325; Dec. Dig. § 72.*]

2. CONTRACTS (§ 71*)—"CONSIDERATION"—FORBEARANCE.

Forbearance of a legal right which one may legally exercise at the instance of a promisor is a valuable consideration, and in general the waiver of any legal or equitable right at the request of another is a sufficient consideration for promise.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 295, 296, 298, 316-324; Dec. Dig. § 71.*]

3. CONTRACTS (§ 72*)—CONSIDERATION—FORBEARANCE—"WELL-FOUNDED CLAIM."

Forbearance to sue upon a claim not enforceable in law or in equity for want of a consideration does not constitute a valid consideration for a new promise; the term "well-founded claim," in reference to a claim of forbearance which will support a promise, meaning that the forbearance must pertain to a claim upon which a recovery might certainly be had, or where a recovery is at least doubtful.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 325; Dec. Dig. § 72.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. BILLS AND NOTES (§ 92*)—CONSIDERATION—FORBEARANCE—ENFORCEABLE CLAIM.

Where an accommodation note was given, the giving up of a right to begin a present action at law thereon was not such a forbearance as would afford a consideration for the maker's new note for the amount of the first note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 186-173, 175-205, 208-212; Dec. Dig. § 92.*]

5. BILLS AND NOTES (§ 493*)—ACTION—PRESUMPTION AND BURDEN OF PROOF.

Under Rem. & Bal. Code, § 8415, declaring that every negotiable instrument is prima facie issued for a valuable consideration, the burden of proof is upon one who pleads a want of consideration for a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1662; Dec. Dig. § 493.*]

6. APPEAL AND ERROR (§ 1012*)—REVIEW—FINDING.

In an action upon a note, tried without a jury, the weight of the evidence was a matter peculiarly for the trial judge, whose finding that the presumption of consideration was overcome was conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

7. EVIDENCE (§ 94*)—PRESUMPTION OF FACT—OPERATION AND EFFECT.

A presumption of fact is not evidence, but a rule of law fixing the order of proof; and, where proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94.*]

Department 1. Appeal from Superior Court, Spokane County; Stanley Webster, Judge.

Action by E. Nicholson against W. M. Neary. Judgment for defendant, and plaintiff appeals. Affirmed.

Belden & Losey, of Spokane, for appellant. E. C. Macdonald and Oscar Cain, both of Spokane, for respondent.

CHADWICK, J. Respondent gave a note payable to the order of appellant and for his accommodation. Later appellant sent the note to his attorneys at Spokane for collection. Respondent was unable to pay, and upon request of the attorneys, and to prevent a present action, he gave a new note for the amount due on the first note. This action was brought on the second note. Respondent answered, denying consideration. After hearing the testimony, judgment was rendered in favor of respondent. Appellant was not present at the trial, nor was he a witness in his behalf, although the court offered to adjourn the hearing until his deposition could be taken.

The fact that the original note was given for the accommodation of the appellant, and that there was no consideration therefor, is not denied in the record before us. Appellant relies solely upon the legal propositions: First, that forbearance to sue upon the first note is a sufficient consideration to support

the promise of the note sued on; and, second, that the proof is insufficient to show a want of consideration for the first note.

[1-3] Appellant quotes the rule as laid down in 6 Am. & Eng. Encyc. of Law (2d Ed.) p. 744, where this principle is extracted from the authorities: "If a person be possessed of a right which he may legally exercise, his forbearance at the instance of the promisor to exercise it is a valuable consideration for the promise"—and from Pollock on Contracts, p. 166: "Consideration means not so much that one party is profiting as that the other abandons some legal right in the present." These definitions are comprehensive and well sustained. The question recurs, Is the acceptance of a new obligation for an overdue promise, made without consideration, and the giving up of a right to begin a present action at law, such a forbearance as will create a consideration for the new promise? We have not found a case which in its facts is exactly parallel with the one at bar, nor has any been cited. The words "well-founded claim" occur frequently in the books; that is, that the forbearance must pertain to a claim upon which a recovery might certainly be had, or where a recovery is at least doubtful. If the claim could not be enforced in law or equity for the want of a consideration for the promise, forbearance to sue will not constitute a valid consideration for a new promise. It is not the right to maintain an action which, when given up, furnishes a consideration. It is only when a recovery, if suit were maintained, would be certain, or, at least, doubtful. In general the waiver of any legal or equitable right at the request of another is a sufficient consideration for a promise, but the mere privilege of filing a complaint is not a right that can properly be called either a legal or an equitable right. The words "legal right" evidently mean a right that may be enforced in a civil action. 5 Words and Phrases, p. 4080 (citing Colson v. Commonwealth, 110 Ky. 233, 61 S. W. 46).

"The compromise of doubtful rights is a sufficient consideration for a promise to pay money, but compromise implies mutual concession. Here there was none on the part of the payee of the note. His forbearance to sue for what he could not recover at law or in equity was not a sufficient consideration for the note." Foster v. Metts, 55 Miss. 80-82, 30 Am. Rep. 504.

"If the right is not doubtful, there is no consideration; for there is neither benefit to the promisor nor detriment to the promisee, and therefore forbearance, or a promise to forbear, to insist on a claim clearly unenforceable cannot be a consideration." 9 Cyc. 341, 342.

A father while in a state of intoxication was induced to execute a note for the indebtedness of an adult son. After the maturity of the note, and while in a state of sobriety,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

he promised the holder to pay the note if he would wait until fall. It was held that the note, having been given while in a state of intoxication, was without consideration, and could not be rendered valid by a subsequent promise and forbearance. The holder of the note could have made no previous demand on which a recovery could have been had. Consequently a forbearance to sue was not a legal consideration. *Newell v. Fisher*, 11 *Smedes & M. (Miss.)* 431, 49 *Am. Dec.* 66.

"It is a very ancient rule of law that a promise to pay money, in consideration of forbearance to sue, when there is no legal cause of action, is without consideration and void." *Palfrey v. Portland, etc.*, 4 *Allen (Mass.)* 55.

A promise to pay, in settlement of a controversy which has not assumed the form of a pending suit, is without consideration unless it is made to appear that there was some reasonable ground for the existence of the controversy, and at least a possibility of recovery. *Allen v. Prater*, 35 *Ala.* 169.

In *Sanford v. Royal Ins. Co.*, 11 *Wash.* 653, 40 *Pac.* 609, the court held that a wrongful assertion of a claim is no ground for compromise. That holding rests upon the principle that a wrongful claim will not furnish a consideration for the promise.

Plaintiff relies upon certain of our own decisions, namely, *Hutchinson v. Mt. Vernon Water & Power Co.*, 49 *Wash.* 471, 95 *Pac.* 1023, and *Snohomish River Boom Co. v. Great Northern R. Co.*, 57 *Wash.* 693-697, 107 *Pac.* 848. These cases are not contrary to but are in line with our present holding. In each of them the original claim was disputed or doubtful.

[4] Here it is not disputed that the note was given without consideration; that being so, the issue of an action if it had been begun, would not be clouded by any doubt whatsoever. If counsel had availed themselves of the opportunity offered by the court to dispute the testimony of defendant that the note was given without consideration, another question might arise, but, as hereinbefore stated, this was not done, and the case comes to us upon an admitted showing that there was no consideration to support the original promise. When controversies of this character arise between the parties to the instrument sued on, there is a growing disposition on the part of the courts to look into and through the entire transaction and to hold that a recovery cannot be had when it is sought on the sole ground that it was given in lieu of an unenforceable demand.

[5, 6] Finally, plaintiff insists that, however the rule may be, defendant has not sustained the burden of proof; that under the statute (section 3415, *Rem. & Bal. Code*) every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and we are referred to *McKenzie*

v. Oregon Improvement Co., 5 *Wash.* 409, 31 *Pac.* 748; *Shaw v. Woodland Shingle Co.*, 61 *Wash.* 61, 111 *Pac.* 1070; *Palmer v. Huston*, 67 *Wash.* 210, 121 *Pac.* 452.

It is true, as suggested in these cases, that the burden of proof is upon one who pleads a want or failure of consideration; but it does not follow that the presumption of a consideration cannot be overcome by the testimony of one witness. It is within the peculiar province of the trial judge to measure and weigh the evidence. If he is satisfied, as he was in this case, that the note was without consideration, and this upon the faith and credit of the testimony of the defendant, it would be a usurpation on the part of this court to interfere with his findings and judgment.

[7] A presumption of fact is not evidence, but a rule of law fixing the order of proof. When proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case by competent evidence. *Scarpelli v. Washington Water Power Co.*, 63 *Wash.* 18, 114 *Pac.* 870; *Elliott on Evidence*, §§ 91-93; *Wigmore on Evidence*, § 2491; *Peters v. Lohr et al.*, 24 *S. D.* 605, 124 *N. W.* 853.

There being no consideration for the original promise, and hence no demand enforceable at law or in equity, a forbearance to sue would not create a consideration for the second promise; and, defendant having sustained the burden of proof, it follows that the judgment of the lower court should be affirmed.

Affirmed.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

SARTORI et ux. v. DENNY-RENTON CLAY & COAL CO.

(Supreme Court of Washington. Dec. 31, 1913.)

1. WATERS AND WATER COURSES (§ 89*)—STREAMS AS BOUNDARIES—MEANDER LINES.

Ordinarily meander lines are not intended or recognized as boundary lines, but only as lines intended to indicate the sinuosities of the stream.

[Ed. Note.—For other cases, see *Waters and Water Courses*, *Cent. Dig.* §§ 91, 92, 107; *Dec. Dig.* § 89.*]

2. WATERS AND WATER COURSES (§ 98*)—BOUNDARIES—THREAD OF RIVER—SUFFICIENCY OF EVIDENCE.

Evidence, in an action to establish the boundary line between lands located on the opposite shores of a river, the witnesses testifying by reference to maps and plats and the trial court having verified their testimony by a special examination of the location in question, held to sustain a decree definitely fixing the location of the thread of the river as the true boundary line.

[Ed. Note.—For other cases, see *Waters and Water Courses*, *Cent. Dig.* § 104; *Dec. Dig.* § 98.*]

*For other cases see same topic and section NUMBER in *Dec. Dig.* & *Am. Dig. Key-No. Series & Rep'r Indexes*

3. ACTION (§ 45*)—JOINDER—ACTION TO ESTABLISH BOUNDARY LINE—DAMAGES FROM OBSTRUCTING STREAM.

In an action to establish the boundary line between lands located on the opposite shores of a river, it was permissible for plaintiff to join a claim for damages caused from the depositing of debris in the river so as to deflect the course of the stream to the injury of plaintiff's lands.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 378-383, 385-448; Dec. Dig. § 45.*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by Ignacio Sartori and wife against the Denny-Renton Clay & Coal Company. From judgment for plaintiffs, defendant appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant. Peters & Powell, of Seattle, for respondents.

MORRIS, J. This is an action to establish the boundary line between the lands of the parties hereto, located upon opposite shores of Cedar river not far from Renton, the respondents' lands being upon the north side, and the appellant's upon the south side, of the river. The contention of respondents was that the center line or thread of Cedar river as it existed January 1, 1908, should be held to be the true boundary line, while appellant contended that the true boundary line should be fixed as the thread of Cedar river as it existed long prior to 1908 and as far back as 1865 when Cedar river was meandered, and that the thread of the stream as shown by these meander lines, except as modified by adverse possession, estoppel, and accretion, should now be held to be the true line. In addition to praying for the establishment of the boundary line, respondents alleged that appellant was engaged in the manufacture of brick and clay products, and that for some years past it had deposited large quantities of earth and stone in the river and along the south bank, until it had filled in the natural channel of the river opposite respondents' lands to such an extent as to impede the natural flow of the river and deflect the force of the stream upon and against the lands of respondents upon the north bank, and as a consequence thereof, during a period of high water in November, 1911, the waters of the river cut into and washed away the fertile surface soil of respondents' lands to the extent of 11 acres, causing damage in the sum of \$16,500. Issue was framed upon these contentions, and the case went to trial, resulting in a decree establishing the boundary line between the lands of appellant and respondents as the thread of Cedar river as found by a survey made in December, 1906, and as it was also found to exist for many years prior thereto. The decree also awarded respondents damages because of the acts of appellant in extending the south bank of the river, to the consequent injury of respondents' lands in the sum of \$1,200. The

decree fixed the course of the north and south banks of the river and the course of the thread of the stream, and further enjoined appellant from depositing earth, stone, or other material in the channel of the river as defined by the courses fixed in the decree. From this decree appeal has been taken.

[1, 2] There can be no dispute but that the thread of Cedar river was fixed as the true boundary line between the lands of appellant and respondents. The difficulty is in now determining, where was Cedar river, and where was the thread of the river at the time it was so fixed. In determining this question one might as well look for the proverbial needle in the haystack as to now attempt to fix this original boundary with any degree of certainty, due to the fact that Cedar river is a rapidly flowing mountain stream having an average fall where it passes through these lands of 27 feet to a mile, and has a bad habit of changing its location and flow and establishing a new channel every few years. A number of maps are in evidence showing the location of the stream in various years, from which it is apparent that the river has not followed the same courses for many successive years, and in a very few instances only do these maps show the course of the river within the meander lines of 1865. While, therefore, we must admit that the thread of the stream as originally established is the true boundary line between these lands, the difficulty, as before indicated, is in determining where that line now is; and, after reading this record and studying the plats and exhibits, we confess a difficulty in arriving at a satisfactory conclusion. The meander lines shown in the survey of 1865 are from 180 to 250 feet apart. The normal flow of the river is shown as from 40 to 90 feet in width, so that, if it be assumed that the river was wholly within these meander lines in 1865, we are still in the dark as to where within these lines the thread of the stream would be. Ordinarily meander lines are not intended nor recognized as boundary lines, but only as lines intended to indicate the sinuosities of the stream. It is, therefore, not unusual to find streams at places entirely without meander lines. As illustrating the difficulty of fixing the meander lines as bounding the stream, it is shown in this record that, in places within these meander lines, trees are growing to which witnesses ascribe a growth of from 10 to 60 years. Many witnesses gave their opinion as to the location of the river in past years, but as these opinions were all based upon what each witness recalled as to the existence and location of certain landmarks which are now obliterated, due in some instances to floods and high water, and in others to changes occasioned by the dumping of its waste material by appellant, the best the witnesses could do was to indicate where, in their judgment,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the channel was at the time covered by their testimony. Necessarily there is a great conflict where witnesses attempt to point out or to indicate the location of a stream and its banks, when by reason of changes, natural or otherwise, it is impossible to indicate the location upon the ground, and such testimony cannot be otherwise than unsatisfactory and unreliable. The trial judge, realizing this, attempted to satisfy himself as to the location of this boundary line by making, in company with respective counsel, a personal examination of the location in question, and endeavored to trace and follow the different channels of the river as existing in various years, by means of soundings with a steel rod, and, having done so, became convinced that the channel, as shown by the survey taken in 1906, was the channel which should be adopted as the true course of the river between the lands of appellant and respondents. There is abundant evidence in this record to establish this channel, which was surveyed before the fill complained of, and before the obliteration of the south bank of the river, and at a time when there was at least some indicating evidence upon the ground as to the existence and course of the true channel. That this channel as shown by this survey existed in 1906 and for an indefinite period before that time is, we think, well established by the evidence, and it conforms in many respects to a survey made by a grantor of appellant some time prior, in which it was sought to determine the area included in the then ownership. This area as then found is approximately the same as found by the court in its decree, and the evidence is susceptible of a finding that it was conceded to be the true area as far back at least as 1898; and, while such fact is not conclusive, it is strong evidence, and entitled to great weight in cases of this kind, when a line can be found that has for some time been acquiesced in as the true line.

We shall not attempt to answer all of appellant's attacks upon the decree. We have gone over the record and attempted to follow the testimony as closely as it is possible to do when witnesses testify by reference to maps and plats, and, having done so, we are satisfied that the lower court determined this boundary as accurately as it is now possible to determine it; and, not finding any preponderating evidence from which we can say the lower court was in error, we affirm the conclusion it has reached.

[3] Upon the question of damages appellant contends that, in actions of this character, it is not permissible to join a claim for damages. Appellant did not suggest this question until it made its argument to the court after the close of the evidence. It is clear that this is a suit in equity, and, having obtained full jurisdiction, we think a court of equity can try out the whole contro-

versy between the parties, and afford such relief as it deems proper. The respondents stated their cause of action in their complaint, and appellant answered thereto. The court was therefore authorized by both parties to try the issues thus made, and to grant any relief embraced within these issues. We have frequently said that in this state the form of action is immaterial, and that in any action the court has power to try any question fairly within the issues submitted, and to grant any relief warranted by the facts.

The judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

MALETTE v. CITY OF SPOKANE.

(Supreme Court of Washington. Dec. 31, 1913.)

1. MUNICIPAL CORPORATIONS (§ 339*)—ORDINANCES—WAGES—MINIMUM RATE—AUTHORITY TO PROVIDE.

Const. art. 11, § 10, confers on cities of the first class the largest measure of self-government compatible with the general authority of the state, and section 11 authorizes them to make and enforce within their limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. Rem. & Bal. Code, § 7507, subd. 86, and section 7518, authorize such cities to make all regulations necessary for the preservation of public morality, health, peace, and good order within their limits, and confers all powers which are or may be conferred on incorporated towns and cities by the laws of the state and all such powers as are usually exercised by municipal corporations of like character and degree, whether specifically enumerated or not. *Held*, that a city of the first class had power to pass an ordinance fixing a minimum wage for common labor employed on public work within the city, whether done by the city itself or by a private contractor, to be paid for by special assessment, though the wage so fixed was higher than the going rate of wages for similar labor paid by private persons within the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 868, 870-873; Dec. Dig. § 339.*]

2. CONSTITUTIONAL LAW (§ 70*)—POWERS OF COURTS.

The Supreme Court has no jurisdiction to declare a matter of state public policy.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 120-132, 137; Dec. Dig. § 70.*]

3. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS—ORDINANCES—MINIMUM WAGE RATE.

Spokane City Ordinance No. A4422, passed August 24, 1909, prescribing a minimum rate of \$2.75 for a calendar day's labor of eight hours on all city work, was not in violation of any public policy of the state, though the rate prescribed was higher than the prevailing wage rate, on the ground that it tended to increase the cost of public work to be paid for by assessments on property benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 868, 870-873; Dec. Dig. § 339.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. MUNICIPAL CORPORATIONS (§ 406*)—STREET IMPROVEMENTS—CAPACITY OF CITY.

A city, in constructing municipal improvements to be paid for by special assessments on property specially benefited, does not act as a mere agent of the property owners so assessed, but rather in the exercise of its governmental authority to levy special taxes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1001, 1002; Dec. Dig. § 406.*]

5. MUNICIPAL CORPORATIONS (§ 283*)—PUBLIC IMPROVEMENTS—CONSTRUCTION—METHOD.

In the absence of statute directing that the work of constructing a public improvement in a city shall be done by contract, the city may do it either by contract or through its own officers, and assess the cost against the abutting property in proportion to benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 753, 755; Dec. Dig. § 283.*]

6. MUNICIPAL CORPORATIONS (§§ 283, 330*)—STREET IMPROVEMENTS—METHOD OF WORK—CHAPTER PROVISIONS.

Spokane City Charter, §§ 97, 98, 99, providing for the construction of public improvements under the control of the board of public works, does not require that such improvements shall be accomplished by contract, but vests in the city council or the board of public works a discretion to have the work done by contract or by the city itself, and, if done by contract after the reception of bids, does not require that the contract shall be let to the lowest bidder.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 753, 755, 854, 855; Dec. Dig. §§ 283, 330.*]

7. MUNICIPAL CORPORATIONS (§ 339*)—PUBLIC IMPROVEMENTS—MINIMUM WAGE ORDINANCE—REASONABLENESS.

Spokane City Ordinance Aug. 24, 1909, No. A4422, providing a minimum wage rate of \$2.75 a day for common labor on all works of public improvement in the city, and prohibiting employment for longer than eight hours in a calendar period of 24, though providing a rate higher than the ordinary rate of wages in the city, was not void for unreasonableness.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 868, 870-873; Dec. Dig. § 339.*]

Gose, Mount, and Chadwick, JJ., dissenting.

En Banc. On rehearing. Rehearing granted. Judgment affirmed.

For former opinion, see 68 Wash. 578, 123 Pac. 1005.

Alex Winston, of Spokane, amicus curiæ.

ELLIS, J. The facts out of which this controversy arose are stated in the opinion on the first hearing (68 Wash. 578, 123 Pac. 1005); but, in order to present a single, comprehensive review of the case, we deem it not amiss to restate them.

The Legislature, in 1899, passed an act declaring that "hereafter, eight hours in any calendar day shall constitute a day's work on any work done for the state or any county or municipality within the state" (Rem. & Bal. Code, § 6572), and provided that: "All work done by contract or subcontract on any building or improvements or works on roads, bridges, streets, alleys, or buildings for the

state, or any county or municipality within the state, shall be done under the provisions of this act: Provided, that in cases of extraordinary emergency such as danger to life or property, the hours for work may be extended, but in such case the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service. And for this purpose, this act is made a part of all contracts, subcontracts or agreements for work done for the state or any county or municipality within the state." Rem. & Bal. Code, § 6573. The act further declared any one violating its provisions guilty of a misdemeanor and, upon conviction, subject to a prescribed punishment. Rem. & Bal. Code, § 6574.

In 1903, another act was passed, declaring that "it is a part of the public policy of the state of Washington that all work 'by contract or day labor done' for it, or any political subdivision created by its laws, shall be performed in work days of not more than eight hours each, except in cases of extraordinary emergency" (Rem. & Bal. Code, § 6575), and that all contracts for such work should provide that they might be canceled by the officers of the state, county, or city having supervision of the work, in case of a violation of the statute (Rem. & Bal. Code, § 6576), and making it the duty of such officers to incorporate in all such contracts stipulations "as provided for in this act" and "to declare any contract canceled, the execution of which is not in accordance with the public policy of this state as herein declared." Rem. & Bal. Code, § 6577.

In pursuance of the public policy of the state so declared, the city of Spokane, on August 24, 1909, by Ordinance No. A4422, so far as here material, provided that:

"Section 1. Hereafter eight (8) hours in any calendar day shall constitute a day's work on any work done for the city of Spokane, subject to the conditions hereinafter provided.

"Sec. 2. Hereafter all laborers employed by the day on municipal work, either directly by the city or by contractors, subcontractors, individuals, partnerships, associations or corporations, on all work for the city, shall receive and be paid not less than \$2.75 for a calendar day's work of eight (8) hours. The provisions of this section shall apply to, and govern all work done for the city of Spokane and all work for any individual, firm, partnership, association or corporation which is done under the direction or under the supervision of, or which is to be accepted by the city of Spokane or any officer or agent thereof."

The ordinance further provided that, in cases of emergency, the hours for work might be extended, but that the rate of pay for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—32

excess time should be $1\frac{1}{2}$ times the rate allowed for the same amount of time during the eight hours' service and that the ordinance be made a part of all contracts thereafter made. By express stipulation and reference thereto, this ordinance was made a part of the contract for the public work the assessment for which is contested in this action.

On March 10, 1910, the city passed another ordinance, No. A5018, providing "that hereafter all work done by common laborers for the city of Spokane or for any contractor, subcontractor or other person doing work by contract or otherwise for the city of Spokane, shall receive the sum of three dollars (\$3.00) per day for eight hours labor," and that the ordinance should be in force from and after April 1, 1910.

On March 25, 1910, the city council, by ordinance, provided for the improvement of Sixteenth avenue by constructing therein a sewer, to be paid for by special assessments against the property benefited, and created an assessment district. The contract for the work was thereafter let to one Broad, and, when he had completed the work thereunder, an assessment roll was prepared, and notice of the time and place for hearing objections was given. The appellant an owner of property in the district, appeared and objected to the confirmation of the roll. His objections were overruled, and he appealed to the superior court. From an adverse decision of that court, he prosecutes this appeal.

The evidence showed that the contractor, in the performance of his contract, paid \$2.75 a day for each common laborer employed in the work, as required by the ordinance first above mentioned and by his contract. The court refused to hear testimony as to whether he paid \$3 a day as required by the second ordinance above mentioned. The evidence showed that the prevailing wage for common laborers in the city of Spokane and vicinity, at the time of the performance of the contract in August, 1910, was \$2.25 a day, whether for a ten-hour, nine-hour, or an eight-hour day, and that in March, when the improvement ordinance was passed, the prevailing wage was \$1.85 for a ten, nine, or eight hour day. There was no evidence whatever as to any distinction in pay by reason of shorter hours, nor any evidence whatever that compensation for employment was ever computed by the hour. The contractor testified that 59 per cent. of the cost of the work was paid out for common labor, and that, but for the ordinance, his bid would have been materially less.

The position taken by the appellant, as stated in the original opinion, and as adhered to in the briefs and argument on rehearing, is admirably summarized as follows: "That the Legislature may fix the hours of labor upon all public works and for public work even in cities is now well settled, and no

allusion to sustaining authority will be made. Indeed, that feature of the case is not challenged by appellant; but it is contended that, where the city is acting merely as an agent of the property owner, it is bound to do its work to his best advantage, and cannot empirically fix a wage and compel its payment by an independent contractor. Appellant bases his argument on two propositions: (1) That the ordinance is unreasonable, contrary to public policy, and oppressive; (2) that the assessment is in contravention of the Constitution of this state and of the Constitution of the United States, in that it takes the property of this appellant without compensation and without due process of law. Abandoning legal phraseology, the concrete question, put in plain English, is whether a city can improve the property of a citizen, either upon his petition or against his will, and tax an arbitrary sum therefor that puts the cost unreasonably above the cost of like work if done through the instrumentality of a private agency." *Malette v. Spokane*, 68 Wash. 578, 580, 123 Pac. 1005, 1006. The last sentence quoted seems to beg, rather than state, the real questions. Of course, if the minimum wage is assumed to be unreasonably high, it would be indefensible on any theory, whether fixed by general statute or by ordinance and whether paid out of a fund raised by general taxation or by special assessment. The real questions are: (1) Is it within the power of any legislative body, whether of the state or city, to fix a minimum wage for common labor as applied to public work paid for by special assessment? In other words, is such legislation void as in contravention of the state and federal Constitutions, in that it takes property without compensation and without due process of law? (2) Is the ordinance in question contrary to any public policy of the state, either expressed in, or implied from, state legislation? (3) Is the ordinance an unreasonable exercise of the right to prescribe the terms of contract by one of the parties, or is the amount prescribed an unreasonable wage? We will endeavor to discuss these questions, so far as may be, separately.

[1] 1. Is it within the legislative power, either of state or city, to prescribe a higher rate of wages than the prevailing rate as a minimum of wages to be paid for common labor in the doing of a public work to be paid for by special assessments against the property specially benefited thereby? The principal argument directed against such laws, when enacted by the state itself, is the claim that they necessarily increase the cost of the work. If, therefore, laws having exactly the same tendency have been upheld, such decisions furnish direct authority for upholding a frank and undisguised minimum wage law. As stated in the original opinion it is now too well settled to require citation of authority that the Legislature may fix the

hours of labor upon all public work and for public work, even in cities. It is also true, as there stated, that "laws fixing the hours of labor, and providing that no less than the going rate of wages shall be paid under contracts such as we have before us, have been generally upheld." To put the matter more exactly, we add that laws fixing the hours of labor have been generally upheld by the courts, even when coupled with the provision that the laborer shall receive for the shorter day prescribed a minimum of wages "not less than the current rate of per diem wages in the locality where the work is performed." Obviously this is a provision for pay above the "going rate of wages" for the same amount of time. In *re Dalton*, 61 Kan. 257, 59 Pac. 336, 47 L. R. A. 380; *State v. Atkin*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343; *Atkin v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148; *Byars v. State*, 2 Okl. Cr. 481, 102 Pac. 804, Ann. Cas. 1912A, 765. As said in *Atkin v. Kansas*, supra, quoting from *In re Ashby*, 60 Kan. 101, 55 Pac. 336: "When the eight-hour law was passed, the Legislature had under consideration the general subject of the length of a day's labor, for those engaged on public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons in like employments, to eight hours, without reduction of compensation for the day's services." The case so quoted by the United States Supreme Court, *In re Ashby*, is in itself a clear demonstration that the maximum hours law there under consideration had the necessary effect of fixing a minimum daily wage above the current rate for the same class of work. Moreover, it seems to have been overlooked that the eight-hour law of this state, so far as overtime is concerned, expressly provides a minimum wage which would necessarily be above the going rate for the same amount of time. In section 6573, above quoted, it is provided that in cases of emergency the hours of work may be extended, "but in such case the rate of pay for time employed in excess of eight hours of each calendar day, shall be one and one-half times the rate of pay allowed for the same amount of time during eight hours' service." A similar provision is found in the eight-hour law of Kansas, and it was for the violation of that provision, as well as the eight-hour provision, that the defendant in *Atkin v. Kansas*, was convicted (see stipulated facts, 191 U. S. page 210, 24 Sup. Ct. 124, 48 L. Ed. 148. The same provision is also found in an eight-hour law contained in a legislative charter of the city of Buffalo and was upheld as constitutional and valid, and a contractor was held criminally liable for its violation. *People v. Warren*, 77 Hun. 120, 28 N. Y. Supp. 308; *People v. Beck*, 10 Misc. Rep. 77, 30 N. Y. Supp. 473.

Assuming, as seems to be assumed both in

argument and in the original opinion in the case before us, that any minimum of wages fixed above the current rate necessarily increases the cost of the work (a thing by no means certain), then it cannot be denied that a provision such as above quoted from the Kansas law would have precisely the same effect. If the one would increase the cost of the work, so, also, would the other, as a simple example will demonstrate. Assuming the current rate of per diem wages to be \$2 for a ten-hour day, and assuming, also, a uniform efficiency in the work of a given laborer, then it follows that the minimum wage of \$2 a day for, let us say, an eight-hour day is just exactly 40 cents more for the same work than it would cost but for the minimum wage provision. As another illustration, the evidence in the case before us shows that the observance of our own eight-hour law alone would have had precisely the same effect on the contract here in question. The contractor himself testified in effect that, but for the minimum wage ordinance, the labor on this work would have cost him \$2.25 a day for an eight-hour day, while the number of hours constituting a day's work customary at the time and place was ten hours. It is too plain for argument that every maximum hours law prescribing less than the number of hours usually constituting a day's labor, when coupled with a provision for minimum pay not less than the current rate for a day's labor, is a minimum wage law pure and simple, prescribing a wage above the current rate for the same class of labor. Every objection, therefore, which can be logically or legally raised against an undisguised minimum wage law, can be advanced, just as logically and just as legally, against the usual eight-hour law. The appellant seems to recognize this fact, since he argues that there are only two grounds upon which courts have held valid laws limiting the hours of labor; that one applies to work hazardous to the health of the employes, as working in mines, mills, and the like (which, of course, rests upon the police power of the state; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780), or where the employe is a child or woman (which also rests upon the same power; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324), and that the other exception is based upon the principle that, when the state or any of its municipalities performs public work, it then, as an employer, has the right to fix the terms upon which it will permit labor to be done for it.

As examples of the last-mentioned class of decisions, appellant cites *Atkin v. Kansas*, supra; *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61, 66, 10 Ann. Cas. 702; and our own decisions, *In re Broad*, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011, 2 Ann. Cas. 212, and *Gies v. Broad*, 41 Wash. 448, 83 Pac. 1025. It is true that the cases cited and also

the Oklahoma case, *Byars v. State*, supra, were based upon the latter ground, which is clearly and logically expressed in *Atkin v. Kansas*, supra, by the late Justice Harlan, speaking for the federal Supreme Court, as follows: "The improvement of the boulevard in question was a work of which the state, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private, character. If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the state, does not infringe the personal liberty of any one. It may be that the state, in enacting the statute, intended to give its sanction to the view held by many that, all things considered, the general welfare of employes, mechanics, and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen, and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the state to declare that no one undertaking work for it or for one of its municipal agencies should permit or require an employe on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern." While, as shown by this quotation, the Supreme Court did not deem it necessary to place the decision on any other ground than the power of the state to prescribe the terms

upon which contracts with it or its agent, the municipality, might be made, it is significant that it also suggests another ground, namely, the promotion of the "general welfare of employes, mechanics, and workmen, upon whom rests a portion of the burdens of government," and as tending to the production of better citizenship, thus unmistakably intimating that the act might also be soundly sustained as an exercise of the police power.

The appellant argues, and seems to have impressed the members of Department 1 of this court, save the late Chief Justice Dunbar, with the view that though this court and other courts have held the eight-hour law sufficiently valid and constitutional to sustain a criminal prosecution, and though an exactly parallel ordinance to the one here in question was held by this court sufficiently valid to sustain an action by a laborer for the collection of a part of the minimum wage above the current rate for overtime, which was withheld by the contractor (*Gies v. Broad*, 41 Wash. 443, 83 Pac. 1025), still those cases do not sustain, as constitutional, either the eight-hour law or the minimum wage ordinance as applied to contracts for public work to be paid for by special assessment, nor the minimum wage ordinance as to any work, since in the original opinion it is said: "So far as we have been able to find, laws fixing a minimum of wages for unskilled labor have been uniformly condemned."

The case of *Clark v. State*, 142 N. Y. 101, 38 N. E. 817, was not cited on the first hearing, and was hence excusably overlooked. In that case a statute of the state of New York fixing minimum wages for day laborers on public works of the state was upheld by the court of last resort of that state, using the following language: "It must be assumed that the Legislature, and all other public bodies intrusted with the functions of government, general or local, will use the power conferred by the Constitution or the law fairly, and in the public interests. There is no express or implied restriction to be found in the Constitution upon the power of the Legislature to fix and declare the rate of compensation to be paid for labor or services performed upon the public works of the state. That legislation is doubtless open to criticism, from the standpoint of sound policy and expediency; but the courts have nothing to do with these questions, so long as it is not in conflict with the Constitution; and we think that a general law regulating the compensation of laborers employed by the state, or by officers under its authority, which disturbs no vested right or contract, was within the power of the Legislature to enact, whatever may be said as to its wisdom or policy."

We are persuaded that the view expressed in the original opinion that, in *Gies v. Broad*, supra, this court did not, in fact, hold the minimum wage ordinance of Spokane there

involved constitutional, and the statement that "the sum of the court's holding" in that case was "that the contractor could not take a wage from a property owner and convert it, or any part of it, to his own use," must be modified. As a matter of fact, that was one result of the holding in that case, but was far from its sum. As shown by the opinion itself, the court could not have held that, nor anything else touching the merits of the case until it first decided that the ordinance was constitutional and valid. The amount involved was only \$15.91, and the only thing which gave the court jurisdiction of the appeal for any purpose was the question of the constitutionality of the ordinance. As pointed out by the court: "The appeal is brought within the jurisdiction of this court by reason of the fact that the action involves the validity of the ordinance above mentioned; the appellant contending that that part of the ordinance which fixes the minimum sum to be paid as wages for a day's labor on any public improvement undertaken by the city of Spokane is unconstitutional and void." The court then held that, under the rule announced in *Henry v. Thurston County*, 31 Wash, 638, 72 Pac. 488, no other question save that of the validity of the ordinance could be reviewed, adding: "If we find the ordinance valid, the inquiry is ended; if invalid, the judgment falls because founded on the ordinance." The following language used by Department 1, touching the opinion in *Gies v. Broad*, seems, therefore, hardly justified: "In this opinion there is an expression which, although not necessary to the decision, may, if taken without qualification, seem to support the contention of the respondent. It follows: 'The principle involved in that case (*Atkin v. Kansas*, 191 U. S. 207 [24 Sup. Ct. 124, 48 L. Ed. 148]) is not distinguishable from the principle involved in the case now before us. For, surely, if it be within the power of the state to limit the number of hours a laborer may be permitted to labor in one calendar day on any public work undertaken by it, it can fix the minimum sum that shall be paid him as wages for such labor. The power to do either must rest on the principle that it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.'" The language was not only "necessary to the decision," but must be "taken without qualification," since it decided the only question in the case of which this court had jurisdiction. The matter of estoppel as against the contractor to dispute a \$15 debt could not give this court jurisdiction in the absence of the constitutional question. Since no member of this court has yet expressed a readiness to frankly overrule the decision in *Gies v. Broad*, the conclusion seems irresistible that

the ordinance here in question must be held valid.

But it is argued that *Gies v. Board and Atkin v. Kansas*, and, by parity of reason, *State v. Atkin*, 64 Kan. 174, 67 Pac. 519, 97 Am. St. Rep. 343 (which was affirmed by the last-mentioned case), and *Byars v. State*, 2 Okl. Cr. 481, 102 Pac. 804, Ann. Cas. 1912A, 765, do not determine the constitutional question because they did not arise at the instance of a taxpayer or of a protesting property owner. To the writer of this opinion, however, it seems hardly probable that the Supreme Courts of three states and the Supreme Court of the United States would have overlooked a phase of the question which, if counsel's contention be correct, must have made the decision of each of those courts different, since no court will be presumed to hold a man liable criminally, or even financially, for violating a void law. As pointed out in *Re Broad*, 36 Wash. 449, 78 Pac. 1004, 70 L. R. A. 1011, 2 Ann. Cas. 212, the unconscionable conduct of the contractor would not be a pertinent argument in such a case. As a matter of fact, the very contention now made appears to have been made in *State v. Atkin*, supra, which arose out of a contract for work paid for by special assessments. At any rate, the point was considered. The Supreme Court of Kansas said (see opinion 64 Kan. page 175, 67 Pac. 520, 97 Am. St. Rep. 343): "The law which appellant violated must have its application in the light of the fact that municipal corporations are the creatures of the state. The Legislature gives them being. They let contracts for the improvement of streets under express authorization of the Legislature, and cannot do so in the absence of such authority. In this instance the lawmaking power provided that the cost of the paving which the appellant was constructing should be paid by assessment against the abutting property. It might have provided a different method of payment, or withheld entirely from the city the right to improve its streets." And again (see opinion 64 Kan. page 179, 67 Pac. 521, 97 Am. St. Rep. 343): "The fact that the abutting property owners are charged more for the improvement by application of the restrictive provisions of the law reducing the hours of labor may be admitted; yet if the work had been done by the state itself, which, as we have shown, has supreme authority in such matters, the property owners could not complain that it employed and paid its servants conformably to the statute in question. There can be no distinguishing difference between the acts of the contractor in the employ of the county, passed upon in the case of *In re Dalton*, supra, and those of the appellant here. Both were proceeding under contracts made with them by the agents of the state, and the principal had power to direct that eight hours should constitute a day's work for all persons laboring in its

behalf." With these facts and this holding before it, the Supreme Court of the United States affirmed the judgment of the Supreme Court of Kansas without reservation, on the ground that the work was of a public character, saying of the act, "indeed, its constitutionality is beyond all question." This, notwithstanding the fact that the contractor's conduct, as shown by the agreed facts (191 U. S. page 210, 24 Sup. Ct. 124, 48 L. Ed. 148), was attempted to be excused by the fact that his contract with the laborer was for pay by the hour at the current hour rate, apparently in order to evade the minimum wage provision of the Kansas eight-hour law to which we have referred. Moreover, the brief for the plaintiff in error printed in the report of the case shows that the fact that the work was paid for by special assessments was called to the attention of the United States Supreme Court. It seems plain therefore, when the actual facts involved and the opinion of the Kansas court, affirmed by the Supreme Court of the United States, are considered, that it does sustain the decision in *Gies v. Broad*, supra, and that when Department 1 of this court, in the first opinion in this case, reaffirmed allegiance to the doctrine laid down in *Atkin v. Kansas*, it was mistaken either in its view of the actual bearing of that case or in its reaffirmation of allegiance.

The case of *Byars v. State*, supra, a well-considered case, arose out of the violation of the Oklahoma eight-hour law also in connection with a contract for public work to be paid for by special assessments against the property benefited, and the same contention was made against the constitutionality of the law as is made in this case. That the court acted advisedly and did not overlook that point is shown by the following language: "Counsel for the defendant contend: That under the terms of this statute, under the guise of a police regulation when it is not so in fact, the right of the employer and employé to contract is abridged in such a manner as to be an infringement upon the constitutional rights of both parties. That said statute is invalid because it contravenes the fourteenth amendment to the Constitution of the United States, and that the contract for paving is not 'entered into by and on behalf of the city of Guthrie.' The city of Guthrie as a municipality is acting simply as an agent of the property owner, whose property abuts on the streets along the proposed improvement. While the city has supervisory power over the streets, the improvement, as shown by the statement of fact, is to be paid for solely by the property owners. Work of the kind mentioned therein does not come within the purview of the statute. Work in behalf of the city would be work for which the city was liable, and which was to be paid for by the city, and not abutting property owners. We believe the contention

of the counsel for defendant is without merit, and is unsupported by reason or authority. We see in this law no infringement of constitutional rights." The opinion discusses, approves, and follows the decision of the United States Supreme Court in the *Atkin* Case, construes the Oklahoma statute as similar to that of Kansas, and closes as follows: "The opening, construction, and maintenance of public highways is purely a governmental function, whether done by the state directly or by one of its municipalities, for which the state is primarily responsible. And it is immaterial whether such public work is paid for by the state, the county, the city, or by the benefited property owners. It is a work of a public, not private, character. The manner of payment does not change the character of the work."

In *Curtice v. Smith*, 202 Mo. 703, 101 S. W. 61, 66, 10 Ann. Cas. 702, the Supreme Court of Missouri held valid an eight-hour labor ordinance of Kansas City incorporated in a contract where the work was to be paid for by special assessment and where the objection was raised by the property owner in contesting the assessment. The court expressly refused to base its holding upon the ground that such work was always done at so much an hour, but placed it on the ground that the ordinance was, in any event, constitutional, citing among others the cases of *State v. Atkin*, supra, and *Atkin v. Kansas*, supra.

It is thus plain that there is ample authority to be found, both in state and federal decisions, to sustain the power of the legislative body, either of the state or of the city, to prescribe a reasonable minimum of wages even above the going rate for common labor performed on public work, and even when the work is to be paid for by special assessments against the property benefited thereby, and the courts have no power to pass upon the wisdom of the measure. We quote again from *Atkin v. Kansas*: "No evils arising from such legislation could be more far-reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all

question." The true friends of constitutional government should be the last to counsel a departure from this rule, since its strict observance seems the only antidote for a growing sentiment in favor of pure parliamentary government. Since the question is one involving the federal Constitution, it would seem that the *Atkin* decision ought to have more weight than that of the Supreme Court of Indiana in *Street v. Varney Elec. Sup. Co.*, 160 Ind. 338, 66 N. E. 895, 61 L. R. A. 154, 98 Am. St. Rep. 325, announced only a few months earlier than that in the *Atkin* Case. The two cases present precisely the same constitutional questions, and the decision of the United States Supreme Court is diametrically opposed to that of the Indiana court, as quoted from at length in the former decision in this case.

The foregoing authorities make it clear that, if street improvement work paid for by special assessments is public work performed under authority conferred by the sovereign power of the state, no constitutional guaranty is impaired by the ordinance in question. That such work is public work cannot be questioned. The power of the city to levy special assessments to pay for public work is referable solely to the sovereign power of taxation delegated to it by the state under direction of the Constitution, art. 7, § 9; Rem. & Bal. Code, § 7507, subds. 10 and 13; Hamilton on Law of Special Assessments, § 47. "It is axiomatic that private property may be taken for public use under the right of taxation, the power of police, or that of eminent domain. In the latter case, compensation must be made to the owner, while under the police power it is principally a matter of legislative discretion. Under the power of taxation for general governmental purposes, private property may in effect be confiscated, but, under the power of special assessment, the limitation is the extent of the benefit conferred, as we shall see later. However, it is now settled in the federal courts, and in the courts of last resort of practically every state of the Union which recognizes the power of special assessment, except Colorado, that all such assessments are laid under the taxing power." Hamilton on Law of Special Assessments, § 49. It is neither an exercise of the power of eminent domain nor of the police power. Hamilton, Law of Special Assessments, §§ 39, 40, 44. We must not confuse the mode of payment for public work with the character of the work. We must not confound the mode of payment with an ownership or property interest in the subject-matter to which the work is applied. We must not confound the mode of taxation with the purpose of taxation. The work of improving a public street is public work and the street is a public street. The special tax is to pay for public work. The right to levy a special tax to pay for public work rests not in the citizen's property interest in the work itself, but only in the

special benefit of the work to his property. The work is none the less public work done by the city as an agency of the state, though done also in a quasi corporate or administrative capacity, as distinguished from its purely governmental functions. The property owner cannot be assessed beyond his benefit, no matter what elements enter into the cost of the work. The language above quoted from the Supreme Courts of Oklahoma and Kansas and from the United States Supreme Court thus becomes directly pertinent and determinative of the question here presented.

While cogent reasons might be advanced for sustaining legislation of this character as a proper exercise of the police power of the state delegated by our Constitution to cities of the state, we find it unnecessary to place the decision on that ground or to discuss that question, since the state courts to which we have referred and the Supreme Court of the United States have sustained legislation, which cannot be distinguished either in principle or in effect from the ordinance here in question, upon the simple ground that "it belongs to the state as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." *Atkin v. Kansas*, supra; *Gies v. Broad*, supra.

2. It is contended that, even conceding the power of the state to adopt a minimum of wages to be paid to laborers on public works carried on through the agency of its municipalities, still the city has no such power. It is argued that the ordinance is void because it seeks to declare a matter of public policy, and it is asserted that neither this court nor the city council has any power to define a question of policy.

[2] As far as this court is concerned, the truth of the claim is so elementary that it may be passed with a simple admission. As to the power of the council, the question can hardly be so summarily dismissed. It is the clear intention of the Constitution to give to cities of the first class, of which the city of Spokane is one, the largest measure of local self-government compatible with the general authority of the state. Constitution, art. 11, § 10. It can "make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Constitution, art. 11, § 11. By virtue of the general law, it has "all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree whether the same shall be specifically enumerated in this act or not." Rem. & Bal. Code, § 7518. It can make "all regulations necessary for the preservation of public morality, health, peace and good order within its limits." Rem. & Bal. Code, § 7507, subd. 88.

All of these powers it assumed in its charter adopted pursuant to the general law. As to matters of local concern, wider powers than those conferred upon cities of the first class by the Constitution and laws of this state can hardly be conceived. It seems plain, therefore that, unless the ordinance in question is contrary to some public policy of the state either expressed by statute or implied therefrom, it must be held valid.

[3] It is not claimed that it contravenes the policy of the state as declared in any express statutory enactment, but it is urged that it is contrary to public policy in that it increases the cost of public work. As we have seen, the state eight-hour law contains in itself a minimum wage provision as to emergency overtime, which is in excess of the prevailing wage. Rem. & Bal. Code, § 6572. Even exclusive of this provision, it has the effect of a minimum wage law. The prevailing daily wage in Spokane was shown to be the same for an eight, a nine, or a ten hour day. Hence, assuming no increased efficiency by reason of fewer hours of work, the law would either increase the number of men simultaneously employed at the same rate of pay as for ten-hour days, or would increase the number of days of employment for the same number at the same rate. It follows that it tends to increase the cost of work in exact proportion to the fewer hours in the working day. The eight-hour law manifests a public policy on the part of the state to better the condition of laborers employed upon public work. The purpose of the minimum wage ordinance is precisely the same, and the policy which sustains the one warrants the other. We fail to find wherein the ordinance in question is contrary to any public policy of the state, either as declared or implied in any statutory enactment. On the contrary, it is in accord with the policy which underlies the eight-hour law.

But it may be remarked, in passing, that it is by no means the general consensus of informed opinion that either maximum time or minimum wage laws, not exceeding a reasonable living wage, when fairly tried out, will have the necessary effect of increasing the cost of work to any material extent, especially when applied only to public work. The evidence shows that there is no scarcity of laborers in Spokane, and it would seem that the shorter hours of labor and higher daily pay would necessarily attract many of them. The city and those doing its work by contract would thus have the choice, and could select the more efficient laborers. This would unquestionably tend to counteract in efficiency the added cost caused by shorter hours and higher pay. Contractors would, in time, learn this fact and make their calculations and bids accordingly. For a thoughtful discussion of this phase of the law, see an article in *Atlantic Monthly* for September, 1913, by James Bates Clark, professor

of economics in Columbia University, by no means an appreciation, also an article by Sidney Webb in the *Journal of Political Economy* for December, 1912, page 979.

[4] It is also urged that, in its control and improvement of streets, "the city acts in its proprietary capacity," and that, where the work is paid for by special assessment, "its council is the agent of the property owner"; the argument apparently being that the power of the council is limited by the strict rules of a private agency. It is true that the expressions to the effect of the first above quotation are found in many of the adjudicated cases, some of them our own; but these expressions are always stated in a qualified way. No well-considered case goes farther than to say that the city's power to improve streets is not a purely governmental function "in the strict sense." The cases usually related to the liability of the city for injuries by reason of defective streets and the like, and the liability is the same whether the improvement of the streets was paid for out of the general fund or by special assessment against the property benefited. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. Rep. 847. It is obvious that the mode of payment does not impress a character upon the work as public or private. No distinction has ever been made between the two classes of streets so far as their public character is concerned, or so far as the quality of the city's ownership is concerned. In neither is the city's ownership of that purely private quality which is found in its ownership of public utilities built and operated by it for hire or profit, such as waterworks or municipal lighting plants. It is only where the work is "of private advantage and emolument" to the corporation that the city "quoad hoc is to be regarded as a private company" in the strict sense. *Bailey v. Mayor, etc., of New York*, 8 Hill (N. Y.) 531, 38 Am. Dec. 669; 28 Cyc. p. 125. On the other hand, "public duties are, in general, those which are exercised by the state as a part of its sovereignty, for the benefit of the whole public, and the discharge of which is delegated or imposed by the state upon the municipal corporation. They are not exercised either by the state or the corporation for its own emolument or benefit, but for the benefit and protection of the entire population. Familiar examples of such governmental duties are the duty of preserving the peace, and the protection of property from wrongdoers, the construction of highways, the protection of health and the prevention of nuisances." *Hart v. Bridgeport*, 13 Blatchf. 289, 293, Fed. Cas. No. 6,149. These authorities are cited with apparent approval in *Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834, 24 L. R. A. (N. S.) 1275. That case can therefore hardly be considered as authority for the claim that street work, however paid for, is not public work. It would seem that, as

to the control and improvement of its streets, the functions of the city partake of both the governmental and corporate qualities; governmental in that the power and duty to open and improve the highways rests primarily in the state as an attribute of sovereignty, and is delegated by it to the city as a governmental agency of the state; corporate in that the streets of the city, in addition to being a matter of public concern to the people of the whole state, like other highways, are also of more intimate concern to the corporate community as such. But the discussion of this phase of the question would seem to be largely academic, since, even if the work be considered purely a matter of private concern to the city, it, like any other person, can prescribe the terms upon which it will contract.

It is true, also, that it is sometimes stated that the city, in making improvements and levying special assessments to pay therefor, is the agent of the property owner. "These statements are, however, mere dicta, representing an analogy but not a principle. The municipality is the superior imposing a tax, not an agent binding a principal by contract. Wherever the question becomes a practical one, it is held that the public corporation or quasi corporation is not the agent." 1 Page & Jones, *Taxation by Assessment*, § 16, p. 32. It is obvious that the agency is merely conventional and lacks nearly all of the elements of an ordinary agency. The authority does not emanate from the supposed principal. The work is not that of the supposed principal. He cannot discharge the supposed agent, nor direct the agent in the performance of the work. He pays for the work by an enforced, involuntary charge as he pays other taxes. "While the general theory of assessments for benefits presents some points of resemblance to quasi contract, assessment is not a form of quasi contract other than as taxes generally are." 1 Page & Jones, *Taxation by Assessment*, § 18. It seems more exact to say that the council is the agent of the law, both in letting the contract and in levying the assessment. Hamilton, *Law of Special Assessments*, p. 400; 1 Page & Jones, *Taxation by Assessment*, § 19. As we have seen, the power to levy the special assessment is traceable solely to the taxing power of the state. In the absence of constitutional or statutory restraint, this power is subject to no other fundamental limitations than these: "It must be for a public purpose, as taxation can be exercised for none other; the property upon which the charge is laid must be peculiarly and specially benefited by the work; and the charge must be apportioned according to the benefits by some reasonable rule, and must not exceed such benefits." Hamilton, *Law of Special Assessments*, § 54. In the absence of some special provision that the work must be let to the lowest bidder, it would seem that the

property owner whose property is assessed for a special improvement, but only to the amount in which it is benefited thereby, would have no more right to complain of the effect of a maximum hours law or a minimum wage law, as increasing the cost of the work, than would a general taxpayer where the work is to be paid for out of the general fund. Indeed, it would seem that he has less reason to complain, since, in theory at least, he gets a direct quid pro quo for the expenditure, while the general taxpayer does not. It will be noted that the quotation from Hamilton in the original opinion is guarded in this respect. We quote again the part stating the condition upon which such provisions have been held to invalidate the assessment: "Where contracts for local improvements are required by law to be awarded to the responsible bidder offering to do the work for the lowest sum, any provision in the specifications tending to increase the cost and make the bids less favorable to the property owners is illegal and void. Such provisions are commonly restrictive of the hours of daily labor that men employed by the contractor may work, or forbidding the employment of Chinese or alien labor, or fixing the minimum rate of wages. Whatever form this restriction assumes will be disregarded by the courts, if the conditions increase the cost of the work to the taxpayers." Hamilton, *Law of Special Assessments*, § 452. Obviously, if it is left to the discretion of the council to determine what elements of cost shall enter into the work, and whether the work shall be done by contract at all, or whether by the city itself and the cost assessed to the property benefited, and, if done by contract, there is no requirement that it be let to the lowest bidder, then the rule stated by Hamilton would have no application. So long as the council acted in good faith, a general law or a general ordinance not unreasonably increasing the cost of the work would not invalidate the assessment.

[5] But it is claimed that: "The charter of the city of Spokane provides that contracts for work of the kind here undertaken shall be let upon competitive bids. It is also the policy of the state, as declared by the Legislature, that all contracts for local improvements shall be done by contract upon like bids." *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005. As to the second statement above quoted, we have been cited to no statute of this state or legislative declaration of any kind requiring work by cities of the first class on local improvements such as here undertaken to be done by contract upon competitive bids, or directing that it must be done by contract at all; and diligent search has failed to reveal any such statute. On the contrary, the statutes (Rem. & Bal. Code, § 7507, subds. 10 and 13) declare: "Any such city shall have power * * (10) To provide for making local improvements, and to

levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof. * * (18) To determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor." And that (Rem. & Bal. Code, § 7560): "Any city of the first class having authority to provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof; and to determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor, may exercise such authority by general or special ordinance or by general and special ordinance jointly." And that (Rem. & Bal. Code, § 7567): "Cities of the first class shall by ordinance prescribe the method by which this act shall be put into operation, and any provisions herein which may be made applicable to existing delinquent assessments may be extended by ordinance to them." See, also, the following sections of the statute: 5802, 7518, 7529, 7530, 7531, 7570, 7572, 7578, and 7894. These statutory provisions all indicate a clear intention to leave the whole matter of making such improvements in cities of the first class to the discretion of the city, subject to its charter provisions. In the absence of some statute directing that the work shall be done by contract, any city may do it either by contract or through its own officers, and assess the cost against the abutting property in proportion to the benefits. "It was not essential that the town should let any contract at all for doing the work. We see no reason why it could not have made the entire improvement through its own officers and assessed the cost thereof on the property fronting upon the street in proportion to benefits. We find nothing in the statute which forbids it." *Tumwater v. Pix*, 18 Wash. 156, 51 Pac. 354. The right of a city to include in assessments items not fixed by competition has been sustained by this court. For example, interest in case of reassessment (*Northwestern, etc., Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Philadelphia Co. v. New Whatcom*, 19 Wash. 225, 52 Pac. 1063; *Young v. Tacoma*, 31 Wash. 153, 164, 71 Pac. 742); engineering expenses and the like (*In re Jackson Street*, 62 Wash. 432, 435, 113 Pac. 1112; *In re South Shilshole Place*, 61 Wash. 246, 251, 112 Pac. 228). It would seem that the discretion of the city, in so far as not controlled by its charter, and, so long as it is exercised in good faith, and not in such manner as unreasonably to in-

crease the cost of the work, will not be interfered with.

[6] As to the second claim, we fail to find any provision in the charter of Spokane providing that such work must be done by contract. That matter is left to the discretion of the city council or board of public works, and, when it is decided to do the work by contract, there is no provision that it shall be let to the lowest bidder. The provisions applicable are as follows:

"Sec. 97. The board of public works shall have exclusive charge of the improvement and extension of all streets and alleys. They shall have charge of improving or altering all sewers. They shall have charge of the waterworks and all improvements and changes in the same. They shall have charge of laying all water pipes and doing everything that pertains to the conduct of the waterworks and the water supply system of the city. They shall also have charge of all things pertaining to the drainage of the city. They shall have charge of all bridges and the erection and improvement of the same. They shall have charge of the employing of all persons in discharge of the duties herein mentioned. They shall have charge of the erection and improvement of public buildings and the inspection of private buildings.

"Sec. 98. When it shall be decided to do work by contract, they shall advertise at least ten days in two daily newspapers of the city for bids, accompanied by a certified check to an amount to be fixed by the board and named in said advertisement, not exceeding 10 per cent. of the estimated cost of the work, reserving the right to reject any and all bids; provided, that in all contracts awarded, in which the probable amount of expenditure would exceed \$1,000, the publication shall be made for a period not less than twenty days. If the mayor and city council shall by resolution declare an emergency to exist, the publication herein provided for may be dispensed with.

"Sec. 99. The board shall have charge of all public works of every kind, where not otherwise provided for in this charter, and charge of furnishing all material and supplies for such work, and shall report to the city council such work, as it shall deem necessary and proper to be performed for the city, and if the council shall concur with the board, the board shall have power to enter into contracts therefor and for the performance of such other public works, as may be authorized or directed by the city council.

"Whenever proposals for supplies for work shall be advertised to be let to the lowest bidder, a specified day and hour shall be named, when such bids shall be opened. Such bids shall be made in duplicate, one to be furnished to the mayor and one to the clerk of the city commissioners, and such bids shall be accompanied by an affidavit of

the bidder, that the same is made in good faith, and there is no collusion or understanding between him and any other bidder on such work. Such bids may be handed in any time before the hour designated for opening the same; and all bids, original and duplicate, shall be opened at the hour named, in public and in the presence of such persons as may see fit to attend such opening of bids. As soon as the bids are opened, the clerk or other officer with whom the same are filed, shall, in the presence of the board or officer opening them, record the same in a book kept for that purpose; provided, nothing herein shall be construed to prevent the rejection of any or all bids tendered when so deemed to be proper."

It will be noted that the board has the power to reject any and all bids, and that it is only in connection with proposals for supplies that the lowest bidder is mentioned at all. There is apparently a discretion even in that case as to whether the advertisement shall be for letting to the lowest bidder or not. These charter provisions are far from being of that mandatory character which would override the general statutes of the state or general ordinances of the city, applicable alike to all work whether done by contract or not. Since the work might be done without letting a contract at all, it is plain that the competitive principle would have no such drastic application as to prevent the city from providing reasonable conditions under which the work might be done, even though such conditions tended in some degree to modify competition in some particular.

[7] 3. Finally, it is urged that the ordinance is unreasonable, and, in its last analysis, the opinion on the first hearing rests upon the initial assumption that any minimum of wages materially above the prevailing rate is unreasonable per se. With this we cannot agree. The reasonableness of an ordinance is always open to review by the court where it is passed under the general powers of the city and not in direct response to a statutory direction; but, even in such cases, the ordinance is entitled to a presumption of reasonableness until the contrary is made to appear to the court in some manner. Judge Dillon lays down the following rule: "But the power of the court to declare an ordinance void because it is unreasonable is one which must be carefully exercised. When the ordinance is within the grant of power conferred upon the municipality, the presumption is that it is reasonable, unless its unreasonable character appears upon its face. But the courts will declare an ordinance to be void because unreasonable upon a state of facts being shown which makes it unreasonable. If the ordinance is not inherently unfair, unreasonable, or oppressive, the person attacking it must assume the burden of affirmatively showing that as applied to him it is unreasonable, unfair, and oppressive."

2 Dillon on Municipal Corporations (5th Ed.) § 591. The court, in such cases, will take notice of existing conditions and circumstances and, if it cannot say that the ordinance is, on its face, unreasonable in view of all of the conditions, it will not declare the ordinance void for that reason. 1 Dillon, Municipal Corporations (4th Ed.) § 327. "Courts, in passing upon the reasonableness or unreasonableness of a statute, and deciding whether the Legislature has exceeded its powers to such an extent as to render the act invalid, must look at the terms of the act itself, and bring to their assistance such scientific, economic, physical, and other pertinent facts as are common knowledge and of which they can take judicial notice." State v. Somerville, 67 Wash. 688, 641, 122 Pac. 324, 326; Muller v. State of Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957.

We will take notice of the fact that the cost of living, even as contributed to by the actual necessities of life, has greatly increased within the past few years, and that this increase has been out of proportion to the increase in the prevailing wages of common laborers. It is admitted that, if the ordinance was reasonable, it is valid; but counsel insists that, as there exists no direct statutory enactment authorizing its passage, the ordinance must be shown to be "reasonable within the meaning of that term as applied to the judicial mind." It would be more exact to say that the burden is even then upon those attacking the ordinance to show that it is unreasonable. Aside from its recognitions of constitutional and statutory inhibitions, the judicial mind is not different from any other mind. It must consider the circumstances, the purposes, and the reasonable tendency of the ordinance to meet such purposes. If the purpose is lawful, and the means reasonable, the ordinance cannot be declared invalid. The seventh biennial report of the commissioner of labor of this state, for 1909-10, presents a table bearing on the cost of living. The commissioner, on pages 39 and 40, referring to this table, says: "Prices for 1900 are given as a base and increases or decreases in the cost of the different commodities considered are shown for a period of years terminating with 1910. For the latter year, a final comparison is presented with prices quoted in 1900. An analysis of the tabulations supplies abundant evidence in support of the common conviction that the cost of living is advancing out of proportion to increases in compensation paid to wage-earners. Moreover, it is important to note that in the list of commodities which have advanced most rapidly are included such staples as rye, graham and wheat flour, rice, eggs, lard, beans, ham, bacon and fresh meats; the average increase in cost of the above commodities for the period mentioned being 72 per cent." The commissioner also states (biennial report for 1909-10, p. 6) that from all of the assembled facts, and as a

result of the investigations of the bureau, it is evident that wages have failed to keep pace with the advance in living expenses. This is also a matter of common knowledge. In view of these conditions, can any one say that a wage of \$2.75 a day is, as a matter of law, more than a reasonable living wage? The unit, as applied to the problem of living, is the family, not the individual, and \$2.75, or even \$3.00, a day can hardly be complacently pronounced as an unreasonable sum for supporting such a unit. (It may be remarked in passing, however, that a comparison of the later with the earlier ordinance, which it does not repeal, indicates that it was probably never intended to apply to work done on the local improvement plan.) To hold that the payment of any sum which we cannot say is above a reasonable living wage, though it may be above the prevailing rate of wages, is a mere gratuity, would be to sacrifice the fact to a mere term. Such a holding would be an indictment of our civilization.

The judgment of the lower court is affirmed.

It is but fair to the members of Department 1 to say that the controlling questions in this case were much more thoroughly briefed and discussed on the rehearing than on the first presentation.

MAIN, MORRIS, and FULLERTON, JJ., concur.

PARKER, J. Upon more mature consideration, I am constrained to concur in the foregoing opinion, though it overrules the decision rendered by Department No. 1, in which I concurred. I was led to entertain the views expressed in the former decision because it then seemed to me that there was a distinction to be drawn between work done by the city to be paid for out of its general funds and work done under the supervision of the city officers to be paid for by special assessment against the benefited property; in that, the former constituted an act of the city in its own behalf without any element of agency being involved, while the latter constituted an act of the city officers as agents of the property owners who were to pay for the improvement by special assessment against their property. However, a review of the authorities cited in Judge ELLIS' opinion convinces me that no such distinction can be rested upon sound legal grounds. The notion of agency on the part of municipal officers for the property owners in the making of local improvements, somewhat loosely expressed in the decisions of the courts, I apprehend, for the most part, arose from the fact that, in the early history of local improvements and assessments, they were not made save by consent of the property owners or some considerable majority of them. This, not for want of legislative power to provide otherwise, but because of legislative restric-

tions against forcing such improvements and assessments upon property owners except by consent of some specified majority of the owners of the property within the particular district involved. Under existing laws in this state, such improvements and assessments can be lawfully made even against the will of all of the property owners of the district involved. This being true, I am now of the opinion that the officers of the city, so far as their powers are concerned, do not represent the owners of property to be assessed for local improvements in any different capacity than they represent the general taxpayer when carrying on a public work for the city to be paid for by general taxation, and that the former is as purely public work as the latter.

The review of the statutory and charter powers of Spokane relative to the making of local improvements and assessments, made by Judge ELLIS, seems to render it plain that such improvements are not required to be done by contract, nor to be awarded to the lowest bidder when done by contract, so far, at least, as labor is concerned; so that the element of competition in that regard is not, by law or charter, required in the making of such improvements any more than when the city employs a servant in any capacity. This problem, it seems to me, in its last analysis, is simply a question of the power of the city, through its duly constituted officers, to contract for public work involving the discretion of such officers to pay or cause to be paid reasonable compensation for such work. Viewed in this light, I am of the opinion that it was not an abuse of discretion on the part of the city authorities to fix the minimum compensation of laborers employed upon public work of the city at the amount they did by the ordinance here involved.

At the former hearing, having in view a distinction between work done by the city at the expense of the general taxpayers and work done by the city officers at the expense of special assessment payers, and that the latter partook of the nature of private work between employer and employé, which I now concede to be erroneous, and the argument of counsel being then directed largely to the city's police power, I was convinced that the city possessed no such police power as would enable it to fix a minimum wage as between private employer and employé. Whether the state, by legislative enactment, may not fix a minimum wage as between private employer and employé, is quite a different question, as to which I refrain from expressing an opinion at this time. But I do not think the question of police power is involved in this case at all—no more than it is when the city employs a servant and fixes his compensation. Should the compensation so fixed be clearly excessive, a taxpayer may have the right to interfere by proper proceedings in court just as he would have the right

to so complain were the city buying supplies and paying a clearly excessive and unwarranted price therefor. I am not able to see that the property owner paying a local assessment would have any different or higher right to complain. I apprehend, however, that such unwarranted use of public funds by the city authorities would have to be of such a flagrant character that reasonable minds could not differ relative thereto, before the courts could be induced to interfere. We have no such case here.

I am free to say that upon the former hearing I was as fully convinced of the correctness of the views expressed by the writer of the opinion as he was himself, but more mature consideration of the real question involved has led me to the views I here express, and I therefore concur in the foregoing opinion.

CROW, C. J. I concur with Judge PARKER. Although I signed the former opinion, I am now convinced that the judgment of the trial court should be affirmed.

GOSE, J. I still adhere to the conclusion reached by the court at the first hearing. 68 Wash. 578, 123 Pac. 1006. The concrete question presented is: Can a city arbitrarily fix a minimum wage, approximately 25 per cent. in excess of the current wage, and assess the same against the property benefited by the improvement upon which the labor has been performed, in the absence of express or clearly implied authority from the state? In my opinion it cannot do so. "Courts will review the question as to reasonableness of ordinances passed under a grant of power general in its nature or under incidental or implied municipal powers, and if any given ordinance is found unreasonable will declare it void as a matter of law." McQuillin, Mun. Or. § 182. The power of the state itself to fix a minimum wage is not before us, for it has not as yet legislated upon that subject, nor has it expressly delegated the power to cities to do so. The needs of the laborer resulting from the higher cost of living are beside the question. Upon that subject I raise no issue. The question is: Shall the reasonableness of the ordinance be measured by the current wage, or by what the court conceives the current wage ought to be? I think the former must be the test until the state itself has definitely spoken. Up to the present it has never been held to my knowledge that a city may make a donation to a citizen under color of law, and assess the bounty against the property of an objecting owner. I cannot escape the conclusion that a payment for a public work, 25 per cent. in excess of the price at which other citizens stand ready to do the work, where the work is done by the city upon the assessment plan, is, in the absence of clear statutory warrant, in the

nature of a bounty. If the city may fix a minimum wage largely in excess of the current wage, it may with a like consistency fix a minimum price for all material that enters into a public work, for the larger part of the cost of most material is human labor; and the man behind the brick and cement—that is, the man who furnishes the labor to put in into usable form—is as worthy of legislative protection as the man who puts it down. Whether the council is the agent of the property owner, as Judge CHADWICK concluded, or the "agent of the law," as Judge ELLIS concludes, where it acts under a general grant of power, its acts must be subjected to the test of reasonableness. Until the state has definitely declared a policy fixing a minimum wage upon all work done for it and its members, whether paid for by general taxation or by assessment upon the property benefited, I feel constrained to take the view that an ordinance like the one in question is unreasonable.

I have contented myself with a brief statement of my view because the subject was fully treated by Judge CHADWICK following the first hearing. I therefore dissent.

MOUNT, J. I concur in the view expressed by Judge GOSE.

CHADWICK, J. I concur in what is said by Judge GOSE. The result of the court's decision is that a city council can, in order to meet what it conceives to be the living expenses of a citizen, arbitrarily take from the substance of one man and give it as a bounty to another, and that without measuring or even considering the ability of the subject of its impressment to pay the tax. The opinion of the court has taken a wide range, but it should be borne in mind that we did not in our former opinion hold the ordinance to be unconstitutional.

We did not hold that the Legislature might not by general law authorize a city to pass the ordinance in question.

We did not hold that a city could not by charter amendment provide for the payment of a minimum wage higher than or even unreasonably higher than the current or going wages.

We did not hold that a city could not fix a wage scale to be paid its employes out of the general fund or that it could not fix the hours of labor. Our holding was in its essence no more than this: That an agent is bound to do for his principal when pursuing the trust relation as well as he could have done for himself. Until the decision in this case was pronounced, this principle had been regarded as fundamental.

It may be inferred from what is said in the majority opinion that we held the ordinances of the city of Spokane fixing a minimum wage to be unconstitutional. In the

former opinion the constitutionality of the ordinances was not questioned. The judges who participated in that decision, with one exception, had no doubt that such ordinances, if properly passed, would do no violence to any constitutional guaranty of personal or property rights.

There is and there can be but one question for solution; that is, whether an ordinance passed without the sanction of a general law passed by the Legislature and approved by the Governor, which fixes a wage from 25 to 40 per cent. higher than the current wages for like labor in the same place, can be taxed against an unwilling citizen without violating that fundamental principle of the law that municipal ordinances must be reasonable. We held under the facts of the case before us that the difference was so great that the ordinance was in its operation unreasonable. We did not hold or preclude ourselves from holding under a different state of facts that the wages fixed by the ordinance might not be reasonable. The majority opinion seems to me to be an endeavor to meet a sociological problem with which this court can have nothing to do, for it is a legislative and political question, and the argument of the majority does not touch the premise of the question before us. If approached at all, it is lost sight of in the assertion of those beneficent principles which are at the present time engaging the attention of thoughtful persons all over the world and which will be in time taken care of by appropriate legislation. In the absence of the authority to which Judge GOSE has adverted, courts cannot and should not be influenced by the opinions of political propagandists, however engaging and however reasonable they may seem to be. Humanitarian impulses are the wellsprings of social progress, but to define them and to put them into the forms of law is not the work of the courts. Their work is limited by narrower bounds, and wisely so, for people of this and all English speaking countries have undertaken by express limitation and by the strongest implications to keep the lawmaking powers in the people themselves. The duty of a court is to follow the law as made by the people, and not to create a rule to meet a situation however urgent, for the power to frame a humanitarian impulse into law (judge-made) implies a power to frame a law that will usurp and cripple the rights of the people.

We have the law before us; Judge GOSE has said in his dissenting opinion what it is; that is, that the power to do these things is in the Legislature and, until it has spoken, it is the duty of the court to follow the law as it finds it. In this case the court has followed a humanitarian impulse, and to that extent its action is to be applauded, but in doing so it has violated principles and commands that may invite those whose

petitions should be more properly addressed to the lawmaking powers, to go to the courts and invoke the sympathy of the judges to the end that it will meet conditions not theretofore fixed by the people or by their representatives. This means but one thing—judicial legislation, which is judicial tyranny. This is especially so in this case. After the original decision was pronounced, the Legislature convened in regular session. Bills were introduced in both the House and Senate, and an attempt was made to pass a law legalizing that which this court had held to be invalid. The bills were killed. The idea of taking from one and giving to another found no favor with the Legislature. This fact, coupled with the decision previously rendered, would in itself be sufficient under the hitherto accepted canons of statutory construction to warrant a reaffirmation of our previous decision. To hold otherwise makes this case *sui generis*.

I want to take exception to the concluding clause of the majority opinion: "It is but fair to the members of Department 1 to say that the controlling questions in this case were much more thoroughly briefed and discussed on the rehearing than on the first presentation." I deny that the real question before the court was more thoroughly briefed and discussed on the rehearing. Every question that was properly before the court was briefed and orally argued. The former opinion of the court was given the mature consideration of every member of the court and was sanctioned by all with two exceptions, one dissented and the other was uncertain at the time. The briefs submitted on rehearing were longer. They quoted from the words and works of political economists and humanitarians, but they nowhere touched the law any closer than did the original briefs. In fact they went beyond the law and in some particulars, as it seems to me, are open to the criticism that they are coercive, or, at least, an invitation to the court to subscribe to the political side of the controversy. In this sense they were offensive and should have been stricken. Personally, I would be glad to see every man who labors paid a fair wage, more than a going wage, for I know that wages are too often hammered down to meet the bare necessities of the wage-earner; but I have not the means to pay those who should be paid more, nor have I the right, when sitting in judgment on the affairs of my fellow men, to say that my neighbor shall pay more, and that by judicial mandate.

The humanitarian or economic phase of the question is not properly before the court, as I have undertaken to demonstrate; but, since it has been discussed, I have this to say:

In considering the necessity of the man who works upon a paving job, it is possible that the court has overlooked the rights and

necessities of the small home owner whose property is improved against his will and who is really unable to meet an arbitrarily added cost. He may be no less a laboring man than the man who works upon a street contract. The fact that a man works for a paving contractor has not hitherto, either in law, equity, or morals, given him a right to be considered over the man who is working in some shop or factory, or in some store or printing office, and who is undertaking to build for himself and his family a comfortable home. To this man who labors the rule of the majority may mean loss and confiscation. A question of ethics might arise if the court had looked at both sides of the question and had been willing to see the necessities, the struggles, of the wage-earner who is also the small home owner, and who is, in virtue of a court-made law, made to bear a burden he had no reason to expect, and which he must have assumed to be beyond the power of the court to declare.

By what right the majority assumes to disregard the testimony in this case and upon the report of the commissioner of labor say what is a reasonable wage, I am at a loss to know; courts have hitherto based their conclusions upon testimony, but assuming that the court is right, I could, if it were proper to do so, furnish documents and opinions of equal merit and of equal force to sustain the proposition that the modern tendency of our municipalities to create assessment districts, to issue bonds, to put charges upon property, to buy prosperity on credit, must in the end inevitably force the one who now owns a home to give it up, and at the same time deter the one who desires to put into realization the home instinct which is dominant in the heart of every normal man. Let it be remembered that in compelling the home owner to pay from 25 to 40 per cent. more for the workman the city furnishes him than he would have to pay if he had employed the same man, and this to meet the increased cost of living, the money collected for that purpose comes in the main from those who are equally deserving and whose necessities are equally as great. The court has made the necessities of the one his fortune. It has made the helplessness of the other his misfortune.

CHAVELLE v. ISLAND GUN CLUB et al.

(Supreme Court of Washington. Jan. 7, 1914.)

1. MECHANICS' LIENS (§ 94*)—RIGHT TO LIEN—SUBCONTRACTOR—"CONTRACTOR."

Rem. & Bal. Code, § 1129, provides that every person performing labor or furnishing material in the construction of any dyke has a lien upon it for labor and material; section 1139 entitles the contractor to recover the amount due according to his contract, after deducting all claims for labor and material; section 1141 gives priority of lien to persons performing labor, then to materialmen, next to

subcontractors, and last to the original contractor; and section 1147 requires a liberal construction of the law. A construction company orally agreed with the principal contractor to do the dredging work in the construction of a dyke, furnishing its own dredger and crew, and to supervise the construction for \$40 per day, which agreement it performed, leaving a balance due it of \$2,078. *Held*, that the word "contractor" was used to include both the principal contractor and the subcontractor, that the subcontractor as such was entitled to a lien for labor and materials as distinguished from the lien given to laborers and materialmen as such, that the fact that compensation was computed by the day did not change its status as a subcontractor, and that it was entitled to a lien for any balance in the order prescribed by the statute.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 126; Dec. Dig. § 94.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1534-1537; vol. 8, p. 7616.]

2. MECHANICS' LIENS (§ 193*)—PROPERTY SUBJECT—EQUITABLE INTEREST OF PURCHASER.

Where the owners of property had contracted to sell it, and were not parties to a contract to contract a dyke thereon, only the interest of the purchasers was subject to a subcontractor's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 335; Dec. Dig. § 193.*]

3. MECHANICS' LIENS (§ 137*)—NOTICE—SUFFICIENCY.

A subcontractor's lien notice designating an unincorporated club as a party, and not the individual members composing it, but alleging that the club was a voluntary association composed of those persons, was sufficient.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 225-233; Dec. Dig. § 137.*]

Department 1. Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Edward H. Chavelle, substituted plaintiff for L. C. Hall, doing business under the name of L. C. Hall & Co., against the Island Gun Club and others, in which the defendant Everett Construction Company filed an answer and cross-complaint. From an order dismissing its cross-complaint, defendant Everett Construction Company appeals. Reversed and remanded.

Coleman, Fogarty & Anderson, of Everett, for appellant. E. H. Kohlhasse, of Seattle, for respondent.

ELLIS, J. This action was instituted by one L. C. Hall for the purpose of foreclosing a lien upon certain premises in Skagit county owned by the defendants Bacon. The Island Gun Club, Suess and wife, Campbell and wife, and Stormfeltz and wife were made defendants as holders of a contract for the purchase of the premises from the Bacons. The Everett Construction Company, a corporation, was made a defendant because of its having previously filed a notice of claim of lien against the same premises. It filed an answer and cross-complaint, to which a demurrer was sustained. In the meantime, Hall had been adjudged a bankrupt, and Edward H. Chavelle, as trustee in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bankruptcy, was substituted as plaintiff. From an order dismissing its cross-complaint, the defendant Everett Construction Company appeals.

[1] The facts admitted by the demurrer to the cross-complaint are as follows: On May 9, 1910, Hall, under a written contract with the defendants Suess, Campbell, and Stormfeltz, and the Island Gun Club, entered upon the work of constructing a dyke around the property in question. The Island Gun Club is an unincorporated association composed of the defendants Suess, Campbell, and Stormfeltz. In carrying out his contract, the principal contractor, Hall, entered into an oral agreement with the appellant, Everett Construction Company, whereby that company was to do the work of dredging, furnish its own dredger and operating crew, and supervise the building of the dyke for the sum of \$40 a day of nine working hours. Hall completed the dyke, performing work alleged to be of the value of \$8,016.87, of which he received \$4,750, leaving a balance unpaid of \$3,266.87. The appellant, under its oral agreement with Hall, furnished the dredger and crew for a period of time sufficient to entitle it to \$2,478.46, of which \$400 has been paid, leaving a balance owing to it of \$2,078.46, with interest. On October 24, 1910, it filed its notice of lien against the premises, and on November 9, 1910, Hall filed his notice of lien. Subsequently, the present action was begun in the lower court, with the result above noted. The sole question presented for our consideration is whether or not the oral agreement entered into between Hall and the appellant here, and the work performed thereunder, was such as to entitle the appellant to a lien on the premises.

The statute under which the appellant claims the right of lien contains the following provisions material to this inquiry (references are to the section numbers of Rem. & Bal. Code):

"Sec. 1129. Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any * * * dyke * * * has a lien upon the same for the labor performed or material furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien or his agent; and every contractor, * * * or person having charge, of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this chapter."

"Sec. 1139. The contractor shall be entitled to recover upon the claim filed by him only such amount as may be due him according to the terms of his contract, after deducting all claims of other parties for labor performed and materials furnished. * * *"

"Sec. 1141. In every case in which different

liens are claimed against the same property, the court, in the judgment, must declare the rank of such lien or class of liens, which shall be in the following order:

- "1. All persons performing labor;
- "2. All persons furnishing material;
- "3. The subcontractors;
- "4. The original contractor."

"Sec. 1147. The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects."

A reading of these sections and an application of the liberal rule of construction prescribed by the section last quoted induces the view that it was the intention of the law-makers to provide a lien for every person furnishing materials going directly into the given structure, or performing labor directly upon it. The provision first quoted (section 1129) accords a lien to every person performing labor or furnishing materials, and section 1141 classifies all persons doing either, and prescribes the rank of their liens. Section 1139, taken in connection with section 1141, must be construed as using the word "contractor" in its generic sense, and including both the principal contractor and subcontractors, else there would be no lien for a subcontractor as such, and no lien whatever for a subcontractor except as he might also be a laborer or a materialman. The latter cannot be the intention, because in section 1141 the subcontractor's lien is subordinated to that of laborers and materialmen, which would be wholly senseless unless there were a distinction between the lien of a subcontractor and that of a laborer or materialman. Construing these three sections together, and giving a meaning to each, it is clear that a subcontractor as such is entitled to a lien for labor or materials or both, furnished and paid for by him in the performance of some specific part of the work under contract with the principal contractor, as distinguished from the lien prescribed for laborers and materialmen as such. The recovery on a subcontractor's lien is therefore like that of any other contractor given under section 1139 "according to his contract"; otherwise it has no independent existence, though expressly subordinated to, and hence distinguished from, the liens of laborers and materialmen under section 1141. It follows that the only sensible distinction between the lien accorded to the principal contractor and the subcontractor is found in the fact that, in marshaling liens, the latter ranks the former, and receives a preference in the distribution of the proceeds of the sale of property subject to the liens on foreclosure, just as the latter is subordinated to the liens of laborers and materialmen as such. There is, and can be, no distinction as to the character of the items going to make up the lien claim of the principal contractor and that of a subcontractor without destroying the lien of the latter as a distinct lien. Each is en-

titled to recover upon his lien claim the amount due according to his contract "after deducting all claims of other parties for labor performed or materials furnished." Unquestionably, the principal contractor who undertakes a given work, and contracts to furnish labor, materials, tools, and instrumentalities for the purpose, is entitled to a lien for all labor performed and materials furnished and paid for by him in the performance of his contract, and the amount of his lien is determined by the amount due him according to the terms of his contract, and neither this amount nor the lienability of his claim is affected by the fact that he also agrees to furnish, as part of the consideration for his contract on the given terms, the instrumentalities and tools used in the work, and by which the labor is made effective, and the materials handled, molded, fitted, and adjusted to the work. In this regard there can be, as we have seen, no distinction between the principal contractor and a subcontractor without destroying the subcontractor's lien. This construction is the only one which accords a meaning and gives an effect to every part of the statute. As said in *Powell v. Nolan*, 27 Wash. 318, 341, 67 Pac. 712, 720: "The other sections of the statute which we have cited clearly indicate that a subcontractor or contractor is to be regarded as performing labor upon the building, and is entitled to file lien claims therefor the same as laborers and materialmen, but subordinate to such liens. Construing the act, as we must, so as to give effect to every part thereof, we must hold that the contractor has a lien for the contract price, irrespective of the fact that he performed no service further than overseeing the construction of the building according to his contract."

Under the statute so analyzed and construed, we think it plain that the appellant here was a subcontractor, and as such was employed, under contract with the principal contractor, to furnish the labor and the appliances necessary to make that labor effective in doing the dredging, and to supervise the work. It follows that it was entitled to a lien for the contract price, namely, \$40 for each day of nine hours, after deducting all claims of other parties for labor performed or materials furnished (section 1139, *supra*), and that its lien should rank third (section 1141, *supra*) in participating in the proceeds of the sale of the property, subject to all liens of laborers and materialmen employed in constructing the dyke.

The mere fact that the compensation was computed by the day cannot have the effect of changing the appellant's status as a subcontractor. Under the facts as pleaded and set up in the lien, it contracted to perform a specific part of the work, namely, the dredging. The mode of computing the payment on the contract cannot reasonably be held to affect the character of the contract. While

the complaint and lien notice do not designate the appellant as a subcontractor *eo nomine*, they do set up the facts which make the appellant a subcontractor, and entitle him to a lien as such. This, under the liberal rule of construction required by section 1147 above quoted, must be held sufficient.

It may be objected that, if the contract amount be held to fix the amount of the subcontractor's lien, as in the case of the principal contractor, there might be danger that, by collusion with the principal contractor, a subcontract or a number of subcontracts could be let for an amount in excess of the contract price for which the principal contractor had agreed to perform the work, and the owner's property thus charged with an amount in excess of what he contracted to pay. Such a danger is more apparent than real, since such subcontracts would be fraudulent on their face, and, if such a situation should develop, it would, present such conclusive evidence of fraud as to defeat all of the liens. No court would sustain subcontract liens in excess of the principal contract price.

Our construction of the statute is inferentially sustained by the decision in *Smyth v. Lance & Peters*, 52 Wash. 560, 100 Pac. 995. While in that case the opinion refers to the lien as a laborer's lien, the facts set out clearly show that Smyth, the lien claimant, was a subcontractor. He took a contract to perform a distinct and divisible part of the work of constructing a building, namely, to do the plastering. He agreed to furnish the men and presumably the tools also, and do the work, and was to receive as pay therefor the amount he paid his men, plus \$7 a day for himself, and 10 per cent. of the amount he paid the men. He was allowed a lien, not only for his own compensation, but for the money which he had paid to the men who assisted him in the work. His recovery was according to his contract.

The cases relied upon by respondents (*Hall v. Cowen*, 51 Wash. 295, 98 Pac. 670, and *Gilbert Hunt Co. v. Parry*, 59 Wash. 646, 110 Pac. 541, Ann. Cas. 1912B, 225) are not apposite. In the first case, the lien claimant furnished no materials, and performed no labor. He merely rented scrapers to the original contractor as tools for doing the work. He was neither a laborer, a materialman, nor a subcontractor, within the terms of the statute. In the second case, *Gilbert Hunt Co. v. Parry*, the same situation was presented. Practically every item in the lien claim was for tools, and appliances, and supplies for running machinery. The things furnished were not materials going into the work, hence did not fall within the terms of the statute.

[2, 3] According to the allegations of the complaint and the appellant's answer and cross-complaint, the Bacons were not parties to the contract with Hall to construct the dyke, hence only such interest in the land

as the Island Gun Club, Suess and wife, Campbell and wife, and Stormfeltz and wife had under their contract of purchase from the Bacons can be subjected to the appellant's lien. The claim that the lien notice was fatally defective, in that it designated only the Island Gun Club as a party, and not Suess, Campbell, and Stormfeltz, individually, is without merit, since it is alleged that the Island Gun Club is a voluntary association composed of these persons. Doubtless, if the decision of the trial court had been based upon that ground, an amendment would have been made to include the parties interested by name. We take it, however, from the argument and from the record, that the trial court held the lien invalid because of the fact that the appellant, by its contract, was obligated to furnish not only the labor, and superintend the work, but also the instrumentality, namely, the dredger by which that labor was made effective. In this, as we have seen, the trial court was in error.

The judgment is reversed, and the cause is remanded for reinstatement and further proceedings in accordance with the views here expressed.

CROW, C. J., and MAIN, GOSE, and CHADWICK, JJ., concur.

GANDER v. SIMPSON et al. (No. 1,964.)

(Supreme Court of Nevada. Jan. 9, 1914.)

ADVERSE POSSESSION (§ 16*)—ACQUISITION OF TITLE—PROOF.

Proof that plaintiff had fenced and partially improved a tract of land established a sufficient possession and occupancy to support title by adverse possession under Rev. Laws, § 4957, when supported by proof of the other essentials necessary to the acquisition of such title, and entitled him to judgment quieting his title in the land against a defendant who established no title thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

Appeal from District Court, Lyon County; Frank P. Langan, Judge.

Action by Arnold W. Gander against Daniel C. Simpson and others. From judgment for plaintiff, the defendant named appeals. Reversed and remanded, with directions.

James R. Judge, of Carson City, for appellant. Mack & Green, of Reno, for respondent.

NORCROSS, J. Arnold W. Gander, respondent, brought this action against Daniel C. Simpson, appellant, and a number of others to quiet title to an undivided one-half interest in the following described land: The S. E. $\frac{1}{4}$ of section 36, township 11 N., range 23 E., lot 1, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 12, township 10 N., range 23 E., less a certain tract in the complaint describ-

ed. All the defendants, other than the appellant, Simpson, disclaimed ownership in the land. Appellant, Simpson, by his answer, admitted title in the plaintiff to the extent of an undivided one-fourth, but denied that defendant had any greater interest therein. Simpson also set up title in himself to an undivided one-half interest in the land described, and prayed judgment in his favor that such interest be quieted.

Neither the plaintiff nor the defendant traced title in themselves from the government. Plaintiff offered in evidence a deed from Isador Cohn to Fannie Nudelman, dated June 22, 1901; from J. and Fannie Nudelman, his wife, to John W. O'Banion and Zadoc Pierce, dated November 12, 1901; from Zadoc Pierce to plaintiff, dated May 18, 1903.

Defendant Simpson offered in evidence deeds from the Occidental Colony Company to J. Nudelman and Ephram Friedman, dated December 14, 1898; from Ephram Friedman and wife to A. M. Spiegel, dated October 10, 1899; from A. M. Spiegel to Jacob E. Cohn, dated September 3, 1902; from Jacob E. Cohn and wife to defendant Simpson, dated August 13, 1906. All the foregoing deeds, whether offered by plaintiff or defendant, describe and purport to convey the property in controversy.

There is nothing in the evidence to show from what source either Isador Cohn, plaintiff's predecessor in interest, or the Occidental Company, defendant's predecessor in interest, obtained title, if any such either possessed, to the land in controversy.

As neither plaintiff nor defendant established a clear legal title to the land in controversy, plaintiff's right to the disputed one-fourth interest must depend upon adverse possession for the statutory period of five years.

The court below found, among other facts, the following: "That on the said 18th day of May, 1903, said plaintiff, Arnold W. Gander, entered into the quiet and peaceable possession of said undivided one-half interest in and to the property set out in his complaint, and thereafter paid the taxes thereon, and cultivated and raised crops on said lands ever since said date; and from the 22d day of June, 1901, said Arnold W. Gander, and his grantors and predecessors in interest, under claim and color of title, held the quiet and peaceable possession of said undivided one-half interest in said property. That said possession and occupation of said lands and water rights was actual, open, notorious, and hostile to defendants, and each of them, and has been continuous and uninterrupted ever since the said 22d day of June, 1901. That, by reason of said conveyances of said land and water rights to said Arnold W. Gander, and by reason of the further fact of his open, notorious, continuous, uninterrupted, hostile, and adverse posses-

For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

sion, under title and claim of title of said lands and water rights, from and after the 22d day of June, 1901, said plaintiff is entitled to have his title to an undivided one-half interest in and to said lands and water rights quieted, settled, and confirmed to him, as prayed for in his complaint, against said defendants, and each of them."

The land in controversy is in two non-contiguous tracts, and are separated from each other by a distance of more than half a mile.

There is evidence showing that 80 acres of the land described is fenced, and, of this 80 acres, some 35 or 40 acres had been and was being cultivated by the plaintiff and his predecessors in interest for more than five years prior to the institution of the suit. It is not entirely clear whether this 80 acres under fence comprises the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 1, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 12, township 10, or is a part of the 200-acre tract to the north; but from the evidence it would appear more probable that it constitutes all of the former tract.

It is clear that, as to the 80 acres described as inclosed by fence and partially improved, the plaintiff has established a superior title, and is entitled to judgment quieting title thereto. Rev. Laws, § 4937.

As to the uninclosed land, it is impossible to say, from the evidence in the record, in whom lies the superior title. Both parties have a deed to the undivided portion of the land in controversy; but it is impossible to tell which deed conveys the legal title. Both parties have paid taxes on the land, and both parties have used the land for grazing purposes. Neither has established title by adverse possession. If the title to the land could be traced from the original or from a common source, that would doubtless settle the controversy as to the uninclosed and unimproved land.

The judgment is reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the plaintiff for the 80 acres of inclosed land, particularly describing the same, and dismissing the action, without prejudice, as to the other land in controversy, or to grant a new trial.

TALBOT, C. J., concurs.

HEYWOOD v. NYE COUNTY. (No. 2,067.)
(Supreme Court of Nevada. Jan. 3, 1914.)

1. OFFICERS (§ 99*)—COMPENSATION—STATUTE.

A provision in a statute that an officer shall receive a salary not exceeding a specified amount does not authorize the payment of the maximum amount, unless his compensation has been so fixed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 142-147; Dec. Dig. § 99.*]

2. STATUTES (§ 206*)—CONSTRUCTION.

A statute should be construed so as to give effect to all of the language of the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 283; Dec. Dig. § 206.*]

3. JUSTICES OF THE PEACE (§ 15*)—SALARY—STATUTE.

Under Act of March 24, 1909 (Laws 1908-09, c. 177), relating to the compensation of county and township officers in Nye county, section 10 of which provides that, in townships polling more than 200 and less than 1,000 votes, the justice of the peace shall receive as his full compensation for all services rendered a salary not to exceed \$1,800 per year, a justice in such a township is entitled only to such compensation as is fixed by the board of county commissioners, which cannot exceed the maximum.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 24; Dec. Dig. § 15.*]

Appeal from District Court, Nye County; L. N. French, Judge.

Action by H. D. Heywood against Nye County. From a judgment for plaintiff, defendant appeals. Reversed.

J. A. Sanders, of Tonopah, for appellant. T. K. Chambers, J. K. Chambers, and F. K. Pittman, all of Tonopah, for respondent.

TALBOT, C. J. Respondent brought this action to recover \$875, claimed to be due him as a balance of salary as justice of the peace of Manhattan township. He was elected in 1908, and held that office during the years 1909 and 1910. At the general election in 1908 more than 200 and less than 1,000 votes were cast in that township. Section 10 of "An act fixing the compensation of county and township officers in Nye county, state of Nevada, and matters pertaining to the collection and disposition of fees arising from such offices, and regulating the conduct thereof, and to repeal all acts or parts of acts conflicting therewith," approved March 24, 1909, which did not take effect until January 1, 1910, provides that, in "townships polling more than 200 and less than 1,000 votes at the last general election, the justice of the peace shall receive as full compensation for all services rendered as such justice of the peace a salary not to exceed \$1,800 per year." Laws 1908-09, c. 177. The same section provided that the justice of the peace, in townships polling less than 200 votes at the last general election, should receive as full compensation the fees provided by the act of February 27, 1893, and that, in townships polling more than 1,000 votes, the justice of the peace shall receive as full compensation "a salary not to exceed \$2,400 per year."

It is alleged in the complaint that under the act of 1909, heretofore mentioned, the plaintiff was entitled to a compensation of \$150 per month for services rendered as justice of the peace of Manhattan township during the year 1910. On the 7th day of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

February of that year the board of county commissioners of Nye county, by a motion unanimously passed, entered an order relating to the salaries of justices of the peace and constables in different precincts, which specified that the salary of the justice of the peace at Manhattan should be \$100 per month, and on the 7th day of October, 1910, it was further ordered by the board "that the compensation of the justices of the peace of Rhyolite, Round Mountain and Manhattan be reduced to \$75 per month on and after October 1, 1910." Following the entry of these orders, the plaintiff collected from the county for the remainder of the year 1910 the reduced amounts designated by the orders. On February 8, 1911, he commenced this action to recover the difference between \$150 per month and the amount he had collected as specified in these orders of the board. The appeal is from an order overruling the demurrer to the amended complaint, and from the judgment entered upon the failure of the county to file an answer.

It is urged, among other things, that the act did not authorize the board of county commissioners to make the orders reducing the respondent's salary. We are referred to dicta in former decisions of this court pronouncing that boards of county commissioners have no power except such as is expressly conferred upon them by law, in which cases no question was involved as to whether the general rule that the courts will give effect to the evident intention of the Legislature when the language is not clear would not apply to an act relating to the powers of the board of county commissioners the same as to any other statute.

We need not determine whether the word "expressly," used by this court in such cases as *Waitz v. Ormsby County*, 1 Nev. 370, and *Lyon County v. Ross*, 24 Nev. 102, 50 Pac. 1, means more than that it must clearly appear that it was the intention of the Legislature to confer the power upon the board.

Of the numerous propositions presented and argued, it is necessary to consider only one. Such closely allied questions as whether, under the rule that the whole act may be considered in order to determine the intention of the Legislature, and whether, in view of the various provisions of the statute authorizing the board to allow the appointment of different deputy county officers and fix their salaries, it is not apparent that it was the intention of the act that the board of county commissioners should fix the salaries of justices of the peace as well as of the deputies, and consequently that this power is conferred upon the board by the act, we need not determine.

[1-3] If respondent's contention that the board has no power except such as is expressly conferred upon it by statute, and was not authorized to make the orders in relation to respondent's salary, be conceded, it would still be necessary to have some clear

provision of law authorizing the payment by the county to the respondent of \$1,800 per year, or \$150 per month, before the county officers would be authorized to allow or pay the claim for salary at that rate, and before the plaintiff can recover. As we held recently, the provision in the statute that an officer shall receive a salary not exceeding a specified maximum amount does not authorize the payment of the maximum amount to him, unless his compensation has been fixed. *State ex rel. Mighels v. Eggers*, 36 Nev. —, 136 Pac. 104.

The words in the act of the Legislature upon which respondent relies, that the "justice of the peace shall receive as full compensation for all services rendered * * * a salary not to exceed \$1,800 per year," do not say or mean that he shall receive \$1,800 per year, unless the amount has been fixed by some duly authorized board or power. To hold that this language authorized the payment of a salary of \$1,800 per year would be equivalent to a judicial amendment of the statute by the elimination of the words "not to exceed" and the substitution of the word "or" therefor, so that the statute would read that he shall receive as full compensation for all services rendered a salary of \$1,800 per year, instead of one not to exceed that amount.

If the Legislature had intended to fix the salary at \$1,800 per year, they would have omitted the words "not to exceed." The court has no authority to eliminate them, or to change their obvious meaning. The rule is well settled that effect should be given to all the language of a legislative act. *Torreyson v. Board of Examiners*, 7 Nev. 19; *Roney v. Buckland*, 4 Nev. 45; *Corbett v. Bradley*, 7 Nev. 106.

The statute must be understood to mean what it has explicitly expressed. *Odd Fellows Bank v. Quillen*, 11 Nev. 109.

It is an elementary rule of construction that, if it is possible, effect must be given to every word of an act. *State v. Ruhe*, 24 Nev. 251, 52 Pac. 274; *Ex parte Presole*, 32 Nev. 378, 108 Pac. 630.

Courts construe the language of a statute so as to give it effect rather than to nullify it. *State v. Martin*, 31 Nev. 493, 103 Pac. 840.

The words "not to exceed \$1,800 per year" in the statute have no different meaning or force in regard to plaintiff's salary than they would have if they were preceded by the words "not less than \$50 per month," and were followed by the words "to be fixed by the board of county commissioners." With such additional words, the language "not to exceed \$1,800 per year" would clearly indicate that the salary should be fixed by the board at any amount not to exceed \$1,800 per year, with the further condition that it should not be less than \$50 per month.

If the act had specified that the justice

of the peace should receive a salary of not less than \$100 per year, and not to exceed \$1,800 per year, it could be argued with as much force on behalf of the county that the salary was fixed at the minimum of \$100 per year as it can be now on the part of the respondent that it is fixed at \$1,800 per year.

As the Legislature did not fix the amount of the salary in the act itself, it was not fixed so that the respondent was entitled to draw or recover any salary, unless it is apparent from the consideration of the whole act that the board of county commissioners were authorized to fix it. If the board were so authorized, the respondent has received from the county all they allowed and all to which he is entitled. If the board were not empowered to fix the salary within the maximum named, then respondent was not authorized to draw any amount before the fixing of his salary under some subsequent remedial act of the Legislature.

The order and judgment of the district court are reversed.

NORCROSS and McCARRAN, JJ., concur.

STATE ex rel. GUTTERY v. LANGAN,
District Judge. (No. 2,052.)

(Supreme Court of Nevada. Jan. 3, 1914.)

1. JUSTICES OF THE PEACE (§ 91*)—PLEADING—COMPLAINT—SUFFICIENCY.

A complaint before a justice by the assignee of a miner's lien against petitioner, the attorney who collected the same, alleging that petitioner undertook the collection on behalf of the assignor of a lien against the B. Gold Mining Company for \$408, and on or about July 12, 1910, petitioner, as such attorney, received \$357.05 and, after deducting all claims for fees and expenses, was accountable to the owner for \$154.55, that on or about June 7, 1910, plaintiff, for a valuable consideration, purchased the lien claim of the owner and ever since had been the owner of the lien and entitled to an accounting from defendant of the amount realized, and that defendant, though importuned, refused and failed to pay the amount and therefore owed \$154.55 to plaintiff, was sufficient, though the allegations that petitioner "was accountable to the owner," "and ever since June 7, 1910, plaintiff had been the owner of the lien" "and entitled to an accounting from defendant of the amount realized," were conclusions of law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 307-323; Dec. Dig. § 91.*]

2. JUSTICES OF THE PEACE (§ 90*)—PLEADING.

Pleadings other than the complaint in a justice's court may be oral and need not be in any particular form; it being sufficient if they state the cause of action or defense in ordinary and concise language without complying with any definite theory of the law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 306; Dec. Dig. § 90.*]

3. EXECUTORS AND ADMINISTRATORS (§ 439*)—ACTION—PARTIES—MINER'S LIEN—ASSIGNMENT—RIGHTS OF ASSIGNEE.

On assignment of a claim by a miner, to secure which he was entitled to a lien, the right

to the lien passed to the assignee and was enforceable by him in a suit in his own name, without reference to whether his assignor lived or died; and hence, on the assignor's death, the assignee was entitled to collect the claim without making the assignor's administrator a party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765, 1766, 1770, 1771, 1174, 1783; Dec. Dig. § 439.*]

4. ATTORNEY AND CLIENT (§ 26*)—ATTORNEY'S LIABILITY TO THIRD PERSON—MINER'S LIEN—ASSIGNMENT—ACCOUNTING.

Where, pending suit to enforce a miner's lien, the miner assigned the claim and died, the record of the assignment was constructive notice to the miner's attorney and to the defendant in the suit that the claim was the property of the assignee, and hence, there being no statute authorizing a payment of the proceeds of the claim by the attorney to the clerk of the district court, such payment was voluntary and did not relieve the attorney from liability to account for such proceeds to the assignee.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 88, 89; Dec. Dig. § 26.*]

Certiorari by the State, on relation of J. Andrew Guttery, against Frank P. Langan, Judge of the District Court of Lyon County. Application for writ denied.

J. A. Guttery, of Yerington, pro se. George S. Green, of Reno, C. H. Miller, of Mason, and H. Pilkington, of Yerington, for respondent.

TALBOT, C. J. Petitioner applies for a writ of certiorari to review the action of the district court, which he claims was without jurisdiction to try and to render judgment against him under the following conditions:

On the 16th day of February, 1909, petitioner, as an attorney at law, brought an action in the district court of Douglas county for one Harry Simpson, plaintiff, against the Buckskin Gold Nugget Mining Company, a corporation, defendant, to foreclose a mechanic's lien amounting to \$374 for wages on mining claims situated in Douglas county. Pending this action, Simpson became afflicted with a fatal illness, and, being apprehensive of death, had the bills against him presented, including bills mentioned in the petition, and one for \$150 owing petitioner for legal services, and signed an indorsement acknowledging that he owed them, and requesting that they be paid out of any property which he possessed, which indorsement was witnessed by Theodore H. Trankle. Simpson authorized the petitioner to retain the \$150 out of any moneys that he might recover in the suit pending against the Buckskin Gold Nugget Mining Company. While the action was pending, and on the 17th day of June, 1910, before judgment was obtained, Simpson made an assignment of his claim and lien for the wages hereinbefore mentioned to Trankle, who filed this assignment for record with the county recorder at Genoa on June 9, 1910, but did not otherwise notify the company

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that he was the assignee of the claim and lien. Trankle was not substituted and did not request to be substituted in the action.

Simpson died on July 6, 1910, and on the 14th of that month, after publication of notice to lien claimants, petitioner, purporting to act as attorney for Simpson, obtained a decree of the district court in the name of Harry Simpson against the Buckskin Gold Nugget Mining Company for the sum of \$350 and costs. Trankle did not appear in court or under his assignment or otherwise except to these proceedings.

After publication of notice of sale, and on the 29th day of July, 1910, the sheriff, on the advice of petitioner, purporting to act for Simpson, accepted from J. A. Knox \$425 for release and satisfaction of the judgment or decree for foreclosing the lien against the Buckskin Gold Nugget Mining Company. On August 5th following, a purported satisfaction and discharge of the lien and judgment was entered. From the amount so collected, and after making deductions for fees of the sheriff and clerk and for publication of notice, the sheriff sent the petitioner \$357.05. After deducting costs, including fee of \$150 for petitioner, he sent to the clerk, with direction to credit to Harry Simpson, deceased, subject to the order of the district court of Douglas county, the balance of \$154.55, which was deposited with the clerk on the 26th day of August, 1910, and has since remained with him, and which has been the bone of contention.

It is alleged that Trankle did not make known to petitioner the assignment of Simpson's claim or lien until after the judgment and decree had been obtained, and that, before bringing suit against petitioner, Trankle knew that the \$154.55 had been so deposited with the clerk, subject to the order of the district court of Douglas county, on the 26th day of August. On December 1, 1910, Trankle commenced an action in the justice's court in Mason Valley township, Lyon county, against petitioner to recover that sum, and in the complaint alleged that petitioner "undertook the collection, on behalf of one certain Harry Simpson, of a mining lien against the Buckskin Gold Nugget Mining Company for \$408, and on or about the 12th day of July, 1910, defendant, as attorney, for said lien received into his hands the sum of \$357.05, and, after deducting from said amount all his claims for fees and expenses, he was accountable to the owner thereof for \$154.55. That on or about the 7th day of June, 1910, plaintiff for a good and valuable consideration purchased of Harry Simpson the said lien of \$408 against the Buckskin Gold Nugget Mining Company, and ever since the said 7th day of June, 1910, plaintiff has been the owner of said lien and entitled to an accounting from said defendant of the amount realized, * * * and defendant,

though often importuned, refuses and fails to pay said amount, and defendant owes \$154.55 at this day to plaintiff."

After trial, and on December 22, 1910, judgment was rendered in the justice's court in favor of Trankle and against the petitioner for \$154.55 and attorney's fees and costs, and, after appeal and trial in the district court, this judgment of the justice's court was affirmed on the 18th day of November, 1912.

Petitioner contends that in entering judgment against him, the justice's court and the district court on appeal had "no jurisdiction over the money and property of a deceased person, in that the matters stated in such complaint are not such allegations as to establish a contract between the said plaintiff, Theodore H. Trankle, and the defendant, J. Andrew Guttery, for the payment of money, in that said complaint contains no allegation establishing any contract between the said plaintiff and the said defendant, and in that the complaint, even if it establishes a trust relation between the said plaintiff and the said defendant, said justice's court had no jurisdiction over trust relations." It is urged that the justice of the peace cannot adjudicate claims against the estates of deceased persons; that such claims cannot be reached by attachment or execution before distribution; that sufficient facts did not exist on which an action against the petitioner could be predicated; that petitioner did not have in his possession or control the \$154.55 at the time the suit was brought, and that he never promised to pay that sum to Trankle; that by failure to give notice of his assignment to petitioner and to the Buckskin Gold Nugget Mining Company, Trankle lost any right under the assignment; that, if the Simpson judgment was void because obtained after his death, the justice's court had no jurisdiction over moneys obtained under a void judgment, and that for these reasons the district court had no jurisdiction on appeal. It is further claimed that the justice's court by assuming jurisdiction in the first instance, and the district court assuming jurisdiction on the appeal, have subjected the petitioner to an expensive suit which is wholly unwarranted in law and forced him to defend the action and resist the execution of judgment, or accept the alternative of being liable in double the amount in controversy to the estate of Harry Simpson, deceased, under section 96 of the Probate Act. Rev. Laws, § 5952.

Petitioner alleges that he has exhausted his right of appeal, and that the judgment will be carried into effect unless reviewed by this court.

[1] In reference to the contention that the complaint in the justice's court does not state facts sufficient to constitute a cause of action, it is said that certain statements in that complaint, such as that "he was ac-

countable to the owners," "and ever since the 7th day of June, 1910, plaintiff has been the owner of said lien" "and entitled to an accounting from defendant of the amount released," are conclusions of law. This may be conceded, and still the complaint taken as a whole is sufficient. The allegation that the defendant in that action, who is the petitioner here, undertook the collection of the mining lien of Harry Simpson against the Buckskin Gold Nugget Mining Company for \$408, and that on this lien petitioner received in to his own hands the sum of \$357, and that after deducting fees and expenses he was accountable to the owner thereof for \$154, and that Trankle, the plaintiff in the action in the justice's court, for a valuable consideration purchased of Harry Simpson the lien of \$408 against that company, states sufficient facts to support the conclusion of the justice and district court that Trankle, as the plaintiff in that action, has ever since been the owner of the lien and that \$154.55 is due him from the petitioner.

The same technical pleadings are not required in a civil action in the justice's court that are necessary in a criminal proceeding which may deprive one of his liberty or in a case originating in the district court. In either court meager allegations showing the issue may support a pleading attacked after judgment which might be deemed insufficient before. Allegations in the nature of conclusions of law are generally sufficient in some forms of action, such as statements merely asserting ownership or possession of property in ejectment and replevin, or that a specified sum is owing upon an account for articles sold and delivered. It is not intended that the pleadings in civil actions in justices' courts, in which any person unskilled in the law may appear as attorney, shall be difficult. They may be direct and simple. Our former civil practice act provided for the commencement of actions in justices' courts "by filing a copy of the account, note, bill, or instrument upon which the action was brought, or a concise statement in writing of the cause of action, and the issuance of a summons thereon, or by the voluntary appearance and pleadings of the parties."

[2] The new Code provides that "pleadings in justices' courts are not required to be in any particular form but must be such as enable a person of common understanding to know what is intended. With the exception of the complaint, they may be oral or in writing. The purpose of the Revised Code is not to make the requirements for the administration of justice more stringent or difficult but more certain, definite, and simple. We have been referred to cases in courts of record in which statements in complaints in the nature of conclusions of law, attacked before judgment was rendered, were held insufficient to state facts constituting a

cause of action. Differently from provisions relating to justices' courts, both the new and the old Codes provide that, in an action commenced in the district court, the complaint shall contain "a statement of the facts constituting the cause of action in ordinary and concise language."

The complaint filed in the justice's court against the petitioner contains statements which would indicate to persons of ordinary understanding that it was sought to recover, after payment of costs, the balance of the money paid by the Buckskin Gold Nugget Mining Company to the petitioner on the claim of lien of Harry Simpson against the company which had been assigned to him by Trankle.

Under the Constitution and statute, the justice's court is the only one having jurisdiction to try and the power to hear and determine demands or controversies regarding simply the recovery of money where the amount involved does not exceed \$300, and the district court is the only one having appellate jurisdiction of such controversies. The action of Trankle against petitioner being simply for the recovery of money in an amount less than \$300, it could be brought only in the justice's court.

[3] Evidently the petitioner made a mistake by treating the lien as a claim belonging to the estate of a deceased person. Under the assignment made by Simpson, the lien passed to Trankle instead of remaining the property of Simpson or becoming a part of his estate. Whether Simpson lived or died, Trankle could collect the claim secured by the lien without making Simpson or his administrator a party. As assignee, the same as the indorsee of ordinary commercial paper, Trankle had the right to be substituted as plaintiff and maintain in his own name the suit against the Buckskin Gold Nugget Mining Company to foreclose the lien or recover the money, the same as the indorsee of a note or the transferee of a mortgage or other instrument. If the owner of property executes a mortgage and later sells the property, the holder of the mortgage, if willing to rely on the property for the satisfaction of the debt, may bring an action against the grantee to foreclose and have the property sold in satisfaction of the mortgage without making the original owner a party.

[4] If it be conceded that, at the time the Buckskin Gold Nugget Mining Company paid the money to petitioner, both were unaware that Simpson had made an assignment of the lien, that the money was paid with the expectation that petitioner would pay it to Simpson, that there was no agreement for paying it otherwise, and that petitioner paid it to the county clerk as ex officio clerk of the district court under the belief that the money belonged to the estate of Harry Simpson, deceased, nevertheless from the undisputed facts as they appear in this proceeding,

and from the complaint in the justice's court, Simpson had made the assignment transferring the claim and lien to Trankle, and the record of the assignment was constructive notice to petitioner and the company at the time the money was paid by the company, and the money, being paid on the claim and lien, in law belonged to Trankle as the assignee of the claim, and as such assignee he was entitled to recover it. If petitioner had paid the money to Simpson, or to any one who had been entitled to receive it, before there was notice of the assignment, the law would not require him to pay it a second time. The act relating to conveyances provides that "every instrument in writing setting forth an agreement to convey any real estate, or whereby any real estate may be affected, . . . acknowledged, certified and recorded, shall from the time of filing with the recorder for record impart notice to all persons of the contents."

It does not appear that any special or general administrator or executor was appointed, nor that any application for administration on the estate of Harry Simpson, deceased, was made. There being no statute providing for the payment of the money to the clerk, and no court order regarding it, any payment to him by the petitioner under the mistaken belief that the money belonged to the estate of Harry Simpson, deceased, was not authorized by law, and the amount remains subject to the control of the petitioner, because he is responsible for its payment to Trankle under the judgment which the justice's court had jurisdiction to render.

If, under any contention in the case, it could be held that the assignment did not transfer the lien and right of action to Trankle, and that the claim continued to belong to Simpson, differently than in the case of an action upon a claim against an estate, which cannot be maintained until after presentation to and rejection by an administrator or district judge, the justice's court would have had jurisdiction if an action had been brought by him or his administrator to recover the sum mentioned, to which Trankle became entitled under the assignment.

The question of the invalidity of the judgment or the lien rendered after Simpson's death is immaterial, for none of the cost incident to the action is involved in the case in the justice's court. The expense of the suit to foreclose the lien was collected from the company and paid. Notwithstanding Trankle did not become a party to that action, he is entitled to the money paid for the satisfaction of the claim and the lien which had been assigned to him, and jurisdiction of the action for the recovery thereof was vested in the justice's court and in the district court on appeal.

The application for the writ is denied.

NORCROSS and McCARRAN, JJ., concur.

VEITH v. NEVADA REDUCTION CO. et al.
(TONOPAH LUMBER CO. et al.,
Interveners). (No. 2,027.)

(Supreme Court of Nevada. Jan. 3, 1914.)

Process (§ 96*)—PUBLICATION—AFFIDAVIT—SUFFICIENCY.

An affidavit to obtain an order of publication of summons, which, in addition to stating that S. was a necessary defendant, and that a cause of action existed against him, stated that plaintiff was a lien claimant, and assignee of other lien claimants, against the property of another defendant, and that S. claimed some interest therein, and that the suit was to have such interest, if any, declared subject to plaintiff's claims, was sufficient to comply with Comp. Laws, § 3125 (Rev. Laws, § 5026), which prescribes the essentials of such affidavits; an allegation, in the nature of a conclusion of law, which would be sufficient in pleading, being sufficient in an affidavit, and there not being the same necessity for statement of facts constituting the cause of action where the defendant to be served by publication is merely incidentally a necessary or proper party, as when a direct recovery against him is sought.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

Appeal from District Court, Nye County; M. R. Averill, Judge.

Action by W. M. Veith against the Nevada Reduction Company and others. From a refusal to quash service, defendant William M. Stokes, trustee, appeals. Affirmed.

P. E. Keeler, of Long Beach, Cal., for appellant. Bartlett & Thatcher, of Tonopah, for respondents Veith, Tonopah Lumber Co. and others. H. H. Atkinson, of Tonopah, for respondents Nevada Reduction Co. and others. Key Pittman, of Tonopah, for respondent Mustang Extension Mining Co. V. S. Thomas, of Wilmington, for respondent Oliver. Hatton & Hatton, of Goldfield, for respondent Peck.

TALBOT, C. J. This is an appeal from a final judgment, and presents the sole question of alleged error in the denial of appellant's motion to quash and set aside the service of summons made upon the appellant out of the state, under an order of publication based upon an affidavit which in part is as follows: "That said W. M. Stokes, trustee, is a necessary party defendant in this cause of action, and that a cause of action exists against him, the said W. M. Stokes, trustee, by the plaintiff, and the cause of action is that plaintiff is a lien claimant and assignee of other lien claimants against the property of the Nevada Reduction Company, a corporation, and that the defendant, W. M. Stokes, trustee, claims to have some right, title, or interest in said property, and this suit is brought to have whatever interest, if any, the said Stokes may have in and to the property of the Nevada Reduction Company to be declared subject to the claims of plaintiff." It is urged that this affidavit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

did not state sufficient facts to authorize the making of the order that service of summons be made by publication. The Code provides that when the person upon whom the service is to be made resides out of the state, "and the fact shall appear by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of summons." Comp. Laws, § 3125; Rev. Laws, § 5026. It has been held that the facts must be stated in the affidavit, and that there must be a strict compliance with the statute. *Coffin v. Kinney*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738; *Victor Mill Co. v. Justice Court*, 18 Nev. 22, 1 Pac. 831; *Roy v. Whitford*, 9 Nev. 370. However, we do not think the language quoted demands the same detailed statement of the cause of action as required in a complaint under section 5038, which provides that the complaint shall contain a "statement of the facts constituting the cause of action in ordinary and concise language." The line between the statement of ultimate facts and conclusions of law in an affidavit or pleading is often a narrow one. Conclusions of law are often held sufficient, as in actions on account, and the common allegation of ownership in relation to real property. As the allegations ordinarily required in a complaint, or even less, may be sufficient for the affidavit, statements well-nigh being conclusions of law, may, in some instances, suffice for the affidavit. A more meager allegation in a complaint will support a cause of action after judgment, or if no objection is made before judgment, than if attacked by demurrer. The former decisions of this court should not be construed as requiring more to be stated in the affidavit than is necessary for a cause of action in a complaint, and an allegation in the nature of a conclusion of law, which is generally deemed sufficient in a pleading, should be so in the affidavit.

As under the language of the statute the provision is in the alternative that it shall appear by the affidavit or a verified complaint "that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action," there is not the same necessity for stating the facts constituting the cause of action, when nothing is sought to be recovered specifically against the defendant, as in this case, and it is shown that he is incidentally a necessary or proper party in an action between others, as there would be if it were sought to recover directly from the defendant on whom constructive service is made, instead of to have him included as a necessary or proper party be-

cause he has in the property some subsequent interest or claim which it is incumbent on him to assert. *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1, 977; 32 Cyc. 477. Where the complaint sets forth a cause of action relating to real estate, it is generally held sufficient to allege that the other defendants have an interest or claim therein which is subsequent to the mortgage, lien, or right of the plaintiff.

In *Farmers' & Millers' Bank of Milwaukee v. Eldred*, 20 Wis. 199, the court said: "The affidavit for publication is sufficient. It states that the action is brought to foreclose a mortgage, and that the defendants [naming them] in respect to whom service is to be made 'are proper parties to said action, and have or claim a lien or interest in the aforesaid property by virtue of judgments which are subsequent to the mortgage set forth in the complaint; that the relief demanded by the said complaint against them consists in wholly excluding them, the defendants, from any interest or lien in the aforesaid property; that said defendants cannot, after due diligence, be found within this state.' This shows that the action is brought to foreclose a mortgage, and that the defendants in respect to whom service by publication was sought to be made were subsequent incumbrancers."

If the statement in the affidavit in the present case that W. M. Stokes, trustee, is a necessary party defendant in this cause of action, and that a cause of action exists against him, be considered as conclusions of law, the other language in the affidavit, and more particularly that quoted, indicating that the plaintiff is a lien claimant and assignee of other lien claimants against the property of the Nevada Reduction Company, and that the appellant claims to have some right, title or interest in that property, and that this suit is brought to have his interest, if any, in the property declared subject to the claims of the plaintiff, is deemed sufficient to support the order that the service of summons be made by publication.

In *Hamilton v. Barricklow*, 96 Ind. 401, an affidavit was held sufficient which stated "that the defendants Charles Hamilton and Elizabeth Hamilton were nonresidents of the state of Indiana; that a cause of action existed against them; that they were necessary parties to the action; and that the action was in relation to real estate."

In *Pratt v. Stone*, 25 Nev. 370, 60 Pac. 514, we held that an affidavit stating that a complaint had been filed to recover a sum of money, which cause of action was fully set forth therein, was sufficient to authorize the order for service of summons by publication, although the complaint was only the copy of an account for goods sold and delivered.

The appellant was served personally out of the state with a copy of the summons and unverified complaint, alleging the cause of action more in detail, and had an opportuni-

ty to defend upon the trial. It does not appear that he was prejudiced by the order, as he might have been if the service of summons had been made by publication, and he had been without notice of the action until after the trial and entry of judgment.

We think the district court was correct in the conclusion that the facts stated in the affidavit for publication of summons were sufficient; and, as the only objection is in that regard, the judgment and the order refusing to quash service is affirmed.

NORCROSS and McCARRAN, JJ., concur.

BYRAN v. CITY OF SPARKS. (No. 2,018.)
(Supreme Court of Nevada. Jan. 3, 1914.)

1. LICENSES (§ 15*)—TRAVELING SALESMEN—STATUTES.

Rev. Laws, § 3879, providing that after April 1, 1907, no city should impose or collect any license or tax upon any traveling salesman selling goods of a manufacturer or dealer having a factory or store in this state, was enacted to give the same exemption to traveling salesmen of manufacturers or jobbers in the state as is enjoyed by similar employes of principals in other states who cannot be taxed by reason of the commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 30-35; Dec. Dig. § 15.*]

2. LICENSES (§ 15*)—OCCUPATION OR BUSINESS—"RETAIL"—"RETAILER."

Rev. Laws, § 3879, provides that no city shall impose or collect any license from any traveling salesman employed by any manufacturer, wholesaler, or jobber, whose factory or store is located in the state. An ordinance imposed a quarterly license of \$15 per quarter upon one engaged in retailing goods other than from a fixed place of business in the city. Defendant, whose place of business in the state, was outside the city, manufactured and compounded spices, extracts, vinegar, and solicited orders, and sold to restaurants, hotels, etc., in the city other kinds of groceries, such as coffee, sugar, etc., in small and large quantities, in broken and unbroken packages. Held that, although exempt from paying the license pertaining to the salesmen of resident manufacturers, defendant was a retailer, and as such was required to pay the license; the word "retail" meaning to sell in small parcels, and not in gross, to sell in broken parts, and in small lots or parcels, rather than in bulk, and the word "retailer" meaning one who retails or sells goods in small quantities or parcels.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 30-35; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6193, 6194; vol. 8, p. 7789; vol. 7, pp. 6195, 6196.]

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Action by F. R. Byran against the City of Sparks. Judgment for plaintiff, and defendant appeals. Reversed.

Lewers & Henderson and W. L. Hacker, all of Reno, for appellant. James Glynn, of Reno, for respondent.

TALBOT, C. J. Respondent brought this action to recover nine quarterly license payments made by him to the city of Sparks, which he alleges were made under protest. He obtained judgment in the district court, and, from an order denying a motion for a new trial, the city has appealed.

Respondent owned a place of business just outside the city of Sparks, and there manufactured and compounded spices, extracts, vinegar, and other articles used in the grocery trade. Also, acting as his own salesman, he solicited orders in Sparks, and bought and sold to restaurants, hotels, bakeries, and confectioners other kinds of groceries, such as coffee, tea, rice, sugar, cheese, bacon, eggs, and olive oil. These sales were made in small or large quantities, and in broken and unbroken packages, and it does not appear to be disputed that he filled any order given him by these customers, no matter how small the quantity.

During the time that he carried on the business and paid the license, the following ordinance was in force in the city of Sparks: "Every person, firm, association or corporation (other than itinerant vendors), engaged in the business or occupation of selling or disposing of at retail, for a commission or otherwise, or in any manner other than at a fixed place of business in the city of Sparks, any goods, wares, merchandise, jewelry, dry goods, meats, cigars, tobacco, fruit, vegetables, or any products of the farm (except as hereinafter provided), shall first obtain a quarterly license from said city to carry on such business or occupation, and shall pay therefor fifteen dollars per quarter."

[1] Before he began paying a license, he appeared before the city council and protested against being required to pay, claiming that he was exempt under the following provisions of the act of March 29, 1907:

"Section 1. On and after the first day of April, 1907, it shall be unlawful for any county, city or town to impose or collect any license or tax upon or from any drummer or traveling salesman employed by, and selling the goods of, any manufacturer, compounder, wholesaler or jobber whose factory or store is located in Nevada.

"Sec. 2. The provisions of section one of this act shall not apply to peddlers or hucksters."

Rev. Laws, §§ 3879, 3880.

It was the contention of respondent that he was the traveling salesman for himself, a "manufacturer, compounder, wholesaler and jobber." The city claimed that he was also a retailer, because he sold his goods direct to consumers, in broken packages, and that consequently he must pay the license.

Evidently the statute, quoted, was passed for the purpose of exempting from the payment of license traveling salesmen employed by and selling the goods of manufacturers,

compounders, wholesalers, or jobbers having factories or stores in this state, so that they might be exempted in common with the traveling salesmen of manufacturers and wholesalers in other states who, as held at different times by this court and the Supreme Court of the United States, cannot be taxed by the state, owing to the provision of the federal Constitution conferring upon Congress the regulation of interstate commerce. *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 206, 3 Am. St. Rep. 901; *Ex parte Stoddard*, 35 Nev. 504, 131 Pac. 133; *Norfolk Ry. Co. v. Sims*, 191 U. S. 441, 24 Sup. Ct. 151, 48 L. Ed. 254; *State v. Bayer*, 34 Utah, 257, 97 Pac. 129, 19 L. R. A. (N. S.) 297.

[2] Conceding that respondent was entitled to the exemption from the payment of the license which pertains to resident and non-resident manufacturers, compounders, wholesalers, and jobbers, it is apparent that, in addition to these lines of business, by purchasing groceries, and selling them in small quantities and broken packages, differently from wholesalers, he acted as a retailer, and as such was required to pay the license, the same as other retailers.

In *McArthur v. State*, 69 Ga. 446, the court said: "Bouvier defines the meaning of the word 'retail' to be to sell in small parcels, and not in gross. And it is so defined by Worcester, Webster, and others who have given their time and study to the meaning of words. Under our law, words are to be given their usual and ordinary significance; to retail, then, is to sell in small quantities or parcels." Other decisions adhere to this definition. *Bridges v. State*, 37 Ark. 226; *Harris v. Council*, 28 Ala. 579; *Koenig v. State*, 33 Tex. Cr. R. 367, 26 S. W. 835, 47 Am. St. Rep. 35.

In *Campbell v. City*, 40 Kan. 654, 20 Pac. 493, the court said: "A 'merchant' is defined to be 'one who traffics or carries on trade; one who buys goods to sell again; one who is engaged in the purchase and sale of goods.' A 'retailer' is defined to be 'one who sells goods by small quantities or parcels.' 'Goods,' as used in this definition, include wares, commodities, and chattels. We have no doubt but that a lumber dealer is included in the ordinary signification of both a merchant and retailer."

In *Markle v. Akron*, 14 Ohio, 591, it is said: "But to retail is to dispose of in small quantities. . . . It may be a distribution of a whole into parcels."

34 Cyc. p. 1685, defines "retailer" as: "One who sells goods by small quantities or parcels; one who deals in merchandise in smaller quantities than he buys, generally with a view to profit."

In *State v. Lowenhaught*, 11 Lea (Tenn.) 15, the court said: "We take it what is meant by retailing is selling by small quantities, to suit customers, articles which are

bought in larger amounts generally. Now one who sells in this way, or whose business is so to sell, is a retail dealer; one who sells by the nature of his business in gross, and not by the small quantity or parcel, to consumers is a wholesale dealer. While these definitions may not include all the elements in detail of either character of dealer, they go far enough for the decision of this case."

In *State v. Hawkins*, 91 N. C. 626, the court said: "To 'retail' means, generally, to sell by small quantities, in broken parts, in small lots or parcels, not in bulk. There is nothing in the statute that goes to show this term is used in any restricted or limited sense, or that it does not imply any retailing, either rightful or wrongful."

In *Osborn v. Holmes*, 9 Pa. 333, defendant was engaged in the manufacture and sale of hats and caps, and also sold articles of domestic manufacture in an amount less than \$1,000 per year. He was held to be liable for the payment of the license required for selling articles in an amount less than that sum.

As it would make no difference in the result of the action, it is unnecessary to determine whether, under the facts shown, the license was in law paid under protest, a question regarding which extended consideration has been given in the briefs.

The judgment of the district court is reversed.

NORCROSS and McCARRAN, JJ., concur.

HENRY GOLD MINING CO. v. HENRY.

(Supreme Court of Idaho. Dec. 18, 1913.)

1. CORPORATIONS (§ 29*)—ORGANIZATION—RIGHT TO ATTACK.

Individuals cannot in collateral suits avail themselves of any defects in the organization of a corporation. This may be done only by the power creating them in a direct proceeding instituted for that purpose.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 77-79, 2504; Dec. Dig. § 29.*]

2. CORPORATIONS (§ 29*)—ORGANIZATION—RIGHT TO ATTACK.

A person who has been instrumental in the formation of a corporation and who has contracted with the corporation with full knowledge of its transactions is not in a position to contest the legality of its formation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 77-79, 2504; Dec. Dig. § 29.*]

3. CORPORATIONS (§ 30*)—CONTRACT WITH PROMOTERS—SPECIFIC PERFORMANCE.

Where four promoters made an agreement to form a corporation, and after the corporation was formed became its sole stockholders, officers, and directors, and made contracts and transacted business on behalf of the corporation relating to a contract previously entered into between the promoters, and had knowledge of the transactions which preceded the formation of the corporation and the contract that the promoters made prior to the organization of the corporation, and this knowledge was imputable to the corporation when they became

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stockholders, officers, and directors, and the evidence shows that the corporation by its acts and conduct has adopted and ratified the agreement made by the promoters before the corporation was organized, and the corporation brings suit against one of the promoters who has not fully complied with his contract entered into as a part of the promoters' arrangement, the plaintiff, the corporation, has a legal cause of action and may sue for specific performance of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 97-100; Dec. Dig. § 80.*]

4. APPEAL AND ERROR (§ 1010*)—VERDICT—EVIDENCE.

Where it is shown by the record that the evidence in the case is conflicting, and the opinion of this court is that there is substantial evidence supporting the findings of the trial court, this court will not reverse the judgment on the ground that the evidence does not support the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by the Henry Gold Mining Company, a corporation, against S. E. Henry, for specific performance of the contract. From judgment for plaintiff, defendant appeals. Affirmed.

Herman H. Taylor, of Sandpoint, for appellant. G. H. Martin and Peter Johnson, both of Sandpoint, for respondent.

STEWART, J. This is an action for the specific performance of a contract to convey to plaintiff an undivided one-fourth interest in and to the Boston, Chicago, and Minneapolis mining claims located in the Pend d'Oreille mining district, Bonner county, Idaho, and to compel the defendant to make conveyance to the plaintiff of such interest. The facts are as follows: That on January 15, 1909, the defendant, Henry Riser, E. E. Fry, and Frank Zimmerman entered into an agreement for the formation of a corporation under the laws of Idaho for the purpose of taking title to said one-fourth interest in said three mining claims and seven other mining claims, for the purpose of procuring money with which to develop the same. That it was agreed by each of said parties that he would, and he did, subscribe for 10,000 shares of the capital stock of the corporation. That it was agreed between defendant and Riser, who owned jointly the seven claims known as the Washington, Oregon, Idaho, Iowa, Colorado, California, and Arizona that they would convey to the corporation, when formed, all their interest in the seven claims last mentioned, and that it was agreed by the defendant that he would convey to the corporation when formed his undivided one-fourth interest in the Boston, Chicago, and Minneapolis mining claims, and it was agreed that the corporation when formed should issue to Riser 300,000 shares of the capital stock of

said corporation and to defendant 300,000 shares of the capital stock of the corporation in payment for the conveyance to the corporation of the mining claims aforesaid and the interest of the said parties therein. Thereafter a corporation was formed by the execution of articles of incorporation January 30, 1909, by the filing thereof February 8, 1909, and the issuance of a certificate of incorporation by the state of Idaho February 28, 1909. That said corporation was organized with a capital stock of 1,000,000 shares of the par value of ten cents each. That upon the completion of the organization of the corporation and the making of the agreement referred to in this opinion, Fry, Zimmerman, and Riser transferred and released to the corporation all their rights which they had acquired under the agreement heretofore referred to, and the corporation ratified and adopted the same. That Fry, Henry, Zimmerman, and Riser subscribed to the capital stock. That the corporation issued to Riser 300,000 shares for his interest in the seven mining claims above mentioned, and to the defendant 300,000 shares of its capital stock in payment for his interest in the ten mining claims above mentioned, and that by compliance by the plaintiff with the agreement the plaintiff became the owner of the undivided one-fourth interest in the Boston, Chicago, and Minneapolis mining claims. That Riser and Henry conveyed to the corporation their interest in the Washington, Oregon, Idaho, Iowa, Colorado, California, and Arizona mining claims by deeds, executed March 4, 1909, and August 25, 1909.

The complaint filed in the case sets forth practically the facts above mentioned, but the same was not verified. The defendant filed a general denial. The case was tried to the court upon the evidence. Findings of fact and conclusions of law were made, and a decree entered in favor of the plaintiff, that the plaintiff is the owner in fee simple of an undivided one-fourth interest in and to the mining claims situated in the Pend d'Oreille mining district in Bonner county, Idaho, to wit, the Boston, Chicago and Minneapolis, located about 3½ miles north of the town of Hope, in Bonner county, Idaho; the adjoining claims being the Colorado and Iowa on the north, and the Washington and Oregon on the south. It was also commanded that the defendant convey to the plaintiff such undivided one-fourth interest in and to said mining claims by a deed sufficient in law to transfer to the plaintiff the defendant's title thereto, and such title as he had on the 30th day of January, 1909, within 30 days from the date of the decree; and it was ordered that, if the defendant failed to execute and deliver such conveyance within the time limited, then the clerk of the court, Robert S. McCrea, was authorized and empowered to execute and deliver such con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

veyance in the name and for and on behalf of the defendant. Then follows a provision that the title is established and quieted in the plaintiff, and that the defendant and all persons claiming by, through, or under him are debarred and estopped from claiming any right, title, or interest thereto. It is also ordered that plaintiff recover costs.

[1] The first error assigned and urged as ground for reversing this case is that the corporation, the Henry Gold Mining Company, was not organized according to the laws of the state. The record shows that the law was complied with and that a certificate from the Secretary of State was issued to the respondent showing that the Henry Gold Mining Company had filed its articles of incorporation in due form. It also appears from the record that Henry, after the organization of the company, purchased stock and executed deeds to it, and acted as a stockholder, member of the board of directors, and secretary of the company, and was its legal advisor and contracted with the corporation.

This court, in the case of Boise City Canal Co. v. Pinkham, 1 Idaho, 790, held that individuals cannot in collateral suits avail themselves of any defects in the organization of a corporation; that this may be done only by the powers creating the corporation in a direct proceeding instituted for that purpose. This rule is considered in 10 Cyc. 259, where the authorities are cited upon both sides. In our judgment, the better reasoning is the rule above stated. See Clark & Marshall on Corporations, vol. 1, §§ 80-256.

[2] In the case of Pittsburg Mining Co. v. Spooner, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149, it was held that a person who had been instrumental in the formation of a corporation and who has contracted with the corporation with full knowledge of its transactions is not in a position to contest the legality of its formation.

[4] The next objection relied upon by the appellant is that the evidence does not sustain the finding wherein the court found that the defendant entered into an oral or any agreement with Fry, Riser, and Zimmerman to convey his undivided one-fourth interest in the Boston, Chicago, and Minneapolis mining claims to the corporation.

The evidence in this case is voluminous, and from a consideration of the same it is perfectly clear that the evidence is conflicting; but our opinion is that it could serve no purpose to analyze this evidence and state the particular facts upon which it is in conflict, inasmuch as we are of the opinion that there is substantial evidence supporting the contention of the respondent. The trial court made findings upon the questions contended for in this alleged error, and such findings are in favor of the respondent, and we are satisfied that the court committed no error in so finding. Salisbury v. Spoford, 22 Idaho, 393, 126 Pac. 400; Wheeler

v. Gilmore, etc., Ry. Co., 23 Idaho, 479, 130 Pac. 801.

[3] The third assignment of error is that the evidence is insufficient to sustain the finding of the court that the corporation did organize or was duly or in any manner informed of the terms, conditions, or provisions of any agreement or adopted the same for the conveyance to the corporation of the one-fourth interest in the Boston, Chicago, and Minneapolis mining claims, or that the defendant received or accepted 300,000 shares of the capital stock in payment for said interest, or that the plaintiff has paid the defendant any compensation for said interest or has become the owner of the same at all.

In answer to this alleged error, we have heretofore considered the validity of the organization of the respondent. The remainder of the assignment of error deals with the question of the right of the corporation to ratify or adopt the acts of the promoters made in its behalf prior to its formation, and whether or not the plaintiff is entitled to maintain this action against the defendant. The four promoters entered into the preliminary agreement for the formation of the corporation, and after the corporation was formed because its sole stockholders and its officers and directors, and we are of the opinion that after the corporation was formed these four promoters and stockholders and officers, when they acted and made contracts and transacted business on behalf of the corporation relating to the contract previously entered into between the promoters, had full knowledge of all of the transactions which preceded the formation of the corporation and the contract that the promoters made prior to the organization of the corporation, and that this knowledge was imputable to the corporation when they became its stockholders, officers, and directors. The record clearly shows this to be a case where a corporation itself, by its acts and conduct after adopting and ratifying the agreement made by the promoters, is seeking to enforce that contract in court against one of the promoters who has not fully complied with his contract entered into as a part of the promoters' arrangement.

The articles of incorporation clearly provide that "the purpose for which it is formed are to carry on the business of mining for gold, silver, copper, lead, and other minerals, buying and selling mining properties, and doing a general mining business." The articles of incorporation place no limitation upon the right of the corporation to contract, and there is nothing in such articles which limits the corporation to any particular method of entering into contracts.

It is a general rule announced by the authorities dealing with corporations, relating to the laws of various states, that a corporation may, in most states, ratify or adopt a contract made by its promoters before incor-

poration, and thus become liable thereon; it may also acquire the right to enforce the same. By such ratification or adoption it makes the contract its own, and may sue thereon in its own name. Where a contract by the promoters of a corporation with the owner of land, under which the latter agrees to sell the land to the corporation when organized, is adopted by the corporation, it may sue for specific performance. *Clark & Marshall on Corporations*, vol. 1, p. 315. See, also, *Cook on Corporations* (6th Ed.) § 707, p. 2408.

We also cite in support of the general rule announced above the following cases: *Paxton Cattle Co. v. First Nat. Bank*, 21 Neb. 621, 33 N. W. 271, 59 Am. Rep. 852; *Low v. Railroad Co.*, 45 N. H. 370; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050.

A case very similar to the case now being considered is the case of *Scadden Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440. In the latter case the court quotes from *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327, the following: "There can be no difference between its making a contract by adopting an agreement originally made in advance for it by promoters, and its making an entirely new contract." *Chater v. Refining Co.*, 19 Cal. 219.

In this contention, as to the right to maintain the action, we call attention to the following cases: *Shorb v. Beaudry*, 56 Cal. 450; *Hunt v. Davis*, 135 Cal. 31, 66 Pac. 957; *Wall v. Niagara Min. & Smelt. Co.*, 20 Utah, 474, 59 Pac. 399. This latter case is very lengthy, but it clearly states the rule of law relating to ratification and adoption of contracts of promoters.

In the case of *Valley Lumber Co. v. McGilvery*, 16 Idaho, 338, at page 367, 101 Pac. 94, at page 104, this court had under consideration a transaction between the vice president of the plaintiff and the defendant, full knowledge of which was shown by the president and general manager and secretary, who were all members of the board of directors, and the court in the opinion says: "The record shows that appellant did ratify it [the transaction] by remaining silent about the matter for several months after it had full knowledge of all the facts. It was then too late to repudiate it. Appellant seeks now to ratify the contract so far as it favors them and repudiate it so far as it does not accord with its interests. This appellant will not be permitted to do. Honesty and fair dealing require the corporation to stand by the contract * * * or repudiate it in toto."

This court also, in the case of *Mantle v. Jack Waite Mining Co.*, 135 Pac. 863, lays down the rule that a promoters' agreement may be ratified by the acts and conduct of the corporation after it comes into existence.

Other errors are assigned wherein counsel

for appellant objected to certain testimony, but we find no merit in the contention. We find no error in the trial court's findings or the judgment.

The judgment is affirmed. Costs awarded to respondent.

SULLIVAN, J., concurs. AILSHIE, C. J., concurs in conclusion.

PETERSON v. MERRITT et al.

(Supreme Court of Idaho. Dec. 17, 1913.)

1. FALSE IMPRISONMENT (§ 12*)—EXECUTION—COMMITMENT—JUSTIFICATION BY OFFICER.

Under the provisions of section 2035, Rev. Codes, a sheriff or other ministerial officer is justified in the execution of all process and orders regular on their face and issued by a court of competent jurisdiction, notwithstanding any defects which may have occurred in the proceedings upon which they were issued.

[Ed. Note.—For other cases, see *False Imprisonment*, Dec. Dig. § 12.*]

2. FALSE IMPRISONMENT (§ 12*)—EXECUTION—COMMITMENT—JUSTIFICATION BY OFFICER.

Where a court of competent criminal jurisdiction arraigned a prisoner on an information charging violation of the prohibitory liquor laws of the state, and the defendant pleaded guilty thereto, and the court announced a judgment of fine and imprisonment against the prisoner and made and entered a judgment and caused a remittitur to issue, and thereafter, and before the delivery of the remittitur to the officer and upon payment by the defendant of the fine and costs, suspended the sentence of imprisonment and ordered the prisoner discharged, and thereafter directed the clerk to issue the remittitur to the sheriff, and the sheriff received the same and served it upon the defendant, and arrested him and imprisoned him in the county jail under such commitment, and the prisoner was thereafter discharged on writ of habeas corpus and sued the officer for false imprisonment, *held*, that the commitment, being regular on its face and having issued from a court of competent jurisdiction, was a protection and justification to the officer, and that such officer is not liable in damages for false imprisonment.

[Ed. Note.—For other cases, see *False Imprisonment*, Dec. Dig. § 12.*]

3. FALSE IMPRISONMENT—EXECUTION OF PROCESS—JUSTIFICATION BY OFFICER.

Where a sheriff acts under process fair and regular on its face, which is issued from a tribunal having jurisdiction of the person and subject-matter, and arrests the person against whom such process has issued and obeys the directions and mandates thereof, he is not liable for false imprisonment, even though irregularities were committed or the process was obtained or sued out in the first place wrongfully, fraudulently, or unlawfully.

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by Chris Peterson against Andrew Merritt and others, for damages for false imprisonment. From judgment for defendants, plaintiff appeals. Affirmed.

F. M. Molyneux, of Sandpoint, for appellant. E. W. Wheelan, of Sandpoint, for respondents.

AILSHIE, C. J. This action was instituted to recover damages for false imprisonment. Respondent Merritt was sheriff of Bonner county, and the Fidelity & Deposit Company was surety on his official bond. The appellant was taken into custody under process issued out of the district court in and for Bonner county, and was held in custody by the respondent as sheriff of the county. The appellant was subsequently released on a writ of habeas corpus sued out in this court. In re Peterson, 19 Idaho, 433, 113 Pac. 729, 33 L. R. A. (N. S.) 1067. Appellant was discharged by the judgment of this court on the ground that he was being unlawfully detained, in that the trial court had exceeded its jurisdiction in ordering the appellant imprisoned after he had complied with a former order and judgment of the trial court.

It appears, as will be seen from an examination of the statement contained in the Peterson Case (19 Idaho, 433, 113 Pac. 729, 33 L. R. A. [N. S.] 1067), that Peterson pleaded guilty to the charges contained in two informations filed against him in the district court of Bonner county, wherein he was accused of violations of the local option law which was then in force in Bonner county. The court had pronounced sentence against the defendant in each of those cases; in one that he be imprisoned in the county jail of Bonner county for six months and pay a fine of \$300 and the costs of the prosecution; in the second case, the sentence directed an imprisonment for six months and a fine of \$200 and costs. The trial court, however, made an order that in the event the defendant paid the fines and costs the sentence of imprisonment should be suspended until the further order of the court or judge thereof. The defendant thereupon paid the fines and costs in both cases and was released and discharged from custody. Thereafter and without further notice or proceeding the clerk of the court, upon the direction of the court, delivered to the sheriff of the county the commitments, and the sheriff thereupon apprehended the defendant therein named, who is appellant here, and held him as a prisoner in the county jail in accordance and conformity with the directions of the judgment and commitment. He thereupon sued out his writ from this court, and was discharged thereon. He subsequently commenced the present action to recover damages from the sheriff and his bondsmen for false imprisonment, alleging that he was detained and imprisoned without authority of law.

[1] The only question presented for our consideration in this case is whether or not the process which was delivered to the sheriff and under which he apprehended and imprisoned the appellant constitutes a legal protection and justification for his action. Section 2035 of the Rev. Codes provides as follows: "A sheriff, or other ministerial officer, is justified in the execution of, and must execute, all process and orders regular on their

face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." In *Roth v. Duvall*, 1 Idaho, 149, the territorial Supreme Court, in considering the duty of the sheriff to execute process and his protection thereunder, said: "It is well settled that the sheriff cannot refuse to serve process regularly issued to him because in his opinion it is defective or irregular. *Drake on Attachment*, § 185; also *Walker v. Woods*, 15 Cal. 66. We think, therefore, that so much of the defendant's answer as undertakes to defend this action by impeaching the regularity of the judgment and execution in the suit of *Roth v. Smith* is without merit, and should be disregarded. It sets up no fact which constitutes any defense. If the defendant in that suit, *Smith*, did not choose to attack those proceedings, the sheriff cannot be permitted to do it for him, and, however defective they may have been, the latter had nothing to do with the case except to execute the process in the usual way."

[2, 3] The decisive question to be determined in the present case is whether the process under which appellant was arrested and detained was regular on its face and issued by a court of competent jurisdiction. The commitment which was delivered to the officer, and which it was agreed was executed by him, and under which he held this appellant, reads as follows:

"At this day the defendant appeared in open court with his counsel, E. W. Wheelan, Esq., the state being represented by Peter Johnson, prosecuting attorney, and John A. Steinlein, Esq. Thereupon the defendant was informed by the court that an information had been filed against him charging him with selling intoxicating liquor contrary to law, namely, whisky, and of his plea of guilty as charged; and was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause appearing or being alleged, the court rendered the following judgment:

"It is the judgment of the law and the sentence of this court that you, Chris Peterson, be imprisoned in the county jail of Bonner county, state of Idaho, for six months, and that said term of imprisonment begin on the date of your admission into said jail, and that you pay a fine of \$300, and that you pay the costs of this prosecution amounting to \$44.30, and that in case said fine and costs are not paid, you be imprisoned in the county jail of said county, until said fine and costs are paid, at the rate of one day of imprisonment for each two dollars of said fine and costs, not exceeding ——— days in all for such nonpayment of fine and costs.

"Done in open court this 10th day of December, A. D. 1910.

"R. N. Dunn, District Judge."

It will therefore be seen from an examination of the commitment that appellant had

been informed against upon the charge of selling liquor contrary to law, and that he had pleaded guilty to the charge, and that sentence had been regularly pronounced against him. The question then arises: Was the process regular upon its face, and did it emanate from a competent authority? In the first place, selling liquor under certain circumstances is a violation of the penal laws of this state. It appears from this process that appellant had violated those laws and that he pleaded guilty to the charge. In the next place, the district court had jurisdiction to try such offenses and pronounce judgment therein. This process appears to have emanated from the district court in and for Bonner county. It did not appear upon the face of the process that the appellant had complied with any of the terms or provisions of the judgment, or that the process had been executed either in part or whole. It seems clear to us that the officer was justified in proceeding to the execution of the process. It is insisted, however, that it was his duty to know and that he did know that appellant had previously paid the fine and costs and that he had been discharged, and that consequently the district judge had lost jurisdiction to again order his arrest and imprisonment under the judgment that had been previously entered. It would seem a violent presumption to hold that the sheriff, who is a mere ministerial officer, must know the law better than the judge who heard the case and entered the judgment. The trial judge was of the opinion that he had the authority and jurisdiction to cause the rearrest of appellant and his imprisonment for the full term of six months, notwithstanding the previous order, and the trial judge was not without a fair appearance of legal authority so to do.

Appellant relies chiefly upon the case of *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379. In that case a seaman and member of the crew of a vessel sailing the Norwegian flag caused the captain of the vessel to be arrested in aid of the collection of a debt for wages. This was contrary to the treaty between the United States and Sweden and Norway, and it was held that the magistrate who issued the writ had no jurisdiction so to do, and that the constable was not justifiable in serving the writ. In that case it was held that knowledge by the officer of extrinsic facts and circumstances may be sufficient to charge the officer with false imprisonment, even though the writ be fair on its face. A careful examination of that case discloses quite clearly that it turned upon the peculiar facts and circumstances of the case, and the fact that the vessel upon which the captain was arrested was a foreign vessel sailing under the protection of a foreign nation, and that the constable had notice thereof, was the controlling consideration with the majority of

the court. One of the judges, however, dissented, and called attention to the dangers of requiring an officer to take notice of oral statements and extrinsic facts at his peril. Mr. Freeman, in his note to the *Tellefsen* Case on page 387 of vol. 60 of the Am. St. Rep., says: "There is some conflict in the decisions as to whether or not an officer will be protected by process regular on its face, if he has personal knowledge of a defect in the previous process which renders such process void or voidable," and cites the monographic note to *Savacool v. Boughton*, 21 Am. Dec. 201. The note to the latter case is a most exhaustive one and deals with the various shades and phases of this question in great detail. That note was written by Judge Freeman, and at page 190 of 21 Am. Dec. he says: "The speedy administration of justice requires that the mandates of all courts, and other tribunals and persons possessing judicial powers, should be executed promptly and without hesitation by those to whom they are directed. To secure this, it is necessary that the law should throw its protecting mantle around those executing such mandates, and hold them harmless, so long as they do only what they are commanded to do, without requiring them to determine whether it is rightly and properly commanded or not. Hence arises the principle that a ministerial officer, acting under process fair upon its face, and issuing from a tribunal or person having judicial powers, with apparent jurisdiction to issue such process, is justified in obeying it, against all irregularities and illegalities, except his own."

In support of the foregoing comment by Judge Freeman, a large array of authorities is cited. Later on, in discussing the "requisites of process which will protect officer," he says: "The rule, as to what is necessary to constitute such process as will afford a sufficient justification to the officer who executes it, is by some authorities stated to be that if the process is void, it furnishes no protection, but if it is regular and perfect, or merely voidable and erroneous, the officer who performs its command may justify under it."

The *Savacool* Case is a leading authority in this country on the subject of justification by a ministerial officer under a writ or process. The court there holds that: "A ministerial officer may justify under a writ regular on its face, whether issued from a court of general or of limited jurisdiction, if the subject-matter of the suit is within the jurisdiction of the court, and nothing appears in the process to apprise the officer of any want of jurisdiction over the person affected by the process." For cases holding to and following the doctrine of the *Savacool* Case, see *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Marks v. Sullivan*, 9 Utah, 12, 33 Pac. 224; *Trammell v. Town of Russellville*, 34 Ark. 105, 36 Am. Rep. 1; *Hofschulte v. Doe* (C. C.) 78 Fed. 436.

Stress has been placed upon the fact that this court has held in *Re Peterson*, supra, that appellant was improperly and unlawfully held in custody. The fact, however, that a prisoner may be wrongfully or unlawfully held does not per se render the officer detaining him liable for false imprisonment. It is for this purpose that the Legislature adopted section 2035, supra. Process may have been procured through fraud or perjury, or a court which has ordered it may have committed the most serious errors or have exceeded its jurisdiction after once having exercised that jurisdiction, but, if these facts do not appear on the face of the process, or, in other words, if the process is regular on its face and comes from a lawful authority, the officer may execute it and legally justify his action. It would be a most dangerous thing if every peace officer should be obliged to examine into the merits of the case and every step taken by the officers who issue process before going about his duty to serve and execute such process. When an officer gets a warrant of arrest or a commitment, he must know whether there is any such crime under the laws as that with which the party is charged, and he must know whether the court who issues the process has jurisdiction over the offense named in the process and authority to deal therewith and issue warrants and commitments and process thereunder.

In the case under consideration, the trial court properly directed the jury to return a verdict in favor of the defendant, and the judgment entered thereon should be affirmed, and it is so ordered. Costs awarded in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

JENSEN v. BUMGARNER et al.

(Supreme Court of Idaho. Dec. 23, 1913.)

1. MECHANICS' LIENS (§ 245*)—FORECLOSURE—NATURE OF ACTION.

An action to foreclose a mechanic's lien is an action in equity.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 427-430; Dec. Dig. § 245.*]

2. MECHANICS' LIENS (§ 290*)—FORECLOSURE—FINDINGS—NECESSITY.

A judgment will be reversed and the cause remanded when the trial court fails to make findings of fact and conclusions of law in an action to foreclose a mechanic's lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 591-597; Dec. Dig. § 290.*]

3. APPEAL AND ERROR (§ 1169*)—GROUND FOR REVERSAL—WANT OF FINDINGS.

There must be a finding of fact upon each and every material issue made by the pleadings, and the failure to so find upon each and every material issue is ground for reversal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4531-4539; Dec. Dig. § 1169.*]

4. MECHANICS' LIENS (§ 290*)—FORECLOSURE—FINDINGS OF JURY.

Special findings of fact upon proper interrogatories may be found by a jury in an action to foreclose a mechanic's lien. Such findings, however, are merely advisory to the court, and may be adopted, either in whole or in part, or rejected, and the court may make its own findings of fact and conclusions of law.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 591-597; Dec. Dig. § 290.*]

5. MECHANICS' LIENS (§ 290*)—FORECLOSURE—JUDGMENT—VALIDITY.

When a jury is instructed by the court to return a general verdict of indebtedness only in an action to foreclose a mechanic's lien, and there are no proper interrogatories submitted to the jury from which special findings of fact are found by the jury and adopted by the court, and where the court makes no findings of fact based upon the issues made by the pleadings, and there are no conclusions of law made by the court, the judgment is void, as well as erroneous, and the failure of the court to make findings of fact and conclusions of law is reversible error.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 591-597; Dec. Dig. § 290.*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by L. Jensen against George E. Bumgarner and another, to foreclose a mechanic's lien. From judgment for plaintiff, defendants appeal. Reversed.

J. F. Colvin and J. C. Johnston, both of Boise, for appellants. G. W. Lamson, of Nampa, for respondent.

BUDGE, District Judge. This action was instituted by the respondent to recover from the appellants \$30.90 upon a contract alleged to have been entered into by the respondent and the agents of the appellants for work and labor performed and material furnished in painting and tinting certain rooms in a building owned by the appellants, situated in the city of Nampa, Canyon county, and for the foreclosure of a mechanic's lien. Judgment was awarded the respondent for the amount prayed for in respondent's complaint, together with court costs and attorney's fees, amounting in all to \$120.35. This appeal is from the judgment, and also from the order denying and overruling the appellant's motion for a new trial.

The complaint is in the usual form, alleging the contract and indebtedness, the filing and recording of the mechanic's lien, the costs incident thereto, and further alleging that \$50 is a reasonable attorney's fee for bringing and maintaining the action, and prays judgment for the amount claimed to be due, together with costs, including attorney's fees, and that a decree of foreclosure be issued, and thereunder the property be sold to satisfy said indebtedness, attorney's fees, and costs. To this complaint the appellants filed an answer, denying specifically the material allegations of the respondent's com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—84

plaint, and by way of affirmative relief alleging a tender, which offer and tender was so made by the appellants in order to avoid the costs and expenses necessary to be incurred in defending this action.

The errors relied upon by the appellants, and upon which they base their grounds for a reversal of the judgment entered in this case, are not separately set out in the appellants' brief, and in order to determine the questions raised by the appellants, it becomes necessary to segregate the grounds or errors relied upon.

In passing we would suggest that it seems to us that the better practice would be to assign and discuss each error relied upon separately under separate heads, and support these assignments of error by citation of authorities, in order that it might be clearly ascertained from the brief the errors assigned and relied upon by counsel.

We gather, however, from the appellants' brief that there are four errors urged by counsel for the appellants upon which they seek to have the judgment in this case reversed and the case remanded, to wit: First, the insufficiency of the evidence to support the verdict of the jury; second, that the verdict of the jury is contrary to instructions Nos. 2 and 4 given by the court of its own motion; third, that instructions Nos. 3 and 5, also given by the court of its own motion, were erroneous, and did not state the law applicable to the testimony in this case; fourth, that the judgment of the court was void, as well as erroneous, for the reason that the said judgment was based solely upon the general verdict of the jury, that there were no special findings of fact found by the jury, and that there were no findings of fact or conclusions of law by the court.

[1-4] The fourth assignment of error, in our judgment, is decisive of this case. We will therefore refrain from discussing the first three assignments of error as herein enumerated. This is an action in equity, wherein the respondent seeks to subject the property of the appellants to the payment of the indebtedness alleged to be due by foreclosure and sale. That being true, it was necessary for the court to make findings of fact and conclusions of law as a basis for the judgment entered herein. While it was discretionary with the court to submit to the jury proper interrogatories from which the jury might make special findings of fact in this case, such findings of fact by the jury would be advisory only to the court, which special findings the court could adopt or reject, either in whole or in part; and, if the jury failed to find upon each and every material issue raised in the pleadings, it nevertheless became the duty of the court to make findings of fact covering each and every material issue raised by the pleadings, and thereafter to make conclusions of law supported by the findings of fact, upon which

findings of fact and conclusions of law the judgment of the court should be based. Section 4407, Rev. Codes; *Sandstrom v. Smith*, 12 Idaho, 446, 86 Pac. 416.

In this case the judgment is based solely upon the general verdict of the jury. The verdict of the jury is nothing more than a general finding of indebtedness, and was not a finding of fact upon all of the material issues raised by the pleadings. There were no findings of fact or conclusions of law by the court.

"Where the court omits to find on all of the material issues, the judgment must be reversed." *Standley v. Flint*, 10 Idaho, 629, 79 Pac. 815.

"If the findings of fact do not support the judgment, the judgment must be reversed." *Ponting v. Isaman*, 7 Idaho, 581, 65 Pac. 434.

"Findings of fact must be responsive to all the material issues raised by the pleadings," and conclusions of law that are not based upon the findings of fact as made by the pleadings will not support a judgment. *Carson v. Thews*, 2 Idaho (Hasb.) 176, 9 Pac. 605.

[5] We are not unmindful of the rule that, in the absence of a showing to the contrary, it will be presumed that the court made all necessary findings of fact, or that such findings were waived, but in this case exception was taken by the appellant to the instructions of the court directing the jury to find a general verdict. It further affirmatively appears that the court directed the jury to find a general verdict only, and that the jury, in pursuance of the court's instructions, so found, upon which general verdict the judgment of the court is based, and upon that alone. This was reversible error. *Penninger Lateral Co. v. Clark*, 22 Idaho, 397, 126 Pac. 524.

Counsel for respondent calls our attention to the case of *Jenkins v. Commercial Nat. Bank*, 19 Idaho, 290, 113 Pac. 463, as a case in point where findings of fact and conclusions of law were made by the court and held by this court to have been unnecessary. That case, however, is in no way similar to the one now under consideration. Counsel evidently failed to note the distinction between that case and the one at bar. That was not an action in equity, but an action at law for damages for the wrongful foreclosure of a chattel mortgage, while this is a suit in equity to foreclose a mechanic's lien. The findings of fact made by the court in the case of *Jenkins v. Commercial Nat. Bank*, supra, were in accordance with the general verdict of the jury, and the judgment of the court was based upon the verdict of the jury. That being true, the judgment rendered was not invalid.

We feel that it would not be out of place at this time to call attention to the trivial amount involved in this appeal. It is true, in the abstract, the right of appeal under our Constitution lies to the superior court, no

matter how small the amount may be, but when there are no constitutional questions involved, or the right of personal liberty, and the amount, as in this case, is so small, the cost to the litigants, the time consumed by the court in determining this character of litigation, not only imposes financial hardship upon the parties to the action, but also upon the taxpayers, and should be taken into consideration by the parties interested, and, if possible, an agreement reached that this character of litigation might be avoided.

The evidence offered in support of the contract sued upon in this action, viewed in the light of creating a lien upon the premises of the appellants that would justify a judgment decreeing the foreclosure and sale of the same, is unsatisfactory. While, upon the other hand, it is admitted that the labor was performed and the material furnished, for which the verdict of the jury as given would seem to be reasonable, however, as above stated, this action must be remanded, and it therefore becomes unnecessary for us to pass at this time upon the sufficiency of the evidence, or to determine the errors of law, if any there are, in the instructions of the court.

The judgment is reversed, and the action remanded, with directions to the court to take further proceedings in accordance with the views herein expressed. Costs awarded to the appellants.

AILSHIE, C. J., and SULLIVAN, J., concur.

CONSTANTINE et al. v. McDONALD.

(Supreme Court of Idaho. Dec. 20, 1913.)

1. CONTRACTS (§ 93*)—CREATION—IGNORANCE OF CONTENTS—ESTOPPEL—FRAUD.

Where a party enters into a written contract in a language that he cannot read, it is as much his duty to procure some person to read and explain it to him before he signs it as it would be for him to read it before he signed it if he were able to read it, and his failure to obtain a reading and explanation of it before signing is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

2. CONTRACTS (§ 93*)—CREATION—IGNORANCE OF CONTENTS—ESTOPPEL—FRAUD.

Held, that the evidence does not show that there was any fraud practiced upon plaintiffs in the making of said contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 415-419; Dec. Dig. § 93.*]

3. CONTRACTS (§ 231*)—EXCAVATION CONTRACT—CONSTRUCTION.

Held, that the evidence is not sufficient to sustain the verdict of the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1046, 1047, 1051, 1052; Dec. Dig. § 231.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Clemento Constantine and others against H. M. McDonald to recover for excavated earth and rock. From a judgment for plaintiffs, defendant appeals. Reversed.

Geo. W. Korte, of Seattle, Wash., and Therrett Towles, of Wallace, for appellant. A. G. Kerna, of Wallace, for respondents.

SULLIVAN, J. This action was brought to recover a balance due upon an alleged verbal agreement for the excavation of certain rock and earth along the line of the Chicago, Milwaukee & St. Paul Railway Company in Shoshone county. The action was tried by the court with a jury, and verdict and judgment were given and entered in favor of the respondents for the sum of \$1,272.55 and costs of suit. A motion for a new trial was denied, and this appeal is from the judgment and order denying the new trial.

Several errors are assigned, but the main question in dispute was whether or not the agreed price for the excavation of rock and earth was to be paid upon measurements in excavations only or in solid beds or masses of rock in its original position in the ground, or whether it was to be measured in loose formation in cars, as claimed by the respondents.

[1] The evidence clearly shows that the respondents in this case made and entered into a written agreement on or about May 1, 1912. The respondents were Italians and claimed they could not read the written contract. The testimony shows that the leader of these Italians had a copy of said contract two or three days before he signed it; that he was able to testify in this case without an interpreter. There is no evidence whatever to show that the respondents were prevented from reading said contract before they signed it, or having it read to them. It is a well-settled rule of law that, if a person cannot read the language in which a contract is written, it is as much his duty to procure some person to read and explain it to him before he signs it as it would be to read it before he signed it if he were able to do so, and his failure to obtain a reading and explanation of it is such gross negligence as will estop him from avoiding it on the ground that he was ignorant of its contents. 9 Cyc. 390.

[2] It would be different if the other contracting party had deceived him or misrepresented the nature and contents of the instrument, but in this case it is not claimed that appellant's agent in any way deceived respondents. There is no evidence showing that there was any fraud practiced upon these plaintiffs in the making of said contract.

[3] The contract provided that the plaintiff should receive for earth excavation 25 cents per cubic yard, and for solid rock excavation 60 cents per cubic yard. The re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spondents testified that their understanding of the contract was that they were to receive 25 cents per cubic yard for earth excavation measured loose in the car, and 60 cents per cubic yard for rock measured loose in the car, and that the car would hold about a yard and a quarter. They kept account of the number of cars taken out by means of a board with holes in it, and every time they took out a car, they pegged a hole, and one of their number kept the account of the number of cars taken out each day in a book kept for that purpose. The evidence shows that solid earth or rock will increase in measurement about 80 per cent. over its solid measurement, or measurement before excavated. It also appears that the usual way of measuring such material is by measuring the excavation from which the material is taken, and not loose in the cars. The jury evidently concluded that the measurements were to be made of the loose material, and the evidence is insufficient to sustain their verdict.

The judgment must therefore be reversed, and it is so ordered, with costs in favor of the appellant.

AILSHIE, C. J., and STEWART, J., concur.

HOLMES v. SANDPOINT & I. R. CO.

(Supreme Court of Idaho. Dec. 22, 1913.)

1. STREET RAILROADS (§ 99*)—COLLISION BETWEEN AUTOMOBILE AND STREET CAR—DUTY OF DRIVER.

Where the evidence shows that an automobile driver backed an automobile out of a garage abutting on a street, and onto the sidewalk, and thence into the street, and upon a street car line, which extended along the street in front of the garage, and a collision occurred between a street car and the automobile, and an action for damages was subsequently prosecuted by the owner of the automobile against the street car company, it was error for the trial court to instruct the jury that the driver of the automobile was not under any duty to look and listen before backing his car across the sidewalk and street and upon the street car line.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

2. STREET RAILROADS (§ 118*) — COLLISION BETWEEN STREET CAR AND AUTOMOBILE—REFUSAL OF INSTRUCTIONS — CONCURRENT NEGLIGENCE.

Instruction given in this case examined, considered, and disapproved.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258-269; Dec. Dig. § 118.*]

3. STREET RAILROADS (§ 99*)—COLLISION BETWEEN STREET CAR AND AUTOMOBILE—CONTRIBUTORY NEGLIGENCE.

The condition of a building which the owner of an automobile selects as his garage and the difficulty of getting into or out of the building does not excuse or justify the negligence of the owner of an automobile or his agent in driving the car out of the building without looking or listening for a street car

which runs back and forth along the street in front of such building.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.*]

4. STREET RAILROADS (§ 85*) — RELATIVE RIGHTS—AUTOMOBILE AND STREET CAR.

The rights of a street car company and the owner of an automobile are equal and concurrent in the public streets; but, while their rights are equal, they are to be measured by the manner in which they are to be exercised. The rights of the street car company are exercised by running its cars on its track, while an automobile may be driven in any part of the street according as convenience, diligence, and safety dictate or demand; but neither one has an exclusive right, and each must observe the concurrent rights of the other and of every other person who seeks to enjoy a like right within the streets, and to this end every person who would use the public streets must exercise care and diligence both for the protection of himself and his property and to prevent doing injury to any other person or property.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 193, 195; Dec. Dig. § 85.*]

Appeal from District Court, Bonner County; J. M. Flynn, Judge.

Action by J. W. Holmes against the Sandpoint & Interurban Railroad Company. From judgment for plaintiff, defendant appeals. Reversed.

Herman H. Taylor, of Sandpoint, for appellant. G. H. Martin, of Sandpoint, for respondent.

AILSHIE, C. J. This is a case where the plaintiff recovered judgment against the railway company for damages caused by the defendant's car striking plaintiff's automobile and injuring the same. The defendant has appealed from the judgment.

Charles Palmer, who was driving an automobile for respondent, was backing the machine out of a building that was abutting on the street, and which was used by respondent as a garage, and ran it onto the street car line, and appellant's car, which was then passing, struck the machine, and pushed it along the course of the track for 40 feet before stopping, and left the automobile in a damaged condition. The evidence shows that the building in which the machine was kept extends up to the sidewalk, and that the sidewalk in front of the building is about 8 feet wide, and that there is an abrupt drop from the door of the building to the sidewalk of about 8 inches, and from the sidewalk to the street a slight declination and then a rise toward the center of the street, and that the distance is 23 feet from the door of the building to the street car track. The driver describes the building and mode of getting out as follows: "Q. Will you tell the jury how the approach to the entrance of the building is constructed—tell them how the lay of the land is there over which the machine had to run in taking it out of the building? A. In coming in or going out the

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building, you come off of the track, make a little dip down, then come up on the sidewalk, a raise of 4 or 5 inches, then cross the sidewalk on a raise again of about 8 inches to come into the door. That is a very steep jump-off there, the 8 inches it is almost down, just a little point let down, to roll down on here, roll up here; then you have got to make a turn right in the door, because the door is not quite straight with the road—you have got to make a turn in the door as you come out or going in, either one. Q. How much wider is that doorway or entrance—how much wider was it at that time than the automobile? A. You have about 6 inches on each side of the automobile—clearance—that is, in the door, between the doors. Q. How wide is this board that was laid in order to run the automobiles up and down over the doorsill, or rather, how long was that board with reference to the width of the automobile? A. 6 foot, 3 inches. Q. How much longer than the width of the automobile was it? A. If you hit it straight, you have got about 3 inches on each side of the automobile."

Palmer, the auto driver, was in the machine operating it, and backing it out onto the street, and the respondent, the owner of the machine, was standing close by, and was in the doorway at the time of the accident. Palmer, in relating what he did, and how he backed the car out, testified: "Q. Did you look for anything at all when you were backing out of there? A. Just getting out; that was all. Q. You were not watching the street car track? A. No, sir. Q. Nor the street cars? A. No, sir; I hadn't time to look at only my machine. Q. If you had started out of there, and gotten out of the door with the rear wheels, could you stop your car at any place that you wanted? A. I could have stopped it within 6 inches at any place that I wanted. Q. Therefore you did not stop it? A. I did not; no. Q. Did you look until you were squarely upon the track for a street car at all? A. No, sir. Q. Did anybody else look for you? A. I heard somebody holler; that is the reason I looked up then. Q. Who hollered? A. I could not say; I think it was Mr. Holmes."

It appears that the street car line is operated on a regular schedule, and that the car that struck the auto was running on about schedule time. It seems that the street car was being operated by only one man, who was serving as motorman and conductor. There is a conflict in the evidence as to just where he was or what he was doing at the time the car was first seen by those who were near to or in the vicinity of the automobile. The motorman testifies that he began to slow down and stop his car as soon as he saw that the automobile was going to run onto the track, and that he stopped the car as soon as it was possible to do so. It is admitted that the driver of the automobile did not at any time look for the street car, or pay

any attention to that, until the respondent warned him to look out, which was only a second before the collision.

It has been most strenuously urged that the evidence in this case is not sufficient to support a verdict and judgment in favor of the respondent. We have concluded, however, not to pass upon the question of the sufficiency of the evidence, for the reason that the judgment in this case must be reversed on account of erroneous instructions given to the jury with which we will deal presently.

It appears to us that the jury must have been misled in at least one material issue in the case by reason of the error contained in instruction No. 12 given by the court to the jury. Instruction No. 12 is as follows: "The court instructs the jury that a person using a public street, such as the street in front of the Molyneux Building, and a street railway have equal rights in the street, and a person using such street is warranted in presuming that said railway company, or those in charge of the operation of its cars, will use ordinary care and prudence to avoid injuring such person while using the street, and it was *not negligence in law* for Charles Palmer to back the automobile in controversy in this case out of said building into the street, nor was it his duty to look and listen before doing so, and, if you find in this case that the motorman in charge of the defendant's car which struck said automobile saw the danger of a collision while he was a sufficient distance away to stop the car and prevent the collision, it was his duty to stop the car, and, if you find that a competent motorman at his post of duty in charge of a car properly equipped with proper appliances for stopping cars speedily in cases of emergency could have stopped the car in time to prevent said collision after the motorman saw, or should have seen, the danger of collision, then your verdict must be for the plaintiff. It is for you to determine from the evidence whether Palmer was negligent in failing to look or listen for an approaching car, and, in determining this question, the rule is whether men of ordinary prudence, exercising ordinary care and prudence, would have so acted under similar circumstances."

[1, 3] The italicized part of the foregoing instruction was clearly erroneous, and no doubt had the tendency to at least withdraw the attention of the jury from the negligence of the driver of the automobile, and left the case in the minds of the jury as though the plaintiff in the case were guilty of no negligence whatever in connection with the accident. The evidence of the witness Palmer, as hereinbefore set out, shows beyond any doubt that he was guilty of negligence and carelessness. He testifies, and apparently attempts to justify his action thereby, that he never looked at any time for the street car, or paid any attention to it, but that, on the contrary, *he had to pay all his attention*

to the machine that he was trying to get out of the building. The very fact that a street car line ran along the street in front of this garage imposed the duty upon one who was backing a machine out onto the street to keep in mind the fact that a street car line was there, and that a car was likely at any time to pass, and that, if he ran the car onto the track, he was taking chances, unless he first observed a clear track. The fact that the building or the opening to the building was so small that it required all the attention of the driver to his auto, so that he could not give any attention to what was going on back of him or in the street, does not excuse his failure to look and take observations. The railroad company did not select the garage, and are not responsible for its dimensions, or the difficulty of getting in and out with the car. If the owner of the machine saw fit to use that kind of a place, he, and he alone, must assume the risks incident to getting in and out of such place. The driver says that he was moving the machine at a speed of not to exceed $1\frac{1}{2}$ or 2 miles per hour, or about 2 feet per second of time, and that he could have stopped it within 6 inches at any time. The street car was running at a speed of from 8 to 9 miles per hour, or from 5 to 6 times as fast as the auto. Even had the motorman seen the auto moving toward the track, under these circumstances it would at least be a question of fact which should go to the jury as to whether he was not justified in assuming that the car would stop before it got on the track, and before the approach of the street car. We are utterly unable to understand how it was possible for either the respondent or his driver to assume for a moment that they had a right to back that car out of the garage, across the sidewalk, and across the street, without ever looking back to see whether a pedestrian, team, or street car might be passing. Had this automobile backed onto a child passing along the sidewalk, the owner of the machine would no doubt have been held liable in damages. It was the duty of a person moving a machine out of the garage onto the street under these conditions to keep a lookout for the traveling public, who had the same rights in this street as respondent.

[4] The assertion that respondent had the same right in the street as the street car company is clearly within the law. That assertion, however, must be considered as an abstract proposition of law. *The rights are equal; but they are to be measured by the manner in which they are exercised.* A street car company can only exercise its right to occupy the street by keeping on the track. On the other hand, an auto may be so operated that it can occupy any part of the street with safety. In other words, it can move from one part of the street to the other, and

is not confined to a track. So with pedestrians. Their place is on the sidewalk, except when crossing from one side of the street to the other, and then the rights of the pedestrian are not as clear and indisputable when he is crossing in the middle of the block as when he is crossing at a street crossing. This was not a street crossing, and it was not a place where the street car company was required or expected to slow down or stop. To instruct the jury under these circumstances that the driver of this automobile, Charles Palmer, "was not under the duty to look and listen before" backing this automobile into the street was clearly erroneous, and misleading to the jury. There can be no question but that he had a right to back the automobile into the street; but he must exercise that right with diligence and care, and there was no diligence and no care in backing it into the street without looking or listening.

[2] We shall not deal with the other instructions separately, and in relation to them will only observe that, as the record appears before us, this is a case in which the court should properly have given an instruction as requested on the law of concurrent negligence, as this is a case to which that rule of law would seem to be peculiarly applicable; at least, the jury ought to be instructed as to the rule of law applicable in cases of concurrent negligence, and advised as to what the law deems concurrent acts of negligence. *McCormick v. Ottumwa Ry. & Light Co.*, 146 Iowa, 119, 124 N. W. 889.

The judgment must be reversed, and it is so ordered, and a new trial is granted. Costs awarded in favor of appellant.

SULLIVAN and STEWART, JJ., concur.

MOSHER v. SUTTON'S NEW THEATER CO.

(Supreme Court of Montana. Oct. 22, 1913.
On Motion for Rehearing,
Jan. 2, 1914.)

1. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—PLEADING.

Though the complaint charged negligence by an employer in not furnishing a safe place of work and in not employing competent fellow servants, if such grounds of negligence were not alleged as interdependent causes of action, proof of either ground would entitle plaintiff to recover.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

2. MASTER AND SERVANT (§ 276*)—INJURIES—CAUSE OF ACCIDENT.

Evidence, in an action for injuries to an employé while working in a theater by scenery falling upon him, *held* to show that the proximate cause of the injury was the act of a fellow servant, and not any unsafe method of handling the scenery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. MASTER AND SERVANT (§ 264*)—PLEADING—VARIANCE.

Though the complaint in an employe's action for personal injuries alleged that the incompetent fellow servant was intoxicated when employed, as well as that he was intoxicated at the time of the injury, in absence of a motion for relief on the ground of surprise, proof merely that he was intoxicated at the time of the injury was not a fatal variance requiring reversal, in view of Rev. Codes, §§ 6585, 6593, relating to variances and defects not affecting substantial rights.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

4. MASTER AND SERVANT (§ 170*)—MASTER'S DUTY—COMPETENT FELLOW SERVANT.

It is an employer's duty to use ordinary care to keep competent fellow servants, as well as to employ them in the first instance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

5. MASTER AND SERVANT (§ 279*)—INJURIES—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for an employe's injuries, *held* to sustain a finding that the coemploye whose negligence injured plaintiff was incompetent, in that he was intoxicated at and before the time of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. § 279.*]

6. MASTER AND SERVANT (§ 203*)—ASSUMED RISK—EFFECT.

The question of assumed risk does not go to the amount of damages an employe recovers, but defeats his entire claim if established.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

7. MASTER AND SERVANT (§ 159*)—NEGLIGENCE OF FELLOW SERVANT—EFFECT.

The negligence of a fellow servant defeats an employe's right of recovery if shown, and does not merely go to the amount of damages recoverable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 318-325; Dec. Dig. § 159.*]

8. MASTER AND SERVANT (§ 262*)—ASSUMED RISK—PLEADING.

Unless it affirmatively appears from plaintiff's own pleadings or proof, the question of assumed risk is a matter of defense which must be pleaded by defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

9. MASTER AND SERVANT (§ 262*)—NEGLIGENCE OF FELLOW SERVANT—PLEADING.

The negligence of a fellow servant is a matter of defense which must be pleaded by defendant if it does not affirmatively appear from plaintiff's pleadings or proof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 855-859; Dec. Dig. § 262.*]

10. MASTER AND SERVANT (§ 297*)—VERDICT.

A verdict for an injured employe was not against the law because one ground of negligence was not proved, where the verdict for plaintiff was general, and there was sufficient evidence to show another ground of actionable negligence alleged.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195-1198; Dec. Dig. § 297.*]

11. APPEAL AND ERROR (§ 994*)—VERDICT—CONCLUSIVENESS.

The Supreme Court cannot decide, on appeal from a judgment for plaintiff and an order denying a new trial, that a jury should have believed defendant's witnesses and discredited plaintiff's witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

On Motion for Rehearing.**12. APPEAL AND ERROR (§ 197*)—VARIANCE—PRESENTATION BELOW.**

If a case is tried on the theory that the pleading is sufficient to admit proof for the purpose for which it is offered, appellant cannot first complain on appeal that there was a variance.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197; Pleading, Cent. Dig. §§ 1428, 1438-1441.]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Charles W. Mosher against Sutton's New Theater Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

George F. Shelton, Fred J. Furman, and A. J. Verheyen, all of Butte, for appellant. William Meyer, of Butte, for respondent.

SANNER, J. The respondent, plaintiff below, brought this action to recover damages for injuries received by him as the result of a fall of some scenery at the appellant's Broadway Theater, in Butte, on December 9, 1910. The complaint is in two so-called causes of action, the first charging a failure on the part of appellant, as plaintiff's employer, to exercise reasonable care to furnish him with a reasonably safe place in which to work, and the second charging a failure on the part of appellant to use ordinary care to employ reasonably competent fellow servants. The answer joins issue upon all the matters alleged in the complaint which form the basis of recovery, but contains no affirmative pleas. The cause was tried to a jury, which returned a general verdict for the respondent, and judgment was entered thereon. Motion for new trial was made and denied. The cause is now before us upon appeal from the judgment, and from the order denying the motion for new trial. In its brief, appellant assigns 49 alleged errors; of these 27 are argued under special heads presenting certain propositions, which we shall consider in their order.

[1] It is to be noted at the outset that, although the complaint is in the form of two causes of action, but one actionable event is set forth, to wit, a fall of the scenery resulting in plaintiff's injuries. The effect of the complaint, notwithstanding its form, was to allege but one cause of action, arising out of the negligence of the appellant in the two particulars mentioned. These particulars are not pleaded as interdependent or concurring causes, as in the case of Forsell v.

Pittsburg & Montana Copper Co., 38 Mont. 403, 100 Pac. 218, and in fact were not such; hence the respondent was not required to establish both, but it was sufficient to take the case to the jury if the evidence presented tended to establish that negligence in either of these particulars caused his injuries. *Westlake v. Keating Gold Min. Co.*, 136 Pac. 38; *Beeler v. Butte & London Dev. Co.*, 41 Mont. 465, 110 Pac. 528; *Hoskins v. Northern Pac. Ry. Co.*, 39 Mont. 394, 102 Pac. 988.

[2] 1. The appellant's neglect to use reasonable care to furnish respondent with a reasonable safe place in which to work is alleged to consist in these facts: That on the stage where the respondent was working "was a large amount of scenery necessary to be used, and which was used," in presenting the performance then being given, "which said scenery was placed against the west wall of said building without any protection to prevent the said scenery from falling; that in order to hold said scenery and prevent same from falling, defendants in the exercise of ordinary care should have provided said stage with a stall or scenery holder, or other proper or safe means of holding said scenery," and because of its failure to do this, the scenery fell and injured him. Under this charge it became necessary for the respondent to maintain three propositions: That he was in the employ of the appellant at the time, that its failure to furnish means for holding the scenery was negligent, and that because of this negligence the injuries occurred. We cannot agree that the respondent has failed to sustain any of these propositions, because, though we may be unconvinced touching his claim of employment, that was a question of fact for the jury in the first instance, and for the court on motion for new trial; both the jury and the court have said upon sufficient evidence, if believed, that the respondent was in the employ of appellant at the time. We do agree, however, that respondent failed in the two other necessary respects, and for these reasons: According to the evidence presented by the respondent, the Broadway Theater was "a combination house;" that is to say, a theater in which traveling companies carrying their own scenery are accommodated. In such houses the method in general use is to have a dock for all scenery not required in the production being staged, but to stack, or lean in packs, against the walls all the scenery required in the production and not actually in place upon the stage. In leaning such scenery against the wall it is pulled out at the bottom so as to give it good footing and prevent its falling. The scenery that fell upon respondent was so stacked or leaned against the wall of the theater, and it did not and could not fall upon him on account of that, or because it was not kept in a holder. It fell upon him because other employes, while straightening the pack to the

perpendicular in the effort to get out a piece from the middle, lost control of it. Quiescent, leaning against the wall, the pack was impotent for harm. Nor when being straightened was there any danger, save from incompetent handling. The reason it fell upon the respondent, as the witness Peiler stated, was that the men engaged in straightening it were drunk and did not have energy enough to hold it. The respondent himself says: "When the stage hands are straightening up these scenery packs to get a piece out, it does not occur very often, if a man is competent, that the scenery gets away from him and falls down on the stage. * * * As to whether I knew if it got toppled over it would fall down on the stage—well, it would not fall over if there was competent men there; there was no chance." The inference from the foregoing is inevitable that the method employed by appellant in keeping the scenery used or to be used in the production being staged—the method in general use among playhouses of like character—was in itself reasonably safe, and that the accident was not primarily due to it, but to the action of fellow servants.

[3] 2. The failure to exercise reasonable care to furnish respondent with reasonably skillful and competent fellow servants is alleged to have consisted in the following facts: That the appellant "carelessly and negligently employed one William Cary as a stage hand to assist in setting up scenery and removing the same from said stage"; that he was incompetent because "at the time of his employment he was intoxicated," and thereby rendered "incompetent and unfit to perform the services required of him"; that these facts were known to appellant, or in the exercise of ordinary care should have been known to it; that "by reason of his said incompetency and unfitness, as herein detailed," said Cary performed his work so carelessly and unskillfully that a portion of the scenery was thrown upon the respondent. It is vigorously insisted by the appellant that the respondent has not sustained these allegations by the proof. The respondent's narrative of the accident and the manner of its happening is substantially this: About a quarter past nine, while talking with the stage manager, Ki Leckie, their attention was called to Cary and one Petrucci, who were over at the pack of scenery on the west or back wall of the stage. Mr. Leckie saw Petrucci beckon, and turning to respondent said: "Go over there and see what they want." Respondent went over, saw Petrucci and Cary holding the scenery pack, and ascertained they were desiring to get out "a pair of curtains." Respondent then turned around, started toward the stage manager to "tell him the condition of these men"; got about ten feet from the pack when it fell upon him. "Cary was then under the influence of liquor." The witness Peiler testified that

Petrucchi and Cary were both handling the pack; that it fell on the respondent "because they did not have energy enough to hold it; there was no power back of them; they were drunk"; that the condition of Cary "was such that it could be noticed by any one coming in contact with him," but the witness could not say whether Cary was intoxicated at the time he commenced work at the theater, because the witness did not see Cary come in. He had, however, seen Cary employed on the stage of the Broadway Theater, prior to the day of the accident, when Cary was intoxicated. Vic. McGrath testified to seeing Cary drink beer twice that day before the show and once during the show, half an hour before the accident. He says it was plainly noticeable at 10 minutes to 8 that Cary had been drinking and was under the influence of liquor; that he had seen Leckie hire Cary for work on the Broadway stage as much as a dozen times before that when Cary was under the influence of liquor. It must be conceded that if we rigidly apply the proof to the allegations of the complaint, there is no evidence that Cary was intoxicated at the time he was hired, but he was noticeably in that condition for over an hour before the accident, during which time appellant's stage manager was present; and this does charge the appellant with keeping him employed when he was incompetent and unfit by reason of his condition. In this situation we have no reason to doubt that the court would, on proper motion, have granted the appellant all necessary relief on the ground of surprise, if such could be fairly claimed. But in view of the fact that no claim of surprise is urged; that Petrucchi, Cary, and others fully testified, denying Cary's intoxicated condition at any time during the performance, we do not feel that at this time the case should be reversed because of a variance so unsubstantial.

[4, 5] It was not only the duty of appellant to use ordinary care to employ, in the first instance, but to use like care to keep employed, competent fellow servants for respondent. If certain witnesses are to be believed, it did not do this, and the accident happened as the result. The argument of counsel of appellant that these witnesses, particularly the respondent himself, were not entitled to full credit, is quite forcible and convincing, but that is not for us. They were believed apparently, and upon their testimony a case was made sufficient to go to the jury.

3. Under "Argument III, Errors XXI and XXII," complaint is made because the court gave instructions numbered 11 and 12, which, it is said, were "prejudicially erroneous in failing to take into consideration the assumption of risk, the negligence of a fellow servant, and the proximate cause of the injury." Errors XXI and XXII assign the giving of instructions C and H, and we do not find that the court gave any instructions

numbered 11 and 12. The only instructions 11 and 12 that appear in the record were requests of appellant which were refused, and properly so, because they do not at all advise the jury that the person sought to be charged with assumption of risk must have appreciated and realized the danger. Instructions C and H, however, to which the argument is really directed, do omit all mention of assumption of risk, and instruction H does fail to categorically charge that the incompetency of Cary, by reason of intoxication, must have been the proximate cause of the injury.

[6, 7] But we do not follow the argument that these instructions "should embody these elements (assumption of risk, negligence of fellow servants, proximate cause), in order to assist the jury in determining the amount of damages," or that either instruction is wrong "because it fails to tell the jury that in arriving at the amount of damages it must take into consideration the assumption of risk and negligence of fellow servants." These things do not go to the amount of damages, but to the utter defeat of plaintiff's entire claim.

[8, 6] Moreover, assumption of risk and the negligence of fellow servants are matters of defense, unavailing if not pleaded—as they were not—unless affirmatively appearing from the plaintiff's own pleadings or proof. Some effort is made to show that assumption of risk does arise from respondent's own testimony; but it cannot be inferred from anything he said that he, at any time before going over to Cary, either knew that Cary was intoxicated or appreciated any danger from that fact; on the contrary, it does appear that when he got to the pack of scenery he then noticed Cary's condition, refused to assist on that account, and was making his way out of whatever danger there was, when the scenery fell. As to the fellow-servant doctrine, it is out of the case, for the further reason that while the respondent pleads the injury to have been due to the act of a fellow servant, it also charges that act to the negligence of appellant in furnishing a fellow servant who was incompetent from intoxication. In passing, we add that the failure of the court in instruction H to specifically charge that the incompetency of Cary, because of intoxication, must have been the proximate cause of the injury is entirely cured elsewhere in the charge, notably in instruction No. 10, offered by the appellant.

Instruction C is further attacked because it advises the jury that the employer must, in all cases, indemnify his employé for the "losses" caused by the former's want of ordinary care. Taking the instructions as a whole, we think it reasonably plain that the term "losses" was used in the sense of legal damages, and that its use did not make the instruction in question so meaningless as to confuse the jury.

[10] 4. It is further urged that the verdict is contrary to law, as in defiance of instructions 5 and 6. These instructions were to the effect that before the plaintiff could recover on his first cause of action, it must be established that the defendant in the exercise of ordinary care should have provided the stage with a stall or scenery holder to hold the scenery, and that its failure to do so was the proximate cause of the injury. It is true, as stated above, that there was no evidence to support the allegation of negligence in this regard; but the verdict is a general one, and as there was sufficient evidence to support negligence in the other particular alleged, we cannot hold the verdict to be against the law on this account.

No argument is presented in the brief to the effect that the giving of these instructions, or the giving of any instructions based upon the so-called first cause of action, was error, and in fact the particular instructions 5 and 6 were given at the request of appellant.

[11] 5. The luminous discussion under the head, "Argument VI" in appellant's brief, amounts to nothing more than to a claim that the jury should have discredited the plaintiff and his witnesses, and should have received as the truth of the matter, the narrative of events given by the witnesses for the defendant. If the case were before us upon appeal from an order granting a motion for new trial as in *Mullen v. City of Butte*, 37 Mont. 183, 95 Pac. 597, or from a judgment based upon an order of nonsuit as in *Escallier v. Great Northern Railway Co. et al.*, 46 Mont. 238, 127 Pac. 458, the consideration urged might be pertinent. As it is, we are powerless to interfere.

The other assignments of error argued in the brief are disposed of by what we have said above. We find nothing in the record to warrant a reversal. The judgment and order appealed from are therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J. concur.

On Motion for Rehearing.

The principal ground of the motion for rehearing is that, since the complaint alleged the failure of defendant to furnish competent fellow servants consisted in the fact that Cary was intoxicated "at the time of his employment," a recovery was not permissible, in the absence of evidence to show his intoxication at the time he was hired, notwithstanding the evidence that for over an hour prior to the accident, during which time the stage manager was present, Cary was kept employed in a noticeably intoxicated condition. We thought, and still think, the variance too unsubstantial to justify a reversal. Revised Codes, §§ 6585, 6593. To this it may be added that the elaborate motions for nonsuit

addressed to the trial court do not urge either a failure of proof or a variance in regard to Cary's intoxication, that the evidence on this point was presented without objection, and that under the established rule of this jurisdiction the complaint will be treated on appeal as amended so as to make the evidence proper and effective.

[12] In other words: "Where a cause is tried upon the theory that the pleadings are sufficient to admit the proof for the purpose for which it is offered, the losing party will not be heard in the appellate court for the first time to assert that there was a variance between the pleadings and the proof." *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724; *Galvin v. O'Gorman*, 40 Mont. 391, 393, 106 Pac. 887; *Archer v. Chicago, M. & St. P. Ry. Co.*, 41 Mont. 58, 71, 108 Pac. 571, 137 Am. St. Rep. 692; *Post v. Liberty*, 45 Mont. 1, 17, 121 Pac. 475; *Lackman v. Simpson*, 46 Mont. 518, 525, 129 Pac. 325; *Moss v. Goodhart*, 47 Mont. 257, 268, 131 Pac. 1071.

The motion for rehearing is denied.

BRANTLY, C. J., and HOLLOWAY, J. concur.

SMITH v. ZIMMER.

(Supreme Court of Montana. Dec. 16, 1913.)

1. HIGHWAYS (§ 198*)—SUPERVISOR OF ROAD DISTRICT—LIABILITY FOR INJURY FROM DEFECTIVE HIGHWAY.

A supervisor of a highway district in which a washout occurred, who, though promptly advised of it, provided no barrier or warning of any kind, in consequence of which plaintiff, who did not know of it, was injured, was *prima facie* liable to plaintiff for such injury.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 504-607; Dec. Dig. § 198.*]

2. WITNESSES (§ 269*)—CROSS-EXAMINATION—MATTERS BROUGHT OUT ON DIRECT.

Questions on cross-examination were properly permitted where the door was opened for them in the direct testimony of the witness.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

3. HIGHWAYS (§ 214*)—ACTION AGAINST SUPERVISOR FOR INJURIES—INSTRUCTION.

Instructions, in an action against a supervisor of a highway district for personal injury from his failure to notify of a defect, given on the theory that defendant was not liable if his failure to repair was due to lack of funds, and ignoring his duty, regardless of funds, to suitably warn the public, and, if necessary, to barricade the washout, were properly refused.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 538-540; Dec. Dig. § 214.*]

4. APPEAL AND ERROR (§ 1195*)—SUBSEQUENT APPEAL—QUESTIONS CONCLUDED—INSTRUCTIONS.

On a subsequent appeal, instructions justified by the former decision were properly given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. APPEAL AND ERROR (§ 1195*)—SUBSEQUENT APPEAL—QUESTIONS CONCLUDED—QUESTIONS FOR JURY.

Where the testimony presented a case for the jury under the decision upon a former appeal, that question was properly submitted to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4861-4865; Dec. Dig. § 1195.*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by G. W. Smith against Henry Zimmer. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 45 Mont. 282, 125 Pac. 420.

A. P. Heywood and Homer G. Murphy, both of Helena, for appellant. Walsh, Nolan & Scallon, of Helena, for respondent.

SANNER, J. The respondent, plaintiff below, while driving, on the night of October 11, 1909, upon which is known as the Elk creek road—a public highway in road district No. 1, Lewis and Clark county—was precipitated into an unguarded washout, and sustained personal injuries. To recover damages for such injuries, he brought this action against the appellant, who was supervisor of district No. 1, and also against the persons who were at that time county commissioners of Lewis and Clark county, grounding his action upon negligent failure to repair and negligent failure to warn the public of the danger. In consequence of the decision of this court upon a former review of this case (Smith v. Zimmer, 45 Mont. 282, 125 Pac. 420), the county commissioners ceased to be defendants, and the action proceeded against the supervisor alone. The trial was to the court, with a jury, who, by their verdict, awarded the respondent damages in the sum of \$2,000. Judgment upon the verdict was duly entered, and, from that judgment, as well as from an order denying appellant's motion for new trial, these appeals are prosecuted.

[1] So far as the liability of appellant is concerned, the facts disclosed by the present record do not substantially differ from those stated in the former decision by this court. Further reference to them, therefore, need not be made, save to add that the evidence shows the washout to have occurred early in June, 1909; that appellant was promptly advised of it; that he provided no barrier or warning of any kind; that the respondent did not know of the washout; and that he could not see it at the time he was injured. In the former decision we said: "Under the facts appearing in the evidence, a prima facie case of liability is made against the defendant Zimmer for failure to make the repairs by removing the obstruction, or, in case he could not do so, for failure to warn the public of the existing condition. * * * At the trial * * * the defendants may be able to show that the condi-

tions were such that, with the means at their disposal, they were unable to make the necessary repairs; * * * but even this would not excuse the omission to take suitable measures to give notice of the obstruction or to provide suitable barriers to prevent a traveler from being injured by it, if the facts show that such was the case."

Sixteen errors are assigned presenting these questions, which we answer in their order:

[2] 1. Whether two certain questions in the cross-examination of the witness Doty were properly permitted. We think they were properly permitted, because the door was opened for them in the direct testimony of this witness.

[3] 2. Whether certain instructions proposed by appellant should have been given. We think not. These instructions proceed on the theory that exoneration of the appellant would follow if his failure to repair was due to lack of funds; they ignore the fact that, under the former decision of this case, it was the appellant's duty, regardless of funds, to suitably warn the public, and, if necessary in the exercise of due care, to barricade the washout.

[4] 3. Whether certain instructions, given at the instance of respondent, were justified. We think they were justified by the former decision of this case. All of them may not have been necessary; but objection was not made upon the ground of repetition.

[5] 4. Whether the appellant's motion to direct a verdict, and his later motion for a new trial, should have been sustained. We are not favored with any argument directed specifically to the denial of these motions; but the testimony presented a case for the jury, under the former decision of this court. The record does not disclose that any imperative reason was presented to the district court for granting a new trial.

The judgment and order overruling the motion for new trial are therefore affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

MARLOWE v. MICHIGAN STOVE CO.

(Supreme Court of Montana. Dec. 18, 1913.)

1. JUSTICES OF THE PEACE (§ 160*)—NOTICE OF APPEAL—SUFFICIENCY.

The purpose of the notice of appeal from a justice's judgment is to inform the adverse party that the cause has been removed to the appellate court so that he may appear and protect his rights in the proceedings to be had therein, and hence it must convey sufficient information to enable the adverse party to know what is required of him, but it need not go further; and a notice not mentioning the amount of the judgment is sufficient.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 579-591, 658; Dec. Dig. § 160.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. JUSTICES OF THE PEACE (§ 159*)—APPEAL— UNDERTAKING—SUFFICIENCY.

Under Rev. Codes, § 7124, prescribing the amount and conditions of an undertaking on appeal from a justice's judgment, an undertaking for twice the amount of the judgment, including costs, stipulating for payment of the judgment and costs upon a withdrawal or dismissal of the appeal, and for payment of any judgment and costs that may be recovered against defendant in the action in the district court, was sufficient, and was not rendered invalid because containing other conditions than those prescribed by the statute, but not affecting the liability of the sureties under the conditions prescribed.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.*]

3. JUSTICES OF THE PEACE (§ 159*)—APPEAL— UNDERTAKING—DISMISSAL.

Under Rev. Codes, § 7128, providing that no appeal from a justice's court shall be dismissed for insufficiency of the appeal undertaking or for any defect therein, if a sufficient undertaking is filed in the district court at or before the hearing of the motion to dismiss the appeal and is approved by the district judge, an original undertaking to pay all costs awarded against appellant on appeal or on a withdrawal or dismissal of the appeal to an amount double the judgment and costs, followed by an abortive clause not sufficiently definite and explicit in terms to impose any obligation upon the sureties, was not wholly void, but was good as an undertaking to pay costs of the appeal, so that its insufficiency did not prevent the preservation of an appeal by the filing of a sufficient substitute undertaking.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 544, 550-578; Dec. Dig. § 159.*]

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Action by Thomas N. Marlowe against the Michigan Stove Company. Judgment in justice's court for plaintiff, and, from an order of the district court dismissing its appeal, defendant appeals. Reversed and remanded.

D. F. McMartin, of Missoula, and C. W. Wiley, of Helena, for appellant. W. W. Patterson, of Helena, and Thos. N. Marlowe, of Missoula, for respondent.

BRANTLY, C. J. This action was commenced in the justice's court of Hellgate township, Missoula county, on March 7, 1912, to recover the sum of \$75, alleged to be due plaintiff for services rendered to defendant at his special instance and request, as an attorney at law. On November 15th, plaintiff was awarded judgment for \$44.50, with costs. The defendant having given notice of appeal to the district court and filed his undertaking with the justice, the record was lodged with the clerk of the district court on December 9th. Counsel for plaintiff thereupon filed a motion to dismiss the appeal on the grounds (1) that the notice of appeal was insufficient, and (2) that the undertaking was insufficient. To obviate the objection to the undertaking, the defendant, on January 11, 1913, and prior to the submission of the motion, filed a new undertaking, approved by

one of the judges of the district court. The motion was thereafter heard and sustained, and on February 8, 1913, formal judgment of dismissal was entered. The defendant has appealed.

[1] It does not appear upon which ground of the motion the court based its action. If it was based upon the first ground, it was error. The purpose of the notice is to give to the adverse party information of the fact that the cause has been removed to the appellate court, so that he may appear and protect his rights in the further proceedings to be had therein. *State ex rel. Rosenstein v. District Court*, 41 Mont. 100, 108 Pac. 580, 21 Ann. Cas. 1307; *Davidson v. O'Donnell*, 41 Mont. 308, 110 Pac. 645; *Jenkins v. Carroll*, 42 Mont. 302, 112 Pac. 1064; *Valadon v. Lohman*, 46 Mont. 144, 127 Pac. 88. This being its purpose, obviously it must convey to the adverse party sufficient information to enable him to know what is required of him. It need not go further. The notice in this case is almost identical in form and substance with that considered in *Valadon v. Lohman*, supra; and, while it does not mention the amount of the judgment, there can be no doubt that it served to give to plaintiff all the information it was necessary for him to have.

[2, 3] Section 7128 of the Revised Codes provides: "No appeal shall be dismissed for insufficiency of the undertaking thereon, or for any defect or irregularity therein, if a good and sufficient undertaking be filed in the district court at or before the hearing of the motion to dismiss the appeal, which undertaking must be approved by the district judge." While the second undertaking is not a model in form, it is in twice the amount of the judgment, including costs, and stipulates for payment of the judgment and costs upon a withdrawal or dismissal of the appeal, or the amount of any judgment and all costs that may be recovered against the defendant in the action in the district court. This meets all the requirements of the statute prescribing the amount and conditions of such an undertaking. Rev. Codes, § 7124. It is not rendered invalid by reason of the fact, as is the case here, that it contains other conditions than those prescribed by the statute, but which do not in any wise affect the liability of the sureties under the conditions prescribed. Section 7116, relating to dismissal of appeals by the Supreme Court, contains a provision substantially the same as section 7128, supra. This provision was considered and construed by this court in *Pirrie v. Moule*, 33 Mont. 1, 81 Pac. 390. It was held that, when the original undertaking on appeal is void, the filing of the substituted undertaking, though approved as therein required, does not preserve the appeal; the purpose of the provision being to preserve the appeal only when the undertaking has not wholly failed to meet the requirements of section

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

7100 et seq., prescribing the mode of taking appeals to the Supreme Court. Since the reason for the enactment of both provisions is the same, the construction given to the former must, we think, be given to the latter also. Whether therefore the order of dismissal here can be sustained on the second ground of the motion depends upon a determination of the question whether the first undertaking was void for all purposes or was only insufficient in the sense that it did not meet all the requirements of section 7124.

Aside from the formal recitals, the undertaking consists of two paragraphs. In the first the sureties undertake and promise that "the appellant will pay all costs which may be awarded against him on appeal or on a withdrawal or dismissal thereof, not exceeding \$117.80," the sum so specified being twice the amount of the judgment and costs. The second paragraph is as follows: "And, whereas, the appellant is desirous of appealing said action and staying the execution of said judgment, jointly and severally undertake and promise in the further sum of \$117.80, said sum being the amount of double the amount of said judgment so appealed from and costs; that if said judgment appealed from be affirmed or the appeal dismissed or withdrawn, or if judgment be recovered against him in the said action in the district court, not exceeding the sum of \$117.80." It is apparent that the person who drew this instrument proceeded upon the assumption that it was necessary to make separate provisions, one to secure the payment of the costs, as distinguished from the judgment proper, and one to secure payment of the judgment itself. It must be conceded that the second clause is wholly abortive, because its terms are not sufficiently definite and explicit to impose upon the sureties any obligation to pay any amount upon any contingency to any person, though it indicates a purpose to bind them to pay the judgment upon the happening of any of the contingencies prescribed by the statute. The first clause, however, contains a specific promise to pay an ascertainable amount upon the happening of any one of the contingencies prescribed, and is not wholly abortive because it fails to name the plaintiff as the obligee. The obligation assumed could not be discharged otherwise than by payment to the plaintiff of the costs awarded on the appeal, or on a withdrawal or a dismissal thereof. For illustration, if a new undertaking had not been substituted, and after a final disposition of the action in favor of plaintiff by trial, or withdrawal or dismissal of the appeal, in an action brought against the sureties to recover the amount of the judgment and costs, they would not be permitted to say that they had not bound themselves to pay the costs. The undertaking was therefore good as an undertaking to pay costs of

the appeal, and for that reason is not wholly void.

The judgment is therefore reversed, and the cause remanded for further proceedings. Reversed and remanded.

HOLLOWAY and SANNER, JJ., concur.

BARNES v. SMITH et al.

(Supreme Court of Montana. Dec. 12, 1913.)

1. CORPORATIONS (§ 36*) — EXISTENCE — CONTINUANCE.

Under the direct provisions of Rev. Codes, § 3905, a corporation once lawfully organized continues to exist until it is dissolved by the expiration of the time limited by its charter, by a judgment of dissolution, or by act of the legislative assembly.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 104; Dec. Dig. § 36.*]

2. CORPORATIONS (§ 182*) — OWNERSHIP OF STOCK — EFFECT.

The acquisition of all the capital stock of a corporation does not vest the owner with the legal title to the corporate property.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

3. CORPORATIONS (§ 182*) — CORPORATE ENTITY — ESTOPPEL TO RELY UPON.

While, under the direct provisions of Rev. Codes, § 3892, the legal capacity of a corporation cannot be inquired into collaterally at the instance of a private citizen in a controversy between him and it, yet as section 3833 requires corporate powers to be exercised by a board of not less than 3 nor more than 13 directors elected from the stockholders, one who owned all of the capital stock of a corporation, but acted through a dummy board of directors, cannot, after having induced the directors to sign a note as surety for the corporation, and transferred the corporate stock to a third person with an agreement that he would save the corporation harmless from all of its debts, take up the note of the corporation and recover against the directors as sureties, for the courts will not recognize the corporate entity, as distinguished from the stockholders, when it is a refuge to conceal fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686-690; Dec. Dig. § 182.*]

Appeal from District Court, Fergus County; E. K. Cheadle, Judge.

Action by John P. Barnes against D. F. Smith and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Edward C. Russel, of Lewistown, for appellant. Belden & De Kalb, of Lewistown, and H. G. & S. H. McIntire, of Helena, for respondents.

BRANTLY, C. J. Action by the plaintiff upon a promissory note for \$5,000, payable on demand and executed and delivered by the Judith Basin Milling Company (hereafter referred to as "the company") to the Empire Bank & Trust Company, of Lewistown, Mont., on March 6, 1911, and thereafter assigned to the plaintiff. Prior to the execution of the note to the bank, the defendants indorsed it as guarantors, waiving presentment, demand,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

protest, and notice. The complaint is in the usual form, alleging demand upon the Milling Company and the defendants, and their failure to make payment. The defendants, admitting that they had indorsed the note and that they have not paid it, deny generally all the allegations of the complaint. They then allege as a special defense substantially the following: That at the times mentioned in the complaint the plaintiff was the owner of the entire capital stock of the company; that on March 6, 1911, they were in charge of the business and affairs of the company, at the request and with the consent of the plaintiff, under an agreement to purchase from him the capital stock thereof; that it became necessary for the company to borrow the sum of money for which the note was executed; that they guaranteed the payment thereof as accommodation indorsers solely for the benefit of the company and at its request, receiving no consideration whatever therefor; that the sum received thereon was used by the company; that the agreement between the plaintiff and the defendants was not carried out, but that on August 26, 1911, the plaintiff sold the entire capital stock to one Charles Borgeson; and that as part of the agreement of sale to Borgeson, and in consideration therefor in part, the plaintiff assumed and promised to pay the existing debts of the company, including the promissory note which is the subject of this action. The reply contains statutory denials of all these allegations, except that it admits, by not denying, that the plaintiff at the times mentioned was the owner of all the capital stock of the company. The trial was to the court without a jury. At the close of plaintiff's evidence the defendants moved the court to direct a nonsuit, for that no cause of action was disclosed by the evidence: (1) Because it appeared that the plaintiff was the owner of the entire capital stock of the company, and therefore that the debt represented by the note was his individual debt; and (2) because under his contract of sale to Borgeson he agreed to assume and did assume all the debts and liabilities of the company. The court reserved a decision of the motion. After the defendants had introduced their evidence, the court sustained the motion and directed judgment in their favor. Plaintiff has appealed.

The evidence discloses the following: The note was executed to the bank for money borrowed for the use of the company, and was used by it. At that time the defendants were ostensibly directors of the company, and the defendant McCullough was acting as its president. On August 26, 1911, the plaintiff sold the stock to Borgeson, the sale being witnessed by a writing which, after stating that the plaintiff is the owner of all the capital stock of the company and reciting the consideration paid by Borgeson, contains this stipulation: "Now, therefore, in consideration of the

premises and of the purchase of said capital stock of the said party of the first part by said party of the second part upon said terms, the said party of the first part, for himself, his heirs, and administrators, does hereby agree to and with the said party of the second part that upon such sale he will turn over to said party of the second part all of the capital stock of the said Judith Basin Milling Company, free and clear of all incumbrances of every kind soever; that he will save the said Judith Basin Milling Company harmless from any debts, suits, judgments, liabilities, or obligations of any kind soever, save as hereinafter specified, incurred by it or by the said party of the first part, prior to the transfer of said capital stock by the said party of the first part to said party of the second part, including taxes of every kind whatsoever for the year 1911, and said party of the second part shall have immediate possession of all premises." Other recitals in the agreement show that the saving clause in this stipulation has no reference to the note due the bank. On August 28th plaintiff paid the bank the amount of the note. It was thereupon indorsed to him without recourse. With reference to this transaction the plaintiff testified on his cross-examination, as follows: "Q. Mr. Barnes, you say you bought this note that has just been shown you? A. Yes, sir. Q. What was the purpose of your buying that note? A. Well, it was against the Milling Company, and when I sold the mill I promised Mr. Borgeson, the man I sold to, that I wouldn't allow any incumbrance to come against him or his interest, and I had a reason for buying the note otherwise. I thought probably it was due the bank. I was interested in the bank, and I paid them the money and took the note, with the risk of ever getting it out of Mr. Smith. I see he had indorsed the note as security on it, and he appeared to be pretty energetic, and I thought probably [I] might catch him some time and get the money out of him."

It does not appear that the plaintiff was at any time a director of the company, nor, if there were others besides the defendants, how many and who they were; but it does appear that at the time the debt to the bank was contracted the plaintiff was the owner of the entire capital stock of the company, and that at the time the sale was made to Borgeson he was in control of all of its property. It also appears by necessary inference that the defendants were not qualified to act as directors, even by nominal ownership of stock. It will be noted, further, that the plaintiff agreed to deliver to Borgeson the immediate possession of the property belonging to the company. It must therefore follow, as a necessary conclusion from the facts thus disclosed and the inferences justified by them, that the defendants, though acting as ostensible directors, were in fact mere agents

of the plaintiff, and were conducting the business of the company for his sole benefit. In brief, the business, whatever its extent, was being conducted in the name of the company, but was, in the ultimate analysis of the situation the business of plaintiff.

[1-3] What are the rights of the parties in the premises? Counsel for the plaintiff cites many authorities which announce the rule that the stockholders are not liable for the debts of the corporation and that the courts will not ignore its existence and entity, but will recognize and preserve it, even though the stock is all owned by one person. In most instances there is no doubt that this rule aids the purpose of the Legislature in authorizing the creation of corporations, particularly industrial corporations, such as is the company here, viz., to encourage trade and industry by enabling natural persons to make profitable investment by availing themselves of the skill, experience, and personal fitness of others, without incurring personal liability for the obligations incurred in the management of the business of the corporation. So, after a corporation has been once lawfully organized, it continues to exist until its life expires by limitation, or it has been dissolved by one of the modes prescribed by the statute. Rev. Codes, §§ 3825, 3905; *Merges v. Altenbrand*, 45 Mont. 355, 123 Pac. 21; *Dally v. Marshall*, 47 Mont. 377, 133 Pac. 681. Its character, as such, cannot be inquired into collaterally at the instance of a private citizen in a controversy between him and it. Its legal capacity can be brought in question by the state only through its proper officer (Rev. Codes, § 3892), and for one of the causes prescribed by the statute (Id. § 6944). The rule is especially applicable to cases in which creditors are seeking to enforce their claims against the corporation, or to hold the directors liable for their failure to file their annual reports, or the like, when, though one director is the owner of all the capital stock, he has continued the business in the corporate name. The acquisition of all of the capital stock does not vest the owner with title to the corporate property, so as to enable him to maintain an action in replevin for it. *Button v. Hoffman*, 61 Wis. 21, 20 N. W. 667, 50 Am. Rep. 181. The ownership of the stock carries with it only an equitable interest in the property. *Wilde v. Jenkins*, 4 Paige (N. Y.) 481. Where one person, owning all the stock, conducts the business in the corporate name, those who deal with the corporation can hold it liable for debts incurred in its name. *Newton Mfg. Co. v. White*, 42 Ga. 148; *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335. In *Louisville Gas Co. v. Kaufman, Straus & Co.*, 105 Ky. 181, 48 S. W. 484, the Court of Appeals of Kentucky held that, though one corporation held all the capital stock of another and was conducting the business of the latter through its own officers and direc-

tors, it was not liable for the negligence of the employes of the latter. The text-writers concur in holding that this is the general rule. *Cook on Corporations* (6th Ed.) § 663; *Thompson on Corporations* (2d Ed.) § 6498. Even so, there are exceptional cases in which the courts refuse to recognize the corporate entity, as distinguished from the stockholders, if the refusal of such recognition is necessary in order to get at the truth. This statement applies especially to cases in which the corporation is used as a cloak for fraud, or to enable the owner of the stock to evade personal liability or to performance of a public duty. It has application, also, to cases in which circuity of action would otherwise be necessary to reach an adjustment of the rights of the parties. It was said by the Court of Appeals of New York, in *Seymour v. S. F. C. Association*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859: "The abstraction of corporate capacity will never be allowed to bar out and pervert the real and obvious truth." And again, in *Anthony v. American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23: "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence, where it only serves to hide or distort the truth." In this latter case the facts were that the Glucose Company had been formed for the purpose of taking over all the property and business of several other corporations, upon an agreement between the incorporators of all of them that payment for the transfer should be made by apportioning to the original stockholders the whole of the stock of the new corporation, except that reserved for use of the treasury. Stockholders of one of the constituent corporations, who had not received their stock, brought an action against the new corporation to compel its delivery to them. The court sustained the action. The extent to which the courts will ignore the corporate entity in order to do concrete justice, when the circumstances require it, is illustrated by the following cases: *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1083, 48 L. R. A. 732, 78 Am. St. Rep. 707; *Andres v. Morgan*, 62 Ohio St. 236, 56 N. E. 875, 78 Am. St. Rep. 712; *Day v. Postal Telegraph Co.*, 66 Md. 354, 7 Atl. 608; *Union Traction Co. v. City of Chicago*, 199 Ill. 579, 65 N. E. 470.

Under section 3833 of the Revised Codes, the powers of a corporation must be exercised by a board of not less than 3 nor more than 13 directors, to be elected from among the stockholders, or, where there is no capital stock, then from the members of the corporation. "Directors of corporations for profit must be holders of stock therein in an amount to be fixed by the by-laws," etc. Section 3833. Manifestly, the Legislature, in making this requirement, intended that the directors should be bona fide owners of stock; otherwise, the aggregate body would be such only in name, and it would be possible for a single person, through his own employes and

agents acting as his "dummies," to conduct his individual business under the guise of a corporation, with all of the attendant privileges and immunities, and thus escape personal liability altogether. The Legislature did not intend this situation to be possible. The result of the requirement is that, when the capital stock passes into the hands of a single person, the entity of the corporation, except so far as it is necessary to protect the rights of strangers, who deal with it through its ostensible officers and agents, is entirely in abeyance, and its functions for the time being cease. So it is held by the current of authority: *Nat. Bank of Gadsden v. Winchester*, 119 Ala. 168, 24 South. 351, 72 Am. St. Rep. 804; *Louisville Banking Co. v. Elsenman*, supra; *Louisville Gas Co. v. Kaufman, Straus & Co.*, supra; *Thompson on Corporations*, § 6498. Strangers dealing with it while this condition exists cannot know of its internal affairs, and those who have made use of it for their own purposes, though they act in good faith, are estopped to deny its capacity or that they are its officers. *Daily v. Marshall*, supra. In controversies growing out of dealings of the ostensible officers with the sole owner of the stock, however, though he deals in the name of the corporation, we think the corporate entity should be ignored, and that the contract liabilities of the company to them should be treated as those of the owner of the stock.

If the bank were seeking recovery on the note which is the subject of this suit, we think it should be treated as a stranger to the corporation; but, so far as concerns the rights of the plaintiff and the defendants inter sese, the plaintiff should be deemed the corporation itself, and as occupying exactly the relation to the defendants as did the corporation when they indorsed the note. And this is but just, because the company could not have borrowed money without the plaintiff's consent, nor could the defendants have become parties to the contract, except as his agents. The district court was clearly right in looking at the substance of the transaction, rather than its technical aspects, and adjudging the rights of the parties accordingly.

Counsel for the plaintiff has devoted considerable space in his brief to a discussion of the distinction between a contract of indemnity and one of suretyship and guaranty, and insists that, since the indemnity clause in the contract of sale runs to Borgeson only, only he or some one claiming under him can enforce it. The disposition we have already made of the case renders it unnecessary to consider the nature of this feature of the contract. Conceding it to be merely an agreement to indemnify Borgeson, it indemnifies him against a claim which the plaintiff cannot enforce against the company in any event, because the payment to the bank was

the discharge of an indebtedness which, so far as concerns the plaintiff, was his own. The judgment is affirmed.
Affirmed.

HOLLOWAY and SANNER, JJ., concur.

STATE ex rel. BULLARD, Atty. Gen., v. JONES.

(Supreme Court of Arizona. Jan. 2, 1914.)

1. COURTS (§ 472*)—SUPREME COURT—ORIGINAL JURISDICTION.

Under Const. art. 6, § 4, giving the Supreme Court original jurisdiction in habeas corpus, quo warranto, and mandamus as to all state officers, and section 6 giving superior courts original jurisdiction in all cases and proceedings in which jurisdiction has not been by law vested exclusively in some other court and specifically giving such courts and the judges thereof power to issue writs of mandamus, quo warranto, review, certiorari, and prohibition, the Supreme Court's jurisdiction in the cases mentioned in section 4 is not exclusive, and the superior courts have concurrent jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 442, 451, 459, 465, 619, 1199-1202, 1204-1224, 1247-1259; Dec. Dig. § 472.*]

2. COURTS (§ 472*)—SUPREME COURT—ORIGINAL JURISDICTION.

Under Const. art. 6, § 4, giving the Supreme Court original jurisdiction in habeas corpus, quo warranto, and mandamus as to all state officers, and section 6 giving superior courts original jurisdiction in all cases and proceedings in which jurisdiction has not been by law vested exclusively in some other court, if Act April 1, 1913 (Laws 1913, c. 37), providing that an action may be brought by the Attorney General in the Supreme Court where by the Constitution that court has jurisdiction or otherwise in the superior court against any person, association, or corporation who usurps, intrudes into, or unlawfully holds or exercises any public office or franchise, was intended to make the Supreme Court's jurisdiction, where it has jurisdiction, exclusive, it is invalid.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 442, 451, 459, 465, 619, 1199-1202, 1204-1224, 1247-1259; Dec. Dig. § 472.*]

3. COURTS (§ 207*)—SUPREME COURT—ORIGINAL JURISDICTION.

In cases such as quo warranto against state officers, in which the superior and Supreme Courts have concurrent jurisdiction, the Supreme Court will decline to take original jurisdiction unless the complaint shows special reasons why it should do so, and the complaint may be filed only after obtaining leave of that court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

4. OFFICERS (§ 28*)—DISQUALIFICATION—STATUTORY PROVISIONS—"PUBLIC SERVICE CORPORATION."

Laws 1912, c. 90, § 1, provides that such act applies to public service corporations therein described. Section 2 declares every common carrier, pipe line, gas, electrical, telephone, and telegraph corporation, and every wharfinger and warehouseman to be a public service corporation and subject to the jurisdiction, control, and regulation of the Corporation Commission. Section 7 provides that no person in the employ of or holding any official relation to any corporation or person subject in whole or in part to regulation by the Commission, and no person

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

owning stock or bonds or pecuniarily interested in any such corporation, shall hold the office of commissioner, and that any person becoming the owner of stocks or bonds or becoming pecuniarily interested otherwise than voluntarily shall within a reasonable time divest himself of such ownership or interest, failing to do which his office shall become vacant. Section 31 gives the Commission power and jurisdiction to supervise and regulate every public service corporation and to do all things necessary and convenient in the exercise of such power and jurisdiction. *Held*, that the inhibition of section 7 against a commissioner owning stock or bonds or being interested pecuniarily in a corporation relates only to public service corporations, which the Commission is given power to supervise and regulate; and hence the ownership of stock in a holding corporation holding all the stock of two insurance companies did not disqualify a commissioner or render his office vacant.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 28.*]

5. OFFICERS (§ 28*) — DISQUALIFICATION — STATUTORY PROVISIONS.

Const. art. 14, § 8, providing that no domestic or foreign corporation shall do business in the state without filing its articles of incorporation or a certified copy thereof with the Corporation Commission, section 17 providing that all domestic and foreign corporations shall make reports to the Corporation Commission of the status and business or condition of such corporation as may be prescribed by law, and article 15, § 4, providing that the Corporation Commission shall have the power to inspect and investigate the property, books, papers, business methods, and affairs of any corporation whose stock shall be for sale to the public, do not make corporations other than public service corporations subject in whole or in part to regulation by the Commission within the meaning of Laws 1912, c. 90, § 7, prohibiting commissioners owning stocks or bonds of any corporation subject in whole or in part to regulation by the Commission.

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 28.*]

6. CONSTITUTIONAL LAW (§ 29*) — SELF-EXECUTING PROVISIONS.

Const. art. 14, § 16, providing that the records, books, and files of all public service corporations, state banks, building and loan associations, trust, insurance, and guaranty companies shall be liable and subject to the full visitatorial and inquisitorial powers of the state, is not self-executing, as it does not confer such visitatorial and inquisitorial powers on any particular person or body.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 32; Dec. Dig. § 29.*]

7. OFFICERS (§ 28*) — DISQUALIFICATION — STATUTORY PROVISIONS — "PECUNIARILY INTERESTED."

Laws 1912, c. 90, § 7, providing that no person owning stocks or bonds of any corporation subject in whole or in part to regulation by the Commission or pecuniarily interested therein shall be appointed to the office of commissioner and that any such person becoming such owner or so interested shall within a reasonable time divest himself of such ownership or interest, failing to do which his office shall become vacant, does not apply to the ownership of stocks or bonds in insurance companies, though by Laws 1913, c. 94, such companies are made subject to the regulation and supervision of the Corporation Commission, especially as a policy holder would be "pecuniarily interested," while section 1 of chapter 94 provides that no member of the Commission shall be directly or indirectly interested in any insurance

corporation "except as an ordinary policy holder."

[Ed. Note.—For other cases, see Officers, Dec. Dig. § 28.*]

For other definitions, see Words and Phrases, vol. 6, p. 5258.]

8. OFFICERS (§ 55*) — DISQUALIFICATION — STATUTORY PROVISIONS.

Under Laws 1913, c. 94, relative to the regulation and supervision of insurance companies by the Corporation Commission, section 1 of which provides that no member of the Commission shall be directly or indirectly interested in any insurance corporation except as an ordinary policy holder, the ownership of stock in an insurance corporation by a commissioner does not ipso facto cause a vacancy in his office justifying the court in quo warranto declaring the office vacant, since the statute prescribes no such penalty.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 76-84; Dec. Dig. § 55.*]

Original proceeding in quo warranto by the State, on relation of George Purdy Bullard, Attorney General, against F. A. Jones. Demurrer to the complaint sustained, and complaint dismissed.

G. P. Bullard, Atty. Gen., Leslie C. Hardy, Asst. Atty. Gen., and William M. Seabury, for plaintiff. Stoneman & Ling, of Phoenix, for defendant.

ROSS, J. This is a proceeding in the nature of quo warranto and has for its purpose the ousting of defendant from the office of Corporation Commissioner of the state of Arizona. The proceeding was instituted by the Attorney General, who "complains of the defendant, upon the verified complaint of Harry A. Davis, a citizen and duly qualified elector of the state of Arizona."

The charge laid against defendant Jones, briefly stated, is as follows: That on or about February 18, 1911, he became the owner by purchase, paying therefor \$750, of 50 shares of the capital stock of the Merchants' & Insurers' Reporting Company and ever since has been and now is such owner of said 50 shares, upon which he has received dividends or been credited upon the books of the company with dividends. That said Merchants' & Insurers' Reporting Company is a California corporation and is the holding company of all the capital stock, consisting of 2,000 shares, par value per share of \$100, of the Bankers' Fire Insurance Company and all of the capital stock, consisting of 1,000 shares, par value \$100 each, of the Phoenix Fire Underwriters, except four shares of each of said last-mentioned companies. The last two corporations are Arizona companies and were organized on or about December 3, 1909. That the stock of said two corporations constitutes approximately all of the assets of the Merchants' & Insurers' Reporting Company, and that the profits derived from the business of said two insurance companies constitutes the only source of revenue of said Merchants' &

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—35

Insurers' Reporting Company and are paid to the latter for the benefit of its stockholders. That in February or March, 1912, defendant Jones became and continuously thereafter remained, until on or about April 6, 1913, the president and a director and stockholder of said Bankers' Fire Insurance Company and Phoenix Fire Underwriters. That on or about June 16, 1913, defendant was duly appointed by the Merchants' & Insurers' Reporting Company its true and lawful attorney with full power and authority to perform every act and thing which it could do, and that after said date the defendant assumed to and did act for and on behalf of said company and by reason thereof was in the employ and held an official relation to said company. That on or about October 4, 1913, the Corporation Commission, the defendant acting as a member thereof, made an order directing the Bankers' Fire Insurance Company and Phoenix Fire Underwriters to submit to it all their records, books, files, notes, accounts, and vouchers, wherever kept, relating to the business of the company, for audit, examination, and investigation, until and including October 16, 1913. That on the last-mentioned date the Corporation Commissioners, defendant acting therein, made an order refusing an extension of time to said corporations in which to submit their reports as required by the order of October 4, 1913. That on October 16, 1913, defendant voluntarily disqualified himself from acting in his capacity as a Corporation Commissioner in the investigation of the affairs of said insurance companies and demanded that his appearance be entered in said proceeding as representing his own interests as a stockholder in the Merchants' & Insurers' Reporting Company. That said Merchants' & Insurers' Reporting Company, Bankers' Fire Insurance Company, and Phoenix Fire Underwriters were severally, since May 28, 1912, subject in whole or in part to regulation by the Corporation Commission, and that defendant has owned and still owns stock in the said Merchants' & Insurers' Reporting Company and is peculiarly interested therein. That defendant accepted employment of the Bankers' Fire Insurance Company and Phoenix Fire Underwriters and was the president of each and a director therein and a stockholder thereof until April 6, 1913, and that he is still peculiarly interested in said corporations. In consequence of which it is alleged that the defendant has violated the provisions of section 7 of chapter 90 of Laws of 1912 of the state of Arizona, and that by reason thereof has disqualified himself from holding the office of Corporation Commissioner and asks that he be ousted therefrom and his office declared vacant. In short, the defendant Corporation Commissioner is charged with being peculiarly interested in, and in the employ of, and holding an official relation

to the three named insurance companies; said companies being subject in whole or in part to regulation by the Corporation Commission.

[1-3] Before taking up the case on its merits, we wish to say that, upon the considerations hereinafter set forth, we hesitated to take jurisdiction for any purpose. Upon reflection, it occurred to us that by taking jurisdiction we would be enabled to state the attitude of this court and the law governing its actions when invoked to take original jurisdiction in this and like proceedings.

Section 4, art. 6, of the Constitution, invests this court with original jurisdiction in habeas corpus, quo warranto, and mandamus as to all state officers. Section 6, *Id.*, invests the superior courts with original jurisdiction in all cases and proceedings in which jurisdiction has not been by law vested exclusively in some other court and specifically vests the superior courts and judges thereof with power to issue writs of mandamus, quo warranto, review, certiorari, and prohibition. Under similar constitutional provisions it has been held in Washington and New Mexico that the Supreme Court and the superior courts have concurrent original jurisdiction of proceedings in mandamus, quo warranto, and habeas corpus as to state officers. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067; *State ex rel. Owens v. Van Stone* (N. M.) 121 Pac. 611. The grant of original jurisdiction by the Constitution to the Supreme Court of such proceedings is not exclusive. "On the other hand," as was said in the last case cited above, "the grant of original jurisdiction to the district courts (superior courts) is general and comprehensive and extends to every kind and form of controversy not excepted in the Constitution, and includes specifically quo warranto." Under the Constitution this court has "original and exclusive jurisdiction" in but one case, and that is in "causes between counties concerning disputed boundaries and surveys thereof, or concerning claims of one county against another. Such trials shall be to the court without a jury." Section 4, art. 6, Constitution.

In section 1, c. 8, Civil and Criminal Procedure, title "Quo Warranto," it is provided: "An action may be brought by the Attorney General in the name of the state upon his relation, upon his own information, or upon the verified complaint of any person, in the Supreme Court, in cases where, by the Constitution of this state, that court has jurisdiction, or otherwise in the superior court of the county having jurisdiction against any person, association or corporation, who usurps, intrudes into or who unlawfully holds or exercises any public office or any franchise within this state, and he shall bring such action whenever he has reason to believe that any such office or franchise is being usurped, intruded into or unlawfully held

or exercised." S. D. No. 127 (chapter 37) Second Special Session of Legislature of Arizona, approved April 1, 1913, not yet officially published. If it was the purpose of the Legislature by this section to make the jurisdiction of the Supreme Court exclusive where by the Constitution it has jurisdiction concurrent with the superior court, as in quo warranto, it exceeded its power. The Attorney General may institute such proceeding in either court, as no act of the Legislature can make the jurisdiction of either exclusive nor limit the right to proceed in either.

While by the Constitution the Supreme Court is given original jurisdiction in certain named cases, it is essentially an appellate court, a court of last resort and not of first resort. That the superior courts have been given concurrent jurisdiction in all these matters (except the one case mentioned above) is very persuasive that its purpose in so doing was to afford the litigant an opportunity to bring his action first in a court essentially one of original jurisdiction, where provision is made by law for a full and complete trial, where a jury may be had, if demanded, and issues tried upon oral testimony—a court in the immediate vicinage of the litigants, fully equipped for a complete exercise of its jurisdiction. The justice and propriety of such an arrangement is recognized by all of the Constitutions of the Union; the theory and practice being that a litigant dissatisfied with the action of the court of first instance may appeal to the Supreme Court, "a court disassociated from all connection with the actual trial and having the time, means, and opportunity for mature consideration of the same."

Section 23, art. 2, Constitution, provides that "the right of trial by jury shall remain inviolate. * * *"

Bailey on Habeas Corpus, § 328, vol. 2, p. 1277, says: "At common law quite generally, issues of fact arising in quo warranto proceedings were triable by jury whether commenced in the Supreme Court under its jurisdiction or in a subordinate court. The Supreme Court may impanel a jury or send the issue to a subordinate court, there to be heard before a jury; the order directing the evidence and proceedings be returned to the superior court for final determination. The issues in such an action are legal issues, and the Codes or statutes of the states have, as quite generally held, made no change in this respect, and hence the right of trial by jury is a matter of right, guaranteed by the Constitutions of the several states."

This question is not before us, and we only suggest it to enforce the reason for first beginning the action in the trial court. Bearing on this point, we quote from *State v. Van Stone*, supra, at page 613 of 121 Pac.: "Another consideration advanced in cases of this kind by many courts is that a court of last

resort should not entertain the jurisdiction unless the case is publici juris; that is, a case which affects the sovereignty of the state, its franchises or prerogatives, or the liberties of its people. Indeed, this doctrine has been so far extended in some of the states as to amount to a positive limitation upon the jurisdiction. It is said in some of those cases that, while the grant of jurisdiction is in general terms, the jurisdiction is not a general jurisdiction in all cases, but by reason of the nature of a court of last resort, and its proper place in the structure of the state government, the jurisdiction is limited to questions in which the state at large is interested as to its prerogatives or franchises or the liberties of its people. In other cases an exception is ingrafted upon this limitation in favor of the jurisdiction in cases of great emergency, or where a refusal to entertain the jurisdiction would amount to a denial of justice. *Homesteaders v. McCombs*, 24 Okl. 201, 103 Pac. 691, 20 Ann. Cas. 181 [38 L. R. A. (N. S.) 1000; *State v. Cobb*, 24 Okl. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639; *People v. District Court*, 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768; *People v. Chicago*, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833."

In cases in which the superior courts have concurrent jurisdiction with this court, we shall decline to take original jurisdiction, unless the complaint shows special reasons why we should do so, and the complaint may be filed only after first obtaining leave of this court. Aside from other considerations, the volume of appellate business in this court would seem to require such a rule.

[4] It is the contention of defendant, and he raises the point by demurrer, that the provisions of section 7 of chapter 90, Laws of 1912, have no application to the state of facts disclosed by the complaint. Section 7 reads as follows: "Each commissioner and each person appointed to a civil executive office of the Commission shall, before entering upon the duties of his office, take and subscribe the constitutional oath of office. Each commissioner shall be a qualified elector of this state, and no person in the employ of or holding any official relation to any corporation or person, which said corporation or person is subject in whole or in part to regulation by the Commission, and no person owning stocks or bonds of any such corporation or who is in any manner peculiarly interested therein shall be appointed to or hold the office of commissioner or be appointed or employed by the Commission: Provided, that if any such person shall become the owner of such stocks, or bonds, or become peculiarly interested in such corporation otherwise than voluntarily, he shall within a reasonable time divest himself of such ownership or interest; failing to do so, his office or employment shall become vacant."

In order to find out the correct and full meaning of this section, it is essential that it be read in connection with all the other provisions of chapter 90. This chapter is a long one, consisting of 87 sections, of which section 7 is only a small part. The title of the chapter is "An act relating to public service corporations, providing for the regulation of the same, fixing penalties for the violation thereof, and repealing certain acts; with an emergency clause." This title makes no reference to the Corporation Commission, its organization, powers, or duties, although these matters are treated of in the body of the law. The first section of the chapter reads as follows: "This act shall be known as the 'Public Service Corporation Act,' and shall apply to the public service corporations herein described and to the Commission herein referred to." Section 2 defines certain words and phrases in common use in connection with public utilities and particularly names and declares "every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation," wharfinger and "warehouseman, * * * to be a public service corporation and to be subject to the jurisdiction, control, and regulation of the Commission and to the provisions of this act." Sections 3, 4, 5, and 6 provide for the election and filling vacancies in office of commissioners, for their legal adviser and necessary corps of assistants. Sections 8, 9, 10, 11, and 12 provide where and when the Corporation Commission may hold its meetings, for a quorum, for their salaries, and compensation of their employes and general expenses of the Commission and reports of their transactions and proceedings to the Governor, each fiscal year. None of the matters in sections 3 to 12, inclusive, is expressed in the title to chapter 90, and whether they are "properly connected" with the subject "expressed in the title" may be seriously questioned.

It may be that those provisions are repugnant to section 13, art. 4, Constitution, reading as follows: "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title"—but we deem it unnecessary to determine that question here.

The sections from 12 to 87 do relate to public service corporations and provide for the regulation of the same and fix penalties for violations of its provisions and fall clearly within the title of the chapter and are properly related thereto.

The powers and jurisdiction of the Corporation Commission are expressly defined and limited by section 31, which is as follows: "The Commission is hereby vested with pow-

er and jurisdiction to supervise and regulate every public service corporation in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Now, turning to section 7, and bearing in mind that chapter 90, of which it is a part, by its first section provides that it "shall be known as the 'Public Service Corporation Act,' and shall apply to public service corporations herein described," let us search for the meaning of those words and phrases in section 7 that prohibit a commissioner from holding any official relation to or being employed by or being peculiarly interested in any corporation or person subject in whole or in part to regulation by the Commission and providing that if such commissioner shall become the owner of stock or bonds, or become peculiarly interested in such corporation otherwise than voluntarily, he shall within a reasonable time divest himself of such ownership or interest; failing to do so, his office shall become vacant. It is the contention of the plaintiff that this section 7 should have a literal interpretation, without regard to its relation to other parts of chapter 90. It is too clear for question that chapter 90 in general purport, meaning, and effect has for its object "public service corporations" and their regulation. Neither in the title of the chapter nor in its body is intimation made that its provisions should reach or affect the regulation of private corporations other than public utilities. That being true, is not the inhibition against a commissioner owning stock or bonds or being interested peculiarly or as employe or otherwise in a "corporation" confined to "public service corporations"? That is, corporations of which the Commission is given "power and jurisdiction to supervise and regulate," as provided in section 31, *supra*.

By the demurrer in this case it is admitted that defendant Jones on February 18, 1911, at a time long prior to his election and qualification as a commissioner, bought, paying therefor \$750, stock of the Merchants' & Insurers' Reporting Company; that he owned such stock when inducted into office February 14, 1912, and still owned it at the institution of this proceeding. The Merchants' & Insurers' Reporting Company is not a "public service corporation" and does not fall within the purview of either the title or the body of chapter 90, and therefore he is not subject to the penalty therein prescribed for one owning stock of a public service corporation.

[5] The Constitution, §§ 2 to 19, art. 15, expressly confers jurisdiction upon the Corporation Commission to supervise and regulate public service corporations, but its plenary power in that respect is not extended by that instrument to corporations other than public utilities.

Section 8, art. 14, Constitution, provides

that "no domestic or foreign corporation shall do any business in this state without having filed its articles of incorporation or a certified copy thereof with the Corporation Commission. * * *

Section 17, Id., provides that all domestic and foreign corporations shall pay to the state such fees and licenses as may be provided by law, and make "reports to the Corporation Commission of the status, business, or condition of such corporation, as may be prescribed by law."

These two sections of the Constitution do not empower the Corporation Commission to regulate "in whole or in part" the corporations mentioned therein.

Section 4, art. 15, Constitution, provides that the Corporation Commission "shall have the power to inspect and investigate the property, books, papers, business, methods, and affairs of any corporation whose stock shall be for sale to the public. * * * The power "to inspect and investigate" the business of a corporation does not make it "subject in whole or in part to regulation by the Commission."

[6] Section 16, art. 14, Constitution, provides that "the records, books, and files of all public service corporations, state banks, building and loan associations, trust, insurance, and guaranty companies shall be at all times liable and subject to the full visitatorial and inquisitorial powers of the state. * * *

The provisions of this section are not self-executing for the reason that "the visitatorial and inquisitorial powers" mentioned are not conferred on any particular person or body. Legislation in aid of this section and section 4, supra, in order to make their provisions effective, was necessary. Chapter 48, Laws 1912 (First Session First Legislature), approved May 16, 1912, accordingly authorizes and empowers "the Corporation Commission to regulate and supervise the business of all persons, copartnerships, associations, organizations or corporations doing, transacting or soliciting" business as home co-operating companies, or of issuing contracts or agreements in the nature of bonds, debentures, certificates, or otherwise, except insurance and some other corporations.

Chapter 69, Laws 1912 (First Session), approved May 18, 1912 (Blue-Sky Law), provides for the regulation and supervision of investment companies by the Corporation Commission. Chapter 50, Laws 1912 (Second Session), approved June 19, 1912, confers a like power in the Corporation Commission over surety companies.

[7, 8] There has been no specific legislation for the regulation of insurance companies, so far as we can discover, except chapter 94, Laws 1913, passed by the Third Special Session of the Legislature on May 13, 1913, to take effect October 1, 1913. The enacting clause of this chapter is "An act to provide for the supervision and regulation of

insurance companies and to regulate the transaction of insurance in the state of Arizona." There are 111 sections of this chapter devoted to prescribing regulations and methods of supervision of insurance companies by the Corporation Commission. Section 1 thereof contains this very significant provision: "No member of the Corporation Commission nor any employé of said Commission shall be directly or indirectly interested in any insurance corporation, except as an ordinary policy holder."

Not until October 1, 1913, were insurance companies "subject to regulation in whole or in part" by the Corporation Commission, and not until then was there any inhibition against a commissioner owning stock or bonds, or being peculiarly interested in, or in the employ of or holding an official relation to, an insurance corporation. That section 7 of chapter 90 has no application to the state of facts in this case is clearly shown, for, if it does apply, then it prohibits a commissioner from being a policy holder in insurance companies, for it expressly prohibits any person from being appointed to or holding the office of commissioner "who is in any manner peculiarly interested" in a corporation "subject to regulation in whole or in part by the Commission." A policy holder of an insurance company would certainly be "peculiarly interested" therein. To prohibit the commissioners or their employes from being policy holders of insurance companies, as would result if we hold the provisions of section 7 of chapter 90 apply here, would lead to absurd results, and accord with "neither rime nor reason."

The Legislature evidently took the view that section 7 of chapter 90 had no application to a state of facts as here appear, for in section 1, c. 94, supra, it prohibited the commissioners and their employes from being interested in any insurance company, except as a policy holder.

Since October 1, 1913, the date that chapter 94 became effective, it is shown by the complaint that defendant Jones had owned stock in an insurance company subject to regulation by the Corporation Commission. In doing this he is standing in the face of section 1 of said chapter. The penalty prescribed in section 7 of chapter 90, as we have seen, does not apply, for by its terms it is restricted to a prohibition of commissioners being interested in public service corporations "subject to regulation in whole or in part by the Commission." Chapter 94 does not provide that interest in an insurance company by a commissioner shall ipso facto cause a vacancy in his office. Indeed, that chapter fails to prescribe any penalty for such violation of its provisions by a commissioner.

It, in other parts of the law, there are penalties for such conduct, they may not be inflicted in this proceeding. We are asked to declare defendant's office vacant, which we

cannot do, as the law fails to prescribe that penalty upon the facts in this case.

Demurrer sustained, and complaint dismissed.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

RAIN v. STATE.

(Supreme Court of Arizona. Dec. 30, 1913.)

1. INDICTMENT AND INFORMATION (§ 110*) — ELEMENTS OF OFFENSE—STATUTORY PROVISIONS—"ENTER."

Under Pen. Code 1901, §§ 418, 422, making every person entering any dwelling house, etc., with intent to commit any felony, guilty of burglary, and defining the word "enter" to include the entrance of the offender, or the insertion therein of any part of his body, or any instrument used, burglary is properly charged by a mere averment of a burglarious entry, and it is not necessary to charge a burglarious breaking.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.*]

For other definitions, see Words and Phrases, vol. 1, pp. 908-911; vol. 8, p. 7593; vol. 3, pp. 2400-2408.]

2. BURGLARY (§ 28*) — INFORMATION — INSTRUCTIONS.

Where the information charged a burglarious entry only, an instruction that to support a conviction the state must establish that accused broke into the building in question, or aided or abetted others in doing so, was properly refused.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 67-78; Dec. Dig. § 28.*]

3. CRIMINAL LAW (§ 830*) — INSTRUCTIONS — REQUESTS—SUFFICIENCY.

Under Civ. Code 1901, par. 1409, directing that instructions shall be given or refused as asked, and Pen. Code 1901, § 955, providing that instructions in criminal cases shall be controlled by the law governing trial in civil cases, the court may refuse an instruction in toto as asked, where it contains both an erroneous statement of the law and a correct proposition, and it need not select the correct proposition and give that as requested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

4. CRIMINAL LAW (§ 780*)—EVIDENCE—ACCOMPLICES—INSTRUCTIONS.

An instruction that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence which, in itself, tends to connect accused with the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof, and that, before a conviction can be had, the jury must believe beyond a reasonable doubt that the corroborating testimony, in itself and without the aid of the testimony of the accomplice, tends to connect accused with the commission of the crime, otherwise accused must be acquitted, sufficiently charges on corroborative testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

5. CRIMINAL LAW (§ 829*) — INSTRUCTIONS — REFUSAL TO GIVE INSTRUCTIONS COVERED BY CHARGE GIVEN.

Where the court charged that a conviction could not be had on the testimony of an ac-

complice unless he was corroborated by other evidence which, in itself, tended to connect accused with the commission of the crime, the refusal to charge that there could be no conviction on the testimony of accomplices alone, however many there might be, if uncorroborated, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 780*)—TESTIMONY OF ACCOMPLICES — CORROBORATION — INSTRUCTIONS.

Under Pen. Code 1901, § 938, declaring that a conviction cannot be had on the testimony of an accomplice only, unless he is corroborated by other evidence which, in itself, tends to connect accused with the commission of the crime, an instruction that if the jury believe that "the material facts necessary to be proven by the state under this information, necessary for a conviction, have been testified to only by the accomplices, and * * * said testimony has not been corroborated by evidence outside of their testimony," accused must be acquitted was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1859-1863; Dec. Dig. § 780.*]

7. CRIMINAL LAW (§ 829*) — INSTRUCTIONS — REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse a requested charge covered by the charge given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

8. CRIMINAL LAW (§ 823*)—TESTIMONY OF ACCOMPLICES — CORROBORATION — INSTRUCTIONS—SUFFICIENCY.

Where the court repeatedly charged that the jury must be satisfied of the guilt of accused beyond a reasonable doubt, an instruction that evidence outside of that of the accomplices would not be sufficient if it merely corroborated the fact that a crime had been committed, but must tend to connect accused with the crime, though it need not be sufficient to prove beyond a reasonable doubt that accused was guilty, was not objectionable as taking from the jury the question of reasonable doubt on all the evidence outside that of accomplices.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. § 823.*]

9. CRIMINAL LAW (§ 901*) — FAILURE TO DIRECT ACQUITTAL—WAIVER.

The error, if any, in overruling a motion for acquittal made at the close of the state's case is waived by accused proceeding with the trial, and introducing evidence which, if curing defects or omissions in the state's case, must be considered in determining the guilt of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. § 901.*]

10. CRIMINAL LAW (§§ 680, 1153*)—APPEAL—ORDER OF PROOF—DISCRETION OF COURT.

The order in which evidence shall be received is discretionary with the trial court, and its rulings will not be reviewed, except in case of abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1609, 1610, 1613, 3061-3066; Dec. Dig. §§ 680, 1153.*]

11. CRIMINAL LAW (§ 404*)—EVIDENCE—ADMISSIBILITY.

On a trial for burglary, the goods stolen are admissible in evidence, in connection with the testimony of the officers and the prosecuting witness, as showing the purpose with which the entry was made, regardless whether accus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed, or third persons jointly charged, made the entry.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.*]

12. CRIMINAL LAW (§ 858*)—EVIDENCE—ADMISSIBILITY.

Where the date of the arrest of accused was a contested question, because of the defense of alibi, the admission in evidence of the warrant under which accused was arrested, for the sole purpose of proving the date, was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 763; Dec. Dig. § 358.*]

13. CRIMINAL LAW (§ 1174*)—SEPARATION OF JURY—NEW TRIAL.

That a juror unaccompanied by a bailiff was permitted, without leave of court, to separate from the jury after their retirement to deliberate on the verdict is not ground for new trial, unless prejudice to accused resulted therefrom, or the evidence reasonably warrants the inference of prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3170-3178; Dec. Dig. § 1174.*]

14. CRIMINAL LAW (§ 855*)—TRIAL—DELIBERATIONS OF JURY.

A verdict will not be set aside because the janitor and his assistants entered the jury room to replenish the supply of ice water during the jury's deliberations on the verdict, and conversed with the jury, in the absence of evidence disclosing dishonesty and corruption influencing the verdict, and accused, seeking to have it set aside on that ground, has the burden of proving that fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2048-2053; Dec. Dig. § 855.*]

15. BURGLARY (§ 38*)—EVIDENCE—CORROBORATIVE EVIDENCE.

Evidence of accused's possession of goods, stolen at the time of a burglary, is admissible on a trial therefor to connect accused with the offense, provided the goods are under his control, but the mere fact that he resided with his family in a house near the place where the stolen goods were stored is inadmissible, unless he had some dominion over the place.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 91; Dec. Dig. § 38.*]

16. CRIMINAL LAW (§ 510½*)—TESTIMONY OF ACCOMPLICES—CORROBORATION.

The testimony of the mother of a third person, jointly charged with defendant with crime, that after defendant was released from jail he requested her to tell her son to say that defendant was not present was admissible to corroborate the testimony of the son, testifying for the state, since the jury may infer that the request of defendant was made because of his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1136; Dec. Dig. § 510½.*]

17. CRIMINAL LAW (§ 507*)—TESTIMONY OF ACCOMPLICES—CORROBORATION.

A witness who only testified that defendant and two persons, jointly charged with him with burglary, were present with the witness, and that defendant stated that he knew where a person lived who had good clothes and a valise, and that they had better go to get them; that defendant and the two departed, and later returned with a valise and contents consisting of articles identified as those stolen at the time

of the burglary—was not an accomplice, and her testimony need not be corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1086; Dec. Dig. § 507.*]

18. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS.

The jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence, and a verdict sustained by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge.

Thomas Rain was convicted of burglary, and he appeals. Affirmed.

James E. Nelson and David L. Bishop, both of Phoenix, for appellant. G. P. Bullard, Atty. Gen., and Leslie C. Hardy, Asst. Atty. Gen., for the State.

CUNNINGHAM, J. The defendant was convicted of the crime of burglary of the first degree, and appeals. The information charging the offense is as follows: "That on or about the 15th day of February, 1913, and before the filing of this information, at the county of Maricopa, state of Arizona, the said Francisco Diaz, Conrado Bustamante, and Thomas Rain did then and there willfully, unlawfully, feloniously, and burglariously enter the room, apartment, and tenement of one Frank Pascale, there situate, with the intent then and there and therein to commit the crime of larceny, contrary," etc. The codefendants pleaded guilty. This appellant entered his plea of not guilty, and upon a trial he was convicted. The appellant complains of error committed in refusing instructions requested, in modifying and giving as modified an instruction requested, in giving a voluntary instruction, in denying a motion to instruct the jury to acquit at the close of the state's evidence in chief, in the receipt in evidence of the exhibits, in permitting the introduction in evidence of the warrant of arrest, and in refusing a new trial because the jury was separated without leave of the court, after retiring to deliberate upon their verdict, and because one juror was separated from the other jurors and not accompanied by a bailiff, and because one not a member of the jury, and not a bailiff in charge of the jury, conversed with the jury in the jury room in the absence of any bailiff, after they had retired to deliberate upon their verdict, and because the verdict is contrary to the law and the evidence.

[1, 2] The instructions asked, but refused in whole or in part, were numbered, and in considering them we will refer, for convenience, to their numbers. Instruction No. 2, the refusal of which is assigned as error, requests the court to inform the jury that the information charges that the defendant did " * * * willfully, feloniously, burglariously, and for-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

cibly break and enter into" the room; while the information actually charges that this defendant and his codefendants Bustamante and Diaz did " * * * willfully, unlawfully, feloniously, and burglariously enter the room." A charge that one "breaks and enters" is a materially different charge from one that he "entered the room." The request further informs the jury " * * * that if there is a reasonable doubt as to whether the defendant did so break into said room, * * * or aided or abetted in breaking into said room, * * * the jury cannot convict the defendant upon said information." If the law required a "breaking and entry" to be charged in the information in order to constitute burglary, that part of the requested instruction would be correct; but the law does not so define burglary, nor require such to be charged, nor require such to be established by proof in order to convict. Section 418, Pen. Code Ariz. 1901, defines burglary as follows: "Every person who enters any dwelling house, office, room, apartment, tenement, shop, warehouse, store, saloon, mill, barn, stable, tent, vessel or railroad car with intent to commit grand or petit larceny or any felony; and every person who enters any outhouse or other building not above enumerated, with intent to commit any felony, is guilty of burglary." The word "enter" is construed by section 422 as used in the preceding paragraph to include an entrance of the offender into such " * * * room * * * or the insertion therein of any part of his body, or of any instrument or weapon held in his hand, or used or intended to be used to threaten or intimidate. * * * " Burglary is properly charged, under our statute defining that crime, by averring a burglarious entry. It is not necessary to charge a burglarious breaking. The information charges a burglarious entry, and the prosecution was only required to establish such entry. The instruction requested the court to charge the jury that the state was required to establish, beyond a reasonable doubt, that the defendant broke into the room, or aided or abetted others in breaking into the room, before they can convict. No such burden was on the state, and no error was committed in refusing such instruction.

[3] Interwoven in the body of the request appears this proposition: "The court instructs the jury that the mere fact that the prosecuting attorney has filed an information against the accused does not raise any presumption that the accused has been guilty of any crime." This, of course, is a correct statement of the law; when properly requested, it is the duty of the trial court to so instruct the jury, but this proposition follows the above-mentioned erroneous statement of the charge in the information, and in turn is followed by the erroneous request that no conviction can be had unless the er-

roneous charge is established by the legal measure of proof, and this correct instruction could not be given, unless the said improper matters were eliminated—unless the instruction as asked should be modified by eliminating the erroneous statements. Section 955, Pen. Code Ariz. 1901, directs that instructions in trials of criminal cases shall be controlled by the law applicable to trials in civil cases. Paragraph 1409, Civ. Code Ariz. 1901, directs that the instruction shall be given or refused as the same is asked. The court was therefore justified in refusing the instruction in toto as asked, for the reason it contained the erroneous propositions of law, and the court cannot be held in error because correct statements of the law were likewise interwoven with erroneous statements in the request as asked. This rule applies to other statements contained in the same request, but they need not be further mentioned. They are not sufficiently segregated in the request to entitle them to be considered independent of the erroneous matter.

[4] Request No. 3 was modified by striking certain words, and given as thus modified. Appellant complains of this action of the court. The instruction as asked is as follows: "The court instructs the jury that the law of the state of Arizona provides that 'a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof,' *and in this case the state relies upon the evidence of accomplices and the corroboration of their testimony for a conviction, and*, before a conviction can be had, the jury must believe beyond a reasonable doubt that the corroborating testimony in itself, and without the aid of the testimony of the accomplice or accomplices, tends to connect the defendant with the commission of the offense, and if such testimony does not satisfy your minds or the mind of each of you beyond a reasonable doubt, then you should acquit the defendant." The words italicised were stricken, and the charge given omitting such words. Appellant contends that the instruction omitting these words left the jury to speculate as to whether certain evidence in the case was intended to corroborate the evidence of accomplices, or to establish the fact that a crime had been committed. This contention is untenable. The instruction as a whole informs the jury of the correct rule to be observed in the consideration of the evidence and of the sufficiency of the evidence upon which a conviction can be based. The words stricken added nothing to the sense of the instruction, and, omitted, the instruction still correctly states the same rule to be observed.

No prejudice could result to appellant from striking out words which, if allowed to remain in the instruction, would not have changed the rule to be observed in arriving at a verdict.

[5] The court refused instruction No. 5, which is as follows: "The court instructs the jury that mere associating of the defendant with the accomplice or accomplices prior to the commission of the offense charged is not a sufficient corroboration to connect the defendant with the commission of the crime. The court further instructs the jury that there can be no conviction of the defendant upon the testimony of accomplices alone, however many there may be, if uncorroborated." The appellant contends that this instruction contains two propositions of law: First, the mere associating of defendant with the accomplices before the crime is not a sufficient corroboration of the evidence of accomplices to connect him with the crime charged in the information; and, second, that no conviction can be had upon the uncorroborated testimony of accomplices, and that the testimony of one accomplice is not sufficient to corroborate that of another accomplice. Instruction in No. 3, above discussed, fully covers the last proposition contained in this request, and the first is sufficiently covered in the other instructions given.

[6] By request No. 7 the court was asked to instruct that, if the jury " * * * further believe that the material facts necessary to be proven by the state under this information, necessary for a conviction, have been testified to only by the * * * accomplices, and you still further believe that said testimony has not been corroborated by evidence outside of their testimony, then in that event you should acquit the defendant." The vice of this request is that it instructs the jury that the law requires the testimony of the accomplices, upon material facts to be proven by the state, under the information, necessary to a conviction to be corroborated by outside evidence before they convict. Such is not the law. Section 938, Pen. Code Ariz. 1901.

[7] Request No. 9 was refused, of which complaint is made. The propositions contained in this request were covered sufficiently in the charge of the court, and no error resulted from a refusal of the court to instruct again upon the same propositions.

[8] The appellant complains of the following voluntary instruction given by the court: "The evidence outside of the evidence of accomplices would not be sufficient if it merely corroborates the fact that a crime was committed, or the circumstances connected with the commission of the crime. But it must tend to connect defendant with the crime. However, it need not be sufficient to prove to you beyond a reasonable doubt that he is guilty." The complaint is made

that this instruction took away the question of reasonable doubt from all of the evidence outside of the evidence of the accomplices, and was misleading and unfair to the defendant. The instruction is subject to criticism, but, read in connection with all of the instructions given, we do not think it sufficient to warrant a reversal of the case. The court repeatedly informed the jury that they must be satisfied of the guilt of the defendant from the evidence beyond a reasonable doubt before they could convict him, and this instruction, though unhappily worded, charges the jury that the corroborating evidence tending to connect the defendant with the commission of the crime must so connect him, but need not of itself be sufficient to convict him, and that it need not also be sufficient to establish all the facts necessary to a conviction, but that there must be some evidence which of itself, and without the aid of the accomplices' testimony, tends to connect the defendant with the offense committed. The law governing the corroboration of an accomplice's testimony is well considered in *Nichols v. State*, 9 Okl. Cr. —, 133 Pac. 256, under a statute similar to our own.

[9, 10] The appellant complains that the court should have granted his motion, and should have instructed the jury to acquit when the state rested its case in chief, for the reason the state had failed, when it rested its case in chief, to produce evidence sufficient to support a conviction. The appellant waived that error, if any, when he proceeded with the trial, after the motion was denied. In order to preserve the right to have such order reviewed, he should stand upon his motion. Having voluntarily proceeded with the trial of the case, during the course of such proceeding other evidence was received; we must consider the whole case regardless of the state of the case when the prosecution rested. If other evidence was offered by the state thereafter, which would cure the defects or omissions, if any, appearing in the state's case in chief, we must consider that such evidence was received for that purpose, although received out of its logical order. The order in which the trial court receives evidence is discretionary, and will not be reviewed, except where it clearly appears such discretion has been abused, which does not here appear.

[11] No merit appears in the complaint that the court erred in receiving in evidence the exhibits, they being property stolen at the time of the burglary, because defendant was not connected with such exhibits. The exhibits were clearly entitled to be received in connection with the evidence given by the officers, and also in connection with the evidence given by the party whose room was entered, as showing the purpose or intent with which the entry was made, regardless of who made the entry.

[12] The date of the arrest became a closely contested question on the trial. The defense was based upon the theory of an alibi, and on that theory the defendant was interested in definitely fixing all dates involved. The prosecution was depending in a measure upon certain statements of the defendant made after the arrest, tending to connect him with the commission of the crime. The warrant was introduced to prove the date of the arrest, and the offer was limited to that one fact. Defendant did not remember the date on which he was arrested. The jury could not have been misled by the introduction of the warrant, under the clear statements of the county attorney of the purpose for which it was offered and the statement of the court that it would be received for that purpose.

[13] The appellant complains that he is prejudiced by reason of the jury being permitted to separate without leave of the court, after retiring to deliberate upon their verdict. Otherwise stated, that one of the jurors was permitted to separate from the jury, not accompanied by a bailiff. This question was before the court in *Young Chung v. State*, 136 Pac. 631, just decided, where we considered the question fully, and held that it must appear from the evidence offered in its support that prejudice has resulted to the defendant, or the evidence must be such as to reasonably warrant the inference of prejudice to the defendant. We adhere to that rule. In this case the state offered evidence tending to show that the juror simply used the telephone to communicate to his family the fact that he was held with the jury overnight, and perhaps to speak of other private affairs. There was some evidence to the effect that a bailiff was with the juror at that time. The evidence of one of the attorneys for the appellant conflicts with the evidence of the bailiff upon that point. But the attorney did not call the fact of separation to the attention of the court until after the verdict was returned. No evidence appears that any mention whatever was made of this case during the separation, if such facts show a separation at all, and no prejudice to appellant can be reasonably inferred from the facts shown.

[14] The appellant insists that the verdict of the jury should be set aside because the janitor and his assistants entered the jury room while it was occupied by the jury for the purpose of replenishing the supply of ice water, and conversed with the jury. This is without merit. Modern times have recognized jurors as sufficiently honest and regardful of the obligations of their oaths so that, if any one charges dishonesty and corruption has influenced their verdict, the burden is on such person making such charge to produce evidence supporting it, either directly and expressly, or by fair, reasonable

inference that such verdict is so tainted. Such evidence is absent from this record.

[15] Appellant contends that the verdict was contrary to the law and the evidence, because the prosecution offered no credible evidence corroborating the testimony of the accomplices which tended to connect the appellant with the commission of the crime, and that all the testimony in the case tending in the least to connect appellant with the commission of the crime is testimony of accomplices, which is not sufficient. The prosecution offered evidence tending to prove that the defendant resided at a house near the cache where the stolen goods were found. It appears from the evidence that defendant and his family resided at that house, and that the house was that of the parents of defendant's wife. The goods were stored in the dugout, and there is no evidence connecting the defendant with any control or dominion over the dugout. The codefendants do not so connect defendant. Possession of goods stolen at the time of a burglary may be given in evidence, upon the trial of the burglary charge, as a circumstance tending to connect the defendant with the commission of the offense. In so far as the stolen goods were not shown to have been in the possession of the defendant, while stored in the dugout, that fact tends in no manner to connect the defendant with the burglary. The fact that he resided with his family in a house situated near the place where the stolen goods were stored is no evidence that he was concerned in stealing them, unless he had some dominion over the place where they were stored. The dugout was locked, and he denied that he had a key to open it. He told the officers that "Cruz" had the key. There is no evidence in the record that he did have a key, and the fact that he believed or knew that "Cruz" had a key would only be evidence that he knew who had control over the place, that fact would be no evidence that he controlled the place or knew its contents. The evidence relating to the place of residence of defendant, and his knowledge of the mere existence of the dugout, standing alone, in no manner tended to connect defendant with the commission of the burglary.

[16] The mother of Bustamente, the codefendant, testified that after defendant was released from jail he requested her to tell her son and the other codefendant Diaz to say that this defendant was not with them. Two inferences may reasonably be drawn from this evidence. One, that the defendant, realizing his equal guilt with the others, begged that they protect him from equal punishment, and in that respect the evidence may be regarded as a statement made against interest, and therefore admissible against him; the other, that, defendant having been informed that the other boys intended to wrong-

fully implicate him in their crime, he wished to persuade them through the mother of one of them to desist from committing such wrong against him. Either inference is reasonable, and the statement or request was admissible in evidence, and it was for the jury to determine, from all the circumstances in evidence before them, which of the two inferences the evidence warrants. They must have considered that the request came from a guilty conscience, and was to be considered in view of the other facts and circumstances, as a tacit statement against interest, and was given weight as such. So considered, the request would be some slight corroboration of the evidence of the accomplices that the defendant was with them, aiding and abetting in the commission of the burglary.

[17, 18] The evidence of Cruz Lastra, the sister-in-law of defendant, is fiercely attacked by counsel for appellant in their brief, claiming that she was also an accomplice of Bustamante and Diaz, and for that reason required corroboration in order to justify a conviction. We fail to find anything in the record justifying such attack. The witness testified that defendants Rain, Bustamante, Diaz, and herself were present, and this defendant stated he knew where a fellow lived near the Star Lodging House who had good clothes and a valise, and they had better go get them; that this defendant took off his coat and turned it, putting it on the inside out, and then the three departed, returning later in the evening with the valise and its contents, consisting of the articles identified as stolen at the time of the burglary. If this evidence is to be credited as true, it corroborates the evidence given by the accomplices, to the effect that they with this defendant went from the home of this defendant to the place of the burglary at his suggestion, and committed the crime, returning with the stolen goods, and stored them in the dugout, where they were later discovered by the officers, and, considered alone, tends to directly connect the defendant with the commission of the crime charged. The unexplained possession of the stolen goods is evidence directly connecting the defendant with the commission of the burglary. The evidence of the witness Cruz does not impress one as absolutely free from doubt as to its truth and sincerity in every respect; but, as the law makes the jury the sole judges of the credibility of the witnesses and the weight to be given the evidence and the sufficiency of the evidence to establish any fact in support of which it has been offered and received in the case, we are not justified in holding that the jury has erred in giving to this evidence weight sufficient to connect the defendant with the commission of the crime charged. The verdict is not contrary to the law, nor to the evidence.

After a full consideration of the entire record, we have found no reversible error committed upon the trial. The judgment is affirmed.

FRANKLIN, C. J., and ROSS, J., concur.

BLAISDELL v. STEINFELD et al†

(Supreme Court of Arizona. Jan. 2, 1914.)

1. APPEAL AND ERROR (§ 384*)—PROCEEDINGS FOR TRANSFER OF CAUSE—APPEAL BOND—FORM AND CONTENTS.

Where but one appeal was taken from the judgment and from an order denying a new trial, an appeal bond reciting that appellant gave notice of appeal in open court from such judgment and such order and conditioned in the language of Civ. Code 1901, par. 1506, that he would prosecute his "appeal" with effect and pay the costs which had accrued in the court below or which might accrue in the appellate court was sufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049-2056; Dec. Dig. § 384.*]

2. APPEAL AND ERROR (§ 748*)—ASSIGNMENTS OF ERROR—DEFECTIVE ASSIGNMENTS—FORCE.

Under Supreme Court rule 8 (128 Pac. xi) providing that an objection to the ruling or action of the court below will be deemed waived unless it has been assigned as error in the manner provided by the rules, where an assignment is so defective as to raise no question for the Supreme Court to decide, it is as if no assignment had been made or attempted to be made, and the objection to the trial court's ruling or action will be deemed waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. § 748.*]

3. APPEAL AND ERROR (§ 748*)—ASSIGNMENTS OF ERROR—STRIKING OUT.

Where an assignment of error is so defective as to raise no question for decision, objection may be made by calling the court's attention to the defect, and no motion to strike the assignment is necessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3058-3064; Dec. Dig. § 748.*]

4. BROKERS (§ 44*)—REVOCATION OF AUTHORITY—EFFECT—ACTIONS—FINDINGS.

In a action by plaintiff against a broker in which plaintiff attacked as usurious an agreement by him to pay a commission of 10 per cent. to the broker on a sale of certain property, whether made by the broker or other parties, where the trial court found that the commission was to be paid only in case the broker effected a sale, and that there had been no sale, and it was admitted in the answer that the plaintiff had revoked defendant's agency to sell, the plaintiff was entitled under the findings to a judgment for the return of collateral security for the payment of such commission, and a judgment authorizing the broker to retain such collateral as security for commissions on a future sale was erroneous, since any unilateral contract of agency to sell real or personal property may be revoked at the will of the principal.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 45; Dec. Dig. § 44.*]

5. JUDGMENT (§ 250*)—CONFORMITY TO PLEADINGS—ANSWER.

In an action in which plaintiff attacked his agreement to pay defendant commissions on a sale of property whenever and by whomsoever

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 12, 1914.

made, as usurious, and in which the defendant's answer alleged that the consideration for such commission was services already rendered by him in his endeavor to sell and dispose of such property and his further efforts to be made by him, which efforts had been made, and prayed for a decree authorizing him to hold as security for the commission earned in regard to the sale certain collateral security, the answer did not support a judgment authorizing the defendant to hold such collateral as security for the payment of commissions on a future sale as it proceeded on the theory that the commissions were already earned.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 386-388; Dec. Dig. § 250.*]

6. BROKERS (§ 88*)—ACTIONS—FINDINGS.

Where, in an action in which plaintiff attacked, as usurious, an agreement by him to pay defendant a commission on a sale of real property and the property of a corporation controlled by him, in which the court found that the commission was to be paid only if the defendant effected a sale, and that there had been no sale, and it was admitted that the plaintiff had revoked defendant's agency to sell, the controversy under the pleadings was as to whether the consideration for such commission was a loan of money and an extension of the time of payment of loans or the performance of services by defendant; a finding that the corporation had appointed the defendant its exclusive agent to sell its property and had agreed to pay him a commission on any sale was outside the issues and did not support a judgment that the defendant was entitled to hold certain collateral deposited by the plaintiff as security for commissions on a future sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 121, 123-130; Dec. Dig. § 88.*]

7. BROKERS (§ 44*)—COMPENSATION—COLLATERAL SECURITY—REVOCATION OF AUTHORITY.

Where an agreement by plaintiff, owning practically all the stock and bonds of a corporation, to pay defendant a commission for selling the corporation's property was revoked before any sale thereof, an unrevoked agreement by the corporation appointing defendant its agent to sell its property, which did not pretend to pledge any of plaintiff's property as security for commissions, did not entitle defendant to hold collateral deposited by plaintiff as security for commissions on a future sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 45; Dec. Dig. § 44.*]

8. USURY (§ 53*) — USURIOUS AGREEMENT — COMPENSATION FOR SERVICES.

An agreement between S. and B., who was indebted to S. in the sum of \$25,000 and to a bank in the sum of \$40,000, recited such indebtedness, B.'s desire to obtain assistance from S. to pay the indebtedness to the bank and to secure S. for the indebtedness due him, and provided, in consideration of the covenants and conditions thereafter contained and to be kept and performed, that S. would pay the bank \$20,000 and endeavor to secure from the bank an extension of six months for the payment of the balance with the option to pay the full \$40,000, taking B.'s note for the amount paid the bank; that certain additional collateral security was to be furnished S.; that S. should have a commission of 10 per cent. on any sale of certain real estate and the property of a corporation worth from \$200,000 to \$250,000, regardless of who should make the sale or of any indebtedness of B. to S., or however remote the sale should be from the date of the agreement; that, if a sale was not made until after B. had discharged all his obligations to S., he should leave with S. sufficient securities to secure the payment of such commission when the sale should be made. It further provided that B. should be entitled to

an extension of six months from the maturity of the several obligations due or to become due by B. to S. B.'s indebtedness to S. bore interest at the rate of 10 per cent. and by the agreement the notes for the amounts paid the bank by S. were to bear interest at the same rate. *Held*, that the payment of the commission was not contingent upon a sale of the properties by S., but that there was an unconditional promise to give him 10 per cent. of the selling price of the property whenever sold by any one, and the consideration for the agreement to pay such commission was therefore, at least in part, a loan of money and the extension of the time of payment, and hence such agreement was usurious under Laws 1909, c. 84, § 1, providing that the legal rate of interest shall be 6 per cent., but that the parties may agree in writing to a different rate, not to exceed 12 per cent., and section 2 providing that any person so contracting for a greater rate of interest than 12 per cent. shall forfeit all interest so contracted for in excess of 12 per cent., especially where the correspondence between B. and S. and the answer filed by S., in an action to have such agreement declared usurious, showed that, up to the time of joining issue, S. understood that he had earned such commission, though no sale had been made.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 91, 114-118; Dec. Dig. § 53.*]

9. USURY (§ 11*)—"USURIOUS" AGREEMENT—ELEMENTS.

The requisites of a usurious transaction are an unlawful intent, which, however, may be inferred from the intentional doing of that which is forbidden by statute, money or money's equivalent as the subject-matter, a loan or forbearance, an absolute and not a contingent agreement to repay, and an exaction for the use of the loan of something in excess of what is allowed by law, whatever its form and whether called a commission or a bonus or by some other name, and, when these elements are present, the transaction will be condemned regardless of its form.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 1; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 8, p. 7245.]

10. USURY (§ 32*)—USURIOUS AGREEMENT.

B. was indebted to S. in a large amount and also owed a bank \$20,000, and negotiations had been pending between them relative to a further loan and an extension of time of payment. S. desired that B. should transfer to him an undivided fifteen hundredths interest in certain realty and 15 per cent. of the stock and bonds of a water and electric company and another corporation controlled by B. B. had previously agreed to pay S. a commission of 10 per cent. on any sale of the real estate and of the property of the water and electric company, and he urged that that agreement should be canceled, and only agreed to transfer such 15 per cent. in addition to the 10 per cent. after S. promised to pay the amount due the bank, taking B.'s note therefor. The attorney who prepared the papers of his own volition drew two agreements, by one of which the payment of B.'s indebtedness to S. was extended, S. agreeing to make a further loan and to pay such indebtedness due the bank, and by the other of which B. in consideration of the release of certain collateral security transferred to S. such interest in the real estate and such percentage of the stock and bonds. *Held*, that the two instruments constituted but one contract, and, B. having agreed to transfer such interest only after S. had agreed to pay the indebtedness due the bank, the consideration for such transfer was the loan of money and the extension of time of payment, and hence, as the property transferred

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with the interest borne by the indebtedness exceeded 12 per cent., such transfer was usurious. [Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 75-77; Dec. Dig. § 32.*]

11. USURY (§ 117*)—ACTIONS — WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action in which plaintiff attacked, as usurious, the transfer by him to defendant of certain property, evidence held insufficient to show that the property was transferred as a gift or that the defendant performed any services for plaintiff, except such as a large lender would naturally bestow on the business enterprises of the borrower.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 328-340; Dec. Dig. § 117.*]

12. USURY (§ 102*)—REMEDIES—RECOVERY OF USURIOUS INTEREST.

Where usurious interest has been paid by the borrower to the lender, the excess over the rate authorized by law may be recovered as the payments are not deemed voluntary and the debtor is not regarded as in pari delicto.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 241, 242, 244-258; Dec. Dig. § 102.*]

13. USURY (§ 93*)—REMEDIES—CANCELLATION OF USURIOUS INSTRUMENTS.

Equity will cancel deeds and incumbrances on real property if tainted with usury or given for a usurious consideration.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 191; Dec. Dig. § 93.*]

Appeal from Superior Court, Pima County; W. F. Coope, Judge.

Action by H. W. Blaisdell against Albert Steinfeld and others. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Reversed and remanded, with directions.

Action by appellant to have certain contracts canceled for being usurious and to have returned to him certain securities and for moneyed judgment for interest paid under such usurious contracts. The case was tried to the court without a jury, and judgment was rendered in favor of appellees. The facts shown and admitted by the pleadings are substantially as follows:

That the plaintiff was the owner, and for some time had been such owner, of practically all the stock and bonds of the Yuma Electric & Water Company and Yuma Gas Company, of Yuma, Ariz.; that for a number of years preceding July 2, 1910, plaintiff and defendant Albert Steinfeld had been intimate personal friends and had many business transactions with each other; that plaintiff had been a borrower of large sums of money from said defendant, who was a very successful business man of large financial interests; and that plaintiff reposed confidence in his business judgment and frequently sought his advice, which was freely and voluntarily given.

On July 2, 1910, the plaintiff was indebted to the Merchants' National Bank of Los Angeles, Cal., in the sum of \$40,000, secured by \$100,000 of the bonds of the Yuma Electric & Water Company, and the bank was demanding and insisting that plaintiff pay his indebted-

ness to it. On said date the plaintiff also owed defendant Albert Steinfeld the sum of \$25,000, evidenced by various promissory notes to secure which plaintiff had deposited with said defendant the following securities: \$27,000 par value bonds of the Yuma Gas Company; also a note of Blaisdell Filtration Company for the sum of \$21,000; also debenture receipt No. 66 of Imperial Water Company No. 4 for \$2,680; also \$20,000 par value of the capital stock of the California Development Company; also 6,300 shares King of Arizona Mining Company; and all plaintiff's equity in the \$100,000 bonds of the Yuma Electric & Water Company held by the Merchants' National Bank as security for said \$40,000 indebtedness to it. Defendant Albert Steinfeld on said date was likewise demanding of plaintiff that he take up and pay off his demands. On said date the plants of the Yuma Electric & Water Company and the Yuma Gas Company were inadequate to meet the demands upon them and were greatly in need of enlargement, which was then under consideration.

A few days prior to July 2, 1910, plaintiff made arrangements with the Merchants' National Bank whereby the latter agreed to accept a payment of \$20,000 on account and give an extension of time on balance. For a considerable period of time prior to July 2, 1910, defendant Albert Steinfeld had been advising plaintiff to sell his various properties and had asked plaintiff to pay off his indebtedness to him. That on said date said defendant Steinfeld, possessing full knowledge of plaintiff's financial embarrassments, agreed to pay to the Merchants' National Bank \$20,000 on account and to take plaintiff's note therefor, due in six months, bearing interest at 10 per cent. per annum, payable monthly, upon the terms and considerations as expressed in the following agreement:

"This memorandum of agreement, made and entered into this second day of July, 1910, by and between Albert Steinfeld of Tucson, Arizona, of the first part, and H. W. Blaisdell, of Los Angeles, California, of the second part:

"Whereas the party of the second part is indebted to the Merchants' National Bank of Los Angeles, California, in the sum of forty thousand dollars (\$40,000) and has placed in said bank and as collateral for said loan, one hundred thousand dollars (\$100,000) of the bonds of the Yuma Electric & Water Company, the same being the property of the said party of the second part; and

"Whereas, the said Blaisdell is now indebted unto the said Steinfeld, all as evidenced by the notes and obligations of said Blaisdell now in the hands of said Steinfeld; and

"Whereas, the said Blaisdell is desirous of obtaining assistance from the said Steinfeld

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

feld to pay said indebtedness unto said bank, or a part thereof, and is further desirous of securing the said Steinfeld for any moneys he may now advance or loan for said purpose and is also desirous of further securing the said Steinfeld upon the indebtedness now existing and the money now owing, as well as the moneys hereafter to be owing by the said Blaisdell unto the said Steinfeld, and the said Steinfeld is willing to assist the said Blaisdell in said matters, and upon the terms and conditions hereinafter set forth:

"Now, therefore, in consideration of the sum of one dollar (\$1.00), cash in hand paid unto each of the parties hereto, one unto the other, and of the covenants and conditions hereinafter contained, and to be kept and performed, it is agreed:

"(1) That the said Albert Steinfeld shall forthwith propose to the Merchants' National Bank of Los Angeles, California, to pay unto said bank the sum of ten thousand dollars (\$10,000.00) upon the said indebtedness to said bank of the said Blaisdell, said bank to forthwith deliver unto the said Albert Steinfeld twenty-five thousand dollars (\$25,000) of the said Yuma Electric & Water Company bonds, now held by said bank, and further, in the event the said Steinfeld's proposal to said bank shall be accepted that he will pay to said bank, on account of said indebtedness of said Blaisdell to said bank, and on or before four (4) months from date hereof the further sum of ten thousand dollars (\$10,000) the said bank at this time, that is to say, at the time said ten thousand dollars (\$10,000) shall be paid, to deliver unto the said Steinfeld an additional twenty-five thousand dollars (\$25,000) of the bonds of the said Yuma Electric & Water Company; and the said Steinfeld will further propose to said bank, and as a condition for making the above payments unto said bank, that said bank shall extend the time of payment for the remaining twenty thousand dollars (\$20,000) of said indebtedness unto said bank, for at least the period of six (6) months from date hereof.

"(2) The said Steinfeld shall have the right and option to pay the said Merchants' National Bank of Los Angeles, the said remaining twenty thousand dollars (\$20,000) of said indebtedness at any time on or before four (4) months from date hereof, and in such event shall obtain and have delivered unto him the remaining fifty thousand dollars (\$50,000) of the bonds of the said Yuma Electric & Water Company held by said bank as aforesaid.

"(3) The said Blaisdell shall forthwith execute unto the said Steinfeld, his note in the sum of ten thousand dollars (\$10,000) payable on or before six (6) months from date hereof, together with interest thereon from date, at the rate of ten (10) per cent. per annum until paid, interest payable

monthly, and provisions for attorney's fees; and the said twenty-five thousand dollars (\$25,000) of the bonds of the said Yuma Electric & Water Company which the said Steinfeld shall obtain from the said bank upon making the said first payment to said bank of ten thousand (\$10,000) shall be held by the said Steinfeld as collateral security for the payment of said ten thousand dollar note of the said Blaisdell to said Steinfeld.

"(4) At the time the said Steinfeld shall make said second payment of ten thousand dollars (\$10,000) unto said bank, as above mentioned, the said Blaisdell shall execute his note unto the said Steinfeld in the sum of ten thousand dollars (\$10,000) which note shall bear interest from date at the rate of ten (10) per cent. per annum until paid, interest payable monthly, and with provision for attorney's fees, and which said note shall be due on or before six (6) months after date; and the twenty-five thousand dollars (\$25,000) of Yuma Electric & Water Company bonds which the said Steinfeld shall receive from said bank upon payment of said second ten thousand dollars (\$10,000) shall be held by said Steinfeld as collateral security for the payment of said last-mentioned note of the said Blaisdell to the said Steinfeld.

"(5) In the event the said Steinfeld shall elect to pay said bank the last remaining twenty thousand dollars (\$20,000) of the indebtedness of the said Blaisdell to said bank, then the said Blaisdell shall at the time the said Steinfeld shall pay the same, execute his note unto the said Steinfeld in the sum of twenty thousand dollars (\$20,000) together with interest thereon, from date at the rate of ten per cent. annum, interest payable monthly, and said note to be payable on or before six months after date; and the said Steinfeld shall in the event receive and have delivered unto him the remaining fifty thousand dollars (\$50,000) of the bonds of the said Yuma Electric & Water Company and which said bonds the said Steinfeld shall hold as collateral security for the payment of said note.

"(6) The said Blaisdell shall forthwith assign and transfer unto the said Steinfeld certificate of stock No. 13 for 945 shares of the capital stock of the Yuma Electric & Water Company as further security for the payment of each and all of said notes of said Blaisdell to the said Steinfeld, and as further security for any and all other indebtedness now existing or which may hereafter exist by the said Blaisdell unto the said Steinfeld.

"(7) The said Blaisdell, together with his wife, shall forthwith execute unto the said Steinfeld a good and sufficient mortgage second only to that certain mortgage executed by Hiram W. Blaisdell and Alice B. Blaisdell, his wife, on the 10th day of February, 1910, and recorded in Book 12 of Realty Mortgages, at page 145, record of Yuma county, Arizona,

upon those certain premises situate in the county of Yuma, territory of Arizona, and described as follows, to wit: * * * Also any and all water rights used with or belonging to said lands or any of them. And it is provided in said mortgage indenture that the same is given as security for the payment of the hereinabove mentioned notes and for any further or other indebtedness now existing or that may hereafter exist by said Blaisdell unto the said Steinfeld.

"(8) The said Blaisdell shall assign and set over unto the said Steinfeld any and all equities which he may now have in any and all securities which the said Steinfeld now holds of the said Blaisdell, said equities to be likewise held by the said Steinfeld as collateral security for the payment of the above notes, and each and all thereof, and for any and all other or further indebtedness that may now or hereafter exist by the said Blaisdell unto the said Steinfeld. And also, the said Blaisdell shall assign unto the said Steinfeld, and as collateral security for the above notes and obligations, and all other indebtedness of the said Blaisdell to the said Steinfeld now or heretofore existing, and all rights and equities he may have in any stock of the Yuma Electric & Water Company not herein specifically mentioned, and any and all bonds of the Yuma Electric & Water Company, and Yuma Gas Company.

"(9) That said Blaisdell shall have the right upon demand, as provided he shall have complied with each and every and all of the terms and conditions herein contained, and in any and all of said obligations contained or to be contained, to an extension of six (6) months from and after the maturity of the several obligations due, or to become due by the said Blaisdell to the said Steinfeld, such extension or extensions to date from the maturity of each several obligation.

"(10) The said Blaisdell shall have the right to sell and dispose of the hereinabove described lands, but at a price not less than five hundred dollars (\$500) per acre, and all of the proceeds of such sale or sales shall go to the said Steinfeld, and be applied upon the indebtedness of the said Blaisdell to the said Steinfeld, save and except that the sum of two hundred dollars (\$200) per acre shall be applied by the said Blaisdell upon the present existing first mortgage upon said lands, to an extent sufficient to cancel the same, said mortgage being the mortgage recorded in Book 12, Realty Mortgages, at page 145, Records of Yuma county, Arizona, as aforesaid.

"(11) The said Blaisdell shall have the right to sell any or all of the said Yuma Electric & Water Company bonds held by the said Steinfeld at a price of not less than eighty cents on the dollar, all of the proceeds of said sale or sales to be paid to said Steinfeld to the extent of the total obligation of the said Blaisdell to the said Steinfeld.

"(12) In the event the said Steinfeld shall not elect to pay to the Merchants' National Bank of Los Angeles, California, the last twenty thousand dollars of the forty thousand dollar indebtedness of said Blaisdell to said bank, heretofore referred to, and within four (4) months from date hereof, the said Steinfeld will at the request of the said Blaisdell, release said bank from holding for said Steinfeld the last fifty thousand dollars (\$50,000) of bonds held by said bank, of the Yuma Electric & Water Company, and in which event further, the said bonds shall be considered subject only to the claim of said bank, as collateral and security for any and all indebtedness of the said Blaisdell to the said Steinfeld, provided, however, that the said Blaisdell shall have the right to sell said bonds at a price of not less than eighty cents on the dollar and shall apply the proceeds thereof, or so much thereof as may be necessary, to the whole indebtedness owing said Steinfeld and whether the same shall be due or not, and a lien is hereby granted said Steinfeld upon said bonds, subject only to the claim of said bank. Should the said Blaisdell find it necessary to sell and dispose of certain of said last fifty thousand dollars of bonds of said Yuma Electric & Water Company, to satisfy and discharge the last twenty thousand dollars due unto the said Merchants' National Bank of Los Angeles, then, and in that event he shall have the right to sell a sufficient number of said bonds at not less than eighty cents on the dollar, to satisfy and discharge said indebtedness, and shall not be required to pay the moneys so applied, unto the said Steinfeld.

"(13) In the event the properties of the Yuma Electric & Water Company shall at any time be sold or disposed of, or the said land hereinbefore referred to, there shall be paid as a commission upon the sale of said lands, unto said Steinfeld, ten per cent. upon the amount received therefor, and the sale shall be made through said Steinfeld, and the commission paid unto him, and the said commission shall be paid upon the sale of said properties in any form, that is to say, the commission shall be paid if the bonds or stock of said company shall be sold, or if the properties of said company shall be sold, and said commission shall be paid said Steinfeld regardless of who shall make or negotiate said sale and shall be paid at the time of said sale and further, said commissions shall be paid regardless of any indebtedness of the said Blaisdell unto the said Steinfeld, and said commission shall be paid whenever the said sale or sales may take place, however remote from this date.

"(14) The said Steinfeld shall have the right to have free access to all the books and records of said Yuma Electric & Water Company and to ask for and receive statements and reports of the operation of the company; to employ at the expense of said company an

additional mechanical engineer; and may take such steps as he may deem proper for the better and more successful operation of said plant, and the protection of said Steinfeld, until any and all indebtedness of the said Blaisdell unto the said Steinfeld shall have been discharged.

"(15) The said Blaisdell shall have the right, and permission is hereby given unto him, to clip from the bonds of the Yuma Electric & Water Company and Yuma Gas Company, which he shall deliver or cause to be delivered, or which may be delivered to the said Steinfeld all interest coupons now due or past due.

"(16) All collateral and security given and to be given by the said Blaisdell hereunder, shall be security for all indebtedness of the said Blaisdell to the said Steinfeld whether now existing or hereafter existing, and for all advances that the said Steinfeld may make for his security, the same to be made in his uncontrolled discretion; and further, any and all advances the said Steinfeld shall make shall bear interest from date they were made at the rate of ten per cent. per annum until paid, said interest to be paid monthly.

"(17) It is expressly agreed, anything herein to the contrary notwithstanding, and the same shall be incorporated in any and all notes and obligations which the said Blaisdell shall execute unto the said Steinfeld for any and all indebtedness, that in case default be made in any one note or obligation, or any covenant or agreement herein or therein contained be not fully kept and performed by the said Blaisdell, that each, all and every note and obligation then existing between the said Steinfeld and the said Blaisdell shall at once become wholly due and payable; and should it be that a note or obligation shall not contain this clause, or one of like tenor and effect, nevertheless the same shall be deemed incorporated in each and all of said notes and obligations.

"(18) The said Steinfeld shall have the right, and it is hereby granted him, in case default shall be made by said Blaisdell in any covenant herein contained, or in any agreement or covenant in any of said obligations now or hereafter to be executed, to sell any part or the whole of the property in his hands as security or collateral, and to sell the same at public or private sale, after giving twenty (20) days notice thereof, and such sale shall be at such place, and upon such terms as to the said Steinfeld may be satisfactory, and the proceeds of such sale or sales shall be applied by the said Steinfeld to the indebtedness of the said Blaisdell to him, and the costs of such sale or sales, and the surplus, if any, and after the deduction of all proper costs and charges, shall be paid unto the said Blaisdell.

"(19) Whenever it shall be necessary in law for any company or corporation to consent in order to bind said corporation to the

terms of this agreement, to make the same effective and binding upon such company or corporation, the said Blaisdell shall cause action to be taken and in due and proper form, and as soon as it may be done, to the end that said corporation shall agree to each and every covenant herein, so far as to said corporation these presents may appertain.

"(20) From time to time and as the said Blaisdell may discharge his obligations unto the said Steinfeld there shall be released and delivered unto the said Blaisdell of the securities held by said Steinfeld such amount as shall be mutually agreed by the parties hereto.

"(21) It is expressly and again set forth, that any and all securities now held by the said Steinfeld of the said Blaisdell, and all further and additional securities which the said Steinfeld shall hereafter and hereunder obtain from the said Blaisdell, or on his account, shall be held by the said Steinfeld as collateral and as security for any and all indebtedness of the said Blaisdell to the said Steinfeld, whether now or hereafter existing, and that the whole of said securities may be retained by the said Steinfeld until the indebtedness shall have been discharged, except such securities as may be released by mutual consent as provided in the last preceding paragraph.

"(22) And further, and in the event the sale of the properties hereinabove mentioned shall not be made until after the said Blaisdell shall have discharged all of his obligations unto the said Steinfeld, that then and in that event, there shall be left with the said Steinfeld, by the said Blaisdell, sufficient securities as shall secure the payment of said commission unto the said Steinfeld, when the sale or sales shall be made."

Pursuant to this agreement plaintiff executed his notes for \$25,000 to defendant Albert Steinfeld, covering the \$25,000 already owing Steinfeld and the \$20,000 to be paid the Merchants' National Bank, and the latter paid the Merchants' National Bank \$20,000 and received from the bank \$50,000 par value bonds of the Yuma Electric & Water Company, and mortgage mentioned in agreement was made out by plaintiff and wife to Steinfeld. On or about July 2, 1910, it was agreed between plaintiff and defendant Albert Steinfeld that the Yuma properties should be offered for sale for the sum of \$200,000, and defendant Albert Steinfeld endeavored to sell said property at such price. That plaintiff did and performed on his part everything required to be done and performed by him under the terms of the contract of July 2, 1910.

Negotiations beginning in December, 1910, and brought to conclusion January 19, 1911, between plaintiff and defendant Albert Steinfeld, resulted in the following instrument being executed:

"This memorandum of agreement, made and entered into this 19th day of January,

1911, by and between Albert Steinfeld, of Tucson, Arizona, of the first part, and H. W. Blaisdell, of Los Angeles, state of California, of the second part:

"Whereas, the parties hereto did on the 2d day of July, 1910, enter into a certain agreement, and which agreement is now in full force and effect; and

"Whereas, the parties hereto are desirous of contracting further in the premises:

"Now, therefore, in consideration of the sum of one dollar, cash in hand paid unto each of the parties hereto, one unto the other, and of the covenants and conditions herein-after contained, and to be kept and performed, it is agreed:

"(1) That the time of payment of each, all and every of the notes, debts and obligations of the party of the second part unto the party of the first part, and mentioned and described, set forth and included in said agreement of date July 2, 1910, is hereby extended for the period of twenty-four (24) months from and after January 1, 1911, and so that each, all and every of said notes, debts and obligations of the party of the second part to the party of the first part, mentioned and described, set forth and included in said agreement of date July 2, 1910, shall become and be payable January 1, 1913, provided, however, and nothing herein contained shall in any manner change, limit or prevent the maturing and becoming due and payable and collectable of any of said notes, debts, and obligations, at any time by reason of failure on the part of the party of the second part to keep and perform each and all of the obligations contained in said agreement of July 2, 1910, or in any of said notes or obligations; it being the intention of the parties hereto merely to extend the time of payment of the principal of said notes, debts, and obligations, and to in no manner change the terms or conditions thereof or of said agreement of July 2, 1910; and the said agreement of date July 2, 1910, shall continue in each, all and every of its parts, covenants, terms and conditions, in full force and effect, save only as to the one matter of the extension of the time of the payment of the principal of the said notes, debts and obligations.

"(2) The party of the first part shall loan to the party of the second part the sum of seven thousand five hundred dollars (\$7,500) and the party of the second part shall forthwith loan in turn, said sum of seven thousand five hundred dollars (\$7,500), and an additional sum of seven thousand five hundred dollars (\$7,500) which he shall himself forthwith advance unto the Yuma Electric & Water Company, and the whole of said money, that is to say, the sum of fifteen thousand dollars (\$15,000) shall be loaned by the said party of the second part unto said company, and at the rate of ten per cent. (10%) per annum interest, said interest payable monthly, and said total loan of fifteen thousand dollars (\$15,000) shall be repaid unto the

said party of the second part by said Yuma Electric & Water Company from time to time from the net earnings of the company. Said money shall be used and expended by said Yuma Electric & Water Company for certain machinery, and the betterment of its property situate at Yuma, Arizona. The said Blaisdell upon payment of said sum of seven thousand five hundred dollars (\$7,500) by the said party of the first part to him shall execute and deliver his personal note for the sum of seven thousand five hundred dollars (\$7,500), payable on or before two years from and after January 1, 1911, and said note shall bear interest from date at the rate of ten per cent. per annum until paid, and said interest shall be payable monthly, and principal and interest shall be payable at the Consolidated National Bank of Tucson, at Tucson, Arizona; and said note shall contain a clause that if said interest be not paid as therein provided, the principal sum of said note may at the option of the said party of the first part, or the holder of said note, become due and payable, and shall contain a further clause that in case said note is placed in the hands of an attorney for collection a reasonable attorney's fee shall be allowed; and said note immediately upon its execution and delivery by the said party of the second part unto the said party of the first part, shall be deemed to be included in and covered by each and all of the terms and covenants and conditions of the said contract between the parties hereto of date July 2, 1910, and all securities mentioned in said contract and held by the party of the first part as security or collateral, shall also be held as security and collateral for the payment of said note for \$7,500.00, and also, all terms, conditions and covenants in said contract shall fully apply to said note and the said note shall be deemed to be included in said contract as fully and to the same extent (and all collateral and securities mentioned in said contract shall be further held as collateral and security for the payment of said note) as if this particular indebtedness as evidenced by said note for \$7,500.00 were set especially and in full in said contract.

"(3) The said party of the second part, as the owner of the bonds and stock of the said Yuma Electric & Water Company, and in control of said corporation, and familiar with its affairs does represent and covenant, and as a part of the condition of these presents, that the amount due and collectable from the sale of water, light, gas and supplies prior to January 1, 1911, will pay all outstanding obligations of said Yuma Electric & Water Company on January 1, 1911, except those obligations incurred and to be incurred in the betterment of the plant, the construction and execution of which betterment are to be made subsequent to January 1, 1911, excepting, however, from this covenant the bonded indebtedness of said corporation; and said party of the second part agrees that

said Yuma Electric & Water Company shall not become indebted in any sum greater than the sum of \$2,000.00 at any time, except for the regular operating expenses which are to be paid monthly as the water, light, and gas accounts are collected, excepting always the said bonded indebtedness; and that the said Blaisdell shall receive no salary as an officer of said company.

"(4) The party of the first part will on demand of the Merchants' National Bank of Los Angeles, California, pay unto said bank a certain indebtedness of the said party of the second part unto said bank in the sum of twenty thousand dollars (\$20,000), and in the event of said demand and payment, the said party of the first part shall be entitled to and shall receive from said Merchants' National Bank of Los Angeles, a certain fifty thousand dollars of the bonds of the Yuma Electric & Water Company, said bonds being the property of the said party of the second part and being now in the hands and possession of said Merchants' Bank of Los Angeles as security and as collateral for the payment of the aforesaid indebtedness in the amount of \$20,000.00 of the said party of the second part unto said bank, and the said party of the second part in the event of such demand and payment, shall authorize and instruct said bank at the time such payment shall be made of said sum of \$20,000.00 to deliver said fifty thousand dollars of bonds of the Yuma Electric & Water Company unto the said party of the first part; and the said party of the second part shall immediately upon payment of said sum of \$20,000.00 by the said party of the first part unto said bank, execute his promissory note unto the said party of the first part and of date the date of payment of said indebtedness and in the sum of \$20,000.00, and which said note shall be payable on or before the 1st day of January, 1913, and which said note shall bear interest from date at the rate of ten per cent. (10%) per annum until paid, interest payable monthly, and interest and principal payable at the Consolidated National Bank of Tucson, at Tucson, Arizona, and with the provision that if said interest is not paid at maturity the owner or holder of said note may declare the principal thereof wholly due and payable, and with the provision in said note further, for attorney's fees; and immediately upon the payment of said sum of \$20,000.00 by the said party of the first part unto said bank of the said indebtedness of the said party of the second part unto the said bank, the said bonds of said Yuma Electric & Water Company in the sum of fifty thousand dollars, and now held by said Merchants' National Bank of Los Angeles, shall be security and collateral for the said money so paid by the said party of the first part, and security for the payment of the said note in the sum of \$20,000.00 to be executed by the party of the second part unto the party of the first part, and shall also be

security and collateral for all other debts and obligations whatsoever of the said party of the second part to the said party of the first part, and whether now owing or not, and whether mentioned herein or not; and further, the said party of the first part shall have the right at any time whatsoever from and after this date, and at his option, to pay unto the said Merchants' National Bank of Los Angeles, the said \$20,000.00 of indebtedness of the said party of the second part unto said bank, and to obtain and receive from said bank the evidence of said indebtedness and the said fifty thousand dollars of bonds of the said Yuma Electric & Water Company, and to hold said bonds as security and collateral for said payment, and as security and collateral for all other indebtedness whatsoever of the said party of the second part unto the said party of the first part whether now or then owing, and the said party of the second part, in the event said party of the first part should voluntarily make such payment unto said bank, shall upon request of said party of the first part instruct said bank to accept said payment of said indebtedness and to deliver the evidence thereof, and the said bonds, unto the said party of the first part; and further the said party of the second part shall immediately upon said payment unto the said bank by the said party of the first part, execute his said note in the said sum of \$20,000.00 unto the said party of the first part, payable on or before January 1, 1913, with interest at the rate of ten per cent. (10%) per annum from date until paid, interest payable monthly, and said principal and interest payable at the place, and said note to contain all of the terms, conditions and covenants, all as in the note hereinabove provided to be executed in the event the said bank should demand payment of said indebtedness; and said note so executed, shall be secured by said bonds, and said bonds shall be held as collateral therefor, and for all other indebtedness whatsoever of the said party of the second part unto the said party of the first part."

Also the following instrument:

"In consideration of the delivery to me this day, by Albert Steinfeld, of Tucson, Arizona, and free and clear of all liens, claims and incumbrances, the following property, that is to say: Debenture receipt No. 66 for bonds of Imperial Water Company in the amount of \$2,680.00; note, Blaisdell Filtration Company, of date November 15, 1915, payable to the order of Blaisdell Company, in the sum of \$21,000.00, together with guaranty of payment of said note by Blaisdell Company and H. W. Blaisdell; six thousand three hundred (6,300) shares of the King of Arizona Company, as evidenced by certificate No. 56; one hundred (100) shares of California Development Company, as evidenced by certificate No. 516; two hundred (200) shares of California Development Company, as evi-

denced by certificate No. 214—I agree to and do by these presents hereby sell, assign and transfer unto the said Albert Steinfeld the following property, that is to say: Fifteen thousand dollars (\$15,000.00) at par of the bonds of the Yuma Electric & Water Company, and being bonds numbered one to fifteen, both inclusive. * * * And I agree to forthwith deliver the same unto the said Albert Steinfeld. Eight thousand dollars of the bonds of Yuma Gas Company, and being bonds numbered 22, 23, 24, 25, 26, 44, 45, and 46. * * * And I agree to forthwith deliver the same unto the said Albert Steinfeld. One hundred fifty shares of the capital stock of the Yuma Electric & Water Company. And I agree to forthwith deliver the same unto the said Albert Steinfeld. This is a sale absolute of said described property. And further I do agree to forthwith grant, bargain, sell and convey unto the said Albert Steinfeld, or to such person as he may nominate, an undivided fifteen one-hundredths (¹⁵/₁₀₀) interest in and to those certain premises situate in the county of Yuma, territory of Arizona, and described as follows to wit: * * *

That said instruments were drawn at the same time and place and were executed on the same day, and that plaintiff did and caused to be done all the things therein agreed to be done by him. Steinfeld did not pay to Merchants' National Bank the balance of \$20,000 mentioned in agreement. That on or about November 7, 1912, plaintiff paid defendant Albert Steinfeld the sum of \$53,000, being all the interest and principal of all notes of his held by said Steinfeld, and demanded the return of his securities. That said Steinfeld, claiming to be the owner thereof, refused to return the following property: \$15,000 par value of the bonds of the Yuma Electric & Water Company; \$8,000 par value of the bonds of the Yuma Gas Company; and 150 shares of the capital stock of the Yuma Electric & Water Company and fifteen hundredths of the lands described—and refused to return \$10,000 par value of the bonds of the Yuma Electric & Water Company and \$4,000 par value of Yuma Gas Company bonds, claiming the right to hold them as security for commissions upon the sale of the property or properties of the Yuma Electric & Water Company in pursuance of the contract dated July 2, 1910, and for services rendered by Steinfeld in trying to sell said properties. That on or about November 8, 1912, and before the bringing of this suit, plaintiff notified defendant Albert Steinfeld that the contracts of dates July 2, 1910, and January 19, 1911, were rescinded.

The controverted facts in the pleadings are: The plaintiff alleges that he was greatly in debt, owing something like \$100,000, and that his creditors, the Merchants' National Bank and Steinfeld, were pressing him

to pay, threatening suits to enforce payments. That defendant Albert Steinfeld knew plaintiff's financial condition, his financial embarrassments and necessities, and his imperative need of raising and procuring money and took advantage of plaintiff's helpless financial condition, and therefore exacted and received, in addition to 10 per cent. interest on loans made and extensions, the agreement in contract dated July 2, 1910, to pay 10 per cent. commission on the sale of his property and the agreement in contract of January 19, 1911, that Steinfeld should have 15 per cent. of his property in addition to 10 per cent. interest on loans. That said agreements were exacted and demanded in addition to paying 10 per cent. interest on loans as a bonus for making loans and for extension of time on loans. That said contracts were unconscionable and extortionate and were obtained by duress and threats. Plaintiff alleges that the return to him of the Imperial Water Company debenture receipt No. 66 for \$2,680, the note of Blaisdell Filtration Company for \$21,000, 6,300 shares of King of Arizona Company, 300 shares of California Development Company, the recited consideration for 15 per cent. of stock and bonds, and fifteen hundredths of lands was not the real consideration for such contract but was for the purpose of evading usury laws of Arizona and for covering up violations thereof.

The defendants specifically deny all the above allegations and with respect to the commission contract of July 2, 1910, admit and allege: "Defendants admit that the 10 per cent. commission mentioned in the contract of July 2, 1910, was to be paid as in said contract set forth (that is to say, it was to be paid to the said Steinfeld regardless of by whom the sale might be made, and regardless of whether at the time of the sale the said plaintiff should be indebted to the said Steinfeld), and in this behalf aver, as aforesaid, that the consideration of said commission was service already rendered by the said Steinfeld in an endeavor to sell and dispose of the said property, and of further efforts to be made by the said Steinfeld to sell and dispose of said properties, and which efforts have been made at great expense of time and some money to the said Steinfeld, and that said commissions were to be paid as compensation for said services so rendered and to be rendered, and that said commission as set forth in said contract was to be paid regardless of any indebtedness (that is to say, that said commission had naught whatsoever to do with said indebtedness but was entirely independent thereof and was for services rendered and to be rendered as aforesaid), and also that certain clauses in said contract of July 2, 1910, in regard to the payment of said commission were inserted therein for the purposes of avoiding any difficulties that might arise in the collection

of said commission and as to whom or what persons had actually effected the same."

With respect to the agreement of January 19, 1911, the defendants allege: "Defendants allege that the sole and only consideration moving to the said Steinfeld for the extension of time on the obligations of said plaintiff to said Steinfeld, and the agreement to take up the indebtedness of said Blaisdell to said Merchants' National Bank, was the interest at 10 per cent. per annum upon said moneys, and that the only true consideration in regard to the transfer of said 15 per cent. of said stocks, bonds, and said lands was the aid, services, and assistance of said Steinfeld, sought by said Blaisdell; that said Steinfeld has rendered said services; and that said services have been and are of great value unto the said plaintiff Blaisdell." Also: "That the said plaintiff, voluntarily and prior to the execution of said contract of January, 1911, asked the defendant Steinfeld to join in his enterprises and offered to give him absolutely 15 per cent. of the bonds of said Yuma Electric & Water Company, being \$15,000 par value of said bonds, and \$7,500 of the bonds of the said Yuma Gas Company and 150 shares of the capital stock of the said Yuma Electric & Water Company, and an undivided fifteen-hundredths interest in and to certain lands in the county of Yuma, and being the lands set forth and described in plaintiff's complaint herein; the said plaintiff requiring the said defendant Steinfeld, in consideration of the transfer and conveyance of said property, to interest himself personally in plaintiff's enterprises and to assist in the improvements and betterment thereof. * * *"

The plaintiff alleges that the value of stock and bonds was \$250,000 and of land was \$25,000. Defendants deny such value, but admit stock and bonds were of a value of \$125,000 and land \$20,000.

Defendants ask that Albert Steinfeld be decreed the owner of \$15,000 par value of bonds of the Yuma Electric & Water Company now in his possession, of \$8,000 par value of the bonds of the Yuma Gas Company now in his possession, of 150 shares of the capital stock of the Yuma Electric & Water Company now in his possession in the name of the defendant Pauli, and fifteen-hundredths interest in the real estate, title to which is in Harold Steinfeld as trustee of Albert Steinfeld; that it be decreed that Albert Steinfeld shall hold, as security for the payment of commission earned in regard to the sale of real estate, \$10,000 par value of the bonds of the Yuma Electric & Water Company now in his possession and \$4,000 par value of the bonds of the Yuma Gas Company now in his possession, all as provided in paragraphs 13 and 22, contract of July 2, 1910.

The findings of fact, in brief, were: That plaintiff and defendant Albert Steinfeld ex-

ecuted the contract of July 2, 1910; that it was not the intent or purpose of either plaintiff or defendant that defendant should receive any commission or compensation by reason of any sale of said property that might be effected or procured without the services of defendant, but that defendant should be the sole judge as to whether any sale that might be effected was as a matter of fact procured by the defendant; that the bonds assigned to defendant in said contract were given by plaintiff as security for any commission to which defendant might become entitled under said contract; that defendant endeavored to sell properties under the terms of contract of July 2, 1910, and that no sale had been effected or procured by him at the date of this action; that the Yuma Electric & Water Company did, pursuant to the agreement of July 2, 1910, appoint defendant its sole and exclusive agent for the sale of its properties and agreed to pay 10 per cent. commission, and that said contract of agency has not been revoked or in any wise canceled by the Yuma Electric & Water Company and is still in full force and effect; that under said contract of July 2, 1910, defendant was given the right to hold plaintiff's securities to secure the payment of commissions that might be earned by Steinfeld; that said contract for commission was independent of and disconnected with the contract for the loan of money or extension of time of payment of obligations, and that the sole and exclusive consideration for commissions to be paid defendant was his services to be performed in procuring the sale; that the loan of money or extension of time on loans was no part of the consideration for the agreement to pay commissions; that said commission was not a bonus for a loan or extension of time of payment but was a commission on sale of property, payable only when property was sold, and then only in the event that defendant directly or indirectly had accomplished the sale; that the contract of July 2, 1910, was not usurious, nor unconscionable, nor extortionate.

The plaintiff and defendant Albert Steinfeld executed the contract of January 19, 1911; that prior thereto, in December, 1910, plaintiff and defendant entered into a verbal contract by the terms of which it was provided that defendant become interested with plaintiff in plaintiff's enterprises at Yuma, and that said plaintiff freely, and without collusion, duress, or compulsion of any kind, and for such consideration, agreed to give, of his own voluntary offer, 15 per cent. of the stock and bonds of the Yuma Electric & Water Company and 15 per cent. of the bonds of the Yuma Gas Company and 15 per cent. of certain lands described in complaint; that on or about said date plaintiff borrowed from defendant \$7,500; that the real, true, and only consideration for the transfer of the said 15 per cent. of bonds, stock, and lands, as set forth in said con-

tract of January 19, 1911, was the services of defendant to be rendered plaintiff, and that the consideration therefor was not the loaning of money or forbearance on money lent or extension of time; that defendant did thereafter render the service agreed on; that there was no usury in either of said contracts of July 2, 1910, or January 19, 1911, nor intent on the part of plaintiff to pay, nor on the part of defendant to receive, any interest in excess of 10 per cent. per annum; and that said contracts were fair and conscionable and equitable and for the mutual benefit of the plaintiff and defendant, and that no advantage was taken of the plaintiff by defendant in the procurement of either of the said contracts, and that such contracts were the voluntary acts of both plaintiff and defendant.

Judgment was entered for defendants as prayed, except that it was provided that plaintiff could apply to the court for an adjudication that a reasonable time for the sale of the property by Steinfeld, as provided in July contract, had elapsed, or to declare the agency for said sale of properties at an end, and should the court be satisfied that no sale had been made, or that agency has been terminated, it would then order the return of said \$10,000 par value of Yuma Electric & Water Company bonds and \$4,000 par value of Yuma Gas Company bonds to Blaisdell.

Other and additional facts are set forth in the opinion of the court.

Selim M. Franklin, of Tucson, and Frank C. Hill and Geo. S. Hupp, both of Los Angeles, Cal., for appellant. Eugene S. Ives, Gerald Jones, and S. L. Kingan, all of Tucson, for appellees.

ROSS, J. (after stating the facts as above).

[1] Appellees, by a motion to dismiss, have attacked the sufficiency of the appeal bond. It is said the bond recites the judgment and order denying the motion for a new trial, but its condition is merely that appellant will pay all costs that might accrue on the "appeal," and it is therefore void.

The bond recites a judgment against appellant, a motion for new trial, and an order overruling the motion, and proceeds: "And the said H. W. Blaisdell did then and there, and on said day in open court, give notice of appeal to the Supreme Court of the state of Arizona from the said judgment and from the said order denying his motion for a new trial aforesaid; and whereas the clerk of said superior court has fixed the probable amount of the costs of said suit of both the appellate court and the court below at the sum of two hundred and fifty dollars (\$250.00), and the said H. W. Blaisdell desires to perfect his said appeal by filing a bond as required by law: Now, therefore, if the said H. W. Blaisdell, appellant, the principal herein, shall prosecute his appeal with effect, and shall pay all costs which have accrued in

the court below, or which may accrue in the appellate court. * * *

It will be observed that the bond recites but one notice of appeal, and that notice of appeal was from the judgment and order denying motion for new trial. The bond is as provided by paragraph 1506, R. S. 1901, "conditioned that such appellant * * * shall prosecute his appeal * * * with effect, and shall pay all costs which have accrued in the court below, or which may accrue in the appellate court." It is contended by appellant that according to paragraph 1493, R. S. 1901, which provides that an appeal may be taken from any final judgment and from any of the orders mentioned in section 1214, there is but one appeal. Whether he is right in this contention or not we do not think necessary to decide, as we are satisfied that there is but one appeal in this case. In jurisdictions where the appeal from the judgment and order refusing a new trial are treated as separate appeals, one bond conditioned as the bond in this case has been held sufficient. *Bell v. Staacke*, 159 Cal. 193, 115 Pac. 221; *Granger v. Robinson*, 114 Cal. 631, 46 Pac. 604; *Pirrie v. Moule*, 33 Mont. 1, 81 Pac. 390.

We do not think the case of *Dean v. Territory*, 13 Ariz. 152, 108 Pac. 476, relied upon by appellees, is in point. In that case the bond recited three separate appeals and contained a single obligation.

[2, 3] Appellees have also filed a motion to strike certain of appellant's assignments of error, alleging their insufficiency. The practice of striking assignments that fail to conform with the rules of the court or with law has never been recognized by this court. According to rule 8 of the rules of this court (126 Pac. xl), "an objection to the ruling or action of the court below will be deemed waived in this court, unless it has been assigned as error, in the manner" provided by the rules. An assignment so defective as to raise no question for this court to decide is as if no assignment had been made or attempted to be made, and any objection to the ruling or action of the trial court thus made "will be deemed waived." No motion to strike is necessary, but objection may be made by calling the attention of the court to the defective assignment.

The appellant makes eight assignments of error, three of which are unquestionably good, and, as they present all the questions we are asked to pass upon, it is unnecessary for us to refer to or discuss the others. The assignments that we shall consider are:

(1) "That the findings of fact do not sustain the judgment in this: That, as the court found that the 10 per cent. commission was only to be paid Steinfeld in the event he himself made a sale, there was no consideration whatsoever for this agreement, Steinfeld not having made any sale; and as it was alleged in the complaint, and admitted in the answer, that Blaisdell, before com-

mencing this suit, had notified Steinfeld that he rescinded his (Steinfeld's) right to sell, the court should have adjudged and decreed that the contract of July 2, 1910, was canceled, and should have ordered Steinfeld to return to Blaisdell the \$10,000 of Yuma Electric & Water Company bonds and \$4,000 of Yuma gas bonds to Blaisdell, without any terms or conditions whatsoever. The court erred in rendering its judgment requiring Blaisdell to make new proof of rescission of the commission agreement and in fixing terms as set forth in the judgment."

(2) "The court erred in not finding, from the evidence, that the contract to pay Steinfeld a commission of 10 per cent. upon the sale of Blaisdell's properties was usurious and void."

(3) "The court erred in not finding, from the evidence, that the consideration to Blaisdell for the 15 per cent. of the bonds, stock, and real property that he transferred to Steinfeld, was a usurious consideration and therefore void, and further erred in not finding said contract unconscionable."

[4-7] 1. Under the findings as well as the claim of right to hold the \$10,000 par value of bonds of Yuma Electric & Water Company and \$4,000 par value of bonds of Yuma Gas Company, as set forth in defendants' answer, the appellant was entitled to a judgment directing their return to him. The findings are to the effect that Steinfeld was to have 10 per cent. commission only in case he effected a sale of the properties, and that there had been no sale. That Steinfeld's contract of agency to sell had been revoked before the institution of suit was admitted in the answer. These bonds were placed with Steinfeld to secure the payment of the 10 per cent. commission in case he earned the commission, and that could only be by his effecting a sale of the property.

"Nothing is better settled in the law than that an authority to sell land, when not coupled with an interest, may be revoked at the will of the principal." *Kolb v. Bennett Land Co.*, 74 Miss. 567, 21 South. 233; *Jayne v. Drake* (Miss.) 41 South. 372; *Simpson v. Carson*, 11 Or. 361, 8 Pac. 325; *John L. Rowan & Co. v. Hull*, 55 W. Va. 335, 47 S. E. 92, 104 Am. St. Rep. 998, 2 Ann. Cas. 884. Any unilateral contract of agency, whether it be to sell personally or realty, may be revoked at the will of the principal.

Further, defendants' answer precludes their right to hold said bonds as security for a possible future sale. The answer says: "That the consideration of said commission was service already rendered by said Steinfeld in his endeavor to sell and dispose of said property, and of further efforts to be made by said Steinfeld to sell and dispose of said properties, and which efforts have been made at great expense of time and money. * * * The prayer to the answer is: "That it be decreed that Albert Steinfeld shall hold as security for the payment of

commission earned in regard to the sale of real estate. * * *" The answer was drafted on the theory that appellant had canceled and rescinded Steinfeld's agency and authority further to act in the matter of selling the properties of appellant. Nor does the fact that Steinfeld had been appointed by the Yuma Electric & Water Company its "sole and exclusive agent" for the purpose of selling its property, with the agreement on its part to pay him 10 per cent. commission on any sale, aid the judgment, for the reason that such agreement was outside the issues made by the pleadings, and further did not pretend to pledge appellant's bonds or any other bonds or property as security for commissions he might earn under his agreement with the company. The judgment should have decreed the appellant the owner of said bonds, free from any claim of lien, and directed their return to the appellant.

[8] 2. This assignment makes the proposition that the court erred in not finding from the evidence that the contract to pay Steinfeld a commission of 10 per cent. upon the sale of appellant's properties was usurious and void. It is the contention of appellant that by the terms of the contract of July 2, 1910, itself, and the undisputed evidence in the case, the only consideration to appellant for this agreement to pay appellee Albert Steinfeld a commission of 10 per cent. when his property was sold, was Steinfeld's agreement to lend him \$20,000 at 10 per cent. per annum for six months, with an option to extend payment for one year, and like extension of time in which to pay the \$25,000 and interest then owing Steinfeld. That defendants' answer "avers that on or about the 2d day of July, 1910, and at the time of the execution of said contract of said date, the said Blaisdell was indebted to the said Steinfeld in the sum of \$25,000. That at said time the said Steinfeld extended the time of payment of all of said indebtedness then due for the period of six months," taking notes therefor bearing 10 per cent. interest, payable monthly. This statement in the answer should be considered in connection with the contract which mentions "indebtedness now existing and the money now owing" from Blaisdell to Steinfeld.

A perusal of the July contract will convince any one that the writer thereof was determined, at the expense of much repetition and great prolixity, fully and clearly to state the agreements as explained and detailed to him. There is no suggestion that the contract contains any stipulation, term, or obligation not intended or fully understood and agreed to. The preamble of the contract recites appellant's indebtedness to Merchants' National Bank and appellee Steinfeld, and then says: "And, whereas, the said Blaisdell is desirous of obtaining assistance from the said Steinfeld to pay said indebtedness unto the said bank, or a part thereof, and is further desirous of securing

the said Steinfeld for any moneys he may now advance or loan for said purpose and is also desirous of further securing the said Steinfeld upon the indebtedness now existing and the money now owing, as well as the moneys hereafter to be owing by said Blaisdell unto the said Steinfeld, and the said Steinfeld is willing to assist the said Blaisdell in said matters, and upon the terms and conditions hereinafter set forth: Now, therefore, in consideration of the sum of one dollar (\$1.00), cash * * * and of the covenants and conditions hereinafter contained, and to be kept and performed." The "terms," "conditions," and "covenants" to be kept and performed then follow and are in short: That Steinfeld would pay to Merchants' National Bank \$20,000 for Blaisdell's credit and endeavor to secure from bank an extension of six months from July 2, 1910, for Blaisdell to pay the balance owing the bank. Blaisdell was to give to Steinfeld his two 10 per cent. \$10,000 notes secured by \$50,000 par value bonds of Yuma Electric & Water Company. Steinfeld at his option could pay to Merchants' National Bank balance of \$20,000 within four months, in which event Blaisdell was to execute his note to Steinfeld for amount bearing 10 per cent. and secure same with \$50,000 par value bonds of Yuma Electric & Water Company. As further security for loans and forbearances, Blaisdell was to assign and transfer all equities and rights of his in any stocks and bonds of the Yuma Electric & Water Company and Yuma Gas Company and execute to Steinfeld a mortgage on his real property in Yuma county. Then follow the terms, prices, and conditions under which Blaisdell may sell or dispose of stocks, bonds, and real estate. Then follows the "term," "condition," or "covenant" in regard to Steinfeld's commission, which "is to be kept and performed," and in consideration of which "the said Steinfeld is willing to assist the said Blaisdell in said matter"; that is, lend him money at 10 per cent. upon security selected and approved by him.

The stipulation as to Steinfeld's commission is, in effect, that he shall have a commission of 10 per cent. upon the amount received for the properties of the Yuma Electric & Water Company and the real estate regardless of who shall make or negotiate the sale, to be paid at time of sale, and to be paid regardless of any indebtedness of Blaisdell to Steinfeld and however remote the sale is made from July 2, 1910, and also that sale shall be made through Steinfeld. In the event that sale is not made until after Blaisdell has discharged all his obligations to Steinfeld, then Blaisdell was to leave with Steinfeld sufficient securities to secure the payment of said commission when the sale or sales shall be made.

It seems to us that the contract has set forth in language most clear, explicit, and convincing that the so-called commission on

sale of property was in part at least the moving consideration to Steinfeld to lend Blaisdell money and to grant extensions of time on money already owing. Under the contract this 10 per cent. was not for services to be rendered by Steinfeld, for he nowhere agreed to render any services in effecting a sale or for any other purpose. His obligation was discharged by lending the money and granting extension of time. Blaisdell's obligation was "kept and performed" on his part when he paid all that he owed, principal and interest, and 10 per cent. "commission" on sale price of his property. That the payment of the principal and interest was considered an incomplete discharge of his "covenants" is shown by the provision in the contract to the effect that, if the property was not sold before the satisfaction of his obligations, then and in that event security should be left with Steinfeld for commissions when sale was made.

Notwithstanding the clear meaning and import of the language used in the contract, defining Steinfeld's right to 10 per cent. commission, in his answer he states that the consideration for said commission was services already rendered and services to be rendered in the sale and disposition of the property, and in his answer insists that he had earned his commission by such services, even though no sale of the property had been made by him or any one else, and insists on retaining security for commission in the face of a revocation of his authority to sell the property, an untenable position under the law as we have heretofore shown, but indicating that he not only at the time of the execution of the contract of July, but at the time of taking issue with plaintiff's cause of action, thought himself entitled by the terms of the contract to the stipulated commission. On March 4, 1912, Steinfeld wrote Blaisdell, "If you finally conclude not to negotiate a sale at the present time, on account of the conditions not being opportune, then I believe you ought to turn over to me the 10 per cent. interest in all your properties, and cancel that part of your contract existing between us;" and again on March 9, 1912, in reply to a letter of Blaisdell in which the latter said, "In regard to your commission of 10 per cent. for selling the property, I do not see how you can ask for that until you have made a sale," Steinfeld said: "With reference to my commission, I shall expect of course that the contract I hold with you and your company shall be lived up to in letter and spirit. If you will remember, the object of making this contract was to make a sale, whether I made it, or you, or anybody else made it, and that in such an event I was to receive the commission stipulated. You also remember what the consideration of this commission was, of my extending to you an additional line of credit and extending the time of payment of the remainder of the obligation." It

is true that Steinfeld in his oral testimony stated that he did not expect any commission unless he was instrumental in making a sale of the property, a position so at variance with his answer filed in the case and with his letters above quoted as not to be reconciled. By adopting the construction placed upon the contract by appellee Steinfeld, as contained in his letters, the terms of the contract are upheld. By adopting the construction now contended for by appellees would be to give the contract a meaning not to be found in its language, but contrary and foreign to its language. The plain, clear, and solemnly written and executed contract should prevail as the measure of the rights of the contracting parties. The contract then between appellee Steinfeld and appellant Blaisdell was that Steinfeld would grant to Blaisdell an extension of time for six months, with an option for one year, on the \$25,000 that Blaisdell owed Steinfeld on July 2, 1910, and lend him \$20,000 more for like time, for which Blaisdell promised and agreed to pay 10 per cent. interest per annum and 10 per cent. on the sale price (estimated at \$200,000 to \$250,000) of property pledged as security whenever sold, either during life of loan, or afterwards, and regardless by whom sold. It is clear that Blaisdell here agreed to pay more than 12 per cent. per annum for the use of the \$45,000. It remains to apply the law to such a contract.

Section 1, c. 84, p. 221, Laws of 1909, provides that the legal rate of interest in Arizona, in the absence of an agreement, shall be 6 per cent. per annum, but that parties may agree in writing to a different rate, not to exceed 12 per cent. per annum. Section 2, *Id.*, is that "any person so contracting for a greater rate of interest than 12 per cent. per annum shall forfeit all interest so contracted for in excess of such 12 per cent. * * *"

[9] "In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take and look only to the substance of the transaction in order to determine whether all the requisites of usury are present. These requisites are: (1) An unlawful intent; (2) the subject-matter must be money or money's equivalent; (3) a loan or forbearance; (4) the sum loaned must be absolutely, not contingently, repayable; and (5) there must be an exaction for the use of the loan of something in excess of what is allowed by law. If all these requisites are found to be present, the transaction will be condemned as usurious, whatever form it may assume, and despite any disguise it may wear. But, if any one of these requisites is lacking, the transaction is not usurious, although it may bear the outward marks of usury." 39 Cyc. 918 and 919.

As Lord Mansfield said in *Floyer v. Edwards*, Cowp. 112, 114, 98 Eng. Reprint, 995: "Where the real truth is a loan of money,

the wit of man cannot find a shift to take it out of the statute."

The "unlawful intent" referred to is presumed "from the mere fact of intentionally doing what is forbidden by statute. It is not necessary that the parties shall know that in so doing they are violating the law." 39 Cyc. 920. "When, in addition to legal interest, the lender exacts of the borrower, as a condition of the loan, or forbearance, an additional sum, the loan is tainted with usury, which cannot be cloaked by calling the illegal exaction 'commission' or 'bonus', or by any other euphemistic name." 39 Cyc. 971.

In *Weaver v. Burnett*, 110 Iowa, 567, 81 N. W. 771, the court quotes Chancellor Walworth in *Colton v. Dunham*, 2 Paige (N. Y.) 267, as follows: "Whenever, by the agreement of the parties, a premium or profit beyond the legal rate of interest, for a loan or advance of money, is, either directly or indirectly, secured to the lender, it is a violation of the statute, unless the loan or advance is attended with some contingent circumstances by which the principal is put in evident hazard. A contingency merely nominal, with little or no hazard to the principal of the money loaned or advanced, cannot alter the legal effect of the transaction."

* * * Where there is a negotiation for a loan or advance of money, and the borrower agrees to return the amount advanced at all events, it is a contract of lending; * * * and whatever shape or disguise the transaction may assume, if a profit beyond the legal rate of interest is intended to be made out of the necessities or improvidence of the borrower, or otherwise, the contract is usurious." See, also, the following cases: *Scott v. Fabacher*, 176 Fed. 229, 100 C. C. A. 147; *Scott v. Lloyd*, 9 Pet. 418, 460, 9 L. Ed. 178; *Buttrick v. Harris*, 1 Bliss. 442, Fed. Cas. No. 2,256; *Inland Trading Co. v. Edgecombe*, 57 Wash. 257, 106 Pac. 768.

We think the contract of July 2, 1910, itself, and the evidence at the trial, conclusively show that the 10 per cent. of sale price of property provided for was a part of the consideration for loan of money and forbearance on money; that the so-called commission under the contract was to be paid at all events; and that the agreement to pay it was as certain as the promise to repay the principal indebtedness with interest, and that its payment under the contract was not contingent upon Steinfeld's effecting a sale of the properties, but was an unconditional promise to give Steinfeld 10 per cent. of the sale price of property whenever sold by Blaisdell or any one else. It follows that the court erred in not finding, from the evidence, that the contract to pay this additional 10 per cent. of the sale price of property to Steinfeld was usurious and void.

[10, 11] 3. The contract of January 19, 1911, it is charged, by the next assignment, is affected with the same infirmities as the

July contract. It is said that the court erred in not finding from the evidence that the consideration for the transfer of 15 per cent. of the bonds, stock, and real property to Steinfeld was a usurious consideration and void, and further in not finding that said contract was unconscionable.

The trial court found that appellant, in consideration of appellee Albert Steinfeld's becoming "interested with plaintiff in his (plaintiff's) enterprise at Yuma, Ariz.," "freely, and without collusion, duress, or compulsion of any kind, and for such consideration agreed to give, of his own voluntary offer," said 15 per cent. of bonds, stock, and lands. "That the real, true, and only consideration for the transfer of said 15 per cent. of said bonds and stock and said lands * * * was the services of said defendant to be rendered by said defendant unto the plaintiff, and that the consideration therefor was not the loaning of money or the forbearance on money lent or extension of time. That the said defendant did thereafter render the services agreed on." That the contract of January 19, 1911, was not usurious. This finding supports the two theories set forth in appellees' answer: (1) That the 15 per cent. was a voluntary gift to Steinfeld in order to have him become identified with appellant in his Yuma enterprises; and (2) that the 15 per cent. was for aid, services, and assistance of Steinfeld to be rendered appellant. It is the contention of appellant that the evidence shows that the only consideration for the 15 per cent. of his property was the lending of money and extension of time on loans, as alleged in his complaint.

The evidence is that from July, 1910, to some time in November, 1910, both appellant and appellee Steinfeld were trying to find a buyer for the Yuma properties, and that they had been unsuccessful. That the main reason for offering the property for sale was to enable appellant to pay off his indebtedness to Steinfeld, Merchants' National Bank, and others, in all amounting to about \$100,000. All this time the demands on the Yuma plants were increasing, and it was necessary that they be enlarged and improved to meet the demands. Blaisdell wanted financial assistance from appellee Steinfeld. These facts are gleaned from their letters to each other. On December 23, 1910, appellant went to Tucson for the purpose of borrowing more money from Steinfeld. Both testified as to what each said on this occasion and as to their agreement. They did not agree as to what took place, but Blaisdell left for Los Angeles with the understanding that Steinfeld would cause their agreement to be reduced to writing for their signatures. Steinfeld alone furnished the data of the contract to the lawyer who wrote two instruments that were satisfactory to Steinfeld, and he caused them to be sent to Blaisdell. One of these instruments was a bill of sale from Blaisdell to

Steinfeld of 15 per cent. of the stock of the Yuma Electric & Water Company and the Yuma Gas Company, 15 per cent. of Blaisdell's bonds of said corporations, and 15 per cent. of all the real estate owned by Blaisdell or Blaisdell and his wife in Yuma county, Ariz. This bill of sale recited the consideration for the transfer as follows: "That whereas the party of the second part has rendered valuable services unto the party of the first part, and for and on his behalf, and for his use and benefit; and whereas, the party of the first part has received other valuable consideration from the said party of the second part; and whereas, the party of the first part is desirous of obtaining the further services of the party of the second part in and about certain of his business enterprises."

The other instrument that Steinfeld caused to be drafted as covering his and Blaisdell's oral agreement of December 23d, and which was sent to Blaisdell at the same time that the above bill of sale was sent, provided for an extension of time for two years from January 1, 1911, for the payment of the \$45,000 then owing Steinfeld by Blaisdell and for the loan to Blaisdell of \$7,500. In fact it is in all material ways the same instrument as the one dated January 19, 1911, found in statement of case, except that it did not provide that Steinfeld should take up the \$20,000 Blaisdell owed the Merchants' National Bank, as does the contract of January 19th.

The two instruments sent to Blaisdell were never executed for the reason that they were not satisfactory to Blaisdell. They may be taken, however, as a true and correct reflex of Steinfeld's understanding of the verbal agreement between them on December 23d, for they were drawn upon data furnished the draftsman by him.

The preamble to the bill of sale sent Blaisdell recites the consideration for the 15 per cent. of appellant's property to be "valuable services" already rendered and "further services" to be rendered Blaisdell "in and about certain of his business enterprises." This recital does not support the idea that Blaisdell was voluntarily giving this property, as was found by the court. The property was to be turned over to him for "services" rendered and to be rendered. The attorney who drew these instruments knew nothing of this transaction until he was told of it by Steinfeld, and in drawing them it may be assumed that he followed the instructions of Steinfeld. On January 19, 1911, Blaisdell went to Tucson and again took up the matter of their agreement which was begun on December 23d. After agreeing between themselves as to the terms of their contract, they went to the offices of Mr. S. L. Kingan, an attorney, for the purpose of having him reduce it to writing.

We will use Mr. Steinfeld's testimony as

to what was said and done after arriving at Mr. Kingan's office: "Mr. Blaisdell came to Tucson. He did not execute the agreements which I had mailed to him. He said there was an objection to it on account of the provision of an indebtedness which was provided for there, and we discussed the matter somewhat. This was in the store in my office. And he also stated that the 15 per cent. which he had agreed to give me was intended by him to cover—to cover the amount of the commission contract, and not as a separate gift of the bonds, of the interest at that time. I said that was not the understanding, nor was it the agreement, because the contract, commission contract, had no bearing whatsoever on this and was not discussed at that time and that I would not accept that. He apparently was satisfied, said that he did not understand it that way, but was satisfied to go ahead with it, and we after—and from my office we went to Mr. Kingan's office to prepare the papers. He came up here for that purpose. We went to Mr. Kingan's office and told Mr. Kingan what we had agreed to, and Mr. Blaisdell again said that he thought I ought to cancel the contract of—commission contract, which I again refused to do. Then Mr. Blaisdell said, 'Well, now, will you obligate yourself to pay that other \$20,000 I still owe the Merchants' National Bank of Los Angeles?' And after thinking the matter over a little while, I said: 'Yes, I will; I will do that.' After I had agreed to pay this debt of the Merchants' National Bank, Mr. Kingan then said, 'Now, it seems to me that this contract that you, gentlemen, want to draw up here might be considered usury.' And that led on to the matter about Mr. Blaisdell wanting—suggested (no, I think I suggested; I don't remember who suggested)—that these securities which I was holding of Mr. Blaisdell's, consisting of a lot, those that are enumerated here in this trial here, should be returned to him, to which I agreed. Up to that time I wish to state—up to that time we had reached Mr. Kingan's office, no mention whatsoever—no intimation had ever been made or nothing has been discussed or talked about usury, or any form of usury, in connection with it. It was a perfectly plain transaction of its kind at that time. I had no idea that there was any usury in it. Mr. Kingan first suggested the usury. I asked Mr. Kingan why it was usury, and he said he did not know it was usury, but it might be considered so. And then I suggested that perhaps these securities, if they were returned to him, asked him whether that would be considered—would modify it in any way; and he seemed to think that that was all right. That was all that was said in that morning conversation. I saw Mr. Blaisdell again that day, in the afternoon, in Mr. Kingan's office. We went to Mr. Kingan's office—that was rather late in the after-

noon—to see whether the papers were ready and to execute them. Mr. Kingan has the papers prepared and Mr. Kingan again suggested that he was not entirely satisfied with the contract; that it was—that it might be considered usurious. And I asked him why. And he says, 'Now, you are returning these papers, which there seems to be some—some lack of consideration here for this.' Then I said to him, I says, 'But I am rendering services here for this 15 per cent. which Mr. Blaisdell is giving me.' And then Mr. Blaisdell said, 'Yes, Mr. Steinfeld is to render me services; he has become identified with me; I want him with me, associated with me, and for that I am giving him this 15 per cent.' Mr. Kingan said, 'Well, now, if that is so, that is different here, and I will reconstruct this contract.' Mr. Blaisdell at that time was very anxious to get away on that day, and he says, 'Well, now, I am very anxious'—asked him how long it would take him to do that. He said it was late in the afternoon, and he couldn't get through with that in time. And Mr. Blaisdell was very anxious to get away, and he says, 'Well, now, Mr. Steinfeld and myself have known each other for a great number of years, and there will never be any such question raised, if there is such a thing to be raised; and we understand each other, and this is the understanding.' And Mr. Kingan said, 'Well, now, if Mr. Steinfeld is satisfied, we can always prove the real consideration in this matter.' And the contract was then executed at that time as it was then prepared. Q. Well, then, state what was the consideration for the transfer of the 15 per cent. to you? A. The services which I was to render Mr. Blaisdell then, and which I did render him."

Mr. Kingan's statement as to what was said and done in his office is as follows: "Mr. Blaisdell and Mr. Steinfeld came to my office on or about January 19, 1911, in the morning, I should judge about 9:30. They came together. I was requested to draw a contract. It is rather difficult for me to state just who said this and who said that. I can simply tell you what took place there, as near as I can remember it. They both came into the office, and Mr. Steinfeld, as I now remember, said that they desired a contract. He and Mr. Blaisdell desired a contract drawn; and they gave me the data. Let me have one of those contracts, please. (Counsel hands paper to witness.) I think Mr. Steinfeld gave me the information which I am going to state: * * * That Mr. Blaisdell owed Mr. Steinfeld, as I remember it, \$45,000, of which \$25,000 he had owed him from the 2d of July, 1910, and \$20,000 for money which he had paid the Merchants' National Bank of Los Angeles, under the contract of July 2, 1910; that the time of payment of that money was to be extended until the 1st day of January, 1913; that Mr. Steinfeld

was to loan Mr. Blaisdell \$7,500, and Mr. Blaisdell was to advance a like amount and was to loan the total sum of \$15,000 to the Yuma Electric & Water Company, and Mr. Blaisdell made certain representations about the indebtedness of the company; and that Mr. Blaisdell was to convey to Mr. Steinfeld 15 per cent. of the amount of the bonds of the Yuma Electric & Water Company, 15 per cent. of the gas bonds, and 15 per cent. of the real estate. I then said that the transaction struck me as usurious; that it appeared that Mr. Steinfeld was extending time of payment of certain money, loaning him other money, and getting 15 per cent. of this property, 15 per cent. of the bonds, and 15 per cent. of the stock, and 15 per cent. of the real estate. I said I didn't think a contract of that sort was either—I said illegal, or some such term as that. Mr. Steinfeld then said, 'What is the matter with it?' Mr. Blaisdell and Mr. Steinfeld were both there, sitting at my desk. 'Well,' I said, 'there is no consideration for this 15 per cent.' Mr. Steinfeld then said, 'Mr. Blaisdell wants me to release, or I will release to him, certain securities of Mr. Blaisdell's, which I now hold, namely, \$21,000 note, or such an amount, of the Blaisdell Company, indorsed by Mr. Blaisdell, and that—and other securities. If I release those to Mr. Blaisdell, will that be a good consideration?' And I said, 'Yes.' And I said, 'Send me down a list of those securities.' Mr. Blaisdell and Mr. Steinfeld then left the office, and in a little while Mr. Steinfeld sent me the list of securities which is released in that instrument. I then proceeded—Mr. Blaisdell, as I remember it, told me that he wanted to get away that day. I then proceeded to draw these contracts which bear the date of January 19th. As soon as I thought about the matter, I saw that what I had stated to Mr. Blaisdell and Mr. Steinfeld about the consideration was not correct, and the contract still appeared to be usurious; and I think, to the best of my recollection, or my recollection now is, that it is because I had that belief that I drew the instruments separately. I divided, of my own volition, the one proposition that both of them had given me, and put it in two instruments—these two instruments which are executed. I did that of my own volition, and I did that because I was under the impression and belief, after I thought over the matter, that it appeared to me to be a usurious contract. I drew those papers in the form that they now are—in the form that they are in the pleadings. After I drew them I had a further interview with Mr. Blaisdell, or Mr. Steinfeld. I didn't see either of them until (it must have been 4 or 4:30 o'clock in the afternoon) Mr. Blaisdell and Mr. Steinfeld came in together. They came in together in my back room, and I was sitting at the desk, and they sat down. Mr. Blaisdell sat in a chair at my right, between the desk and the wall, and Mr. Stein-

feld sat directly in front of me, opposite me, across my large desk. I had the two contracts before me. I said to them, 'I am still not satisfied about these contracts.' Mr. Steinfeld said, 'What is the matter with them?' or words to that effect; and I said, 'Well, they strike me as usurious.' And Mr. Steinfeld again asked why, and I might have mentioned—I thing I did say, 'Well, there is no consideration for this 15 per cent.' Mr. Steinfeld then leaned across the table toward me and said, 'Oh, but I am to render services for that 15 per cent.' Mr. Blaisdell, sitting at my right, said, 'Yes, Mr. Steinfeld is to become identified with me in these various enterprises.' He used the words 'identified with me in these enterprises.' And I said, 'Why didn't you tell me this before?' And Mr. Steinfeld said, 'Oh, I don't know; I don't know why I didn't tell you;' and no satisfactory answer was made. And I said, 'Well, that being so, my doubts are removed. This is an entirely different proposition, and I want to redraw these instruments, to set forth the real situation.' Mr. Blaisdell then said, 'I don't want to stay over here another day; I want to catch this evening's train.' I don't know where he said he was going to, but I think to Los Angeles or Yuma. He said, 'Mr. Steinfeld and I are old friends; we will never have any trouble about this matter.' And I said, 'All right, go ahead and sign up these papers;' and the papers were then signed. * * * Mr. Blaisdell requested Mr. Steinfeld to relinquish the 10 per cent. commission under the contract of July 2, 1910, for the sale of the property. Mr. Steinfeld said, 'No, I won't relinquish that. I have done a lot of work in regard to the sale of the property. I have negotiations,' as I remember now, 'pending. I think I have earned that commission, and I won't give it up.' Mr. Blaisdell then said, 'Well, Mr. Steinfeld, will you absolutely agree to take care of the Merchants' Bank, the \$20,000 that is still due the bank?' And Mr. Steinfeld said, after some hesitation, he says, 'Yes, I will do that; I will agree to pay that \$20,000 absolutely when they call on me.' I overheard that. * * * There wasn't anything about a gift—nothing said about a gift, Mr. Hupp. What I testified to this morning was that Mr. Blaisdell asked Mr. Steinfeld to release the 10 per cent. commission. * * * I did not understand then that Mr. Blaisdell was making a present of this 15 per cent. for the purpose of securing Mr. Steinfeld's valuable presence in his company and helping him out. Mr. Steinfeld didn't state to me why Mr. Blaisdell was giving this 15 per cent. at that time. I cannot tell you what had been agreed upon before they came to the office."

It seems hardly necessary to enter upon an analysis of the above testimony for the purpose of ascertaining its meaning. The witnesses purport to detail what took place at

the last meeting of the contracting parties between whom negotiations had been pending from December 23, 1910, up to the date of conversation January 19, 1911, in which the subject-matter of the transaction was loan of money and extension of time by Steinfeld to Blaisdell, upon interest and security, and the transfer as a part of the same transaction by Blaisdell to Steinfeld of an interest agreed and settled in this meeting to be 15 per cent. of certain property of Blaisdell's. Part of the consideration of the transaction (the loan of money and extension of time by Steinfeld and transfer of property by Blaisdell) was that Steinfeld would obligate himself "to pay that other \$20,000" that Blaisdell owed the Merchants' National Bank. This Steinfeld agreed to do. Until this promise was included in the contract, there had been no meeting of the minds of the contracting parties. Blaisdell until then had been insisting that he should transfer to Steinfeld but 5 per cent. of his property, which, with the 10 per cent. of the July contract, would make the 15 per cent.; Steinfeld refusing the transfer of 5 per cent. and insisting that the 15 per cent. was in addition to and independent of the 10 per cent. he was to receive under the July contract. Blaisdell made it a condition of the contract before acceding to Steinfeld's demand that the latter would agree unconditionally to take up the balance he then owed the Merchants' Bank, \$20,000. Up to this time there were only negotiations. Their dealings became a binding contract when their minds came together in harmonious agreement. That Steinfeld's agreement to take care of Blaisdell's indebtedness to the bank entered into the consideration of their contract is significantly emphasized by the absence of any mention thereof in the draft of the contract that Steinfeld caused to be drawn and sent to Blaisdell covering their negotiations at their first meeting of December 23, 1910. This item first appears in their last meeting in Mr. Kingan's office January 19, 1911, and is specifically set forth in the contract of that date as one of the "covenants and conditions" thereof.

The two instruments of January 19th were not two contracts. They were but one contract. As Mr. Kingan says: "I divided, of my own volition, the one proposition that both of them had given me." Any consideration in either was a consideration for the other. They must stand or fall together. The recited consideration (the releasing to Blaisdell of certain of his stocks and bonds and a note held by Steinfeld) in the instrument transferring the 15 per cent. of Blaisdell's property was not relied upon in the court below, nor in the presentation to this court, as a sufficient or any consideration for such interest.

There is no substantial evidence to support the court's finding that this 15 per cent. of Blaisdell's property was a voluntary gift. Kingan says he heard no mention of its be-

ing a gift by either of the parties. The value of the 15 per cent. of Blaisdell's property was \$37,500, and 5 per cent. would be \$12,500. We submit that it seems to us a contradiction in human nature to refuse a free will offering of \$12,500, for Steinfeld says, "I would not accept that;" and it likewise imposes on our experience and observation to believe that the almoner, upon the rejection of the offer, would without some valuable consideration or impelling motive yield to a demand of three times the offer. Steinfeld himself testified that it was not a gift. Neither is the finding that the 15 per cent. of Blaisdell's property was transferred to Steinfeld for services supported by any substantial evidence.

Steinfeld probably believed he was stating the truth when he testified that the consideration for the transfer of the 15 per cent. of Blaisdell's property was for services independent of loaning money and extending the time of payment of loans. But this was only his construction of the contract. The facts that he and his witness Kingan detail, and other evidences, show that his conclusion was erroneous. Where a transaction involves many propositions dependent upon each other, the lay mind might not unreasonably, for the purpose of an emergency such as exists in this case, undertake to segregate each proposition into separate contracts. However, the law will not permit this. The "services," as pleaded in the answer and as testified to by Steinfeld, in the broad general sense in which it was used, would cover all aid or assistance one might be able to render another. It might mean a thousand things.

On his cross-examination Steinfeld was asked about the services that he had rendered to Blaisdell for the 15 per cent. of the latter's property as follows: "Q. Now, what services did you render to Mr. Blaisdell in consideration of that 15 per cent. during the balance of that month of December? A. I don't remember. Q. Did you perform any? A. Well, I can't remember just what all happened there. Q. Now, what services during the month of January, 1911, did you render Mr. Blaisdell in consideration of that 15 per cent.? A. Well, as I have said, it has been a continuous line of service; it is continuous work that I have given him along there. Q. Can you tell me anything that you did during the month of January, 1911? A. No, I can't tell you anything except in a general way. Q. In the month of February? A. These letters here, these would indicate something which I have been doing. Q. What did you do outside of going to Yuma for Blaisdell in consideration of that 15 per cent.?" To the latter question Mr. Ives objected, and the objection was sustained by the court. Afterwards Steinfeld did testify that he met a number of people in Tucson and Los Angeles and discussed with them Blaisdell's business affairs. The time

he gave to Blaisdell's business did not interfere with the conducting of his own business. He made one trip to Yuma. The services rendered, therefore, were negligible and only such as a large lender would naturally bestow on the business enterprises of the borrower.

In discussing the evidence in the case, we have not referred to Blaisdell's version of the transaction that resulted in the execution of the two instruments of January 19, 1911. While his testimony supports the complaint and is to the effect that Steinfeld exacted and demanded the transfer to him of 15 per cent. of his property, before making the loan and granting extension of time and agreeing to take up the \$20,000 still owing the Merchants' National Bank, we feel justified in relying upon the instruments executed, and the testimony in behalf of appellees in arriving at the conclusion that the January contract was usurious and void.

Under the January contract the lender was to be repaid every dollar that he had loaned or should advance, together with 10 per cent. per annum payable monthly. In addition thereto he was paid or given as a bonus 15 per cent. of certain of appellant's property amounting in money to some \$37,000. The 12 per cent. allowed by law was exceeded. As heretofore stated, the appellant had repaid to appellee Albert Steinfeld all of his indebtedness, together with 10 per cent. interest thereon as agreed, before bringing this action.

The relief asked by appellant in his complaint under the agreements of July 2, 1910, and January 19, 1911, and all the instruments made and executed thereunder concerning the 10 per cent. commission and the 15 per cent. transfer of his property to Steinfeld, his trustees Harold Steinfeld and F. R. Pauli, is that they be declared null and void; that his stock and bonds be ordered returned to him, or their value, and for \$2,137.50, being the amount of interest paid Steinfeld upon the bonds held by him; that defendant Harold Steinfeld be ordered to re-deed to him the 15 per cent. of lands; that F. R. Pauli be ordered to reassign to him the 150 shares of stock of the Yuma Electric & Water Company; and for general relief and costs.

The judgment of the trial court should have been that Steinfeld return to appellant the stocks and bonds held by him as security for claim of commission under the July contract, as under the facts he had earned no commission and was entitled to no commission by virtue of that contract.

[12] It is well settled at common law that where usurious interest has been paid by the borrower to the lender, as was done under the January contract, he may recover the excess over the rate the parties are author-

ized by law to contract for. In such case the payments are not deemed voluntary, nor is the debtor regarded as being in pari delicto in making them. 39 Cyc. 1030.

"Equitable relief is granted against usurious contracts, whether executory or executed, since from considerations of public policy the two parties are not regarded as standing in pari delicto. * * * If the contract is executory, the borrower may obtain the remedy of a surrender and cancellation of the securities which he has given for the usurious loan. If the contract is executed, he may recover back the usurious amount paid in excess of the sum actually borrowed, and legal interest thereon. * * *" *Pomeroy's Equity Juris.* vol. 2 (3d Ed.) par. 937.

The note to *Baum v. Thoms*, 65 Am. St. Rep. 368 (150 Ind. 378, 50 N. E. 357), reads as follows: "Payment of usurious interest is regarded as made under moral duress and is therefore excepted from the operation of the ordinary rule that voluntarily paying an illegal claim estops the payor from maintaining an action to recover such payment. Note to *Bexar Building, etc., Ass'n v. Robinson*, 22 Am. St. Rep. 41. One who has paid more than the legal rate of interest may recover the excess in an action of assumpsit and is not limited to the remedy prescribed by the statute to prevent usury. But, to entitle the plaintiff to recover, he must show that he has done all that equity requires. *Wheaton v. Hibbard*, 20 Johns. [N. Y.] 290, 11 Am. Dec. 284; *Musselman v. McElhenny*, 23 Ind. 4, 85 Am. Dec. 445; monographic note to *Davis v. Garr*, 55 Am. Dec. 399, 400. Compare *Ferguson v. Soden*, 111 Mo. 208 [19 S. W. 727], 33 Am. St. Rep. 512."

[13] Equity will cancel deeds and incumbrances on real property if tainted with usury or given for a usurious consideration. *Davison v. Smith*, 60 W. Va. 413, 55 S. E. 466, 470; *Scott v. Fabacher*, 176 Fed. 229, 100 C. C. A. 147.

The trial court should have given judgment to appellant for a return of all property paid over or given to Albert Steinfeld under the 15 per cent. contract of January 19, 1911, and directed Harold Steinfeld to deed back to appellant fifteen hundredths of the lands and premises deeded to him as trustee of Albert Steinfeld under said January contract, and ordered F. R. Pauli to transfer or reassign the 150 shares of the capital stock of the Yuma Electric & Water Company, and given appellant judgment for whatever interest that had been paid Steinfeld on bonds held by him.

Judgment is reversed, and case remanded, with direction to enter judgment for appellant in accordance with this opinion.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

MURDICA v. STATE.

(Supreme Court of Wyoming. Jan. 10, 1914.)

1. JUDGES (§ 51*)—DISQUALIFICATION—BIAS—STATUTES—CONSTRUCTION.

Comp. St. 1910, § 5148, provides that, when an objection in a criminal case is made to the judge for bias or prejudice under section 5147, he shall call in one of the other district judges of the state to try the action, who shall try or continue the cause as if it had been originally brought before him. *Held*, that where, in a criminal prosecution, an affidavit of prejudice is filed against the judge, there can be no issue taken thereon, but it has the effect of absolutely disqualifying the judge to proceed in the case or to determine any further question touching or affecting the trial.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

2. JUDGES (§ 49*)—DISQUALIFICATION—AFFIDAVIT OF PREJUDICE—"TRIAL."

The word "trial," as used in Comp. St. 1910, § 5147, providing that the defendant in a criminal action may make affidavit that he believes he cannot receive a fair trial owing to the prejudice of the judge, in which case section 5148 requires that the judge shall call in another judge to try the case, etc., means any hearing wherein any controverted question of law or fact is presented to the court for determination.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 187, 188; Dec. Dig. § 49.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7095-7103, 7821.]

3. JUDGES (§ 51*)—DISQUALIFICATION—PREJUDICE—CHANGE OF VENUE.

Where an affidavit of prejudice against the judge before whom a criminal case was called for trial was filed and called to his attention as authorized by Comp. St. 1910, §§ 5147, 5148, the judge was disqualified thereby to pass on a subsequent motion for change of venue because of prejudice of the inhabitants of the county.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

4. CRIMINAL LAW (§ 757*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES.

Where certain detectives testified for the state, and the court charged that the jury was at liberty to treat their testimony as that of interested witnesses, a further instruction that they ought not as jurors to disbelieve them solely because they were employed to obtain testimony for the prosecution, but should give their testimony the same consideration as any other testimony in the case, giving it such weight as, considering its nature, their opportunity for knowing the facts of which they testified, their appearance and demeanor on the witness stand, and all other elements going to affect their credibility, etc., it was entitled to receive, was erroneous as interfering with the right of the jury to determine for themselves whether interest or bias on the part of the witnesses had been shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1772-1785; Dec. Dig. § 757.*]

Error to District Court, Weston County, David H. Craig, Judge.

Vincenzo Mordica was convicted of murder, and he brings error. Reversed.

Enterline & La Fleiche, of Sheridan, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

SCOTT, C. J. On September 7, 1912, an information was filed in the district court of Weston county charging the defendant in the language of the statute with having on April 30, 1912, in said county and state, willfully, unlawfully, feloniously, and with premeditated malice killed and murdered one John Grachino, and to this information the plaintiff in error, defendant there, was on September 9, 1912, duly arraigned and entered his plea of not guilty. On the day following, to wit, September 10, 1912, the defendant filed his motion supported by his affidavit for a change of judge pursuant to the provisions of section 5147, Comp. Stat. 1910. Upon the filing of this motion the court's attention was called to the same, whereupon the court announced that the matter would be taken under advisement. On the same day, and before a jury had been impaneled in said cause (section 5152, Id.), the defendant also filed in the office of the clerk of said court a motion for a change of venue supported by affidavit under the provisions of said section 5147. The prosecuting attorney filed his affidavit traversing the affidavit of the defendant, and on the same day, to wit, September 10, 1912, the defendant requested the court to call some other judge to hear and act upon the motion for a change of venue from the county of Weston. The bill of exceptions recites: "And thereupon, the said cause having already been delayed two days beyond the date set for the trial thereof, and the jury having in the meantime been kept in waiting, at the request and for the convenience of the defendant to allow him and his counsel time to prepare and present their motion for a change of venue from the county of Weston, the court, the Honorable C. H. Parmelee, judge, presiding, did then and there refuse and decline to call any of the other district judges of the state of Wyoming to hear and try the aforesaid motion of the defendant for a change from the county of Weston, to which said refusal the defendant at the time by his counsel excepted. And the court did thereupon, through the Honorable C. H. Parmelee, judge, presiding, announce that it would then and at that time hear the defendant's motion for a change of venue from the county of Weston. And be it further remembered: That the said defendant by and through his counsel did then and there protest and object against a hearing by the aforesaid court with the Honorable C. H. Parmelee, judge, presiding, of the defendant's motion for a change of venue from Weston county, which said objection and protest were then and there overruled by the court, and the defendant by his counsel then and there excepted. Whereupon the said defendant, by Enterline & La Fleiche, his attorneys, and the defendants Toni Aspoll, by H. P. Isley, his attorney, and Paul Monette, by his attorney, A. H. Beach, appeared and jointly entered into the stipulation in re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gard to the testimony to be taken upon said motion for a change of venue from the county as set forth herein." The court, Judge Parmelee presiding, having heard the testimony in support of and against the motion, took the same under advisement and on September 11, 1912, entered its order overruling said motion, and on September 14th following entered its order calling in Judge Craig of the Third judicial district to further hear and try the case.

The question here presented is: Was Judge Parmelee the regularly elected and presiding judge of the Fourth judicial district after the filing of the affidavit alleging bias and prejudice of the judge and asking that one of the other district judges of the state be called in to try the case, and, his attention having been called thereto, disqualified to hear and determine the motion for a change of venue? There is no objection urged as to the sufficiency of this affidavit under section 5147, *supra*. That section is as follows:

"Sec. 5147. The defendant in a criminal action may make an affidavit stating that he believes he cannot receive a fair trial owing to the bias or prejudice of the judge or the excitement or prejudice against him in the county; the prosecuting attorney may thereupon traverse by his affidavit the allegations of defendant, except those concerning the bias or prejudice of the judge, and the court or judge shall thereupon set down the issue so presented for trial before him at a stated time, at which time both parties shall present their witnesses, who shall be examined under oath orally, and if it appears to the court or judge, upon such hearing, that the trial would be more impartial in another county, the application shall be granted."

[1] In order to construe this section upon the facts here presented, it becomes necessary to consider section 5148 as to the effect of an objection to the judge by affidavit. That section is as follows: "Sec. 5148. When the objection in a criminal action is to the judge, he shall call in one of the other district judges of the state to try said action, who shall try or continue the cause as if it had been originally brought before him."

The purpose of the statute is to give the defendant the right to a fair trial before a judge and jury who are neither biased nor prejudiced. The ruling upon a motion for a change of venue, when contested, involves the weighing of evidence and the exercise of a legal discretion, and under the statute the filing of the affidavit for a change of judge alone disqualifies the judge against whom such affidavit is directed from presiding at the trial by reason of an indisputable presumption of bias or prejudice arising from the making and filing of such affidavit. To permit a judge against whom objection has been properly made to preside at the hearing and determine a disputed motion for a change of venue or a continuance might be

far more prejudicial than a ruling on the admission of testimony or the giving of an instruction. It is true that the statute gives the defendant the right to file such an affidavit, but we cannot say that the statute should be held for naught because the right or privilege is subject to abuse, but, if it be so, then the remedy is with the Legislature and not with the courts. It will be observed that by section 5147, upon filing an affidavit objecting to the judge, no traverse to such affidavit is permitted to be filed. In other words, no issue of fact is or can be permitted. No legal discretion is lodged in the court, for the filing and calling the court's attention to such an objection of record disqualifies the judge so objected to from trying the case. It is suggested that the statute is subject to the construction that the judge is disqualified only from presiding at the trial; that the trial begins after the jury is sworn; and that the disqualification goes to the trial or continuance of the case alone and not to preliminary matters leading up to the trial. We do not think this is the correct rule, for the statute must be given a liberal construction, and by the provisions of section 6207 the selection and impaneling of the jury is a part of the trial, and by the provisions of section 6235, after the jury has been impaneled and sworn, the trial shall proceed in a certain manner as therein indicated.

[2] We think the trial, as contemplated in the statute under consideration, begins when any controverted question of law or fact is presented to the court for determination. 21 Ency. P. & P. 956. The distinction between what constitutes a trial and jeopardy should be clearly borne in mind, a distinction too well known and understood to need discussion. For the purposes of review at least, whatever ruling is made by the trial court in a criminal case proper to be embraced in the bill of exceptions and of which the defendant feels himself aggrieved must be assigned as a ground in the motion for a new trial (section 6236, Comp. Stat. 1910) and preserved by the bill of exceptions (section 6241, *Id.*). One of the grounds for a new trial by section 6236 is: "Irregularity in the proceedings of the court, jury or the prosecuting attorney or the witnesses for the state, or any order of the court or abuse of discretion, by which the defendant was prevented from having a fair trial." The new trial thus sought is based upon errors occurring at the former trial either before or after the jury is called to try the case. In this sense we do not think the strict construction of the statute contended for by the state is applicable.

[3] Indeed, the theory of our Criminal Code is fairness to the accused, and if the judge is disqualified, by bias or prejudice, from presiding at the trial, and the statute makes him so upon filing the statutory affidavit, he is equally disqualified from further exercising any legal discretion touching or

affecting defendant's trial. In any case where misconduct or abuse of discretion by the trial judge is shown whereby the defendant was prevented from having a fair trial, the verdict should be set aside. It would thus seem that such misconduct or abuse of discretion is not limited to matters occurring after the jury is impaneled and sworn but applies to precedent matters as well, and such matters are called to the trial court's attention by the motion for a new trial, as it was in this case. It was early held in this jurisdiction that a motion for a change of judge in a criminal case upon the ground of prejudice or bias of the judge disqualifies such judge from further presiding in the trial of the case. *Hamilton v. Territory of Wyoming*, 1 Wyo. 131. In *Huhn v. Quinn*, 128 Pac. 514, a civil case recently decided by this court, it was held under a statute no more mandatory that a motion supported by the statutory affidavit disqualified the judge so objected to from further acting in the case other than to call in one of the other district judges of the state to preside at the trial. Such being the construction of the statute which has long obtained in this jurisdiction, we feel that this court is bound thereby. In *Buchanan v. State*, 2 Okl. Cr. R. 126, 101 Pac. 295, the defendant was prosecuted for and convicted of the crime of rape. Before the case was called for trial, the defendant moved for a change of judge, supported by affidavit in which he stated in the language of the statute: "That he cannot have a fair and impartial trial on account of the bias and prejudice of the presiding judge. * * *" The motion was overruled, for which the case was reversed. The same court held in *Dodd v. State*, 5 Okl. Cr. R. 513, 115 Pac. 632, that: "When a trial judge is disqualified to sit in the trial of a cause, he cannot make a valid order appointing a special county attorney to appear and prosecute on behalf of the state upon suggestion of the disqualification of the regularly elected and qualified attorney." In *Saltn v. State*, 89 Ala. 56, 8 South. 66, it was held that, where a judge was disqualified to try the case by reason of relationship to the prosecutor, it was erroneous for him to make orders setting the day for trial, determining the number of special jurors to be drawn and summoned and the manner of drawing them. We cite without further comment, in support of our construction of the statute here involved, the following cases, viz.: *State ex rel. Nolan v. Judge* 22d Jud. Dist., 39 La. Ann. 994, 3 South. 91; *Frevort et al. v. State*, 19 Nev. 363, 11 Pac. 273; *Lincoln v. Territory*, 8 Okl. 546, 58 Pac. 730; *Gordan et al. v. Connor et al.*, 5 Idaho, 673, 51 Pac. 747; *State v. Kent*, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686; *Cory v. Silcox*, 5 Ind. 372; *Witter v. Taylor*, 7 Ind. 110; *Manley v. State*, 52 Ind. 215; *Krutz v. Frifith*, 68 Ind. 444.

Judge Parmelee, in assuming to preside during the hearing upon the motion for a change of venue after being disqualified by reason of the affidavit directed to him, necessarily construed the statute in question. His ruling upon that question was *stare decisis* in that court and *res adjudicata* in the case until reversed. There was then nothing for the defendant to waive, and the announcement by him thereafter, and within a month of the time of the ruling on the motion for change of venue that he was ready for trial at the time the case was called by the court (Judge Craig presiding), was not an express waiver of errors which had theretofore occurred and to which exception had been duly taken. In *Jones v. C. N. W. R. Co.*, 36 Iowa, 68, it was held where a motion for a change of venue was improperly overruled, the case continued and tried at a subsequent term, that the error was not waived by going to trial. That decision was followed in *McCracken v. Webb*, 36 Iowa, 551, where the change was erroneously granted and the trial had taken place in the court to which the cause had been changed. In *Ferguson v. Davis County*, 51 Iowa, 220, 224, 1 N. W. 509, after the change of venue had been granted, the parties stipulated that the case should be and was tried on a certain named day and after verdict a motion for a new trial was made. It was insisted that by reason of those matters the error in granting the change was waived. The court say: "Neither of these objections is well taken. The defendant had objected to the change, been overruled and excepted. It could do nothing more, and clearly waived nothing by stipulating that the trial, which must take place some time, should be had on a named day. The defendant could not prevent the trial from taking place. In the motion for a new trial the defendant insisted that the court had erred in granting the change, and for this reason, if no other, it waived nothing. It was the last and only appeal which could be made to the court below." Following these decisions, and we think we are justified in so doing from the high standing of the court from which they emanated, we have no hesitancy in saying that there was no waiver of the error in defendant going to trial before the court, Judge Craig presiding. The defendant had objected to Judge Parmelee passing on the question of the change of venue, been overruled and excepted thereto. He could do nothing more. He could not prevent his trial from taking place. He was compelled to submit to the way his case had shaped itself, and, if there was error to his prejudice, he had his right of review. It is insisted that the error was not prejudicial because he had the benefit of a trial before an unprejudiced jury. It was so urged in *Ferguson v. Davis County*, *supra*. The court there said: "If this position be correct, it

logically follows that in all cases when the place of trial is erroneously changed, and there is no other error in the case, that it is without prejudice. In this view we do not concur. If the trial of a cause is illegally changed or refused, prejudice is conclusively presumed, because an illegal act has been done." In the case before us we think, as the statute disqualifies the presiding judge upon the filing of the required affidavit, his ruling that he was not disqualified to hear and determine the motion for a change of venue and his doing so were erroneous and of necessity prejudicial.

[4] The defendant requested and the court refused to instruct the jury that greater care should be used by the jury in relation to the testimony of persons employed to find evidence against the accused than in other cases because of the natural and unavoidable tendency and bias of such person to construe everything as evidence against the accused and disregard everything which does not tend to support their preconceived opinions of the matter in which they were engaged. The last part of this instruction was bad, for it is argumentative. We have grave doubts as to the propriety of the first part of the instruction, as it is a comment on the weight of the evidence. The instruction was directed to the evidence of two witnesses for the state, who were compensated at the rate of \$8 per day to secrete themselves in the jail where they could overhear any and all conversation between the defendant and two others who were jointly charged with the same homicide. The court, after refusing to give the instruction so requested, gave on its own motion instruction No. 1, in part as follows: " * * * You are at liberty and ought to treat such testimony in the light of testimony given by interested witnesses and give their testimony closer scrutiny before accepting its truth than if they were wholly disinterested witnesses. * * * " Assuming that this instruction was one proper to give on the facts of the case and of which we have heretofore expressed our doubts, we think the latter part of the instruction was clearly erroneous and prejudicial. That part of the instruction is as follows, viz.: "Yet you ought not as jurors disbelieve such witnesses solely and only for the reason that they were employed to obtain testimony for the prosecution, but you should give their testimony the same consideration as any other testimony in the case, giving it such weight as, considering the nature of the same, their opportunity for knowing the facts of which they testify, and their appearance and demeanor upon the witness stand and all other elements which go to their credibility, including their interest and bias, and give to their testimony such weight as under all the circumstances the same is, in your judgment, en-

titled to receive." It will be observed that the court told the jury that in weighing the testimony they should take into consideration the interest and bias of the witness. The jurors were the sole judges of the credibility of the witness, and it was for them to determine whether any interest or bias was shown by the evidence, and, if so, they could take into consideration such interest and bias, if any, in weighing the testimony.

Other errors are assigned upon the court's refusal to give instructions at the request of the defendant and in giving some of the instructions over his objection. It is also contended that the evidence is insufficient to support the verdict, and that the court erred in some of its rulings on the admissibility of evidence. We do not, in view of the fact that the case must be reversed and sent back for a new trial, deem it proper to discuss the evidence, nor is it necessary to discuss any of the questions other than as hereinbefore referred to. The judgment will be reversed.

Reversed.

BEARD, J., concurs. POTTER, J., did not sit.

ASPOLI v. STATE.

(Supreme Court of Wyoming. Jan. 10, 1914.)

JUDGES (§ 51*)—CHANGE OF JUDGE—AFFIDAVIT OF PREJUDICE—EFFECT—SUBSEQUENT JURISDICTION.

Where an affidavit of prejudice has been filed against the judge before whom a criminal case is called for trial, he is thereby disqualified from determining any further question of law or fact in the case, and therefore has no jurisdiction to pass on a subsequent motion for change of venue.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 224-231; Dec. Dig. § 51.*]

Error to District Court, Weston County; David H. Craig, Judge.

Tony Aspoli was convicted of murder, and he brings error. Reversed.

Harry P. Ilsley, of Sundance, for plaintiff in error. D. A. Preston, Atty. Gen., for the State.

SCOTT, O. J. The plaintiff in error, defendant below, was jointly charged with one Paul Monette, by information filed in the district court of Weston county, on September 7, 1912, of having on April 30, 1912, in said county, feloniously and with premeditated malice killed and murdered John Glachino. He was duly arraigned in open court on September 9th following and entered his plea of not guilty. On the last above-mentioned day the defendants named in the information filed a joint motion supported by affidavit for a change of venue, which affidavit was traversed by an affidavit controverting the matters and things therein alleged.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes 127 P.—37

On September 10th following, before the hearing on the motion for change of venue had been heard, and while the same was pending, the defendants filed a joint motion for a change of judge supported by affidavit and in open court called the presiding judge's attention thereto. The court took the motion for a change of judge under advisement and against the protest of the defendants proceeded to hear and determine the issue upon the motion for a change of venue, and the court on September 11th, after hearing the evidence, denied the motion. On September 14th following, the court made its order setting the time for trial on October 4, 1912, before the district court of Weston county, with Judge Craig presiding, who had been called in to preside at the trial. The defendant Aspoll was tried separately, convicted of murder in the first degree, sentenced to suffer the extreme penalty of the law, and brings error.

The bill of exceptions contains none of the evidence given upon the trial but does contain the evidence given upon the hearing of the motion for a change of venue. The only question here presented is: Was Judge Parmelee, the presiding judge of the district embracing with other counties the county of Weston, disqualified from further sitting or presiding in the case upon the filing of the statutory affidavit for a change of judge? This is the identical question discussed and decided in the opinion in *Murdica v. State*, 137 Pac. 574, this day filed, in which we answered this question in the affirmative. It was the same crime charged against *Murdica* and in the commission of which *Aspoll* was alleged to have participated. They all joined in the hearing for a change of venue under like conditions and circumstances, and the same reasons there urged for a new trial are presented in this case, and the conclusion there reached can as well be predicated upon the record here. In this view of the case it becomes unnecessary to discuss the question, and we are content to rest our conclusion here upon the reasons set forth in that opinion. The judgment will be reversed, and the case remanded for a new trial.

Reversed.

BEARD, J., concurs. POTTER, J., being ill, did not sit.

WOOD et al. v. SLOAN. RIO PUERCO IRRIGATION CO. v. JASTRO (two cases). CANAVAN v. CANAVAN.
(Supreme Court of New Mexico. Nov. 29, 1913.)

1. APPEAL AND ERROR (§ 399*)—WRIT OF ERROR—CONSTITUTION.

Const. art. 6, § 3, providing that the Supreme Court shall have jurisdiction to issue writs of error, which may be issued by the direction of the court or any justice thereof, repealed Laws 1907, c. 57, § 3, providing for

the issuance of writs of error by the clerk of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2103, 2105, 2106; Dec. Dig. § 399.*]

2. APPEAL AND ERROR (§ 399*)—WRITS OF ERROR—ISSUANCE—DIRECTION OF COURT.

Where the Supreme Court, upon statehood, appointed the clerk of the former territorial court to be clerk of the Supreme Court, and allowed him to continue to issue writs of error as had been the practice before statehood, writs of error so issued with the knowledge and acquiescence of the Supreme Court and the justices thereof, must be taken to be issued at their direction, within Const. art. 6, § 3, providing for that manner of issuing writs of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2103, 2105, 2106; Dec. Dig. § 399.*]

Error to District Court, Santa Fé County; Abbott, Judge.

Action by J. B. Wood and J. A. Davis, co-partners as the Wood-Davis Hardware Company, against J. H. Sloan. There was a judgment for defendant, and plaintiffs bring error. On motion to dismiss, whereupon plaintiffs filed a motion to enter nunc pro tunc an order confirming the issuance of their writ of error. Motion to dismiss denied, and order of allowance entered nunc pro tunc. See, also, 131 Pac. 493.

Wilson, Bowman & Dunlavy, of Santa Fé, for plaintiffs in error. Renehan & Wright, of Santa Fé, for defendant in error.

PARKER, J. This cause is here on writ of error. A motion was filed by defendant in error to dismiss the writ on the ground that the same had been issued by the clerk of this court without the direction of this court or a justice thereof. Thereupon plaintiff in error filed a motion to enter nunc pro tunc, as of the date of the issuance of the writ of error, an order approving, allowing, and confirming its issuance.

[1] In *Farmers' Development Co. v. Rayado Land & Irrigation Company*, 134 Pac. 216, we had this matter before us. A discussion and decision of it was entirely unnecessary to a decision of that case; the plaintiff in error having failed for want of a cost bond, as is pointed out in the opinion. For the purpose of settling the practice, however, we did discuss this matter in that case, and held that section 3 of article 6 of the Constitution repealed, pro tanto, section 3 of chapter 57, Laws of 1907, regulating the issuance of writs of error. This holding was correct, and we do not desire now to depart from it in any particular. The holding was that such writs must be issued by "direction of the court or any justice thereof."

[2] The further question is presented in this case, not mentioned or argued in that case, viz.: What amounts to a "direction" by the court or any justice thereof? It is to be remembered that for years, under the ter-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ritorial régime, it had been the uniform practice, provided by law, for the clerk to issue these writs upon the filing of a præcipe for the same by the interested parties. Upon the advent of statehood and the formation of this court, we appointed the clerk of the former territorial court to be the clerk of this court. It then and there became our duty to instruct the clerk that writs of error hereafter could be issued only by "direction" of the court or a justice thereof. This we failed formally to do. In accordance with his former custom and practice, he proceeded to issue these writs when applied for, and we have proceeded to hear and determine causes in large numbers brought before us in this manner. While no formal orders have been made allowing the writs, each member of the court has had personal knowledge of this course of conduct. Each member has, from time to time, been actually present and known personally of the issuance of some of these writs, and has acquiesced in and consented to the act, as well as to the general course of practice. Under such circumstances, we hold that such writs have been issued by "direction" of the court, or of some justice thereof, within the meaning of the Constitution. To hold otherwise is to put form above substance, to convert a failure of duty on the part of the court itself into a trap for the unwary litigant, and to unsettle large and important interests heretofore determined by the court.

Of course, a court speaks only in one way, viz., through its orders and judgments. For the sake of formality and regularity, therefore, an order will be entered, allowing the writ of error in this case, nunc pro tunc as to the date of the issuance of the same, and the motion to dismiss the writ of error will be denied; and it is so ordered.

Three other cases, viz., *Rio Puerco Irrigation Co. v. H. A. Jastro*, Nos. 1546 and 1547, and *Stephen Canavan v. Kate Canavan*, No. 1562, are in the same condition, and the same order will be entered in each of them.

ROBERTS, C. J., and HANNA, J., concur.

ROSWELL NURSERY CO. v. MIELENZ.
(Supreme Court of New Mexico. Dec. 17, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 843*)—ABSTRACT QUESTION—REVIEW.

An abstract question, disconnected with the granting of relief in a case, and the determination of which would not affect the result, becomes an academic question, which this court will not consider.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

2. SALES (§ 345*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In the case of a breach of an executory contract for the sale of goods by vendee before title has passed, the vendor, as a general rule, cannot recover on the contract price, but his right is limited to an action for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 956-961; Dec. Dig. § 345.*]

3. SALES (§ 384*)—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Where an executory contract provides for the manufacture of an article after a particular pattern or style, so that it would be useless, or practically useless, to any one except the person for whom made, or in the case of trees prepared for planting, upon breach by the vendee before delivery, the measure of damages is the whole contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

Appeal from District Court, Chaves County; McClure, Judge.

Action by the Roswell Nursery Company against Fred Mielenz. From a judgment for plaintiff, defendant appeals. Affirmed.

The plaintiff in the district court obtained a judgment against the appellant for \$119.25, being the contract price of certain trees ordered by appellant on February 29, 1912, for delivery in the spring of that year, which order, in part, defendant attempted to countermand, before delivery had been made, by a letter dated March 20, 1912, wherein he said: "Have been trying hard to get around to the tree planting; hard luck seems to be hitting our work all the way through; just won't be able to put in the one ten-acre block; had to build a terraplane; too much salt grass in it; and couldn't get enough dirt, so it won't work. Consequently would like to cancel that part of the order. Think will be able to get at the other ten-acre block next week." A few days later—i. e., March 26th—defendant again wrote as follows: "Friend Johnson: Your letter received regarding trees. What I want is to be relieved of the order for the 10 acres, as just can't get the water there to put them in; as to heeling them in, wouldn't think of that for one minute; nor would I haul water. Taking this order over as I did, and what have done for you here, seems as if you ought to be able to reciprocate since am up against it. Would also like to know about the cottonwoods, as, if get in the 10 acres, will want cottonwoods around them, even if real late, I believe; seems as if they ought to do well if set out as late as April 15th; would want the mountain cottonwood only. Let me know about your experience in setting them out that late. It will cramp me to get out the 10 acres by that time, but believe the apples are all right that late; if we can get together, would want the trees for the 10 acres at once, and will heel them in here; that ought to set them back a little, and believe, by time have ground in shape and water on it, that they will do good. Yours truly, Fred Mielenz."

Plaintiff's uncontradicted testimony is that upon the receipt of the first of these letters he had the trees in the heeling ground ready for shipment; that 170 trees, included in the order, he had purchased from another nurseryman, having grown the rest himself; and that the trees were a total loss if he did not deliver them. The shipment was made on the 3d or 4th of April, and was rejected by defendant, and after remaining in the depot, at point of delivery, for two or three months, was burned by the railroad company.

At the conclusion of the trial the court announced that he would find for the plaintiff. Whereupon counsel for defendant made oral request for certain findings, relative to which the transcript reads as follows:

"Finding of fact requested by the defendant:

"Mr. H. M. Dow: (1) Did Mr. Johnson, as agent of the Roswell Nursery Company in this case, have notice or receive notice, prior to the shipment of the trees in question, that the defendant didn't wish to carry out his order?

"(2) Prior to the shipment in question did Mr. Johnson, as agent of the Roswell Nursery Company, regard Mr. Mielenz as having countermanded this order.

"The Court: I will give you the first finding of fact. Now, the second finding of fact: Did this man regard Mr. Mielenz as having countermanded the order? His position was he had no right to countermand it. I find the fact that this man notified him he didn't want the trees prior to the shipment. Answer to first finding, 'Yes.'

"Mr. H. M. Dow: I will ask for another finding, to make it more specific: Did Mr. Johnson have notice from the defendant, prior to the shipment of the trees, that the defendant didn't want the trees he had ordered?

"The Court: I will say 'Yes' to that."

H. M. Dow, of Roswell, and R. C. Dow, of Carlsbad, for appellant. R. D. Bowers, of Roswell, for appellee.

HANNA, J. (after stating the facts as above). [1] The first question presented for our consideration is that the judgment is contrary to the findings of fact. In this connection appellee urges that the so-called findings of fact are not the findings of fact contemplated by section 2999 of the Compiled Laws of 1897, because not in writing, or requested in writing, or signed by the judge and filed with the clerk.

In view of our conclusion in this case that the findings of facts are not contrary to the judgment rendered, for reasons that will appear in this opinion, the contention of appellee becomes an abstract question, disconnected with the granting of relief in this case, and the determination of which would not affect the result arrived at. 2 Cyc. 533.

The appellant asserts that the judgment is

contrary to the findings. Our view being that the order in question could not be countermanded, as an abstract proposition of law, for which reason the objection of appellant fails, our opinion upon the subject of appellee's contention with respect to the findings becomes purely an academic question, which we decline to pass upon.

A careful examination of the record discloses that the trial court proceeded upon the theory that the order, upon which the contract involved in this case was based, could not be countermanded under the circumstances of the case. Such being the view of the trial judge, his findings cannot be properly considered to be contrary to the judgment rendered in the case.

The correctness of the view of the trial court will be considered under the next proposition for consideration, viz., that the judgment is contrary to law, because the order sued on had been countermanded before plaintiff had done everything required by the contract. We cannot see that there had been a revoking of the order, previously given, though there was an expressed desire to avoid responsibility for half the order. It also appears that, before defendant attempted a partial countermand of his order, he had been advised by plaintiff in a letter, dated March 13, 1912, that the trees were ready for shipment, having been placed in the heeling ground.

[2, 3] The appellant contends that in the case of a breach of an executory contract for the sale of goods, before delivery, the seller cannot recover on the contract price, but his right is limited to an action for damages.

We do not disagree with appellant's contention in this respect, and that the principle is supported by the great weight of authority is clear. (See authorities collected in case note to *Acme Food Co. v. Older*, 17 L. R. A. [N. S.] 808); but the principle, like so many others, is not without exception. We find that the principle in question has no application to a case where one had contracted to manufacture articles upon order according to specifications to be designated, and had purchased all the necessary material and parts, but had not assembled the same. *Gardner v. Deeds & Hirsig*, 116 Tenn. 128, 92 S. W. 518, 4 L. R. A. (N. S.) 740, 7 Ann. Cas. 1172.

The necessity and reason for the exception to the principle, admitted to be controlling in the case of executory contracts generally, is well stated in an editorial note to the case last cited, in the following language: "And the general rule can have no application, unless it appears that, upon breach by the vendee, the vendor could have placed the commodity on the market, and, by thus disposing of it, have relieved himself from the consequences of the vendee's default. If the article manufactured is made after a particular pattern or style, so that it would be useless, or practically useless, to any one except the

person for whom made, it would seem as if the vendor should be entitled to recover the whole contract price."

The reasoning of this editorial note is peculiarly applicable to the present case. The defendant had received an order for certain fruit trees one and two years old, and, before the desire of plaintiff to change or modify his order was received, had ordered a part of the trees from another nurseryman, and had dug up other trees from his own nursery, cutting the same back and putting them in the heeling ground ready for shipment.

It also appears that undisputed testimony, to the effect that inability to deliver the trees would result in their total loss, was introduced. Under such circumstances, we do not think the general principle should apply, but, on the other hand, that the case falls more fairly within the exception generally invoked in the case of manufactured articles.

Finding no error in the record, the judgment of the district court is affirmed.

ROBERTS, C. J., and PARKER, J., concur.

HARRIS v. HARDWICK.

(Supreme Court of New Mexico. Dec. 2, 1913.
Rehearing Denied Dec. 18, 1913.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF (§ 133*)—FORECLOSURE—AGREEMENT BETWEEN MORTGAGOR AND PURCHASER—VALIDITY.

A. agreed with B. that he would procure a mortgage on land owned by A. to be foreclosed and sold on execution. B. agreed to become a purchaser of the land at such sale, and to pay to A. the difference between the price he was required to pay for the land less than \$3,500. The contract was fully performed, and B. was placed in possession of the land, under a deed executed to him under such foreclosure proceedings. He refused to pay A. the agreed difference of \$925. *Held*, that the vendor could recover the stipulated price.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 293-298; Dec. Dig. § 133.*]

2. FRAUDS, STATUTE OF (§ 133*)—PRICE OF LAND CONVEYED—RIGHT OF ACTION.

The statute of frauds is no bar to an action for the price of land actually conveyed, where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the grantee to accept a deed, because the contract was oral.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 293-298; Dec. Dig. § 133.*]

Appeal from District Court, Eddy County; McClure, Judge.

Action by W. B. Harris against E. F. Hardwick. From a judgment for plaintiff, defendant appeals. Affirmed.

On the 3d day of April, 1908, appellee and appellant entered into a written contract whereby the appellee agreed to convey by good and sufficient warranty deed to appel-

lant certain real estate in Eddy county, N. M. By the terms of the contract, appellant was to pay appellee, as consideration for the real estate, the sum of \$3,500, and appellee was to furnish the appellant an abstract of title, showing fee-simple title in appellee, with the exception of a certain mortgage in the sum of \$1,703.15, and interest thereon from the 28th day of October, 1907, at the rate of 10 per cent. per annum, and taxes for the last half of the year 1908, which sums were to be paid out of the purchase price or assumed by appellant. On the day of making and executing said contract, appellant paid to appellee the sum of \$300, which sum, however, under the contract, was only required to be deposited in escrow. The amount of the mortgage, interest, and taxes named in said written contract amounted to \$2,225, which sum, together with the \$300 paid to appellee, deducted from the stipulated purchase price of \$3,500, left remaining the sum of \$925, for which sum appellee recovered judgment in the lower court.

About two weeks after the signing of the written contract, and while said contract was in full force and effect, appellant requested appellee to have the said mortgage foreclosed, stating to appellee, as his reasons therefor, that by means of the foreclosure he, the appellant, could and would acquire a more perfect title, or a title that he would prefer to the said land, and appellant agreed orally with appellee, and bound himself unto appellee, not only to carry out his contract of purchase for the land aforesaid, but further agreed that he (appellant) would purchase the land at the foreclosure sale, or would cause the same to be purchased for his use and benefit, and would thereby protect appellee fully in the transaction, to the end that appellee would receive, and appellant would pay appellee, the amount of the balance due under said written contract. Pursuant to the understanding and agreement aforesaid, appellee requested the holder of said mortgage to foreclose the same, which was done because of such request, by the holder thereof in September, 1908, and at the sale had thereunder the land was purchased by appellant, through his attorney and agent, for the amount of the judgment plus \$7.94. At the sale there was one other bidder, the mortgagee, who bid the amount of the judgment. Appellant entered into possession of the land, and still retains such possession.

From the evidence it appears that there was a judgment lien on said real estate, inferior, however, to the mortgage lien, and it was because of this lien, and in order to free the land therefrom, that appellant requested that the mortgage be foreclosed. Appellant, upon the trial, disputed the above facts, and denied the making of the parol agreement; but as the court rendered judgment for appellee, and found the issues in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his favor, the above must be accepted as the facts in the case, for there was sufficient evidence to support appellee's theory of the case. From judgment rendered, appellant prosecutes this appeal.

Gibbany & Black, of Roswell, for appellant. Osborn & Robinson, of Roswell, for appellee.

ROBERTS, C. J. (after stating the facts as above). [1, 2] There are several assignments of error in this case by appellant, all presenting, however, but one proposition worthy of consideration, which may be stated as follows: Under the statute of frauds, which is in force in this state, "no action shall be brought upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Appellant here urges that a recovery in this case is precluded by the above provision of the statute, because the subsequent modification of the written contract was in parol, and was, therefore, not enforceable. If appellee was seeking to compel appellant to carry out the terms of the parol agreement to become a purchaser at the foreclosure sale, the statute of frauds could probably be successfully invoked as a defense to the action. In this case, however, the contract was fully performed by appellee, and likewise by appellant, except the payment of the consideration. Appellee caused the mortgage to be foreclosed and the property to be sold as he agreed to do. Appellant purchased the property at the sale, and took possession of the same, which he still retains, all under parol contract. "The statute is no bar to an action for the price of land actually conveyed, where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the grantee to accept a deed, because the contract was oral." 20 Cyc. 294, and case cited.

The case of *Arnold v. Stephenson*, 79 Ind. 126, was almost identical with the case at bar. There a judgment had been recovered against A. and an execution levied upon his land. Prior to the sale under the execution, B. agreed verbally with A. to buy in the land at the sale and to pay off a mortgage upon the land and certain other charges, and to pay to A. the difference between the amounts so paid and the stipulated price of \$6,000. B. purchased the land at the sale, paid only a portion of the debts which he agreed to assume, and refused to pay A. any further money under the agreement. B. took possession under the sheriff's deed, and was in

possession at the time of the institution of the suit. To a complaint reciting the above facts, a demurrer was interposed and sustained. Judge Elliott, speaking for the court, says: "We think that, in cases of the class to which the one under consideration and that cited belong, it should be held that, where the purchaser receives a sheriff's deed, and acquires full title and complete possession of the land, he cannot escape liability upon the ground that the statute of frauds prohibits the enforcement of verbal contracts for the sale of an interest in land. We accordingly hold that, where the agreement is so far performed that the purchaser acquires a perfect title and full possession of the property, the vendor may recover the stipulated price. This is in accordance with the rule stated by Mr. Browne: 'When so much of a contract as would bring it within the statute of frauds has been executed, all the remaining stipulations become valid and enforceable, and the parties to the contract regain all the rights of action they would have had at common law.' Browne, *Statute of Frauds*, § 117. This rule secures justice. Appellee obtained a title by the sheriff's sale, and the most rigid adherence to the requirements of the statute could have given him nothing more. The execution of the contract is really none the less complete because the land passed by the sheriff's deed instead of by the conveyance of appellant. *Schenck v. Sithoff*, 75 Ind. 485. Appellee has secured all he bargained for, and he ought to pay what he promised."

It is so well settled that the statute of frauds cannot be made the means of perpetrating a fraud that authorities need not be cited. Appellee, under the facts, parted with a substantial interest in his property upon the faith of appellant's promises. Appellant received all that he asked or required under the contract, for his promise and the statute cannot be interpreted to enable him to receive the benefit without yielding the agreed consideration.

Finding no available error in the record, the judgment of the trial court is affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

EDWARDS et al. v. FITZHUGH.
(Supreme Court of New Mexico. Dec. 17, 1913.)

(Syllabus by the Court.)

1. MORTGAGES (§ 567*)—FORECLOSURE—RIGHT TO PROCEEDS.

A.'s property was sold under foreclosure judgment to satisfy the mortgages of B. and C., senior and junior mortgagees. C. at the sale bid in the property for the sum of the mortgage debts, interest, and costs, as shown by the judgment. After the sale B. discovered that he had been overpaid. Such overpayment was caused by an erroneous calculation of interest. B. paid

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the excess into court. *Held* that, as long as the judgment remains in force, the sum paid by B. into court is not a surplus of the foreclosure sale remaining after the mortgage debts were satisfied, and as such the property of A. as mortgagor and owner of the equity of redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1632-1638; Dec. Dig. § 567.*]

2. APPEAL AND ERROR (§ 877*)—REVIEW—PERSONS ENTITLED TO ALLEGE ERROR.

Where the appellant has no interest in a sum of money, an assignment of error that the trial court erred in its disposition of such sum will not be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

Appeal from District Court, Curry County; Richardson, Judge.

Action by J. E. Edwards and others against J. S. Fitzhugh and another. From the judgment, the defendant named appeals. Affirmed.

In this action, the appellant, Fitzhugh, had been sued on two mortgages, of which one Brickey was the senior and the Clovis National Bank the junior mortgagee. Judgment was confessed by Fitzhugh, and a sale of the property conveyed by the two mortgages was ordered and made. The Clovis National Bank became the purchaser at the sale, bidding what appeared by the judgment the total of the two mortgage debts, interest, costs, and attorney fees. The bank paid Brickey the amount due him, as appeared from the judgment. After being paid, Brickey discovered he had been overpaid in the sum of \$772.78; the mistake being due to an erroneous calculation of interest. Being willing to refund what did not belong to him, but in a manner that would not expose him to any liability, he asked to be permitted to pay the sum into court. The Clovis National Bank then filed its motion to reopen the case, set aside and correct Brickey's judgment, correct its bid, and, if necessary, order a resale of the property and order the sum in court paid to it. Fitzhugh opposed this motion, claiming the fund. Upon hearing the court found that the bank was entitled to the money, and ordered the sum paid into court and held for the further order of the court. Fitzhugh appeals.

Harry L. Patton and H. D. Terrill, both of Clovis, for appellant. A. W. Hockenhull, of Clovis, for appellees.

MECHEM, District Judge (after stating the facts as above). [1] The appellant's claim to the fund is put upon one ground, viz., that it is a surplus of the foreclosure sale remaining after the satisfaction of the mortgage debts, and as such belongs to him as mortgagor and owner of the equity of redemption. Although the appellee asked that the judgment be set aside and corrected, this was not done, and the judgment remains in full

force and effect. The judgment is conclusive as to the amount of the mortgage debts. As far as the record shows, the property was sold for less than the amount of the mortgage debts, interest, attorney's fees, and costs. Therefore there is no surplus. Such being the foundation of appellant's claim to the fund in controversy, the court did not err in denying it.

[2] As the appellant has no right to the fund, he is not interested in its disposal, and for that reason the assignment of error to the finding of the court that the appellee is entitled to the fund is not considered.

The judgment of the lower court is affirmed.

ROBERTS, C. J., and PARKER, J., concur.

EVANTS v. TAYLOR.

(Supreme Court of New Mexico. Dec. 5, 1913.)

(*Syllabus by the Court.*)

1. PRINCIPAL AND SURETY (§ 118*)—RELEASE OF SURETY—CONTRACT OF INFANT.

The surety on the note of a minor, given in payment for real estate, is discharged from liability thereon, where the minor, on becoming of age, disaffirms the contract and restores the property purchased.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 286-295; Dec. Dig. § 118.*]

2. INFANTS (§ 81*)—DISAFFIRMANCE OF CONTRACT—TENDER OF PROPERTY PURCHASED.

Where an infant purchases real estate, and upon coming of age disaffirms the sale, he must, in order to make the disaffirmance effectual, restore the property, if he has title to it, to his vendor; and in such case the duty to restore becomes a right to restore, which the vendor may not defeat by refusing to take back the property.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 41, 46, 50-63; Dec. Dig. § 31.*]

3. PLEADING (§ 192*)—DEMURRER—DEFECTIVE ALLEGATION.

A defective allegation in a pleading can only be raised by a demurrer distinctly specifying the defect as a ground of objection. Subsection 36, § 2685, Comp. Laws 1897.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 408-427; Dec. Dig. § 192.*]

Appeal from District Court, Eddy County; McClure, Judge.

Action by S. S. Evants against A. L. Taylor. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This action was brought by S. S. Evants on two promissory notes, dated October 26, 1908, executed at Hereford, Tex., payable to the order of Evants, and signed by W. O. and A. L. Taylor, in the order named. Each note recites that it is given as part payment on a certain described property in the town of Hereford, Tex.; a vendor's lien being retained to secure the notes. W. O. Taylor appeared by his guardian ad litem, J. C. Davis, and answered that at the time he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

signed the notes he was a minor about the age of 18 years, and that the notes were given in consideration of a deed from plaintiff to him for the real estate described in the notes, which deed is attached to and made a part of his answer; and further answering he says: "This defendant specially tenders back to plaintiff a deed to said property, which this defendant is filing in this case as a tender to plaintiff, tendering back to plaintiff all that was received on account of signing said notes. And this defendant offers to do all things which the court may find to be proper and just for him to do in order to effect a disaffirmance of the notes and seeming obligation aforesaid with justice and fairness to the plaintiff in conformity with law."

The plaintiff filed a reply, denying the matters alleged in the answer, except as to the statement that defendant had signed the notes. Thereafter, on September 3, 1912, W. O. Taylor filed an amended answer, containing substantially the same allegations, with the addition that he alleges he arrived at the age of 21 years on July 5, 1912, and "that he now disaffirms and revokes the said contract and refuses to perform the conditions in the contracts or notes." To which answer plaintiff replied, denying all the facts so alleged, except the execution of the notes. A. L. Taylor by his answer admitted the execution of the notes, that he signed said notes as surety for W. O. Taylor, and that the consideration of the notes was the conveyance of the property described in them to W. O. Taylor, who was at the time an infant; that since attaining his majority he "disaffirms and revokes" said notes, and "has tendered back and surrendered back to plaintiff in this cause the lots and real estate for the payment of which the two notes in question were given." This allegation appears in A. L. Taylor's second and third amended answers. The appellee demurred to the second amended answer, on the ground that it stated no defense in law, which demurrer was sustained, and appellant on January 17, 1913, filed his third amended answer, which was stricken from the files on the motion of appellee because it contained no facts not formerly pleaded and held insufficient, to which ruling of the court appellant excepted and refused further to plead, and judgment was entered against him as prayed in the complaint.

J. B. Atkeson, of Artesia, for appellant.
J. H. Jackson, of Artesia, for appellee.

MECHEM, District Judge (after stating the facts as above). [1] The question presented is: Will a surety on a note sued on by the original payee, given by an infant for the purchase price of real estate conveyed by the payee of the note to the infant, be discharged from liability, where the principal on coming of age disaffirms the deed con-

veying the real estate and tenders back a deed to the payee? If the late infant on arriving at his majority may disaffirm the deed, and if such disaffirmance renders it void ab initio, propositions not questioned, and if the deed tendered vests the payee in all that he ever parted with in consideration of the note, which it does as far as the record in this case discloses, then the consideration of the note is wiped out or extinguished. The defense is failure of consideration, which is good as between the original parties to the note. Section 28, c. 83, Laws 1907. We are of the opinion that the question stated must be answered in the affirmative. *Baker v. Kennett*, 54 Mo. 82; *Keokuk County State Bank v. Hall*, 106 Iowa, 540, 76 N. W. 832; *Kyger v. Sipe*, 89 Va. 507, 16 S. E. 627.

It is true that the plea of infancy is a personal defense, and as such cannot avail the surety; but this only applies to the contract itself upon which the surety is bound, in this case the note, and does not extend to the consideration for the note. Where the principal is discharged because of incapacity to contract, the surety stands in the position of principal promisor. His promise in this case was based upon a consideration moving to his principal, which has failed through no fault of his. His obligation cannot be extended beyond the note. He cannot be held to have promised that W. O. Taylor, on attaining his majority, would not avoid the deed. He did not guarantee both the note and the consideration for the note. The cases cited by counsel for appellee support the rule that a discharge of the principal by reason of infancy does not discharge the surety, but in all the cases so cited the contract was supported by a valuable consideration.

[2] Appellee states that by his amended reply to the second amended answer of W. O. Taylor he alleges that he refuses to take back the property or a deed for the same. The pleading mentioned is not in the record; but, as this cause must be reversed, we will treat the point as raised. It may be disposed of very easily upon principle. Where an infant receives anything by reason of a contract, which he disaffirms upon coming of age, he must restore what he received under the contract in order to make the disaffirmance effective. He cannot avoid the contract and still retain the fruits of it. 22 Cyc. 614. Now, if the right of the infant to disaffirm is absolute, of which there can be no doubt, and in order to exercise that right he must restore the thing received, if he still has it, then the duty to restore becomes a right to restore; otherwise, the right to disaffirm would depend upon the will of the opposite party.

[3] The allegation of tender is attacked, because it is not shown how the tender was made. This defect was apparent on the face of the answer, and should have been

taken advantage of by a demurrer distinctly specifying this ground of objection. Subsection 36, § 2685, C. L. 1897. For aught that the record shows, the court below ruled on the effect of a tender, and not whether a tender was well pleaded.

The judgment of the lower court is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

ROBERTS, C. J., and PARKER, J., concur.

CITY OF TUCUMCARI v. BELMORE.
(Supreme Court of New Mexico. Dec. 3, 1913.)

(Syllabus by the Court.)

1. NAMES (§ 4*)—VIOLATION OF ORDINANCE—PARTIES—DESIGNATION—VALIDITY OF JUDGMENT.

The addition or omission of the suffix "Jr." is immaterial in either a civil or criminal proceeding. The person so styled is presumed, in the absence of some proof to the contrary, to be the same person referred to, whenever his name appears with, or without, the suffix.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 3; Dec. Dig. § 4.*]

2. MUNICIPAL CORPORATIONS (§ 633*)—VIOLATION OF ORDINANCE—REVIEW—JUDGMENT—CORRECTION.

Where, in a judgment covering several cases, by inadvertence or otherwise, one or more cases are included over which the court had no jurisdiction to render judgment, this court has jurisdiction, under section 38 of chapter 57 of the Laws of 1907, to modify the judgment by eliminating such case, or cases, from the judgment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1390-1399; Dec. Dig. § 633.*]

3. MUNICIPAL CORPORATIONS (§ 633*)—VIOLATION OF ORDINANCE—NATURE OF ACTION.

Where a city ordinance is not before the court, and where a judgment for violation of the same is an ordinary judgment for money in the amount of a fine, and where no imprisonment is imposed, and where the nature of the act charged against the defendant is not criminal in character and is not punishable by any general law of the state, but relates solely to a local regulation of the city for the safety and welfare of its inhabitants, the proceeding will be treated by this court as a civil and not a criminal proceeding.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1390-1399; Dec. Dig. § 633.*]

4. APPEAL AND ERROR (§ 613*)—RECORD—CERTIFICATION—BILL OF EXCEPTIONS.

Where the certificate of the trial judge to an alleged bill of exceptions is not certified to by the clerk of the court, and is not shown to have been filed in the clerk's office, neither the alleged bill of exceptions to which it relates nor the said certificate will be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2702-2707; Dec. Dig. § 613.*]

Appeal from District Court, Quay County; T. D. Lieb, Judge.

Judgments were rendered against D. A. Belmore, Jr., for violating a city ordinance, and he appeals. Modified and affirmed.

C. H. Hittson, of Tucumcari, and F. C. Wilson, of Santa Fé, for appellant. C. C. Davidson, of Tucumcari, for appellee.

PARKER, J. These cases both arise out of judgments for violations of an ordinance of the city of Tucumcari. The first case is a judgment for violation of section 6 of Ordinance No. 47, which prohibits wooden buildings within certain prescribed fire limits of the city, and the second case is a judgment for the violation of section 18 of the ordinance, which prohibits the keeping and maintaining of such buildings within such fire limits; each day they are so kept or maintained constituting a separate offense. Appellant assigned numerous errors in each case; but, the record not having been properly preserved, they are not here for review. An additional brief was filed, which presents some questions arising upon the record proper, which will be considered.

[1] 1. In both cases the appellant is styled D. A. Belmore, Jr., in the complaint. In No. 1553, the verdict follows the complaint in this regard, but the judgment omits the suffix "Jr." from the name. In No. 1554, both the verdict and the judgment omit the suffix. Appellant argues that the judgments are void for want of jurisdiction of the person of the defendant, by reason of this variance in the name. In No. 1553, this variance in the name was never called to the attention of the court, and in No. 1554 it was not called to the attention of the court until January 4, 1913; the appeal having been taken to this court on October 10, 1912. The defendant on that date filed a motion to vacate the judgment, based partly on this ground, which was denied by the court. A sufficient reason for the action taken would seem to be that, at the time the application to vacate the judgment was made, the appeal had been taken and perfected by filing a supersedeas bond. Even had the district court then had jurisdiction to vacate the judgment, the action taken was nevertheless correct. The addition or omission of the suffix "Jr." is immaterial in either a civil or a criminal proceeding. The person so styled is presumed, in the absence of some proof to the contrary, to be the same person referred to, whenever his name appears with, or without, the suffix. 29 Cyc. 267, 268; People v. Collins, 7 Johns. (N. Y.) 549; Teague v. State, 144 Ala. 42, 40 South. 312; State v. Casero, 112 La. 453, 36 South. 492; Com. v. Beckley, 44 Mass. (3 Metc.) 331; City of San Francisco v. Randall, 54 Cal. 408; State v. Grant, 22 Me. 171; Window v. State (Tex. Cr. App.) 72 S. W. 193; 36 Cent. Dig. title "Names," § 3. The appellant complains, not that he was not charged, tried, and adjudged

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to pay a fine, but he complains that the judgment in one case, and the verdict and judgment in the other, failed to follow the complaint, and to style him as "Jr." There is no intimation in the record that there is another Belmore to whom the judgment could apply.

[2] 2. It appears that counsel for the city, in No. 1554, moved to consolidate all causes pending against the defendant, giving their docket numbers. It appears from a recital in one of the orders made in the case that the parties in open court stipulated that the verdict and decision in No. 527, which was the case actually tried, should apply to and govern causes Nos. 527 to 529, inclusive, and Nos. 532 to 552, inclusive, between the same parties, the issues therein being identical. The final judgment, however, adjudges a fine of \$25 in each case, numbered 527 to 553, inclusive. This leaves cases Nos. 530, 531, and 553 without the terms of the stipulations, and renders the judgment, it is argued, void on its face, for want of jurisdiction. Counsel for appellee, in his brief, asserts that No. 527 was tried, and that there were only 22 other cases covered by stipulation. This would seem to show that, in so far as the judgment purports to cover cases numbered 530, 531 and 553, it was without jurisdiction and void. But this does not render the whole judgment void. The part of the judgment which was rendered without jurisdiction is severable from that which was within the jurisdiction of the court. It is perfectly apparent that the discrepancy arises out of a mere clerical error; but, if it did not, and was intentional on the part of the court, we have the power to render the proper judgment here, by eliminating the three cases numbered 530, 531 and 553. Chapter 57, § 38, Laws of 1907; *Tagliaferri v. Grande*, 16 N. M. 486, 120 Pac. 730.

[3] 3. The conclusion reached in the preceding paragraph is based upon the theory that the proceedings against the defendant are civil and not criminal proceedings. Whether we might not modify the judgments, even were the proceedings criminal, we do not decide as it is not involved. The assumption that the proceedings are civil, and not criminal, is based upon the form of the judgment, it being an ordinary judgment for money in the amount of a fine, which the court assessed. No imprisonment is imposed, nor is any provided for as a means of collection of the judgment. The nature of the act charged against the defendant is such as to show that it is not a crime in any sense, is not punishable by any general law of the state, but relates solely to a local regulation of the city, for the safety and welfare of its inhabitants. Under all of the authorities, at least the great weight of authorities, such proceedings under such circumstances are civil and not criminal in character. 2 Dillon, Mu-

nic. Corp. (5th Ed.) §§ 749, 750; 3 McQuillan, Munic. Corp. § 1030. Section 2407, C. L. 1897, provides for two forms of proceedings for the violation of city ordinances, viz.: One civil in form, and providing that the first process shall be a summons; the other, a warrant for the arrest of the offender, based upon affidavit. The section provides for a fine or penalty, and for imprisonment as a means of collection of the same. Whether the ordinance in this case authorizes imprisonment we are not at liberty to ascertain, the ordinance not being before us for consideration, as will be presently pointed out. The record is in such condition as to preclude a careful consideration of the nature of such proceedings as these, and we reserve the proposition for discussion in some future case, where it may be clearly raised.

[4] 4. For the same reason we cannot consider the question raised by appellant to the effect that the ordinance does not provide for the collection of costs, and that, therefore, the judgment must be unwarranted in so far as the costs are concerned. The certificate of the trial judge, settling the bill of exceptions, appears on the last page of the transcript, and is the last entry therein. Preceding it is the clerk's certificate to the transcript. The fact that the judge's order settling the bill of exceptions was ever filed in the clerk's office, or that the judge, in fact, ever made the order, is nowhere authenticated in the transcript. It needs no argument nor authority to support the conclusion that, under such circumstances, there is no bill of exceptions before us, and we are precluded from examining the same as to the contents of the ordinance or any other matters therein contained.

For the reasons stated, the judgments below will be modified, so as to exclude therefrom Nos. 530, 531, and 553, and, as modified, they will be affirmed; and it is so ordered.

ROBERTS, C. J., and HANNA, J., concur.

ROGERS v. KEMP LUMBER CO.
(Supreme Court of New Mexico. Dec. 2, 1913.
Rehearing Denied Dec. 22, 1913.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE (§ 171*)—APPEAL—TRIAL DE NOVO.

On appeal to the district court from a justice of the peace a cause is triable de novo.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 655-657; Dec. Dig. § 171.*]

2. ATTORNEY AND CLIENT (§ 140*)—COMPENSATION—AMOUNT.

In the absence of a contract, express or implied, between attorney and client, fixing the stipulated percentage which the payee is entitled to recover from the payor, in case of default and the placing of the note in the hands of an attorney for collection, as the compensation which the attorney is to receive, the at-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

torney is only entitled to recover from his client the reasonable value of his services.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 338-349; Dec. Dig. § 140.*]

Appeal from District Court, Chaves County; McClure, Judge.

Action by W. E. Rogers against the Kemp Lumber Company. From judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Reld & Hervey, of Roswell, for appellant. W. E. Rogers, of Roswell, for appellee.

ROBERTS, C. J. [1] Appellee instituted suit before a justice of the peace in Chaves county to recover the sum of \$85, alleged to be due him from the appellant as attorney's fees. In the justice court appellant interposed a plea to the jurisdiction of the justice of the peace, which was overruled, and thereupon it declined to plead further, and judgment was rendered in favor of appellee for the sum prayed in his complaint. Appellant appealed to the district court, and there conceded the jurisdiction of the justice of the peace, whereupon appellee moved for judgment of the district court affirming the judgment of the justice of the peace, which motion was overruled, and which ruling of the court is assigned as error by appellee upon a cross-appeal. The assignment is wholly without merit, as the case in the district court is triable de novo upon the merits under our statute.

[2] The facts necessary to be stated to understand the question raised by appellant by his assignment of errors may be briefly stated as follows: Appellant held a power of sale mortgage, securing a note which provided, upon default, for 10 per cent. additional upon the amount of principal and interest unpaid "for attorney's fees, if placed in the hands of an attorney for collection." The mortgagor being in default, appellant consulted appellee, as an attorney, relative to the procedure to be taken by it to foreclose the mortgage and its rights under the mortgage, and had him draw a pencil memorandum of a notice of sale, which appellant caused to be published as required by law. Appellant sold the property under the notice of sale for \$850, which was sufficient to cover the principal, interest, and costs of sale, not including any charge, however, for attorney's fees. Appellee claims that he is entitled to 10 per cent. of the amount due on the note at the time of sale as attorney's fees, by reason of the stipulation in the note above set out. Appellant, on the other hand, insists that he is only entitled to reasonable compensation, and as the evidence introduced upon the trial in the district court, without dispute, shows that \$25 is the reasonable value of the services performed by appellee, his recovery should be limited to that amount. There was some claim made by appellant to

the effect that there was an account stated between the parties for \$10 as compensation; but, as appellee testified that this sum was for only a part of the work done by him, viz., drawing the notice of sale, and did not include advice and consultation, we will not consider the question, but will treat it as not being involved in the case.

It will thus be observed that the question in the case is as to whether or not the stipulation in a note of fixed percentage as attorney's fees is the measure of compensation between attorney and client, where a dispute arises between them as to the attorney's compensation, in the absence of a contract, express or implied, fixing such amount as compensation. Upon the question no authorities have been cited by either party, but on principle it would seem that the question must be answered in the negative. The stipulated amount in the note is the limit of the payee's right to recover from the payor, and is inserted solely for his benefit, and to compensate him for damages and expense entailed upon him by reason of the payor's default. As between payee and his attorney, in the absence of a contract, express or implied, the attorney is not limited to the percentage stated in the note, nor does it measure his compensation. He is entitled to recover only the reasonable value of his services.

As the undisputed facts in this case show that the reasonable value of appellee's services, based upon a quantum meruit are \$25, this cause is reversed, and the district court is directed to enter judgment in appellee's favor for said sum; and it is so ordered.

HANNA and PARKER, JJ., concur.

Ex parte LUJAN.

(Supreme Court of New Mexico. Dec. 2, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1001*)—STAY OF SENTENCE—VALIDITY.

Where a district court is without power to suspend the execution of the judgment in a criminal cause, or to withhold the commitment, an order so made, attempting to do so, is null and void, and without force and effect, and amounts to surplusage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

2. CRIMINAL LAW (§ 1001*)—SATISFACTION OF SENTENCE—VOID STAY.

Where a defendant, duly sentenced by a district court to serve a definite term in the state penitentiary, is permitted to go and remain at large under a void order of the court, he may be taken into custody and compelled to serve the term fixed in the judgment, even though a longer period of time than that for which he was sentenced has elapsed since the sentence was imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Original application for writ of habeas corpus by Juan Lujan. Petitioner remanded, and writ discharged.

On September 25, 1908, Juan Lujan, the petitioner herein, upon a plea of guilty to an indictment charging him with the crime of assault with a deadly weapon, was by the district court of Eddy county sentenced to serve a term of imprisonment of two years in the territorial penitentiary at Santa Fé, N. M. The judgment of the court was in the following words, viz.: "Now comes the territory, by her district attorney, and comes the defendant in his own proper person, in custody, and the sheriff, and the defendant, being asked if he has anything to say why the sentence of the court should not be passed against him, nothing says, and the court, pursuant to a plea of guilty heretofore entered herein, assessed his punishment at imprisonment in the territorial penitentiary at hard labor for the full period of two years, and that he pay the cost of this prosecution. It is therefore considered and adjudged by the court that the defendant, Juan Lujan, be imprisoned in the territorial penitentiary situate at Santa Fé, New Mexico, for the full term of two years, and that he pay the costs of this prosecution, to be taxed, and that execution issue therefor, and the sheriff of Eddy county is hereby ordered to deliver the said Juan Lujan to the superintendent or warden of the said penitentiary, and that the said superintendent or warden of the said penitentiary confine the said Juan Lujan in said penitentiary for the full term of two years from the date of the confinement hereunder, and until said costs are discharged by operation of law, and that commitment issue therefor. And it is further ordered that, if the defendant shall forthwith remove himself from the territory of New Mexico, the commitment hereunder shall not issue so long as he shall remain absent from the said territory."

No commitment was issued in said cause until July 17, 1913, when an order was made by the district court of said county directing the issuance of a commitment, because of a violation of the terms of the order upon which commitment was withheld, and thereafter petitioner was taken into custody and confined in the state penitentiary at Santa Fé. Thereupon petitioner applied to this court for his release upon a writ of habeas corpus.

Askren & Gilbert, of Roswell, for petitioner. Ira L. Grimshaw, Asst. Atty. Gen., for the State.

ROBERTS, C. J. (after stating the facts as above). [1] The power to suspend the execution of a sentence in a felony case is conferred upon the district courts of the state by section 1, c. 32, S. L. 1909. The order of suspension in this case, however, was made

prior to the enactment of the statute, and petitioner's application for his release from the custody of the warden of the state penitentiary is predicated upon the assumption that the district court, when it sentenced petitioner upon his plea of guilty, in the absence of a statute so authorizing, had not the power to provide "that, if the defendant shall forthwith remove himself from the territory of New Mexico, the commitment hereunder shall not issue so long as he shall remain absent from the territory of New Mexico." If it be conceded that the court had the power to make the order suspending the execution of the judgment, it would follow necessarily that, upon violation of the order, the court would have the right to revoke the order and commit the defendant. On the other hand, if the court was without power to suspend the execution of the judgment, or withhold the commitment, then the order so made attempting to do so would be null and void, and without force and effect, and would amount to surplusage. *Spencer v. State*, 125 Tenn. 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680, and cases cited; *Fuller v. Mississippi*, 100 Miss. 811, 57 South. 806, 39 L. R. A. (N. S.) 242.

[2] This being true, the only question involved in this case is whether the court has lost its power to enforce the execution of its judgment providing for the imprisonment of petitioner in the state penitentiary for a period of two years, by reason of the fact that more than said period of time has elapsed since the imposition of the sentence. In other words, can a sentence be satisfied until it has been actually served, in the absence of a pardon? While there is a conflict of authority upon the proposition, we believe the correct rule was laid down by the Mississippi Supreme Court in the case of *Fuller v. Mississippi*, 100 Miss. 811, 57 South. 806, 39 L. R. A. (N. S.) 242: "It is immaterial that a longer period of time than that for which appellant was sentenced has elapsed since the sentence was imposed. While at large under this void order, to which he did not object, appellant was in the same situation that he would have been had he simply escaped from custody. In such case the sentence is not satisfied until it has been actually served. *Ex parte Belle*, 56 Miss. 282; 1 Bishop's Crim. Proc. (4th Ed.) 1384; *Spencer v. State*, 125 Tenn. 64, 140 S. W. 597, 38 L. R. A. (N. S.) 680; *State v. Abbott*, 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112, Ann. Cas. 1912B, 1189; *Miller v. Evans*, 115 Iowa, 101, 88 N. W. 198, 56 L. R. A. 101, 91 Am. St. Rep. 143; *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175; *Tanner v. Wiggins*, 54 Fla. 203, 45 South. 459, 14 Ann. Cas. 718." See, also, *In re Leo Hinson*, 156 N. C. 250, 72 S. E. 310, 36 L. R. A. (N. S.) 343; *People v. Parich*, 118 Cal. 332, 50 Pac. 425; *Ex parte Vance*, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574; *Dolan's Case*, 101

Mass. 219; O'Dwyer v. Kelly, 133 Ga. 824, 67 S. E. 106; In re Herbert L. Collins, 8 Cal. App. 367, 97 Pac. 188.

For the reasons stated, petitioner will be remanded to the custody of John B. McManus, superintendent of the state penitentiary, to be dealt with according to law, and the writ of habeas corpus will be discharged; and it is so ordered.

HANNA and PARKER, JJ., concur.

CRANE v. COX, County Treasurer.
(Supreme Court of New Mexico. Dec. 11, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 615*)—DELINQUENT TAXES—SALE.

Section 34, c. 84, Laws 1913, directing the collector to offer for sale "each parcel of property upon which any taxes are delinquent as shown by the tax rolls," held to authorize the sale of property for taxes which had become delinquent prior to the year 1913.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1284; Dec. Dig. § 615.*]

2. TAXATION (§ 615*)—OPERATION—RETROSPECTIVE ACT.

Chapter 84, Laws of 1913, as construed to authorize the sale of property for taxes delinquent previous to the time the act became effective, held not to operate retrospectively in respect to such taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1284; Dec. Dig. § 615.*]

3. TAXATION (§ 652*)—INJUNCTION TO RESTRAIN SALE.

A preliminary injunction will not be granted to restrain the sale of property for taxes, unless the taxpayer first pays so much of the tax as he admits is just.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1324-1331; Dec. Dig. § 652.*]

Appeal from District Court, Dona Ana County; El. L. Medler, Judge.

Action by Harold O. Crane against William W. Cox, Treasurer and ex officio Collector of Dona Ana County. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint contains substantially the following allegations: That the plaintiff is the holder of the legal title to certain mining claims in Dona Ana county, upon which there are due delinquent taxes for the years of 1904 to 1912, inclusive; that the defendant, the treasurer and ex officio collector of Dona Ana county, had on the 14th day of June, 1913, and for four consecutive weeks thereafter, published a notice that he would, on August 4, 1913, sell all property upon which any taxes were delinquent in said county, as shown by the tax rolls, to satisfy the taxes, penalties, and costs due thereon; and that, unless restrained, plaintiff is informed and believes said officer will make such sale. And plaintiff further alleged that the valuation of his property for purposes of taxation for the several years mentioned was

erroneous and grossly in excess of the real taxable value thereof; that the attention of the district attorney and defendant had been called to said erroneous and excessive assessments, and a request made upon them for a correction and change of the same, to avoid injustice to the plaintiff; that a letter from plaintiff's counsel to the officers was attached to the complaint as showing such demand; that, unless defendant be restrained as aforesaid, plaintiff will suffer great and irreparable injury, and that he is without adequate remedy at law. Plaintiff prayed the issuance of a temporary writ of injunction restraining the defendant from selling or attempting to sell any of the plaintiff's property for delinquent taxes, penalties, or costs; that defendant be required to show cause why such injunction should not be made perpetual; and, further, in the event the court should hold the defendant authorized by law to make the threatened sale, that a hearing be had upon the validity of the various assessments, whether or not the valuations upon which said assessments were based were not grossly in excess of the real taxable value of said property, and whether or not defendant is entitled to charge against the said property the several items of interest, costs, and penalties, and that the levies and assessments be adjusted, corrected, and changed so as to avoid injustice to plaintiff. The defendant demurred on the ground that the complaint on its face failed to state a cause of action, because it showed that defendant was proceeding to sell the plaintiff's property in accordance with section 34, chapter 84, Laws of 1913. The demurrer was overruled, and the defendant electing to stand on his demurrer, and refusing to further plead, final judgment was entered, granting the permanent injunction as prayed for in the complaint.

Frank W. Clancy, Atty. Gen., for appellant Holt & Sutherland, of Las Cruces, for appellee.

MECHEM, District Judge. [1] Chapter 84, Laws of 1913, went into effect immediately upon its approval, March 18, 1913, and as it expressly repealed chapter 22, Laws of 1899, it provides the only procedure for the sale of property for delinquent taxes. Section 34 of the act reads as follows: "Within forty-five days after the first day of June in each year the collector shall prepare, and cause to be published for not less than once in each week, for four consecutive weeks, in some newspaper published in this county, or if there be no newspaper published in the county, then in some newspaper published in the state and of general circulation in the county, notice that he will, on the day specified in said notice, at the hour of 10 o'clock in the forenoon, at the court house of the county, offer for sale, separately and in consecutive order, each parcel of property upon which

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any taxes are delinquent, as shown by the tax rolls, or so much thereof as may be necessary to realize the respective amounts due, which sale shall continue until not later than four o'clock in the afternoon, and from day to day at the same hours, until all of said property shall be sold or until the amounts due shall be paid or realized; but such sales shall not continue for more than thirty days, and the collector shall make record of his acts and doings as hereinafter provided."

It is admitted that the words "each parcel of property upon which any taxes are delinquent, as shown by the tax rolls," is broad enough to include taxes delinquent both before and after the time the law became effective. But it is said, first, that to hold that the act does apply to taxes delinquent before it became effective is to give it a retrospective operation; and, second, in view of the well-known rule of statutory construction that "words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied" (*U. S. v. Heth*, 3 Cranch, 399-413, 2 L. Ed. 479; *Sohn v. Waterson*, 17 Wall. 598, 21 L. Ed. 737), this act should be limited to a prospective operation that is applicable to taxes becoming delinquent subsequent to the passage of the act only.

Is the first position assumed, viz., that if the act applies to taxes delinquent before its passage it is a retrospective law, correct? If it is not, then no opinion need be given on the second. "A retroactive or retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." 36 Cyc. 1201; *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 139, Fed. Cas. No. 13,156; *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240; *Gladney v. Sydnor*, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517; *Gage v. Stewart*, 127 Ill. 207, 19 N. E. 702, 11 Am. St. Rep. 116; *Rich v. Flanders*, 39 N. H. 304; *Chicago, etc., R. R. Co., v. State*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *Black on Interpretation of Laws*, § 114.

A law is not retrospective, or a law does not operate retrospectively, simply because it applies to transactions which originated before the law took effect; but it is the nature of the application that is determinative. This view was well put by the Supreme Court of Nebraska in *Chicago, etc., R. R. Co. v. State*, supra, in the following words: "A statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law has been defined as one intended to affect transactions

which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence. *Bishop on Written Laws*, § 83; *Black on Interpretation of Laws*, § 114."

In *Smith v. Auditor General*, 20 Mich. 398, the court, speaking through Justice Cooley, said: "We do not understand it to be questioned that it was competent for the Legislature to make the general provisions of the act of 1869 apply to the taxes previously assessed and returned, so far as subsequent proceedings to be taken by the state were concerned, if they had seen fit to do so. The question is whether they have expressed an intention to that effect. Unless that intention distinctly appears, the familiar rule of construction, which presumes that legislation is designed to have prospective operation only, will require the court to hold that the legislative purpose was that this act should apply only to taxes subsequently assessed. For although to apply it to taxes previously levied would not, so far as the course of official proceeding for the enforcement thereof is concerned, be strictly retrospective in the proper sense of that term, yet so far as it increased penalties, or in any manner affected the taxpayer's rights or interests as they depended upon previous acts or delinquencies, it would be plainly so, and the purpose of the legislation to give it that operation is not to be presumed, where the words are ambiguous or reasonably susceptible of a different construction."

In the case of *In re Taxes in Hennepin County v. Baldwin*, 62 Minn. 518, 65 N. W. 80, where a statute provided that, "if any tax is prevented from being collected, the auditor should add the amount to the tax for the current year," the court said, construing the act with respect to its operation: "The argument of counsel for the landowner upon the fourth question is wholly based upon the proposition that *Laws 1885, c. 2, § 23* (*Gen. St. 1894, § 1631*), is prospective in the sense that it only authorizes the auditor to add to the tax for the current year taxes for other years, which shall, after the passage of the act, be prevented from being collected. In support of this contention he relies on the phrase 'if any tax is prevented from being collected.' The statute in question does not impair any vested right, or create any new right, or impose any new obligation. It is purely remedial, and merely gives a remedy for enforcing existing rights and obligations. Such statutes are to be liberally construed, in order to accomplish the beneficent purpose for which they were enacted; and, unless a different legislative intent is expressed or clearly implied, they will generally be construed to apply to rights and obligations that accrued before enactment, as well as to those to accrue after. Such, we think, is

the construction which should be given to the statute under consideration."

In *Gage v. Stewart*, 127 Ill. 207, 19 N. E. 702, 11 Am. St. Rep. 116, a statute declaring that hereafter no purchaser at a tax sale shall be entitled to a deed, unless he has complied with certain conditions designated in said statute, was held to apply to sales previously made for which no deed had issued and for which the landowner yet retained the rights of redemption. In answer to the argument that, so applied, the statute was retrospective, the court said: "It is insisted that, the sale occurring October 21, 1873, the laws then in force will control in the subsequent proceedings necessary to maturing the tax title, and therefore no notice to the owner was required to be shown as a prerequisite to the making of the deed. We are of the opinion that the section of the act of 1879 was intended to take effect in present as to all notices served * * * thereafter, and to apply to all purchasers at tax sales, and their assignees, irrespective of when the sale for taxes was made. This, we think, the clear import of the language employed. The provision is not in respect of sales thereafter to be made, but is that 'hereafter no purchaser, or assignee of any such purchaser, of any land or lot, for taxes, etc., at any sale,' etc., shall be entitled to a deed until he shall have complied with the conditions prescribed in that section of the statute. The amended act applied to all steps to be taken after it went into effect, and which could be performed according to its requirements. Nor does this construction give the act a retrospective operation, as seems to be supposed. The rule undoubtedly is that a retrospective effect will not be given to a statute unless the legislative intent that it shall so operate is clearly manifested. But no such effect is sought to be given this statute. The Legislature, for the better protection of those having the right of redemption, required that notice be served upon the owner, if found to be in the county, at least three months before the expiration of redemption. No other change affecting the right of the purchaser or holder of the certificate of purchase is wrought by this amendment. It in no way affects or applies to the sale, or any of the precedent steps in the proceeding, lawful under the former statute, but relates exclusively to acts to be performed by the purchaser, or his assignee, subsequent to its taking effect, and by the performance of which his inchoate right in the land, under his certificate of purchase, might ripen into a title. These requirements, of giving notice of the sale, when redemption will expire, and making proof thereof to the clerk, are in the nature of remedies to be pursued by the purchaser or holder of the certificates of purchase to mature and perfect his title to the land under the tax sale. As to all these acts, which could be performed by the purchaser,

or his assignee, after the statute became in force, it would necessarily operate prospectively. *Bac. Abr. 'Statute,' 9."*

In *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240, a statute of Ohio which authorized an auditor to go back four years to correct false returns, where formerly by statute he could not for that purpose go behind his annual settlements with the treasurer, was attacked as being a retroactive law, and as such in conflict with the Constitution of Ohio. The court said: "In our opinion, no right of the taxpayer has been invaded by the act of 1878. His investments in stocks and bonds were subject to taxation, the taxes upon such investments were due to the state, and the act of 1878 merely provided a method by which the taxes might be assessed and collected in spite of the annual settlements made by the auditor. It gave a new remedy to the state for enforcing a right which it had all the time possessed, namely, the right to the taxes upon property liable to taxation. Such an act is not a retroactive law within the meaning of the Constitution of Ohio. In the case of *Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 139 [Fed. Cas. No. 13,156], Mr. Justice Story thus defines a retroactive (or, as he calls it, a retrospective) law: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' The act of 1878 took away no vested right of the taxpayer, it imposed upon him no duty or obligation, and subjected him to no disability in reference to past transactions."

[2] The point is not made that the operation of the statute of 1913, complained of by the appellant, would in any manner affect any right he possessed under the previous law or in any wise change his status; nor do we, from a careful reading of the statute, see that such a consequence is to be reasonably anticipated. The statute does not interfere with any act done under—or any condition that exists by reason of—the former law. It merely provides for the sale of property upon which a lien for taxes has been ascertained, fixed, and declared, giving to the lien no force or effect which it did not possess under the law by which it was created. It is therefore held that, upon the question as here presented, the act of 1913, in providing for the sale of property for taxes delinquent for years previous to 1913, does not operate retrospectively.

[3] Counsel for appellee contend that the complaint states a cause of action by the allegation of excessive assessments, which they say entitles the appellee to relief under the provisions of section 23 of the act. This phase of the case was not passed upon by the

lower court. We do not express any opinion on the question. However, it is very clear that appellee is not entitled to an injunction preliminary to a hearing upon the alleged excessive assessments. By a letter attached to the complaint, written by appellee's attorneys to the district attorney, it is said that the valuations, if reduced 50 per cent. would represent the reasonable value of the properties. He must pay on that basis before he is entitled to a preliminary injunction in any event. *Albuquerque Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91; *Cooley on Taxation*, vol. 2, p. 142.

The proper procedure in such case is announced in *Albuquerque Bank v. Perea*, supra, as follows: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when, in the end, it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed."

The judgment of the lower court is reversed, and remanded for further proceedings not inconsistent with this opinion.

ROBERTS, C. J., and PARKER, J., concur.

FRASER v. STATE SAVINGS BANK et al.
(Supreme Court of New Mexico. Dec. 4, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 393*) — FINDINGS — ULTIMATE FACTS.

The court is only required to find the ultimate facts in controversy, raised by the issues in the case, and is not required, nor is it proper, to set out the evidence upon which it relies in determining such ultimate facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 920-923; Dec. Dig. § 393.*]

2. TRIAL (§§ 394, 404*)—FINDINGS—CONSTRUCTION.

Findings are not to be construed with the strictness of special pleadings. It is sufficient if, from them all, taken together with the pleadings, the court can see enough upon a fair construction to justify the judgment of the trial

court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 924-926, 957-962; Dec. Dig. §§ 394, 404.*]

3. APPEAL AND ERROR (§ 1009*)—FINDINGS—EVIDENCE.

Where the trial court hears all the witnesses testify, and is thus able to observe their manner and demeanor while testifying, the appellate court will not review the evidence further than to determine whether or not the findings are supported by substantial evidence, in the absence of such an overwhelming weight of evidence against such findings as would clearly show that the trial court erred in its conclusions drawn therefrom; and in an equity case, where the court hears the witnesses *ore tenus*, there is no reason for a departure from the rule.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

4. CONTRACTS (§ 53*)—CONSIDERATION—INADEQUACY.

Mere inadequacy of consideration is not sufficient, in and of itself, to avoid a contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 231, 232; Dec. Dig. § 53.*]

5. CONTRACTS (§ 170*)—CONSTRUCTION BY PARTIES.

Where parties to a contract construe it as having created a partnership relation, and act upon such construction, the court will not, after rights have accrued thereunder by reason of such construction, give to the contract a different construction, which would be at variance with the understanding of the parties to it.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.*]

Appeal from District Court, Taos County; T. D. Leib, Judge.

Action by William Fraser against the State Savings Bank and others. From a judgment for defendants, plaintiff appeals. Affirmed.

On December 16, 1910, the appellant and appellees John B. Bidwell and A. Clarence Probert made and executed the following agreement, viz.:

"This agreement, made and entered into this 16th day of December, 1910, by and between William Fraser, as party of the first part, and John B. Bidwell and A. Clarence Probert, as parties of the second part, that for and in consideration of the sum of two thousand dollars and other more valuable consideration we hereby form ourselves into a joint and copartnership under the firm name and style of Fraser, Bidwell & Probert for the purposes of developing, improving, selling, and disposing of the mineral properties of the said William Fraser within a period of two (2) years' time from this date, or as long thereafter as the said William Fraser may agree to and with said parties of the second part; and in further consideration for the time and moneys expended by the said John B. Bidwell and A. Clarence Probert a warranty deed has been executed and given to each one of the said parties of the second part, conveying an undivided one-third interest in and to all of said mining

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

properties belonging to the said William Fraser, and if said mining properties are not sold or disposed of within the said period of time mentioned above, then said warranty deeds are to be void and of no effect, and the said mining properties mentioned in said warranty deeds are to revert back to the said William Fraser.

"It is further hereby mutually understood and agreed that in the event of an expiration or forfeiture of this agreement or contract that all moneys expended by the said John B. Bidwell and A. Clarence Probert, parties of the second part, that the said William Fraser hereby agrees to reimburse and pay back the whole amount of said moneys in the form of a lien against all of said properties mentioned in said warranty deeds, so that the said John B. Bidwell and A. Clarence Probert shall not be out any moneys that were expended in this copartnership or transaction by them.

"In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

"[Signed] William Fraser. [Seal.]

"[Signed] John B. Bidwell. [Seal.]

"[Signed] A. Clarence Probert. [Seal.]

"Signed, sealed and delivered in presence of

"[Signed] J. Wight Giddings.

"[Signed] Fidel Cordoba, Jr.

"[Signed] Enrique Gonzales."

On the same day, and as part of the same transaction, appellant made, executed, and delivered to each of the above-named appellees a warranty deed, signed by appellant and his wife, by which he conveyed to each, respectively, an undivided one-third interest in and to all his mining properties therein named, and also a like interest in and to a toll road owned by him in the Rio Hondo Cañon leading to said mining properties and the grantor's rights in the Laroux grant. On the same day, or shortly thereafter, Bidwell placed to Fraser's credit in the Taos Savings Bank, or applied on Fraser's debts, approximately \$2,000.

Thereafter, on February 18, 1911, Fraser, Bidwell, and Probert made and entered into a written contract with Charles T. Martin, by which they agreed to convey to him, for the sum of \$77,500, all the property above mentioned. The contract was signed by Fraser, Bidwell & Probert, a copartnership, by each of the individuals composing the alleged partnership, and by Martin. By the terms of the contract \$20,000 was to be paid in cash and the balance was to be paid in two installments, at stated times. Pursuant to the contract, the \$20,000 was paid, which was turned over to Probert, and by him deposited in the Taos Savings Bank, out of which sum all of Fraser's debts were paid, amounting to approximately the sum of \$10,000, and some cash was distributed to each of the parties to the so-called partnership

agreement by Probert. Deeds to the property were executed by the three parties, as required by the contract, which were placed, under the contract, in escrow with the Hanover National Bank of New York City, for delivery to Martin upon compliance by him with the terms of the contract. Subsequently Martin paid to the Hanover National Bank the first installment of \$18,500, as required by the contract, which payment was made in September, 1911.

Immediately prior to such payment, Fraser instituted this suit in the lower court for the dissolution of the alleged copartnership between Fraser, Bidwell, and Probert, the rescission of the two deeds for one-third interest each in Fraser's property to Probert and Bidwell, the accounting for \$20,000, part of which had been taken by Bidwell and Probert with proper commission allowances to Probert and Bidwell for their services quantum meruit, and their reimbursement for their expenditures under the copartnership agreement, the appointment of a receiver to carry out the undertaking with Charles T. Martin, the injunction of Probert and Bidwell and the State Savings Bank from interfering with Fraser in carrying out the contract with Martin, and certain modifications thereof to which Fraser alone had agreed, and to restrain Probert and Bidwell from directing the Hanover National Bank not to receive the payment of \$18,500 about to fall due, as modified by certain agreements made by Fraser, individually, and the authorization of the receiver to take and hold, under proper bond, the money Martin should pay under said contract. The basis of the complaint was fraud, in that advantage had been taken by Bidwell and Probert of Fraser's weakened mental condition in the transaction.

The appellees answered, denying all the allegations of fraud and overreaching and the weakened mental condition of Fraser, and alleged full performance of the contract on their part. They also set up fraud on Fraser's part in his attempted dissolution of the partnership agreement.

Charles T. Martin intervened, for the purpose of securing advantage of certain modifications in the original contract of purchase, made by Fraser just prior to the institution of this suit.

B. G. Randall, receiver of the Taos Savings Bank, also intervened for the purpose of subjecting Probert's interest in the funds, should he ultimately be adjudged entitled thereto, to certain indebtedness owing by him to the bank.

Trial was had to the court in equity, which found the issues in the main case in favor of Bidwell and Probert, and against Fraser, and in favor of Randall, receiver, upon his claim against Probert. The intervention of Martin was determined against him. The plaintiff, Fraser, appealed to this court, as likewise did the intervener, Martin. Sub-

sequently the appeal as to Martin was dismissed, at his request.

Additional facts appear in the opinion.

Renehan & Wright, of Santa Fé, for appellant. A. C. Voorhees, of Raton, and Frank T. Cheetham, of Taos, for appellees.

ROBERTS, C. J. (after stating the facts as above). While many claimed errors are assigned, we will confine our consideration to those only which appellant has discussed in his brief and upon the hearing of the cause in this court.

Complaint is first made that the findings of fact made by the trial court are mere conclusions of law, and therefore the decree made is inoperative, because not supported by findings; such findings having been requested by appellant. It would require unnecessary space to incorporate all the findings of fact and conclusions of law made by the trial court. It is perhaps sufficient to state that the court found that the parties entered into the so-called partnership agreement set out in the statement of facts, on the date herein named; that pursuant to such partnership agreement Fraser and wife made, executed, and delivered to Bidwell and Probert deeds to one-third interest, each, in and to the property described in the complaint; that Bidwell and Probert performed all the conditions of said agreement on their part to be performed; that there was a good and sufficient consideration for the said deeds; that said deeds were executed and delivered by plaintiff as his free and voluntary act, and without any undue influence or duress of Bidwell and Probert; that at the time of making such partnership agreement and executing said deeds said Fraser was of sound mind and had the mental capacity to make said contract and execute said deeds; that the attempted dissolution of the copartnership by Fraser was an attempt to defraud Bidwell and Probert. Certain other facts were found, not involved in this appeal, however, as such facts affected only the interveners, Martin and Randall, the receiver of the Taos Savings Bank.

[1] The court is only required to find the ultimate facts in controversy, raised by the issues in the case. Here the questions to be determined were: (1) The mental condition of Fraser at the time he entered into the contract with, and executed the deeds to, Probert and Bidwell; and (2) were said deeds executed and delivered by Fraser to Bidwell and Probert freely and voluntarily, and without any undue influence or duress on the part of either Bidwell or Probert? These were the main issues in the case, the ultimate facts which the court was required to determine in order to render a judgment. In 38 Cyc. 1980, it is stated: "The setting out of matters of evidence and subordinate facts in the findings is neither necessary nor proper, as a finding of ultimate facts necessarily

includes all the probative facts, together with the inferences therefrom, and it is the province and duty of the court to state ultimate, rather than evidentiary or probative, facts in its findings."

[2] The court was not required, nor would it have been proper, to set out the evidence upon which it relied in determining the ultimate facts found. Nor does the fact that conclusions of law may have been intermixed with the findings of fact render such findings so objectionable as to require a reversal of the case. In the case of *Baker v. De Armijo*, decided at the last term of this court, and reported in 128 Pac. 73, we quoted, with approval, the following excerpt from the case of *O'Reilly v. Campbell*, 116 U. S. 420, 6 Sup. Ct. 422, 29 L. Ed. 669: "Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law." Tested by this rule, we think the findings are sufficient to support the judgment.

[3] Appellant next contends that the findings of fact are not supported by sufficient evidence, and, further, that it is the duty of this court, this being an equity case, to review all the evidence in the record, and, regardless of the findings of the trial court, enter such a decree as "may be agreeable to law." In other words, notwithstanding the rule adopted and always adhered to by the territorial Supreme Court, that it would not, where the trial court heard all the evidence *ore tenus*, and thus had the opportunity of observing the witnesses while testifying, and was thereby enabled to judge, from their manner and demeanor while testifying, the weight to which their testimony was entitled, disturb the findings of fact made by the trial court, if such findings were supported by substantial evidence, or, as sometimes stated, "by sufficient evidence." Of course, where the testimony is taken by an examiner, or by deposition, or is in the main so taken, and this court has the same opportunity as the trial court possessed of determining the facts, the reason for the rule does not exist, and the appellate court will review the evidence and arrive at its own conclusion as to the facts established thereby. But where, as in this case, the court heard all the witnesses testify, and observed their manner, demeanor, and appearance while on the stand, this court will not review the evidence, further than to determine whether or not the findings are supported by substantial evidence, in the absence of such an overwhelming weight of evidence against such findings as would clearly show that the trial court erred in its conclusions drawn therefrom. In an equity case, where the court hears all

the witnesses testify, there is no reason for a departure from the rule. Under the old equity practice such cases were heard entirely upon written evidence, which doubtless, and correctly so, established the practice that the appellate court would review and weigh the evidence; but under modern practice the reason for the rule no longer exists.

Upon the trial of the case, a great deal of testimony was introduced for the purpose of showing that appellant was mentally inefficient at the time he entered into the contract of December 16, 1910. On his behalf, it was established that about six months prior thereto he was thrown from a buggy and received a severe blow on the head, from which he was unconscious for from ten days to three weeks. Witnesses for appellant detailed various circumstances and conduct on his part thereafter, upon which they based the opinion that he was of unsound mind. Two physicians testified, as experts, that from a review of the facts detailed by other witnesses, and examinations which they had made of appellant, he was of unsound mind at the time of making the contract. On the other hand, the physician who attended him during his illness testified that there was a complete recovery from the injury, and that he was restored to a normal condition mentally, about two weeks after the injury. Upon the trial there was introduced in evidence a great many letters written by appellant, dating from about four weeks after his injury to some months after the signing of the contract in question, all of which, without exception, appeared to have been written by a man in possession of all his mental faculties. Indeed, such letters were remarkably clear, explicit, and concise, and would hardly be reconcilable with mental deficiency or unsoundness of mind on the part of the writer.

Again, the experts for appellant testified that the condition of his mind would naturally become worse, his intellect would become gradually impaired, and that the disease with which he was suffering was "progressive"; that in no event could there be hope of improvement in his mental condition; that at the time of the trial he was in a worse condition mentally, or at least was no better, than he was at the time he executed the contract December 16, 1910. Appellant testified as a witness upon the trial, and was subjected to a rigid cross-examination. From his testimony it appears that he knew all the details of his business, even to the minutest details, and there is nothing whatever to suggest an impaired intellect. It is probable that the trial court gave considerable weight to his testimony, and his manner and conduct upon the stand, in arriving at the conclusion that he was of sound mind, as also the letters written by him, before and after the contract was executed. From a review of the evidence, it appears that the findings in this respect are support-

ed by substantial evidence, and are not subject to attack here.

Nor was there any evidence of duress, fraud, or overreaching. It is true Fraser was, at the time he entered into the contract with Bidwell and Probert, in straitened circumstances; but neither of the appellees had anything to do with bringing about such condition. The evidence discloses that Fraser owed about \$10,000, some of which was past due; that his property had been sold for taxes, and interest on some of his other debts was past and pressing. He required for his immediate necessities approximately \$2,000, which Bidwell agreed to and did advance under the contract. The written contract, set out in the statement of facts, it is admitted by all parties, did not express the entire agreement between the parties. All agree that Bidwell was to, and did, advance the sum of \$2,000, and that he was further to drive a tunnel and develop the property and put it in shape for examination by purchasers. Immediately upon signing the contract, he repaired to the property and began work agreed to be done. Probert, on the other hand, was to find a purchaser for the property, and to pay all expenses connected therewith. Fraser contended, upon the trial, that the agreement which he made with Probert and Bidwell did not include the deal which was consummated; that it was expressly excepted from the contract, and he was to have the right to proceed with the sale, which was being promoted by Mr. Manley of Denver. This was denied by Bidwell; Probert not testifying. But the letters which Fraser wrote to Probert, while the Manley deal was pending and about to be consummated, furnish strong evidence that no such exception was made from the contract. He advised Probert of every detail of the proposed deal, and asked his advice, spoke of the three acting in concert in the matter, and, we think, justified the trial court in concluding that no exception whatever was intended by Fraser or the parties.

From the transcript of the evidence, it appears, without dispute, that Fraser sent for Bidwell to come to his house two or three days prior to December 16th, the date when the contract and deeds were signed. His object was to induce Bidwell to engage with him in the tie and lumber business. Bidwell declined to go into the business, because of the uncertainty of the title to the land upon which it was proposed to operate. During the conversation Bidwell told Fraser that he had about \$2,000 in cash which he was not using at the time. Fraser asked him to loan him the money, to enable him to pay his pressing debts and taxes. Fraser claims Bidwell agreed to do so, but this is denied by Bidwell. The next day, at Fraser's suggestion, they went into Taos and called to see Mr. Probert, who was unknown to Bidwell. The next day Bidwell and Probert had a talk, in the absence of Fraser, but at Fras-

er's suggestion, relative to some plan to assist Fraser. Bidwell says they agreed upon the plan which consummated in the contract. The next day Bidwell submitted the details of the proposition to Fraser, which he accepted; he claiming, however, that the Manley deal was excluded therefrom, and that Probert was to find a purchaser for the property at a price of not less than \$300,000. It will be seen that there is no suggestion of fraud, or duress, or overreaching, in the above recital of the facts leading up to the making of the contract and executing the deeds. Fraser had ample time to consider the proposition, having taken the deeds out overnight for his wife's signature.

[4] Mere inadequacy of consideration is not sufficient, in and of itself, to avoid a contract. In the case of *Eyre v. Potter*, 15 How. 59, 14 L. Ed. 592, the Supreme Court of the United States say: "Against an array of evidence like this, the question of equivalents or of the exact adequacy of consideration cannot well be raised. The parties, if competent to contract and willing to contract, were the only proper judges of the motive or considerations operating upon them; and it would be productive of the worst consequences if, under pretexts however specious, interests or dispositions subsequently arising could be made to bear upon the acts deliberately performed, and which have become the foundation of important rights in others. Mere inadequacy of price, or any other inequality in a bargain, we are told, is not to be understood as constituting *per se* a ground to avoid a bargain in equity. For courts of equity, as well as courts of law, act upon the ground that every person who is not, from his peculiar condition or circumstances, under disability, is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargain be wise and discreet or otherwise, or profitable or unprofitable, are considerations not for the courts of justice, but for the party himself to deliberate upon. * * * Again, it is ruled that inadequacy of consideration is not of itself a distinct principle of equity. The common law knows no such principle. The consideration, be it more or less, supports the contract. Common sense knows no such principle. The value of a thing is what it will produce, and it admits no precise standard. One man, in the disposal of his property, may sell it for less than another would. If courts of equity were to unravel all these transactions, they would throw everything into confusion, and set afloat the contracts of mankind. Such a consequence would of itself be sufficient to show the injustice and impracticability of adopting the doctrine that mere inadequacy should form a distinct ground for relief. Still there may be such unconscionableness or inadequacy of consideration in a bargain as to demonstrate some gross imposition or some undue influence;

and in such case courts of equity ought to interfere, upon satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would, to use an expressive phrase, shock the conscience, and amount in itself to conclusive and decisive evidence of fraud."

Again in another case the same court used the following language which fits the circumstances of the case at bar: "Enough appears in the record to convince the court that the respondent was in straitened circumstances, that his business affairs had become complicated, that he was greatly embarrassed with litigations, and that he was in pressing want of pecuniary means; but the court is wholly unable to see that the complainant is responsible for those circumstances, or that he did any unlawful act to deprive the respondent of his property, or to create those necessities or embarrassments, or to compel him to do what he acknowledges he did do, which was to yield to the pressure of the circumstances surrounding him, and as a choice of evils accepted the advance of \$5,000 and the shares assigned to him, in the new organization as proposed, and voluntarily signed both the agreement and the assignment. Such an act as that of signing those instruments, under circumstances disclosed in the record, must be regarded, both in equity and at law, as a voluntary act, as it was unattended by any act of violence, or threat of any kind, calculated in any degree to intimidate the party, or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he avers, still the fact is he did consent when he might have refused to affix his signature to the instruments, as he had repeatedly done for the year preceding; and, having consented to the arrangement and signed the instruments, he is bound by their terms, and must abide the consequences of his own voluntary act, unless some other of his defenses set up in the answer have a better foundation." *French v. Shoemaker*, 14 Wall. 333, 20 L. Ed. 852.

[5] Counsel for appellant next insists that the agreement, entered into by the parties, did not constitute a partnership contract, but was at most a brokerage agreement. Had the parties to the contract not treated it as constituting a partnership agreement, we would be inclined to agree with counsel; but all the acts of the parties, and circumstances in evidence, from the time of making the contract in December until the conclusion of the sale to Martin, plainly show that Fraser and Bidwell and Probert recognized that a partnership existed between them by virtue of said contract, and treated each other accordingly. Having placed a construction upon the contract, and acted thereunder, the court will not, at this time, and after all the rights have accrued, give to the contract a different construction, which would plainly

be at variance with the understanding of the parties to it. 30 Cyc. 360.

Appellant contends that, as the written agreement did not embrace the entire contract between the parties, and a part of it rested in parol, that it was a parol contract, and that the partnership agreement was within the statute of frauds, first, because it was not to be performed within a year, and, second, because it concerned land. This question is not involved in the case, however, as it was not raised by the pleadings.

What we have already said in the case disposes of appellant's contention that the court erred in not decreeing the dissolution of the partnership. The only basis in the complaint for the dissolution of the relations between the parties was the unsoundness of appellant's mind at the time of the execution of the contract by which the partnership was formed, and the alleged fraud, duress, and overreaching of appellant at that time. On these issues the court found for the appellees; consequently there was no ground for a decree of dissolution.

For the reasons stated, the judgment of the lower court will be affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

STATE v. COATS et al.

(Supreme Court of New Mexico. Dec. 2, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 260*)—APPEAL BY PROSECUTING WITNESS—TITLE OF CASE.

Where a justice of the peace, under section 3, c. 61, Sess. Laws 1907, finds that a criminal prosecution has been instituted "maliciously, or without probable cause," and taxes the costs against the prosecuting witness, and the prosecuting witness appeals from such judgment, the case should be docketed in the name of the state against the prosecuting witness, and not as originally entitled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

2. CRIMINAL LAW (§ 260*)—TAXATION OF COSTS—APPEAL BY PROSECUTING WITNESS—DISCRETION OF DISTRICT COURT.

In such a case, where the prosecuting witness appeals from a judgment of the justice of the peace taxing him with the costs, the district court is required to try the question as to whether the prosecution was instituted maliciously or without probable cause de novo, and must enter its own independent judgment in the case. In such case the discretion conferred by the statutes upon the justice of the peace is necessarily transferred to the district court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

3. CRIMINAL LAW (§ 260*)—TAXATION OF COSTS—APPEAL BY PROSECUTING WITNESS—BURDEN OF PROOF.

Upon such appeal the burden is upon the state to show that the prosecution was instituted maliciously or without probable cause.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.*]

Appeal from District Court, Sierra County; Mechem, Judge.

John Coats and another were acquitted of keeping a disorderly house within 300 yards of a schoolhouse, and costs were taxed to the prosecuting witness, and he appeals. Affirmed.

Edward D. Tittmann, of Hillsboro, Special Prosecutor, for the State.

ROBERTS, C. J. G. W. Bledsoe was the prosecuting witness in an information filed by the district attorney, before a justice of the peace, against John Coats and his wife, wherein they were charged with conducting a disorderly house within 300 yards of a schoolhouse. Upon trial the defendants were acquitted, and the justice of the peace found that the prosecution was instituted "maliciously and without probable cause," and taxed the costs against Bledsoe, and ordered him committed, until the costs should be paid. From the judgment taxing him with the costs, Bledsoe appealed to the district court. In the district court the state filed a motion to dismiss the appeal, on the ground that the district court was without jurisdiction to try the case, because no appeal could be taken from the judgment of the justice of the peace. The court overruled the motion and called the case for trial, and, the state offering no evidence, a judgment was entered discharging Bledsoe from the payment of the costs of the case. From such judgment the state appeals, and predicates error upon two grounds, viz.: (1) The imposition of costs upon the prosecuting witness resting solely within the discretion of the justice of the peace, no appeal lies to review such discretion; and (2) upon appeal, in such a case, the burden was upon the appellant, and in the absence of any evidence it was the duty of the court to enter judgment for the state.

[1] Before considering the question stated, it is probably advisable to notice a question of practice, presented by the record in this case, but not discussed by counsel. The case is docketed in this court, and was apparently so docketed in the district court, as "State of New Mexico v. John Coats et al., the defendants in the original case. This is improper. The case against John Coats was disposed of by the judgment of the justice of the peace, and when he taxed the costs against Bledsoe the judgment therein became a judgment in behalf of the state against said Bledsoe, and so it should appear in subsequent proceedings involving such judgment.

[2] Appellant's brief is devoted chiefly to a discussion of the first ground upon which error is predicated. The section of the statute under which the justice of the peace imposed the costs of the case upon the prosecuting witness reads as follows: Section 3, c. 61, S. L. 1907: "Upon the trial of any criminal

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case, whenever the court or justice of the peace shall be satisfied that any such case has been instituted maliciously or without probable cause, the court may in its discretion tax the costs therein against the prosecuting witness, in which event such witness shall stand committed until such costs be fully paid."

The argument is advanced that, the imposition of costs upon the prosecuting witness resting in the discretion of the justice of the peace, such discretion will not be reviewed by an appellate court. This would be true, if the appellate court simply reviewed the judgment of the justice of the peace, and reversed or affirmed the same; but under our statute (section 3317, C. L. 1897) the case in the district court must be tried de novo, and the district court necessarily is required to enter its own independent judgment. This being true, the discretion conferred upon the justice of the peace by the section of the statute first quoted is necessarily transferred to the district court by the appeal.

To establish the contrary rule, the state relies upon the following quotation from 11 Cyc. 272: "In North Carolina, where the court decides whether grounds exist for imposing costs on the prosecutor, its finding that the facts warrant the imposition is conclusive." But that this rule applies only to appeals from the district court to the Supreme Court is clearly shown by the North Carolina Supreme Court in the case of *State v. Hamilton*, 106 N. C. 660, 10 S. E. 854: "Section 738 empowers the court to imprison the prosecutor for nonpayment of costs, if it shall adjudge that the prosecution was frivolous and malicious. This is held constitutional. *State v. Cannady*, 78 N. C. 539. These findings of fact by the court below have been repeatedly held conclusive, and not reviewable by this court on appeal (*State v. Adams*, 85 N. C. 560; *State v. Owen*, 87 N. C. 565; *State v. Dunn*, 95 N. C. 697), though such findings of fact by a justice of the peace are reviewable by the superior court on appeal (*State v. Murdock*, 85 N. C. 598; *State v. Powell*, 86 N. C. 640)."

By section 3305, C. L. 1897, Bledsoe had the right to appeal to the district court from the judgment against him. This being true, the district court properly overruled the motion to dismiss the appeal.

[3] As the case was triable de novo on appeal, the burden was upon the state to show that the prosecution was instituted "maliciously or without probable cause"; and, the state failing to offer any evidence upon the trial, the district court properly dismissed the case and discharged the prosecuting witness.

Finding no error in the record, the judgment of the district court is affirmed; and it is so ordered.

HANNA and PARKER, JJ., concur.

Ex parte CICA et al.

(Supreme Court of New Mexico. Dec. 23, 1913.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 4*)—NATURE OF WRIT—DISTINGUISHED FROM WRIT OF ERROR.

The writ of habeas corpus is not a writ of error, nor does it, except when perverted, discharge the functions of a writ of error.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 4; Dec. Dig. § 4.*]

2. HABEAS CORPUS (§ 30*)—GROUNDS—REVERSIBLE ERRORS.

Errors or irregularities in the course of the proceedings at or anterior to the trial, which, if presented to an appellate court by way of appeal or writ of error, must necessarily result in the reversal of the judgment, are not sufficient, for that reason, as grounds for the release of a prisoner upon application for a writ of habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 25; Dec. Dig. § 80.*]

3. CRIMINAL LAW (§ 104*)—JUDGMENT—COLLATERAL ATTACK BY HABEAS CORPUS—PRESUMPTION AS TO JURISDICTION.

As to jurisdictional questions, a judgment under which the prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 170; Dec. Dig. § 104.*]

4. CRIMINAL LAW (§ 991*)—HABEAS CORPUS (§ 30*)—SENTENCE—VALIDITY.

A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2518, 2525, 2528; Dec. Dig. § 991.* *Habeas Corpus*, Cent. Dig. § 25; Dec. Dig. § 30.*]

Application of Joe Cica and another for a writ of habeas corpus. Writ denied.

This was a petition for a writ of habeas corpus. The petitioners allege that: On the 18th day of November, 1913, a complaint was filed before J. M. Gauna, a justice of the peace in precinct No. 20 of Colfax county, attempting to charge an offense against the petitioners under a city ordinance of the city of Raton; said ordinance being designated as Ordinance No. 133 in said complaint, but charged to have been Ordinance No. 135 in the return and answer of the sheriff to the writ of habeas corpus. On the day the complaint was filed the petitioners were sentenced to 60 days in the common jail of Colfax county, and to pay a fine of \$25, and to pay costs amounting to \$7.50 each, and a commitment was issued accordingly. The petitioners were, in accordance with the mandate of the so-called commitment, taken into custody by Abe Hixenbaugh, sheriff of Colfax county, and by him imprisoned in the county jail on the 18th day of November, 1913, and there they remain.

The sheriff, by way of response to the writ, filed his return thereto. Thereupon the petitioners moved to quash the return and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

discharge the prisoners upon the petition and return of the officer. The return, which was designated "Return and Answer," admitted all the material allegations of the petition, except the averments with respect to the ordinance upon which the prosecution was based in the justice court.

A. C. Voorhees and Elmer E. Studley, both of Raton, for petitioners. Orle L. Phillips, Asst. Dist. Atty., of Raton, for the State.

HANNA, J. (after stating the facts as above). The petitioners contend that the judgment rendered by the justice of the peace, upon which the commitment is based, was void for the following reasons: First, because there was no arraignment of the defendants; second, because the judgment sentencing each of the defendants to 60 days in the county jail and to pay a fine of \$25 and costs was excessive, and beyond the power of the court to impose.

[1] In considering the first ground of objection to the judgment, it is necessary to admit the well-settled principle that the writ of habeas corpus is not a writ of error, nor does it, except when perverted, discharge the functions of a writ of error. 2 Freeman on Judgments, § 620; Hurd, Habeas Corpus (2d Ed.) 328.

[2] Pursuant to this principle it has been quite universally held that errors or irregularities in the course of the proceedings at or anterior to the trial, which, if presented to an appellate court by way of appeal or writ of error, must necessarily result in the reversal of the judgment, are not sufficient, for that reason, as grounds for the release of a prisoner upon application for a writ of habeas corpus. Freeman on Judgments (4th Ed.) § 620; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

The particular phase of the question here raised—i. e., that there was no arraignment of the defendants—does not seem to have been passed upon by any court of last resort, save that of the Supreme Court of Indiana, which court held, in the case of Winslow v. Green, 155 Ind. 368, 58 N. E. 259, that, where one has been tried and convicted in the superior court, he will not be released by habeas corpus because he was not arraigned and did not plead in such court, since, as such errors do not go to the jurisdiction of the court, its judgment is not subject to collateral attack. In that case, as in the case now under consideration, it was not denied that the court had jurisdiction both of the subject-matter and the person of the defendant.

Our territorial Supreme Court, in the case of In re P. Peraltareavis, 8 N. M. 27, 41 Pac. 538, following Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, said: "That the only ground on which that court [United States Supreme Court], or any court, without special statute authority, will give relief on habeas corpus, is where there is want of

jurisdiction over the person or the cause, or some other matter rendering the proceedings void, as distinguished from what is merely erroneous and reversible."

[3] Our habeas corpus statute was adopted prior to the rendition of the opinion on the Peraltareavis Case, and was doubtless carefully considered by the court at that time. We do not concede that the failure of the record, in this case, to show affirmatively an arraignment of the defendants, is a jurisdictional defect that would render void the judgment in the case and subject it to collateral attack. It has been held that, as to jurisdictional questions, a judgment under which the prisoner is held is aided by the same presumptions as in other cases of collateral assault. If the record is silent as to jurisdictional facts, jurisdiction is presumed. Freeman on Judgments, § 619; Ex parte Ah Men, 77 Cal. 198, 19 Pac. 380, 11 Am. St. Rep. 263.

In concluding our discussion upon this subject, we desire to observe that it is not contended by the petitioners that no arraignment was had; but their contention is entirely based upon the failure of the record to disclose the fact of arraignment.

The further contention of petitioners respecting defects in the complaint and impropriety of holding that the prosecution was had under Ordinance No. 135, of the city of Raton, when the complaint was originally made under Ordinance No. 133, are likewise collateral attacks upon the judgment of the justice court, which cannot now be entertained in this proceeding for the reason given.

[4] This leaves for our consideration the question that the judgment sentencing each of the defendants to 60 days in the county jail and to pay a fine of \$25 and costs was excessive and beyond the power of the court to impose. The ordinance upon which the judgment was based provides: "Sec. 3. Any person violating any provisions of this ordinance shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in a sum of not exceeding twenty-five dollars, or by imprisonment in the county jail for a period not exceeding sixty days."

It is urged by the petitioners that our statute is substantially the same as the statutes of Idaho and Missouri, and that our statute was adopted from the Missouri statute after it had been construed by the Supreme Court of that state in the case of Ex parte Page, 49 Mo. 291. We are not convinced of the correctness of this contention, though there is great similarity between the statutes. The facts involved in the Missouri case, however, are not the same as those with which we are now concerned.

This case being similar to that of Ex parte Mooney, 26 W. Va. 36, 53 Am. Rep. 59, from the opinion therein we desire to quote at length with approval: "It is insisted, however, that as the court had no legal right

under the statute to sentence the petitioner both to confinement in the penitentiary and to pay a fine, it exceeded its jurisdiction, and thereby the whole proceeding became illegal and void. In support of this view the cases of *Ex parte Page*, 49 Mo. 291, *Rex v. Ellis*, 5 Barn. & Cress. 395, and *Rex v. Bonne*, 7 Ad. & Ellis, 58, are relied on by counsel for petitioner. The two latter cases were decided upon writs of error by the Court of King's Bench, and by reason of the peculiar constitution of that court the determination of such cases by it have no analogy to the proceeding by habeas corpus in our courts. I do not, therefore, regard those cases as authority in this case. The other case, from Missouri, was in some respects different from the one before us. In that case the extreme limit which the court could inflict as a punishment for grand larceny was fixed by statute at seven years' confinement in the penitentiary; but the court sentenced the petitioner to such confinement for that crime for ten years. The court on habeas corpus held that the trial court by that sentence had exceeded its jurisdiction, and therefore under the provisions of the statute of that state the petitioner was discharged. The statute referred to declared that when a prisoner is brought up on habeas corpus, if it appear that he is in custody by virtue of process from any court or judicial officer, he can be discharged only in one of the following cases: 'First, where the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum or person. * * * Sixth, where the process is not authorized by any judgment, order or decree, nor by any provision of law.' Wagn. Stat. 690, § 35. The judge, who delivered the opinion of the court, after quoting said statute, says: 'It seems to me that the court in passing the sentence exceeded its jurisdiction in the matter, and that it did not act by authority of any provision of law. This application, therefore, I think comes within the meaning of the statute.' 49 Mo. 292. It seems clear from the opinion that the court decided that case under the influence of the statute; and consequently it can be no precedent, and can have no application in a state like ours, where no such statute exists. But, if that case could be regarded as decided upon principle, it must be disapproved, since it is not only contrary to the general rules hereinbefore stated, but it is in positive conflict with numerous other and seemingly better considered decisions of courts of other states. In *re Petty*, 22 Kan. 477; *Ex parte Parks*, 93 U. S. 18 [23 L. Ed. 787]; *People v. Jacobs*, 66 N. Y. 9; *People v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211; *People v. Baker*, 89 N. Y. 460."

As pointed out in this opinion (*Ex parte Mooney*) the sentence under consideration by the Missouri case was not severable, while in the *Mooney Case*, fine and imprisonment having been imposed, and one or the other

being in excess of the statutory provision, it was held that the sentence was void as to the excess only, the sentence being severable. In the Idaho case, *Ex parte Cox*, 3 Idaho (Hasb.) 530, 32 Pac. 197, 95 Am. St. Rep. 29, a judgment imposed a sentence of five years for violation of an Idaho statute, when the statute in question authorized a maximum penalty of two years. This case is similar to the Missouri case of *Ex parte Page*, which was cited by the Idaho Supreme Court with approval.

In a later case, *Ex parte Crenshaw*, 80 Mo. 447, where the court exceeded the limit of punishment in imposing a fine of \$500, the Supreme Court held: "Notwithstanding these errors in the proceeding of the court, we cannot discharge the prisoner, since the order for his commitment, until he shall have obeyed the order to restore the goods, was a legitimate exercise of the power of the court. Neither this nor any other court can, on a petition for habeas corpus, discharge the prisoner for a mere irregularity in the proceeding. It must be for an illegality which renders the commitment void." *Hurd on Habeas Corpus*, 327. Here the court had jurisdiction, and the imprisonment of the petitioner, until he should comply with the order of the court, was warranted by law. After he shall have restored the goods the prisoner will be entitled to his discharge, the other requirements of the judgment being nullities. *Feely's Case*, 12 Cush. [Mass.] 598; *People v. Markham*, 7 Cal. 208."

The great weight of authority is that, where a court has jurisdiction of the person and the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion in excess open to question and attack. In *re Taylor*, 7 S. D. 382, 64 N. W. 253, 45 L. R. A. 136, 58 Am. St. Rep. 843. See, also, authorities collected in note.

Counsel for petitioners contends that this rule is not applicable to the present case, because the judgment is not separable. In this he is mistaken, as the judgment here is separable. The principle is better stated, in its entirety, in the following language: A sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and the offense, and only void as to the excess, when such excess is separable and may be dealt with without disturbing the valid portion of the sentence. *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *State v. Klock*, 48 La. Ann. 67, 18 South. 957, 55 Am. St. Rep. 259; *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59.

It is our conclusion that the sentence in this case is separable, and that, had petitioners paid the fine or suffered the imprisonment, they would be entitled to the writ; but, having done neither, they are not entitled to release. In *Ex parte Lange*, 18 Wall.

163, 21 L. Ed. 872, it was held that: "The error of the court in imposing the two punishments mentioned in the statutes, when it had only the alternative of one of them, did not make the judgment wholly void." In that case the petitioner, before applying for a writ of habeas corpus, had paid the fine imposed. He was discharged.

For the reasons given, the writ is denied.

ROBERTS, C. J., and PARKER, J., concur.

WINSTON v. IDAHO HARDWOOD CO. (Civ. 1,404.)

(District Court of Appeal, Second District, California. Nov. 10, 1918.)

1. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—FAILURE TO FILE ARTICLES OF INCORPORATION.

Though a foreign corporation fails to file articles of incorporation with the Secretary of State in accordance with Civ. Code, §§ 408, 409, it is not precluded from defending an action brought against it; the only punishment being under section 410, which merely imposes a fine for its failure and provides that it shall be unable to maintain any action in the courts of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542-2544, 2546, 2563-2567; Dec. Dig. § 661.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—PROCESS.

Where a foreign corporation fails to file its articles of incorporation with the Secretary of State in accordance with Civ. Code, §§ 408, 409, an action could not be instituted against it by the service of process on the Secretary of State; section 405 providing that every foreign corporation at the time of filing the certified copy of its articles of incorporation shall file with the Secretary of State a designation of some person within the state upon whom process may be served, and that, in event no such person is designated, service on the Secretary of State shall be a valid service, not authorizing service on the Secretary of State until after the articles of incorporation have been filed in accordance with sections 408, 409.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.*]

3. CORPORATIONS (§ 641*)—FOREIGN CORPORATIONS—STATUTE.

A statute purporting to curtail the privilege of foreign corporations to maintain or defend actions in the state courts should not be construed to extend beyond the plain meaning of its terms.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2518, 2604, 2607; Dec. Dig. § 641.*]

4. JUDGMENT (§ 126*)—DEFAULT JUDGMENT—SUBSTITUTED SERVICE—PROOF OF CAUSE OF ACTION.

In an action against a foreign corporation for salary due plaintiff, begun by constructive service, where the corporation defaulted, judgment cannot be entered by the clerk under Code Civ. Proc. § 585, subsec. 1, but plaintiff must, under subsection 3, establish in open court the validity of the claim sued on.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 223, 224, 228-230; Dec. Dig. § 126.*]

5. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO DEFEND.

Civ. Code, §§ 408, 409, require foreign corporations doing business in the state to file their articles of incorporation with the Secretary of State. Section 405 requires the corporation at the time of such filing to file a designation of a person upon whom process may be served, while section 406 provides that a noncompliance with section 405 shall preclude the corporation from defending any action. Held that, where a foreign corporation neglected to file both its articles of incorporation and the designation of a process agent, it was not precluded from defending an action; section 408 not being applicable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542-2544, 2546, 2563-2567; Dec. Dig. § 661.*]

Appeal from Superior Court, Kern County.

Action by J. G. Winston against the Idaho Hardwood Company. From a judgment for plaintiff, defendant appeals. Reversed.

H. G. Redwine, of Los Angeles, for appellant. S. Wyman Smith, of Bakersfield, for respondent.

SHAW, J. Defendant appeals from a judgment by default entered against it.

[1-3] The verified complaint alleged that at all the times mentioned defendant was a corporation created under the laws of Idaho; that plaintiff was employed by defendant as general manager of its property, consisting of certain real estate therein described, situate in Kern county, Cal.; that plaintiff on the 19th day of February, 1911, entered upon his duties as such general manager and continued therein until October 1, 1912. Followed by allegations as to the salary agreed to be paid plaintiff by defendant, a demand therefor, and nonpayment. While there is no direct allegation that defendant, was doing business in this state, respondent contends that such inference necessarily follows from the allegation that defendant employed plaintiff as general manager of its real estate. It is not alleged that defendant failed to comply with the provisions of sections 408 and 409, Civil Code, whereby every corporation organized under the laws of another state and doing business in this state is required to file in the office of the Secretary of State of the state of California a certified copy of its articles of incorporation, or that defendant had failed to designate a person upon whom service of process issued against it could be served. The record discloses that the sheriff of Sacramento county, to whom the summons was delivered for service, certified that he "personally served the same on the 23d day of December, 1912, on the defendant, the Idaho Hardwood Company, a foreign corporation doing business in the state of California, by delivering to and leaving with Frank H. Corey, chief deputy for Frank C. Jordan, the Secretary of the state of California, in the said county of Sacramento, a true copy of said summons, together with a copy of the complaint in said action referred

to in said summons." He further certified that defendant had not designated any person residing in the state of California upon whom process could be served. At the expiration of 30 days from the date of this service, defendant's default was entered, followed on the same day by a judgment entered by the clerk of the court in accordance with the prayer of the complaint. The contention of respondent is that his complaint shows that defendant was a foreign corporation doing business in this state, and that the sheriff's return of service of summons shows that defendant had not designated any person in the state upon whom service of process issued against it could be made, and hence the service of the summons upon the Secretary of State was sufficient, under sections 405 and 406 of the Civil Code, to give the court jurisdiction of defendant.

Assuming that defendant neglected to comply with the provisions of sections 408 and 409, *supra*, requiring it to file a certified copy of its articles of incorporation, the only penalty fixed therefor is found in section 410, Civil Code, under which it is subjected to a fine of not less than \$500, in addition to which penalty it is deprived of the right to maintain any suit or action in any of the courts of this state. Under the provisions of this section defendant, by reason of its failure to file the certified copy of its articles, could not invoke the aid of the courts of the state in maintaining an action, but there is nothing in the section prohibiting it, by reason of such failure, from defending an action when called into court to answer. *American, etc., Wireless v. Superior Court*, 153 Cal. 533, 96 Pac. 15, 126 Am. St. Rep. 125, 17 L. R. A. (N. S.) 1117. Nor is there anything in section 405, Civil Code, which, under the circumstances here shown, authorized the service of process issued against defendant upon the Secretary of State. By that section "every corporation other than those created by or under the laws of this state must, at the time of filing the certified copy of its articles of incorporation, file in the office of the Secretary of State a designation of some person residing within the state upon whom process * * * may be served." Not until "the time of filing the certified copy" was defendant required to make the designation, and, in the absence of proof that it had filed the certified copy, such time had not arrived and no duty devolved upon it to file such designation. "A statute of this state which purports to curtail the privilege of foreign corporations to maintain or defend actions in this state, and to impose conditions upon compliance with which alone they may be permitted to do so, will not be construed to extend beyond the plain meaning of its terms considered in connection with its object and purposes." *American, etc., Wireless v. Superior Court*, *supra*. There are no allegations in the complaint of any facts

which would authorize the service of summons upon the corporation by delivering it to the Secretary of State; nor was there, as shown by the record, any competent proof of the existence of such facts offered at the trial.

[4] As stated, the judgment was rendered, not by the court, but by the clerk. The contention of respondent is that, since the action was one arising upon contract for the recovery of money only, and no answer having been filed with the clerk within the time specified in the summons, it became the duty of the clerk to enter judgment for the amount demanded in the prayer of the complaint. Subdivision 1, § 585, Code Civ. Proc. In *Olender v. Crystalline Mining Co.*, 149 Cal. 482, 86 Pac. 1082, it is said that the sections herein quoted, consisting of a codification of the act of March 17, 1899, substituted the service upon the Secretary of State for the service by publication formerly prescribed by the Code in cases where the corporation had no agent in the state. This being true, under subdivision 3 of section 585, Code of Civil Procedure, it is made the duty of the court to examine the plaintiff under oath for the purpose of determining the amount which he is entitled to recover and render judgment therefor. Our conclusion is that no facts were alleged or established under which defendant could be brought into court by service of the process upon the Secretary of State, and that, conceding the service to have been regular, as claimed by respondent, the clerk had no power to render the judgment.

[5] Pursuant to notice, respondent at the time of the hearing of the appeal moved to dismiss the same upon the ground that defendant was not entitled to a hearing for "the reason that it has not filed a certified copy of its articles of incorporation in the office of the Secretary of State of the state of California, nor * * * filed in the office of the Secretary of State of the state of California a designation of some person residing in the state upon whom process should be served for and in behalf of the said corporation issued by authority of or under any law of this state." In support of his motion respondent presented the transcript on appeal and a certificate from the Secretary of State to the effect that defendant had not, prior to August 20, 1913, filed a certified copy of its articles of incorporation in the office of Secretary of State of California, nor designated any person residing in the state upon whom process against it could be served. As we have seen, the only penalty which attached to the failure to file the certified copy of its articles, as provided in section 410 of the Civil Code, was the imposition of a fine of \$500 and the denial to it of the right to maintain an action; and since, under said section 405, defendant was not required to file its designation of a person upon whom process might be served other

than at the time of filing such copy, there was no want of compliance with the duty imposed upon defendant by said section 405. Hence the provisions of section 406, Civil Code, which deny to a foreign corporation doing business in this state the right to "maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions of the preceding section," have no application to the facts here shown. Failure to file the copy of its articles of incorporation, as required by sections 406 and 409, rendered it subject to the penalties imposed by the provisions of section 410, but the denial of the right of a foreign corporation to defend, as provided in section 406, attaches only when it fails to designate an agent in the state upon whom service may be made, and the duty of filing such designation arises only at the time of filing the copy of the articles of incorporation, which, as we have seen, in this case were never filed.

The motion to dismiss is therefore denied, and the judgment appealed from is reversed.

We concur: CONREY, P. J.; JAMES, J.

JOHNSON v. RELIANCE AUTOMOBILE CO. (Civ. 1166.)

(District Court of Appeal, Third District, California. Nov. 11, 1913. Rehearing Denied by Supreme Court Jan. 10, 1914.)

1. HIGHWAYS (§ 184*)—USE OF—INJURIES.

In an action by a person injured while watching an automobile race on a highway when an automobile left the highway and struck him, evidence held insufficient to sustain the allegations of the complaint that defendant, a corporation engaged in selling automobiles, was the owner or in possession of the automobile in question, that it entered such automobile in such race, or that the driver thereof was its agent, servant, or employé.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

2. CORPORATIONS (§ 492*)—OFFICERS—IMPLIED AUTHORITY.

The secretary and treasurer of a corporation engaged in selling automobiles had no authority as such to enter an automobile in a race in its name or to render it liable for the consequences thereof; and hence where it did not know of or authorize such entry, and no acts of its acquiesced in by it, or acts of it, from which an inference could be reasonably drawn that the driver was acting under its authority, were shown, it was not liable to a person injured by such automobile while watching the race.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1903; Dec. Dig. § 492.*]

3. HIGHWAYS (§ 184*)—NEGLIGENT USE OF HIGHWAYS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action by a person injured while watching an automobile race on a highway when an automobile left the highway and ran into and injured him, evidence held insufficient to show negligence on the part of the driver.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by Otis F. Johnson against the Reliance Automobile Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Lewis F. Byington, of San Francisco, for appellant. Austin Lewis and R. M. Royce, both of San Francisco, for respondent.

CHIPMAN, P. J. Action for personal injury. The charging part of plaintiff's amended complaint is as follows: "That on the 23d day of October, 1909, plaintiff was in an orchard known as Stanley Orchard, Stanley Road, near San Leandro, in the county of Alameda, state of California, and was then and there watching the course of the automobile race hereinafter mentioned, which said race was then being held and conducted. That the said orchard marched (sic) upon the highway hereinafter mentioned. That on the said date defendant corporation was the owner and in the possession of a certain Knox automobile, and had entered the said Knox automobile for the Oakland Portola automobile race, the said Knox automobile being numbered as 11 in the said race and was entered for events 1 and 3, and the driver of said automobile was Frank Free. That during the progress of the said race, when the said automobile arrived at a position on the highway opposite to the orchard in which plaintiff was standing, the said Frank Free carelessly and negligently turned the said automobile off the said road and ran it into the said orchard where it knocked down a tree in its course and thereafter ran into and knocked down plaintiff herein, and inflicting upon him the injuries hereinafter set forth."

It is further alleged that the Frank Free above mentioned was, in the original complaint, made a defendant but is not so made in the amended complaint, but that, at the time of the accident, he was "an agent, servant, and employé of said defendant corporation, and during all the times herein mentioned acted within the scope of his said employment."

The answer is a specific denial of the material averments of the amended complaint and alleges "that plaintiff was negligent and careless, and assumed risks and hazards, together with the dangers arising therefrom, in and about the alleged matters in said complaint referred to, which negligence and carelessness and risks and hazards, proximately contributed to and caused his alleged injury and damage."

At the close of plaintiff's testimony and also at the close of the evidence in the case defendant's motion for nonsuit was denied. The cause was submitted to the jury, and plaintiff had the verdict. Defendant appeals from the judgment on the verdict and from the order denying its motion for a new trial.

The facts in the case appear almost entire-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ly from the testimony of witnesses called by the plaintiff.

[1] It appears that on October 23, 1909, an automobile race for speed and endurance was arranged to take place along what is known as the Foothill boulevard, between San Leandro and the city of Oakland; the cars traveling westerly towards Oakland. The event had been widely advertised and drew a large number of people. Among them was plaintiff in company with a young lady. They went at first to an elevated point to witness the race, safe from any possible danger, reaching the place about 8 o'clock in the morning. They remained there until about 1 o'clock, and, as was explained, they took a position 200 or 300 feet from this first position, in an orchard bordering the boulevard, where they would be protected from the sun by the shade of the trees. This point was about 50 or 60 feet from the boulevard and at the second row of fruit trees. There was no fence at the roadside and the only obstruction was the curb of the paved street. At the point chosen the road made a curve towards where they were standing and gave them a view of the cars as they approached the curve and also at the curve and as the cars left it speeding westward. What happened will best be stated by the witnesses.

Plaintiff testified: "The last I remember we had just gotten up from sitting under a tree. It was warm that time in the day, being about 1 o'clock, and that being the only shade around the course, and we would get up every time the car came around so we could see, see it make the curve, and we had just gotten up when this car made the curve, and that is the last I remember. * * * After we got up I remember seeing the car come towards the curve; and I remember there was something wrong; and that is the last I remember. * * * I judge there were 50 or 60 people in that particular part of the orchard. They were watching the race."

Mrs. Johnson, who became plaintiff's wife after the accident, testified: "We were watching the automobiles make the curve, and one of them came around the curve and swerved towards where we were standing. Ran over the curb into the orchard and struck Mr. Johnson. It just grazed past me."

Witness Adams testified: "I was about 400 or 500 feet westerly from the scene of the accident. I saw the car when it was at the curve swerve from the road and go into the orchard. I saw the young man start to run. I thought he ran about 25 feet when he was struck by the automobile. I believe the car was going along the road about 60 miles an hour."

Witness Henderson was on horseback on the Stanley road, leading across the boulevard, not far from plaintiff's position. He testified: "There is a curve beyond the Stanley orchard to the east, and from the

orchard I could see the cars turn the curve and dash up towards the orchard. * * * It is about the lowest place along the boulevard. * * * If the automobile went straight ahead at that point it would hit the Stanley road, about the intersection there. The man was trying to turn on the curve and it turned some and started to skid; it seemed to be skidding. He was too close to the curb and he seemed to be afraid to strike it broadside and turned into it. I think it passed partially around the curve then. It seemed to be skidding. If he had hit the curb broadside the way he was going he would have turned over. I mean the curb on the hillside, the orchard side. He tried to turn to the left. I saw him give an effort at the wheel. It seemed to me the automobile passed over Johnson."

Witness Frank Free, called by plaintiff, testified: "I am an automobile driver. October 23, 1909, I was driving a Knox car, No. 11, in the Portola race in Alameda county. That car ran into this orchard and hit Mr. Johnson. Mr. Royce (counsel for plaintiff): Q. Before the car left the road the steering pin broke, did it not? A. Yes, sir. The Court: Q. Did you enter it in the race? A. Mr. Charles Richardson. Q. And who was Mr. Charles Richardson? A. As to that I could not say. * * * Q. And for whom were you running it? A. Mr. Charles Richardson." He testified that he had driven the car in the "tryout"; brought it from the Reliance automobile garage on Van Ness avenue; that he did not then know that Mr. Richardson was an officer of defendant company; that "he was told by the racing committee that Mr. Richardson attended to the details of entering the car"; that he did not know Mr. Crim, the president of the company; that his negotiations were all with Mr. Richardson by mail; that Mr. Richardson was the only man he had any conversation with about the car. The car "was shipped out from the Knox factory to run in this race. The Court: Q. Were you connected in any way with the Reliance Automobile Company? A. Just for the race, that's all. Q. How were you connected with the Reliance Automobile Company for this race? A. Well, I was employed by Mr. Charles Richardson. Whether he had anything to do with the Reliance Automobile Company, or with the Knox factory, I do not know. I had all my dealings with him. * * * I do not know who owned the Knox car at the time of the race. I do not know to whom it was shipped." Cross-examination: "To Mr. Byington (attorney for defendant): When the car reached the curve at the orchard the steering knuckle broke. It is an arm that fits in the spindle. * * * The steering knuckle is the part of the steering apparatus which connects the front axle with the steering gear. And that broke as I was making the turn. And when that broke I lost control of the car. * * * To Mr. Royce: Q. You are a professional driver, are you not? A.

Yes, sir. Q. In whose employ were you at the time of the race? A. Mr. Charles Richardson. Q. Did he pay you personally? A. Yes, sir. Q. Did he pay you in the name of the Reliance Automobile Company? A. He paid me in cash. I do not think I gave a receipt. I drew some money before the race. I think I was paid over here in Alameda county. To Mr. Byington: When I reached the curve and the steering knuckle broke I lost all control over the car. * * * When the car reached this curve and the steering knuckle broke the car jumped over the curb and into the orchard. It plunged straight ahead. I at once threw on the brakes. The rear wheels were as near blocked as they could be. It was impossible to guide or direct the car around the curve. The car had been carefully examined by me and by a skilled mechanic before starting on the race, and every part of it found to be in good condition. The steering gear was not broken before it reached that curve. * * * If there was any defect in the steering knuckle it was something that could not be seen from external observation."

Witness Crim, president of the defendant company, testified for plaintiff: That his company was, at the time of the trial, agent for the Knox cars but he could not state whether it was such agent in 1909; that he did not attend the race and did not know of it; that he did not see the Knox car in their garage before the race. Their salesrooms were at 342 Van Ness avenue and their garage at 547 Fulton street. "Q. Did your company enter this car? A. No, sir. Q. Are you positive they did not enter it? A. Yes, sir. Q. Did you arrange any of the details of this race? A. No, sir. * * * I did not know that there was a car entered in the race in the name of the company. * * * I do not know of our company ever requesting the Knox factory to send a car out here to be entered in that race. * * * Q. Did Mr. Richardson have power to enter automobiles in races for the company? A. No, sir. Mr. Royce: I think that is all." On cross-examination: "The Reliance Automobile Company did not enter the Knox car in that race."

There was some testimony at this point that in May, 1910, Mr. Austin Lewis, one of plaintiff's attorneys, wrote to Mr. Crim soliciting an interview with regard to this accident. A meeting took place subsequently with Mr. Lewis at which Mr. Crim said that Richardson was secretary and treasurer of defendant company and "had charge of the stores but had no power to enter automobiles in races." Mr. Lewis testified that at the interview he showed Mr. Crim a program of the Portola race which read: "Car number 11; entered events 1 and 3; name of car, Knox; piston displacement, 373.06; entrant, Reliance Auto Co.; driver, Free; mechanic, Robinson." On objection of defendant, the court ruled that: "You have

no right to introduce this document in evidence except as a part of a conversation, and it does not prove the facts which the entry itself may state." Mr. Lewis testified that he showed Mr. Crim this document, and he replied that "he would have to consult his stockholders before taking any action in the matter." "The Court: Q. What, if anything, did he say in reference to the entry of the car by the Reliance Automobile Company? A. No discussion was had with regard to the entry for the automobile company." Mr. Royce, still later, saw Mr. Crim "in regard to a proposed compromise of this action." He testified: "I spoke to Mr. Crim and asked him about that compromise we were suggesting. He said, 'Well, I have seen the stockholders, and we have decided not to accept.' And I said, 'What's the matter? The compromise is reasonable enough.' 'Well,' he said, 'You ask too much.' That is about all."

Witness Richardson, called by plaintiff, testified that he was the secretary and treasurer of defendant company on October 23, 1909; and "there is no such office as manager of the company." He was asked who gave the committee in charge of the race the information for entering the car, and answered: "I did. Mr. Royce: Q. Did you see the entry made when you were there? A. Yes, sir. To the best of my recollection, I think the entry was made in the name of the Reliance Automobile Company. The Reliance Automobile Company was engaged in the automobile business in San Francisco. To Mr. Byington: I personally entered the car in the race." Plaintiff rested. A motion for nonsuit, on grounds hereinafter stated, was made and taken under advisement and defendant ordered to proceed.

The testimony for defendant was substantially the same as given for plaintiff and explained a little more fully what appeared in the testimony for plaintiff. Witness Free described the Knox car and the examination made of it before the race and repeated his testimony as to the breaking of the steering knuckle. Witness Robinson was Free's mechanic and testified fully to the perfect condition of the car and to Free's skill as a driver, also to the breaking of the steering apparatus and loss of control of the car. Both he and Free examined the car after the accident and found the cause of the accident as they had testified.

Richardson testified as follows: "The Reliance Automobile Company never at any time authorized or directed the entry of the car driven by Mr. Free in the Portola road races, held October 23, 1909. To the Court: It was the car of the Knox Automobile Company. It belonged to the Knox Automobile Company, and was returned to them. I asked the Knox factory to send it out to me for the purpose of the race. I negotiated with the company. I do not remember whether it was shipped to me or to the Reliance Au-

tomobile Company. I, personally, was acting for the Knox Company October 23, 1909, and not as a corporation. Our corporation was engaged in the business of selling automobiles. They did not sell Knox automobiles prior to October, 1909. The Reliance Automobile Company subsequently became agent for the Knox. The contract was signed, I believe, in December, 1909, or January, 1910. Q. And did the Reliance Automobile Company ever enter any car in any race of any kind? A. No, sir; it did not."

The record purported to contain all the evidence, and we have given substantially all of it. At the close of defendant's evidence counsel renewed his motion for nonsuit on the grounds first stated, to wit, that plaintiff had failed to prove a sufficient case for the jury in that "plaintiff had failed to prove that defendant was the owner of, or in possession of, or had entered in any race, the automobile which caused the injury to plaintiff, or that Frank Free was the agent or employé of defendant, at the time mentioned in the complaint, and had failed to prove negligence on the part of defendant, but had proven negligence on the part of plaintiff contributing to the injury and an assumption of risk on the part of plaintiff, resulting in plaintiff's injury." We fail to discover any conflict in the evidence on the issues presented by the pleadings.

[2] It is alleged in the amended complaint that the defendant "was the owner and in the possession of a certain Knox automobile, and had entered the said Knox automobile for the Oakland Portola automobile race." Also that Frank Free, who drove the said machine, "was at all times herein mentioned an agent, servant, and employé of said defendant corporation, and during all the times herein mentioned acted within the scope of his employment." It was incumbent upon plaintiff to establish these issues by a clear preponderance of evidence. The most that can be said of this evidence as to defendant's liability is that Richardson, who at the time was secretary and treasurer of the defendant company, acting as an individual, arranged to enter the Knox car in the race; that he personally employed Free to drive it and paid him for his services. There is not any evidence that Richardson had any authority as secretary and treasurer to enter cars in races generally or in this particular race. On the contrary, the evidence is that he had no such authority and was not given any such authority in this instance; that defendant did not own the Knox car and was not the agent for its sale; that defendant had never entered any car for any race. It was not necessary to show absolute ownership in defendant; it would have been sufficient to charge it, if otherwise liable, had it been in possession and control of the car and had it entered for the race. But the proofs fall far short of showing such a state of facts. It

is true that Richardson entered the car in the name of defendant company. But this was unknown to the defendant and was without its authority, and it cannot be said as matter of law that he had any such authority by virtue of his office. Besides, his testimony was that he acted in his individual capacity. If we were at liberty, which we are not, to reject the evidence introduced by plaintiff, we should have to hold, in order to sustain the judgment, that the jury were justified in finding that Free was defendant's agent and was acting within the scope of his authority as such agent, and that this inference was justly derivable from the nature of the corporation and from Richardson's relation to it as secretary and treasurer. All that the evidence discloses as to the business in which defendant was engaged is that it was selling automobiles. Richardson's duties as secretary are not shown, nor are there shown any acts of his as such secretary, acquiesced in by the corporation, or any acts of the corporation itself from which an inference can be reasonably drawn that Free was driving the car in question under the authority, express or implied, of the corporation. We cannot say that the business of selling automobiles carries with it by implication the racing of automobiles in public meets of speed and endurance such as the Portola races here in question. Nor can we say that the secretary of a corporation engaged in selling automobiles has express or implied authority to use its name in entering cars and to render it liable for the consequences thereof. There can be no presumption that the secretary of a corporation is clothed with authority to do an unlawful act.

[3] A further issue was raised by the complaint, to wit, that "the said Free carelessly and negligently turned said automobile off the said road and ran it into the said orchard and ran into and knocked down plaintiff, inflicting the injuries" complained of. This is denied, and it is alleged in the answer that "plaintiff was negligent and careless, and assumed risks and hazards, together with the dangers arising therefrom in and about the matters alleged in said complaint referred to, which proximately contributed to and caused his alleged injury and damage."

The evidence introduced by plaintiff shows, without substantial conflict, that the accident was not due to want of care or to the negligence of Free in driving the car. It had been thoroughly inspected by a competent mechanic and by Free himself, a skilled driver, who had driven it in the "try-outs" and was in perfect condition, so far as could be detected. "When the car reached the curve at the orchard," mentioned in the evidence, "the steering knuckle broke. * * * The steering knuckle is the part of the steering apparatus which connects the front axle with the steering gear. And that broke as I was making the turn. And when that broke

I lost control of the car, as far as steering was concerned. * * * When the car reached this curve and the steering knuckle broke, the car jumped over the curb and into the orchard. It plunged straight ahead. I at once threw on the brakes. The rear wheels were as near blocked as they could be. It was impossible to guide or direct the car around the curve." This is the testimony of Free when called by the plaintiff and is confirmed by the observation of other witnesses. Plaintiff suggests in his brief that there were several theories as to what occurred, "one that the machine was driven too near the curb; that to avoid striking the curb Free turned off the road into the orchard and the steering knuckle broke when the car crossed the curb or afterwards in the orchard." This suggestion is based upon the testimony of witness Henderson which we have stated in connection with that of other witnesses. No such theory can reasonably be predicated of Henderson's testimony. What he observed is entirely consistent with the testimony of Free, given as plaintiff's witness, and of Robinson, who was on the car, and other witnesses. Henderson testified that Free "tried to turn to the left," which was away from the curb. There is no dispute of the fact that the steering knuckle broke when the car was on the curve, and it is not unlikely that when that happened the car, to Henderson's observation, "seemed to be skidding." There is nothing in Henderson's testimony on which a theory can be based imputing negligence in Free's management of the car.

Upon this branch of the case the question presented is simply this: Where a person, as a spectator, voluntarily attends an automobile race, for speed and endurance, upon a public highway, and takes a reasonably safe position to witness the event, may he recover for an injury inflicted by one of the racing automobiles which did not result from want of care in its management by the driver, or from any known or visible defect in the car, but did result from the unavoidable breaking of some parts of the automobile? Defendant supports the negative of this position by decisions of courts of high repute. The view we have taken of the case makes it unnecessary to decide the point. We content ourselves with the citation of the cases which have been examined by us and appear to support defendant's contention. *Johnson v. City of New York* et al., 186 N. Y. 139, 78 N. E. 715, 116 Am. St. Rep. 545, 9 Ann. Cas. 824; *Bogart v. City of N. Y.*, 200 N. Y. 379, 93 N. E. 987, 21 Ann. Cas. 466; *Heffern v. Village of Haverstraw*, 143 App. Div. 527, 128 N. Y. Supp. 399; *Scanlon v. Wedger*, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395; *Frost v. Josselyn*, 180 Mass. 389, 62 N. E. 469; *Dowell v. Guthrie*, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598.

As we do not think there was any evidence

tending to show that the car was entered in the race by the authority or with the sanction of defendant, our conclusion is that its liability is not proven.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

KOWALSKY et al. v. NICHOLSON.
(Civ. 1213.)

(District Court of Appeal, First District, California. Nov. 6, 1913. Rehearing Denied by Supreme Court Jan. 5, 1914.)

1. JUDGMENT (§ 326*)—CORRECTION—ORDERS
NUNC PRO TUNC.

Where the entry in the minutes does not correctly embody the judgment given by the court, or the judgment was inadvertently made or entered, it may be corrected nunc pro tunc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 628; Dec. Dig. § 326.*]

2. JUDGMENT (§ 326*)—JUDGMENT OF DISMISSAL—RELIEF.

Where an action is dismissed for want of prosecution, the judgment should, as a matter of course, direct the return to defendant of property taken from her on replevin; and, if it inadvertently omits an order to that effect, the order may be entered nunc pro tunc.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 628; Dec. Dig. § 326.*]

3. JUDGMENT (§ 326*)—CORRECTION—NUNC
PRO TUNC.

Where a judgment did not give the successful party the full measure of the relief incident to the judgment, the successful party is entitled to have it corrected nunc pro tunc as of the date of its original entry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 628; Dec. Dig. § 326.*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by J. N. Kowalsky and others against Estella Nicholson. From an order entered nunc pro tunc, amending a previous order dismissing the action for want of prosecution, plaintiffs appeal. Affirmed.

Edward Lande, of San Francisco, for appellants. Arthur H. Barendt, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from an order entered nunc pro tunc, amending a previous order dismissing an action for lack of prosecution.

The action was in claim and delivery, under proceedings in which the plaintiffs had secured possession of the property described in the complaint. After the cause had been at issue for nearly four years, the court, upon notice to the plaintiffs, granted defendant's motion to dismiss the same for want of prosecution. Subsequently the court, upon due notice to the plaintiffs, amended its order of dismissal nunc pro tunc as of the date of its original entry by adding the following: "And the defendant is entitled to have returned to her all the property taken

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from her under the previous proceeding of this action of replevin, or if return thereof cannot be had, then she shall have judgment for the value thereof in the sum of \$1,000, and for the delivery to her of the undertaking in this matter."

The record does not show that the original entry as made by the clerk was different from the one directed by the court; and plaintiffs therefore contend that the court had no power to change the order or judgment, nor, in changing it, to direct that it be entered *nunc pro tunc*.

[1-3] In a case where it is made to appear that the entry in the minutes does not correctly embody the judgment given by the court, it is a familiar rule that the court may, at any time, amend the judgment *nunc pro tunc* to make the entry conform to the true judgment. *Morrison v. Dapman & West*, 3 Cal. 255, 257; *Cowdery v. London & S. F. Bank*, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115. And in this state the power of the courts to amend their judgments is not wholly confined to such cases. It extends also to cases where, as here, the order was inadvertently made and entered. This is not a case like the *Estate of Potter*, 141 Cal. 424, 75 Pac. 850, where, upon dismissal, the court might have directed different forms of judgment to be entered. Here, the defendant being entitled to a dismissal of the action, as the court correctly held it followed under the circumstances disclosed by the record that the judgment should, as a matter of course, have directed the return to her of the property taken. Its failure to do so, it clearly appears, was merely an inadvertence or mistake, and not a judicial error.

In the *Estate of Schroeder*, 46 Cal. 304, a personal judgment was rendered against the administrator, and it appeared from the record that the judgment ought to have been made payable in due course of administration. It was held that this was such an error or mistake as the court could correct. To the same effect see *Bostwick v. McEvoy*, 62 Cal. 496.

In the *Estate of Willard*, 139 Cal. 501, 504, 73 Pac. 240, 64 L. R. A. 554, an allowance was made to a broker instead of to the administrator as prayed for; and it was held that the court had power on motion to set aside the void allowance, to amend the decree by striking out the allowance as made, and to insert therein in place thereof an allowance to the administrator, so as to properly dispose of the issue presented by the petition and effectuate the intention of the court. In other words, the error was not such as could only be remedied by a motion for a new trial.

In the case of *Leviston v. Swan et al.*, 33 Cal. 480, 484, a judgment in foreclosure did not provide that any one was personally liable for a deficiency, and should be bound therefor after a sale of the property. More than three years subsequently an order of the

court was entered, directing the docketing of a judgment for the deficiency. This order was affirmed, the Supreme Court saying: "The judgment in this case, as first entered, was defective in not designating the defendants who were personally liable for the debt; but, inasmuch as the record shows who they were, the court had the power to amend the judgment at any time by adding a clause designating the defendants who were personally liable. The more regular motion would have been to amend the judgment by supplying the omission which was apparent upon the face of the record, but we consider the course pursued as amounting substantially to the same thing." See, also, *MacNeil v. Ward*, 11 Pac. Coast Law Jnl. 244; *Freeman on Judgments*, vol. 1, § 70, p. 93.

In Texas the "courts may at any time add to their judgments such clauses as may be necessary to carry them into effect when there is anything in the judgment by which to amend." In New York, when the amendment calls for the insertion of what would have been granted "as a matter of course" in the first instance, the cases hold that the judgment may be corrected. 1 *Freeman on Judgments*, § 70, pp. 93, 95.

In the case of *Wiggin v. Superior Court*, 68 Cal. 398, 402, 9 Pac. 646, 648, the court set aside a decree of final distribution which it had the day before granted, on the ground that the discharge of the administrator provided for therein had been inadvertently made. Upon appeal it was held that the lower court had jurisdiction to vacate the order of final discharge, it having been made inadvertently, and the motion for that purpose being made within a reasonable time. The court said: "To illustrate, suppose a judgment is taken upon a default prematurely entered, or a judgment is inadvertently entered in favor of defendant, where it was intended to be in favor of plaintiff, or that for any one of a hundred reasons which might be supposed the court has accidentally or inadvertently entered orders or decrees not in consonance with its judgment or with law, and from which rank injustice must follow, can it be contended that the court has no power * * * to correct the error, and that the injured party must be remitted to an appeal for remedy? We think not."

Upon the dismissal of the action in the case at bar defendant was entitled to the return of the property involved in the action; and a failure to enter the requested correction of the judgment would be equivalent apparently to a judgment in favor of the plaintiffs on the merits of the case. This would be manifestly unjust; and, as the record shows that defendant was entitled to judgment as finally entered, and as the motion to correct the mistake was promptly made, the action of the court in the premises must be sustained.

Of course the defendant, being entitled to have the judgment corrected, was entitled to have it corrected nunc pro tunc as of the date of its original entry. Freeman on Judgments, vol. 1, § 74, p. 104.

The order appealed from is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

MERCHANTS' COLLECTION AGENCY v. GOPCEVIC. (Civ. 1,174.)

(District Court of Appeal, Third District, California. Nov. 11, 1918.)

1. LIMITATION OF ACTIONS (§ 127*)—AMENDMENTS—NEW CAUSE OF ACTION.

In an action for compensation for medical services, where the original complaint counted on a contract, but alleged all facts necessary to support a recovery on a quantum meruit, an amended complaint, adding a count on a quantum meruit, does not constitute a new cause of action against which limitations would have run up to the time of the amendment, but merely states the original cause of action on which limitations were tolled by the filing of the original complaint.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

2. PLEADING (§ 248*)—COMPLAINT—COMMON COUNTS.

As Code Civ. Proc. § 426, providing that a complaint shall contain a statement of the facts constituting a cause of action in ordinary and concise language, does not preclude the use of the common counts, an amended complaint, containing a count declaring on a quantum meruit, will not, because of formal allegations, be construed as stating a wholly different cause of action than the original complaint which, though declaring on an express contract, stated sufficient facts to support a recovery on a quantum meruit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. § 248.*]

3. PHYSICIANS AND SURGEONS (§ 24*)—ACTIONS FOR COMPENSATION.

In an action for compensation due a physician for services rendered, his testimony that he was entitled to a fee of \$10 per hour for a period of 29 days is ample to support a recovery of less than \$500.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 53-62; Dec. Dig. § 24.*]

4. INTEREST (§ 18*)—ALLOWANCE OF INTEREST.

Interest is not properly allowable on an unliquidated demand due upon an implied contract.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 32-34; Dec. Dig. § 18.*]

5. APPEAL AND ERROR (§ 1151*)—DETERMINATION—REVERSAL.

Where a judgment improperly allowed interest upon a recovery on an implied contract, it will not be reversed on appeal, but will be modified by striking therefrom the allowance of interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Merchants' Collection Agency against Milos M. Gopcevic. From a judgment for plaintiff, defendant appeals. Modified and affirmed.

John F. Davis and Charles S. Wheeler, both of San Francisco, for appellant. E. H. Wakeman, of San Francisco, for respondent.

BURNETT, J. The appeal is from a judgment on an assigned claim in favor of plaintiff for the sum of \$480, with interest in the sum of \$125.55. We may adopt the following statement of the proceedings as made by appellant: "The original complaint was filed on October 13, 1908, and contained but one count. * * * Afterwards the said superior court, over the objection of appellant, made an order, duly excepted to by appellant, permitting the respondent to file an amended complaint, and this amended complaint was filed on June 5, 1911. The amended complaint contained two counts: The first, though somewhat amplified, was the same count based upon an *express contract* as set forth in the original complaint; the second was an ordinary quantum meruit count for the reasonable value of the alleged professional services. Appellant pleaded the statute of limitations to both counts by demurrer and answer, and also invoked that statute in his motion for a nonsuit. The court overruled the demurrer, denied the motion for nonsuit, and in its findings of fact determined that neither count was barred by the statute of limitations, although the second count on quantum meruit was not filed until more than two years after the filing of the original complaint. The court further found that no express contract had been made by appellant and respondent's assignor, but it gave respondent judgment for the reasonable value of said services, together with interest thereon from October 13, 1908."

Appellant presents three contentions, as follows: "(1) That the second count or cause of action set up in the amended complaint was barred by subdivision 1 of section 339 and subdivision 2 of section 337 of the Code of Civil Procedure; (2) that the evidence is insufficient to justify the finding that Milos M. Gopcevic promised to pay to Walter H. Fearn, respondent's assignor, the reasonable value of the professional services rendered by him; (3) that the lower court erred in granting interest from October 13, 1908, the date of filing the original complaint, upon the sum awarded to respondent as the reasonable value of the professional services rendered by respondent's assignor."

[1] The first proposition is based upon the assumption that the second count sets forth an entirely different cause of action from

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—39

that contained in the original complaint, as it is not contended that when the action was brought it was barred by any statute of limitations. It is argued that according to the original complaint the plaintiff's primary right arose out of the alleged express agreement between the assignor and the defendant, and that this is "entirely different and distinct from an obligation implied by law, or even from an express agreement to pay the reasonable value of services rendered at another's request."

Decisions from other jurisdictions are cited in support of this view, among which is *Meinshausen v. A. Gettelman Brewing Co.*, 133 Wis. 95, 113 N. W. 408, 13 L. R. A. (N. S.) 250, containing the following declaration: "We must hold that the cause of action in quantum meruit was separate and independent from the cause of action on express contract, and that no action was commenced on quantum meruit until the filing of the amended complaint, at which time that cause of action was barred by the statute of limitations."

But we need not go into other states, as we have the point decided by our Supreme Court in direct opposition to appellant's contention. The case is the familiar one of *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, wherein it is held that: "A complaint in an action for breach of contract, which as originally framed seeks to recover the contract price of services performed by the plaintiff in pursuance of the contract, together with profits which he would have made, on the ground that he had been technically 'prevented' from completing the contract by the defendant, may be amended so as to aver a claim for the value of the services actually done as upon a quantum meruit. Such an amendment is not the substitution of a new cause of action, so as to continue the running of the statute of limitations until its filing."

Appellant attempts to make a distinction between that case and this, upon the ground that in the former, "though the general frame of the early complaints showed that the pleader was suing on the express contract, the facts alleged in these complaints were sufficient, under the liberal principle of code pleading, to sustain a quantum meruit." We cannot agree with the opinion of the able counsel for appellant, as we are satisfied that the distinction does not exist. In the original complaint here the facts alleged "*were sufficient under the liberal principle of code pleading to sustain a quantum meruit.*" They may not be set forth with equal precision or proportionate elaboration to the *Cox* Case but, of course, the question is not one of rhetoric. Indeed, having before us all the eight complaints in the *Cox* Case, we think it is quite apparent that the pleader in each indulged in much unnecessary and redundant detail.

The essential point is that all the facts re-

quired to support a judgment on quantum meruit are found in the complaint filed in this case October 13, 1908. The substantive averment material here is: "That within two years next immediately preceding the commencement of this action, defendant became and was indebted to said Walter H. Fearn of professional services rendered by said in the amount of \$6,962.50 for and on account Walter H. Fearn at the special instance and request of defendant herein, at a stipulated and agreed rate and price, which said rate and price said defendant promised to pay to said Walter H. Fearn." We have thus a sufficient statement of quantum meruit and the additional averment of an express promise to pay a certain amount. The complaint, in other words, would support a judgment on either of the theories mentioned. That the two theories were not set forth in separate counts is of no consequence as far as the question before us is concerned.

That all the necessary elements of a quantum meruit are exhibited in the original complaint follows from a consideration of *McFarland v. Holcomb*, 123 Cal. 84, 55 Pac. 761. In that case the complaint alleged: "That William A. Holcomb was, at the time of his death, indebted to the plaintiff in the sum of \$7,400 as a balance due to plaintiff for nursing, boarding, lodging, counseling, advising and taking care of the said William A. Holcomb almost continuously from the 29th day of November, 1870, down to the 4th day of November, 1895, in the city and county of San Francisco, state of California." The court held that the complaint was sufficient and not obnoxious even to special demurrer for uncertainty. It was declared that: "Under our system of pleading, when only the facts which constitute the cause of action are to be alleged, it is not requisite to aver either the consideration or promise, when they are implied as a legal conclusion from the facts which are alleged"—and further: "In the present case the nursing of the decedent by the plaintiff, and his acceptance from her of his board and lodging during the time specified, was a consideration sufficient to support the promise for compensation therefor which is implied in law, and to render him liable therefor." The promise implied by the law is, of course, to pay the reasonable value of the services. The complaint therein was therefore one in implied assumpsit, and was emphatically approved by the Supreme Court. In the original complaint here we have the same common count, but with the unnecessary additional allegation that the services were performed at the special instance and request of defendant.

[2] Appellant attaches some significance to the fact that the simple rule of the Code as to pleadings (section 426, Code Civ. Proc.) was not observed in framing the original complaint, but it cannot be controverted that the common counts are not at all inconsistent

with said rule. "It was held in this state at an early day, and has since been repeatedly held, that the common counts may be used to state a cause of action, notwithstanding the provision referred to, which was found in the old statute, and was adopted into the Code." *Pleasant v. Samuels*, 114 Cal. 37, 45 Pac. 998, and cases cited. The original complaint containing, thus, all the essential facts of a quantum meruit, the more formal and elaborate statement of them thereafter in a separate count could not possibly be construed as the introduction of an entirely new cause of action.

[3] As to the evidence, it may be said that the record is quite brief. The inference from Dr. Fearn's testimony is that the services were performed under an express agreement with appellant for the payment of \$10 an hour. Appellant testified: "I never employed Walter H. Fearn to perform medical services for or on behalf of my brother, Peter Gopcevic, or for any other purposes, or at all. I never promised to pay said Walter H. Fearn the sum of \$10 per hour, or any other sum, nor did I promise to pay him the reasonable value thereof." The court adopted the view that the services were performed for appellant, but it rejected the theory of an express promise to pay \$10 an hour or \$240 a day. Of course any conscientious judge would require the most convincing evidence of such contract before he would allow an enormous charge like that. Nor is it likely that he would hold \$3,900 to be a reasonable charge for the services, even of a physician, for 29 days. Nine hundred dollars seems much more consonant with just and fair dealing. As to the point that there is no evidence to sustain this finding, it is sufficient to say that there is no specification that the evidence was insufficient to show the value of the services. This probably accounts for the deficiency of the bill of exceptions in that respect; it not purporting to contain all the evidence.

But it is not correct to say that there is no evidence of the value of the services. Dr. Fearn testified that "detention fees were \$10 an hour," and that, in response to appellant's statement, "I want you to stay right here and not go away," he replied: "Mr. Gopcevic, that is a very expensive proposition. The lowest charge I can make according to the fee bill is \$10 per hour for detention." It is, of course, a fair presumption that the fee bill is an expression of the opinion of the profession that such services are worth that amount. It would be at least a legal inference from the doctor's testimony that his services were worth \$10 an hour. This would manifestly support the finding of a less amount, to wit, the sum of nearly \$130 per hour.

[4, 5] We find merit in the third point made by appellant. The court's conclusion being based upon an implied contract, it was not proper, under the decisions, to allow in-

terest before judgment. *Cox v. McLaughlin*, supra; *Erickson v. Stockton & Tuolumne Railroad Co.*, 148 Cal. 206, 82 Pac. 961; *Farnham v. California, etc., Trust Co.*, 8 Cal. App. 266, 96 Pac. 788; *American Hawaiian, etc., Co. v. Butler*, 17 Cal. App. 784, 121 Pac. 709. A new trial, however, is not required for this reason.

The judgment is modified by striking therefrom the sum of \$125.55 for interest, and, as thus modified, the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

PEOPLE v. HARTMAN. (Cr. 215.)

(District Court of Appeal, Third District, California. Oct. 21, 1913. Rehearing Denied by Supreme Court Dec. 20, 1913.)

1. CRIMINAL LAW (§ 1023*)—APPEAL—MOTION IN ARREST OF JUDGMENT.

In a criminal case no appeal lies from a motion in arrest of judgment, nor from a verdict, nor from an order suspending judgment and placing accused on probation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2558-2598; Dec. Dig. § 1023.*]

2. CRIMINAL LAW (§ 1023*)—APPEAL—MOTION FOR NEW TRIAL—"ORDER."

Pen. Code, § 1237, provides that an appeal may be taken by defendant from an order denying a new trial, and section 1239 declares that an appeal from a judgment may be taken by defendant by announcing personally, or through his attorney in open court when the judgment is rendered, that he appeals from the same, or from an "order made after judgment" in the same manner. Section 1247 provides for obtaining a transcript of the reporter's notes at defendant's application on any appeal taken from any judgment or order in any criminal proceedings, etc. Held that the word "order" in section 1247 is not limited to an order made after judgment but includes an order denying defendant's motion for a new trial; and hence the contention that no appeal lies from an order denying a new trial before judgment, because no machinery for taking such an appeal from such order has been prescribed, is unsustainable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583-2598; Dec. Dig. § 1023.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5020-5023; vol. 8, p. 7739.]

3. DIVORCE (§ 308*)—DECREE—CONSTRUCTION.

A wife sued for divorce on a complaint containing a prayer for the custody of a minor child and for \$10 a month for her own support. The divorce was granted on default, and a decree rendered ordering that the entire custody of such child be awarded to the wife, together with the sum of \$20 per month for her support and maintenance. Held that the decree could not be construed as containing any provision requiring the husband to contribute to the support of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 801, 802; Dec. Dig. § 308.*]

4. PARENT AND CHILD (§ 17*)—CUSTODY OF CHILDREN—DUTY TO SUPPORT.

Where a divorce decree awarded the custody of a minor child to the wife and contained no provision requiring the husband to contribute to its support, it was the duty of the wife to support and educate the child according

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to her circumstances in life, as provided by Civ. Code, § 196, and in the absence of any proceedings to compel the husband to contribute to such support, as authorized by sections 138, 139, his failure to so contribute was not a willful failure without lawful excuse to furnish necessary food, etc., to the child, which is made a felony by Pen. Code, § 270.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

H. E. Hartman was convicted of failing without lawful excuse to furnish necessary food and support to his infant child, and he appeals. Reversed.

Preston & Preston, of Ukiah, for appellant. J. Chas. Jones, Deputy Atty. Gen., for the People.

CHIPMAN, P. J. Defendant was convicted by a jury upon an information charging a violation of the Penal Code, § 270; the charging portions of said information being as follows: "The said defendant on or about the 1st day of January, A. D. 1912, at the said Mendocino county, state of California, and before the filing of this information did then and there, and ever since said date, willfully, unlawfully, and feloniously omit without lawful or any excuse to furnish necessary food, clothing, shelter, or medical attendance for his child named Dorothy Maxine Hartman; the said child being then and there under five years of age and dependent on said defendant for food, clothing, shelter, and medical attendance, contrary to the form," etc. Dated September 18, 1912. The verdict was as follows: "We, the jury, find the defendant guilty as charged in the information, but with a strong recommendation that he be placed on probation so long as he pays the amount agreed on with his wife." At the time appointed for judgment, defendant interposed a motion for a new trial on the statutory grounds and also a motion in arrest of judgment on several grounds, among which were: That the information does not state facts sufficient to constitute a public offense; that it fails to state that the minor child is in a dependent and destitute condition; or that defendant is under legal liability to support said child; or that the offense charged, if any, was committed in Mendocino county. The record proceeds: "The court denied the same and thereupon pronounced its judgment: 'That whereas you (the said H. E. Hartman) having been duly convicted in this court of the crime of felony, to wit, failure to support your minor child, it is therefore ordered, adjudged, and decreed that you (the said H. E. Hartman) having been duly convicted in this court of the crime of felony, to wit, failure to support your minor child, and that you be placed on probation, and it is further ordered that you pay \$10 per month on the 15th of every month beginning

April 15, 1913, for this period of two years, for the support of said minor child. It is also further ordered that you pay said amount on the 15th day of every month to the probation officer, under whose charge you are placed till the 15th of March two years hence. Pronouncement of judgment is hereby suspended.' The defendant then gave notice that he hereby appeals to the District Court of Appeals * * * from the order denying the defendant's motion in arrest of judgment, also from the order denying his motion for a new trial, and also from the order suspending judgment and placing this defendant on probation, and from the whole and every part of each of said orders."

[1] No appeal lies from a motion in arrest of judgment or from the verdict. *People v. Lonnen*, 139 Cal. 634, 73 Pac. 586. Nor is there an appeal, so far as we are advised, from the order suspending judgment and placing defendant on probation.

[2] The Attorney General makes the point that, "while the Penal Code has not repealed the section which states that in a criminal case a defendant may appeal from an order denying a motion for new trial"—section 1237 specifically provides that an appeal may be taken by a defendant from an order denying a motion for a new trial—"the statute has utterly failed to provide machinery for taking an appeal from such order. * * * Up to this time neither the Supreme Court nor the District Court of Appeal has made or formulated any rule providing how a defendant shall take an appeal from an order denying a motion for new trial in a criminal case." It is pointed out that prior to the amendment of section 1240 of the Penal Code (Stats. 1909, p. 1086) the appeal from such order was taken under that section. But, as it has read since 1909, it applies only to appeals by the people. Attention is called to section 1239, which provides how an appeal may be taken "from a judgment" or from an "order made after judgment," which, it is claimed, cannot be used to perfect an appeal from an order made before judgment, such as is an order denying a motion for new trial. Finally it is contended that, while section 1247 of the Penal Code treats of making up of the record on appeal, the word "order" used in the section has reference only to "an order made after judgment," as provided in section 1239. Section 1247 reads: "Upon any appeal being taken from any judgment or order, of the superior court, to the Supreme Court, or District Court of Appeal, in any criminal proceeding, where such appeal is allowed by law"—and then follow directions for making up the record. Stats. 1911, p. 692. Section 1241 of the Penal Code provides as follows: "Any announcement of appeal made in open court by either the defendant or the people, must be by the clerk immediately entered in the minutes of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

court," whose failure to do so "shall in no way affect or invalidate the appeal." We have seen that the right of appeal from an order denying a motion for a new trial is expressly given by section 1237; that "any announcement of appeal made in open court by either the defendant or the people" must be at once entered in the minutes (section 1241); and that "upon any appeal being taken from any judgment or order * * * in any criminal proceeding, where such appeal is allowed by law," the defendant may make an application, under section 1247, for the transcription of the reporter's notes, etc. By section 1247a it is provided that after these notes have been filed with the clerk and corrections, if any, are made and the judge has certified the transcription as correct, the clerk "must immediately transmit the same to the court to which the appeal was taken, and thereupon it shall become a part of the record upon appeal." In the present case the trial court suspended the pronouncement of judgment, as it was authorized to do under section 1203 of the Penal Code, and placed the defendant upon probation. If there was, then, no judgment from which defendant could appeal, the only course open by which to have the proceedings reviewed was by an appeal from the order denying his motion for a new trial. It is of this remedy which the Attorney General would deprive him. Under this view of the law now urged upon us there is no way by which a convicted defendant, who had been placed upon probation, can have his trial examined into on appeal unless judgment of conviction and sentence has been pronounced upon him by the court. We are unwilling to hold, as is contended, that the order referred to in section 1247 is an order made after judgment, thus leaving the defendant remediless by appeal. The statute reads: "Upon any appeal being taken from any order of the superior court," etc. This language is broad enough to include the order in question, notwithstanding the provisions of the preceding section 1239 allowing an appeal from "any order made after judgment," especially in view of section 1237 expressly giving the right of appeal from an order denying a motion for a new trial.

The court instructed the jury "that the time covered by the information is from on or about January 1, 1912, up to the date of filing the information, which is the 18th day of September, 1912."

It appeared that the defendant and Blanch Hartman were married December 15, 1907, ten days after the child in question was born. They separated less than a year thereafter. Blanch Hartman commenced her action for divorce on the ground of desertion, and summons was served on defendant September 23, 1910. The prayer of the complaint was for the custody and care of the child and \$10 per month for plaintiff's support and maintenance. The defendant failed to answer, and

on his default, the interlocutory decree was entered November 10, 1910, in which it was "ordered that the entire care, custody, and control of Dorothy M. Hartman, the minor child of said parties to this action, be and the same is hereby awarded to the plaintiff together with the sum of twenty (\$20) dollars per month for her support and maintenance, payable on the second Monday of each and every month hereafter commencing with the 14th day of November, 1910." The final decree was made and entered on November 24, 1911, in which the order as to the care and custody of the child and the support and maintenance of the wife is the same as in the interlocutory decree.

[3] The natural as well as the grammatical construction of the language of the decree is that the award of \$20 per month was for the support and maintenance of the wife and was in accordance with the prayer of the complaint except that it was for \$20 instead of \$10 per month. If there is any doubt as to the construction to be given the decree, the defendant is entitled to the benefit of such doubt. The defendant testified that he did not know until the action was brought that the decree contained any provision for support, and there was no evidence that he was ever served with a copy or knew of its provisions further than generally that a decree of divorce had been granted to his wife. The evidence was that the child has been in the care and custody of Mrs. Hartman's parents the most of the time since its birth and during the entire period charged in the information. There is no evidence that the child failed to receive all "necessary food, clothing, shelter, or medical attendance" or that it suffered for the want of any of the necessaries of life. There was evidence that, some time before the divorce, defendant paid to the grandparents \$10 per month for four months but has not contributed anything towards its support since that time except \$10 sent his wife about the time the divorce was granted. There was evidence tending to show that he was able at some of this time to have contributed towards its support, and there was evidence that during much of the time he was sick and unable to earn any money, once having been operated on for appendicitis and for some months confined to a hospital. The evidence, however, was sufficient to warrant the implied finding of the jury that, during the period from January 1, 1912, to September 18, 1912, defendant could have contributed to the child's support had he been so disposed. The question is: Was he under any legal obligation to do so?

The trial court gave the following instruction to the jury: "I charge you that in this case, if you find that in the decree of divorce the court ordered the defendant here to pay the sum of \$20 per month toward the care, custody, and education of the minor child

named, then it became the duty of this defendant to pay such sum as required by the court, and the same became a legal charge against said defendant, and it was the duty of this defendant to pay the same, even though he was deprived of the custody of the child by the decree of divorce." The court also charged the jury: "That if you believe from the evidence in this case beyond a reasonable doubt that said defendant was able during said period (January 1, 1912, to September 18, 1912) to contribute toward furnishing the necessary food, clothing, shelter, or medical attendance for his said child, and that he willfully omitted to do so without lawful excuse, then it is your duty to find the defendant guilty as charged in the information, no matter what his condition has been since said time nor what it may be at the present time." The court instructed the jury further: "That it is the law of this state that a parent who willfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance for his minor children is guilty of a crime and may be prosecuted therefor in the name of the people of the state of California. I charge you, therefore, in this case that, if the court in the decree of divorce ordered this defendant to pay the sum of \$20 per month or any other sum toward the support of this child, it was his duty to do so, and if he willfully omitted to do so without any lawful excuse therefor, as charged in the information, then you should find the defendant guilty as charged in the information."

It will be observed that the court did not instruct the jury that the divorce decree placed any duty upon defendant to support his child but left the question of its interpretation with the jury. The decree was introduced and admitted for the purpose of showing that by its terms it imposed this duty upon defendant, and the jury so construed it. We do not think it warranted such construction. The theory of the prosecution was that this decree placed upon defendant this duty, and, he having failed to show any lawful excuse for its nonperformance, the verdict of guilty necessarily followed; and it is contended that the fact that the child was cared for willingly by its grandparents furnished no sufficient excuse for defendant's failure of duty put upon him by the decree of divorce.

[4] In the Matter of McMullin, 164 Cal. 504, 129 Pac. 773, the decree of divorce, upon substituted service of defendant, was granted in the state of Nevada and awarded the care and custody of the children of the marriage to the plaintiff with provision for her and their support. She came into this state and instituted guardianship proceedings upon the person and estate of her minor child, Juanita. Later McMullin, defendant in the action for divorce, was held to answer in the superior court by a magistrate for a

violation of section 270, Penal Code, in failing to provide his minor child, Juanita, with necessary food, clothing, shelter, and medical attendance. It was held on habeas corpus that, while the decree of divorce must be given full credit in this state, the order for payment of money to support the child cannot be enforced against the petitioner; that there being no enforceable decree for the support of the child, its custody having been given to the wife, section 196 of the Civil Code made it her duty to give the child "support and education suitable to his circumstances," there having been no "valid adjudication equivalent to an order made under a power similar to that granted by section 139 of our Civil Code, by which the husband is obligated to support his progeny while denied their custody." As we understand this decision, it is authority for holding that where, in a divorce proceeding, the custody of a minor child is given the mother and no provision in the decree is made for the support of such child by the father, the parent entitled to the custody of the child must support it. By supplementary proceedings, in a proper case, the court may, under sections 138 and 139 of the Civil Code, require the parent who has not the custody of the child to contribute to its support, but, until some such proceeding is had, his failure to so contribute to the child's support cannot be made the ground of a criminal proceeding under section 270 of the Penal Code. In the case cited the court said: "The legal effect, then, of both the Nevada decree and the guardianship decree was to give the mother the custody and control of the children without charging upon the husband their support. Under section 196 of the Civil Code this situation prima facie relieves the husband of the duty of support and casts it on the wife." The principle would seem to apply as well to a domestic decree as to a foreign decree; the determining fact being, as here, that it devolved no duty on the father and did devolve it on the mother.

In the case of *People v. Schlott*, 162 Cal. 347, 122 Pac. 846, which was a prosecution under section 270 of the Penal Code, the duty of the divorced husband to provide for the child's support was held to have devolved upon him because the decree expressly required this of him, and therein constituted the distinguishing difference between that case and *Selfridge v. Paxton*, 145 Cal. 713, 79 Pac. 425. In reviewing the decision of the District Court of Appeal from the First District, in the *Schlott* Case (opinion by the late Mr. Justice Hall, 12 Cal. App. Dec. 523), the Supreme Court does not express dissent from the reasoning of that decision when applied to a case where the divorce decree imposes no duty on the husband and father to contribute to the support of the child whose custody is given to the wife and mother. Judge Hall there took the view that, under

our statutes and the decisions of the Supreme Court by him pointed out, the duty to furnish the child with food, etc., "is upon the parent entitled to its custody" (Civ. Code, § 196); and in *Ex parte McMullin* it was expressly held that "this situation *prima facie* relieves the husband of the duty of support and casts it upon the wife." This view of the law we must accept and enforce, though not in accord with that expressed by us when the case was before us. In *re McMullin*, 19 Cal. App. 481, 126 Pac. 368. The instructions of the learned trial judge were based upon an erroneous view of the law and necessarily misled the jury to defendant's prejudice.

Defendant contends with some reason that where, as here, the child was willingly and apparently well and adequately cared for by its grandparents during the period charged, the omission by defendant to furnish necessities is not sufficient to make out a crime under section 270 of the Penal Code. The section declares the parent guilty of a felony "who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attendance for his child." There was evidence that defendant had offered to take the child and support it, but, as he was not entitled to its custody, this offer probably cannot avail him. The grandmother of the child testified that defendant had not been asked by the grandparents to contribute to the child's support during the period charged in the information, although, as has been stated, defendant agreed some years before to pay them \$10 per month for that purpose and paid this sum for four months but made no further payments. The complaining witness, Mrs. Hartman, testified that, in the latter part of 1911, she wrote defendant for money for the child's support then in the keeping of its grandparents, to which he replied that he would take the baby "and support her at his home and keep her until I wanted her, but that was not the ruling of the court. I was supposed to have her and I could not afford to pay for her board and have her with me. * * * Q. And from that time until this you have never made any demand on him for support? A. No. Q. And you think that was about November, 1911? A. Well, I couldn't swear to that. Q. Anyway it was last fall? A. Yes, sir; last fall. * * * Q. Then from the fall of 1911 to the time you started the suit (which was in September, 1912) you never even so much as asked him for support for the child any more did you? A. No, not that I can remember." She testified that there was an understanding between herself and husband before the divorce decree was entered that she would not call upon him for money until she needed it. They were talking about the divorce and she did not want him to oppose it, and he insisted as a condition of not doing so that nothing should

go in the decree about support. She refused to agree that no provision should be made for her support and insisted on the decree giving her \$10, because, as she said, she could not trust his word, but she agreed not to call on him for it unless she needed it. This agreement cannot be taken as affecting in any way the terms of the decree and it is significant only as tending to excuse defendant for omitting to support the child except when called upon to do so. Defendant cites several cases which lend support to his contention.

A Missouri statute (Rev. St. 1909, § 4492) provides that if any father without lawful excuse fails to provide such infant with necessary food, etc., he shall be punished. Defendant and his wife separated, the wife going to her father's house taking with her one child of the marriage, and another was born at the house of the wife's father, and both children were there supplied with all necessary food, etc. Defendant, after the separation, contributed nothing to their support. It was held that "necessary" food, clothing, and lodging, used in the statute, is food, etc., which the infant actually needed at the time; and that as the infant children were receiving necessary food, etc., defendant was not guilty. *State v. Thornton*, 232 Mo. 298, 134 S. W. 519, 32 L. R. A. (N. S.) 841. Said the court: "The Legislature did not enact this law for the purpose of punishing the parents for failure to do their duty as such. Such a purpose would smack too strongly of paternal government. The only legitimate object of the statute is to secure to infants, who are in future to become citizens of the state, proper care; such care as is necessary to protect their lives and health. In other words, to prevent destitution. It follows from the foregoing that, if the infant children are receiving food, clothing, and lodging from any source, there is no occasion for the state to interfere by penal law or otherwise." Again: "The statute penalizes the refusal of the father to supply necessary food, etc. Under the law pertaining to necessities, a necessary article is one which the party actually needs. It is not enough to show that the article is *per se* classed as necessary, such as food and clothing. It must also be actually needed at the time." Some other cases to like effect are cited.

We are urged to give a construction to section 270 of the Penal Code in harmony with these decisions. We are not prepared to accept unqualifiedly the doctrine of the case cited, and, as we think the case in *re McMullin* is decisive of the question here, we express no opinion as to the scope and meaning of section 270, *supra*.

The order is reversed.

We concur: HART, J.; BURNETT, J.

HEIM et al. v. MOONEY et al. (Civ. 1159.) (District Court of Appeal, Third District, California. Nov. 12, 1913. Rehearing Denied by Supreme Court Jan. 10, 1914.)

PRINCIPAL AND SURETY (§ 145*)—ACTION—CONCLUSIVENESS OF FORMER ADJUDICATION.

The judgment of dismissal, at the instance of plaintiff therein, of an action for injunction, in which a receiver was appointed on said plaintiff's ex parte application, on his giving the bond required by Code Civ. Proc. § 566, is, in the absence of fraud or collusion, conclusive against the sureties, as well as against him, of the appointment having been procured wrongfully or without sufficient cause, making them liable to the defendant therein for damages from the appointment.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 397-401; Dec. Dig. § 145.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Julius F. H. Heim and another against Fred T. Mooney and another. From a judgment for plaintiffs, and from an order, defendants appeal. Affirmed.

Theodore A. Bell, of San Francisco, for appellants. John T. York, of Napa, and I. I. Brown, of San Francisco, for respondents.

CHIPMAN, P. J. This is an action on a receiver's bond. Plaintiffs had judgment, from which, and from the order denying their motion for a new trial, defendants appeal.

One John S. Noble commenced an action for an injunction, in the superior court of Napa county, against the plaintiffs in this action wherein he sought to procure the appointment of a receiver pendente lite, to take and retain exclusive possession of certain real and personal property at the time used in the furniture and undertaking business by and in the possession of and belonging to them. The court appointed a receiver in the action on Noble's ex parte application upon filing a statutory bond in the sum of \$10,000, executed by Noble as principal and the defendants in this action, Mooney and Davis, as sureties. Thereupon the receiver entered upon the discharge of his duties and took possession of all the property involved, excluding the plaintiffs herein therefrom. Later on the court required a further bond of \$5,000 to be given, and it was executed by the same principal and sureties and was filed in the action. Subsequently the defendants in that action (plaintiffs herein) gave notice of a motion to vacate and annul the order so appointing the receiver, accompanied by certain affidavits. Before the date set for the hearing of said motion, Noble, plaintiff in said action, voluntarily dismissed his action and caused a judgment of dismissal to be entered therein; the present suit following to recover damages sustained by reason of the appointment of the receiver.

The court found that plaintiffs had been damaged in the sum of \$1,106.80. No question arises as to the sufficiency of the evidence to sustain this finding. The court also found that Noble, in his said action, "did wrongfully and without sufficient cause procure the appointment of said receiver and his continuance in office in said action." The judgment of dismissal of said action was as follows: "Judgment of Dismissal. [Title of court and cause.] The plaintiff herein having made an order for the dismissal of the above-entitled action and the clerk having made an entry of dismissal thereof in his register of actions: Therefore, by virtue of the law and by reason of the premises aforesaid (no trial in said case having been had), it is ordered, adjudged and decreed that the above-entitled case be and the same is hereby dismissed. Judgment entered April 11th, A. D. 1907. N. W. Collins, Clerk of the Superior Court. [Seal.] Clerk's Office of the Superior Court, in and for the County of Napa, State of California." Indorsed: "Filed April 11, 1907."

At the trial defendants offered to prove the facts set out in the complaint and amended complaint in the action brought by Noble against the plaintiffs herein. The court sustained the objection of plaintiffs to such evidence, and there was no evidence introduced by either plaintiffs or defendants in support of the averment of the complaint and the finding of the court that the appointment of the receiver was procured wrongfully or without sufficient cause, except the said judgment of dismissal hereinbefore set forth. Appellants assigned as error the insufficiency of the evidence to show that the appointment of the said receiver was procured wrongfully or without sufficient cause. This presents the sole question in the case.

Section 566 of the Code of Civil Procedure provides, among other things, as follows: "If a receiver is appointed upon an ex parte application, the court * * * must require from the applicant an undertaking, with sufficient sureties, * * * to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver and the entry by him upon his duties, in case the applicant shall have procured such appointment wrongfully, maliciously, or without sufficient cause. * * *"

No case is cited, and we have found none, where the action was on a receiver's bond after dismissal by the plaintiff of the action in which the bond was given. The question is: Did the dismissal of the action against the plaintiffs by Noble have the effect to finally decide that the appointment of the receiver was procured wrongfully or without sufficient cause? In the absence of an adjudication of the precise question, a solution

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

must be sought upon principle and by resort to cases as nearly analogous as may be.

It is not to be doubted that the dismissal of the action in which the injunction was issued was a dissolution of the injunction and the discharge of the receiver and discharged the sureties on his bond from any subsequent liability. Their engagement relates to that action and none other, and, when it was dismissed, all their obligations terminated except such as had already accrued. The fact that the plaintiff, Noble, might bring another similar action does not concern the sureties in the dismissed action nor can it affect their liability, for their bond has no relation to a subsequent action. We think it is equally true that, in the absence of fraud or collusion, the sureties are bound by the judgment against their principal in the proceeding to the extent of their engagements in the bond. Had the court, on a hearing on the merits, determined that the appointment of the receiver had been procured wrongfully or without sufficient cause, such judgment would have been conclusive against the sureties. Mr. Freeman says: "It seems to be generally conceded that, whenever a surety has contracted in reference to the conduct of one of the parties in some suit, or proceeding in the courts, he is concluded by the judgment." 1 Freeman on Judgments, § 180 (3d Ed.). The author cites many examples of cases, such as injunction bonds; sureties who have become parties to a bond for the delivery of property replevied, or to dissolve an attachment, or to release attached property; sureties upon the bond of an administrator or executor; instances, too, where the responsibility of sureties is fixed in suits to which they were not parties, and in which they were not tendered an opportunity to defend. The rule is given in *Braiden v. Mercer*, 44 Ohio St. 339, 7 N. E. 155, where many cases are examined. We can see no reason why the rule should not apply to sureties who have engaged to answer for damages which may result from their principal having procured the appointment of a receiver wrongfully or without sufficient cause.

The court cannot appoint the receiver until the undertaking is given, and in it the sureties engage that, if their principal procures the appointment wrongfully or without sufficient cause, they will pay all damages sustained by reason thereof. They distinctly "contract with reference to the conduct of one of the parties" to the suit.

The question was quite fully discussed by Mr. Justice Brewer in *Hoge v. Norton*, 22 Kan. 374, which was the case of dissolution of an attachment. The court, however, did not consider what result would follow if the record had disclosed a dissolution by the voluntary dismissal on the part of the plaintiff. And this brings us to the question

here: Was the judgment dismissing the action, upon the motion of plaintiff, determinative of the fact that the appointment of the receiver was procured wrongfully or without sufficient cause?

In *Dowling v. Polack*, 18 Cal. 626, the court said: "This is an action upon an injunction bond, and the dismissal of the suit in which the injunction was issued amounted to a determination by the court that the injunction had been improperly granted. The suit was dismissed for want of prosecution, and, with respect to the particular case, the judgment of dismissal had the same effect upon the rights of the parties as would have resulted from a judgment upon the merits. It terminated the proceedings, and by its legal operation and effect set aside and discharged the injunction; it was the final action of the court operating directly upon the injunction and destroying the foundation upon which it rested." Cases are cited in which the action was dismissed on motion of the plaintiff with the same result. Continuing, said the court: "Looking at the matter in the light of principle, it would seem that the failure of a plaintiff to prosecute his suit should be regarded as a concession of his inability to maintain it. The issues are not actually examined and passed upon, but by his failure to appear he virtually confesses that the result of a trial would be to find them against him. A dismissal under such circumstances must be understood as proceeding upon this idea, and so far as relates to the case itself, as determining everything involved in it. In effect, a dismissal is a final judgment in favor of the defendant; and, although it may not preclude the plaintiff from bringing a new suit, there is no doubt that, for all purposes connected with the proceeding in the particular action, the rights of the parties are affected by it in the same manner as if there had been an adjudication upon the merits." Affirming this case, in *Leese v. Sherwood*, 21 Cal. 152, 164, it is said: "A dismissal of an action is a final decision of the action, and it is a final decision of the action as against all claims made by it."

In *Fowler v. Frisbie*, 37 Cal. 34, the injunction was dissolved on motion of the defendants but it did not appear upon what grounds. Said the court: "Standing alone, and without explanation, the order was an adjudication that the injunction ought not to have issued." See, also, *Porter v. Hopkins*, 63 Cal. 53.

In *Asevado v. Orr*, 100 Cal. 293, 299, 34 Pac. 777, *Dowling v. Polack* was affirmed. In that case there was a voluntary dismissal of the action. Orr was not a party to the bond and as to him he was held not liable on grounds in no wise affecting the liability of the sureties. As to them the court said: "The voluntary dismissal of the action by the plaintiffs had the same effect as a de-

cision of the court that they were not entitled to the injunction."

In *Frahm v. Walton*, 130 Cal. 396, 62 Pac. 618, *Dowling v. Polack* was again affirmed. The court said: "As the voluntary dismissal of the action by the plaintiffs was an admission by them that they were unable to maintain their injunction, * * * it must follow that, by the terms of the undertaking, the defendants are entitled to recover from the sureties whatever damages they sustained 'by reason of the injunction.'"

In the case last cited a motion of defendants was pending for the discharge of the injunction, as there was here a motion to discharge the receiver supported by affidavits, but the plaintiffs did not wait for the hearing of the motion. The court said that plaintiffs could not deprive the defendants of their right to compensation by "rushing to the clerk's office and dismissing the action before the court could make an order upon the motion."

In *Lothrop v. Southworth*, 5 Mich. 436, it was held, in an injunction suit, that the surety was bound by a decree against his principal and could raise no question as to its correctness. It was said in this case that the surety undertook that his principal should abide the judgment of the court. "He can, therefore, raise no question of the correctness of the decree, nor impeach it in this collateral proceeding." Similarly, it was said, in *Towle v. Towle*, 46 N. H. 434: "By signing the bond in suit with Towle, the plaintiff in the suit in equity, the sureties voluntarily assumed such a connection with that suit that they are concluded by the decree in it in the present suit upon the bond so far as the same matters are in question."

The engagement of a surety on an injunction bond is "to the effect that he will pay to the party enjoined such damages * * * as such party may sustain * * * if the court finally decides that the applicant was not entitled thereto." Code Civ. Proc. § 529. In *Asevado v. Orr*, *supra*, the court said: "Their (the sureties') liability depends simply upon proof that the injunction was issued; that the defendants suffered damages thereby; and that the court has decided that the plaintiff was not entitled to the injunction. The voluntary dismissal of the action by the plaintiffs had the same effect as a decision of the court that they were not entitled to the injunction." In short, the judgment of dismissal on plaintiffs' motion was conclusive of the fact that the plaintiffs were not entitled to the injunction, and the sureties could not retry that issue in an action against them on their bond. We are unable to see why the principle governing these cases does not and should not apply to the case before us.

In the *Kansas* case, *supra*, Mr. Justice

Brewer points out that the view urged by appellant "exposes to this possible result."

Unless the judgment of dismissal is conclusive on the sureties as well as upon the principal, as respects their liability for compensatory damages, a retrial of the issue in an action on the bond might result in a verdict, if tried by a jury, in favor of the sureties and become final upon appeal. Thus we would have two conflicting judgments upon the same issues of fact. While such a result may not always be avoided, it should not be allowed to happen unless imperative rules of law would sanction it as necessary to avoid doing some greater injustice. We do not think it unreasonable to hold that the sureties contracted with knowledge that their principal had the right, and might exercise it, to dismiss his action, to be followed by such consequences as the law would impose. The pleadings in the original action show that it was brought to enjoin the defendants (plaintiffs here) from interfering with real and personal property involved. The appointment of a receiver was ancillary to that action and not its main object. It would seem to us that this furnishes some reason for applying the rule governing the liability of sureties on the injunction bond. There is no reason why the rule in actions on injunction bonds should prevail to allow the recovery of damages upon the dismissal of the action and deny it on the receiver's bond, given in the same action, unless the terms of the latter bond compel it, and we do not think they do. Besides, as intimated above, the appointment of the receiver necessarily depends upon the right to the injunction, and when that right is swept away it carries with it all justification for appointing the receiver. If the injunction was improperly issued, it must follow that the appointment of the receiver was without sufficient cause.

Appellant cites many cases illustrating the liability of sureties on official bonds. These cases are not in point. In those cases the sureties, as was said in *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647, cited by appellant, "undertake in general terms that the principal will perform his official duties." The sureties do not undertake that the principal will perform a specific act in a particular way. The acts of public officers performed in official capacities are not in the same class with the acts of a principal in a judicial proceeding for which sureties stand sponsor. Cases cited by appellant for malicious prosecution and the like are not in point. No question of motive or probable cause is here involved. *Asevado v. Orr*, *supra*.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

PEOPLE v. OSTRANDER. (Cr. 808.)

(District Court of Appeal, Second District, California. Nov. 18, 1913.)

1. BURGLARY (§ 3*)—OFFENSES—NATURE OF OFFENSE.

One who broke and entered a boat house not with the intention of committing larceny, but to procure a place of refuge for a female companion, is not guilty of burglary.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. §§ 24-27; Dec. Dig. § 3.*]

2. CRIMINAL LAW (§ 1158*)—APPEAL—REVIEW—NEW TRIAL.

The granting of a new trial will not be disturbed on appeal where the evidence as to accused's guilt was conflicting; the sufficiency of the evidence to support the conviction being a question for the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3061-3063, 3070, 3071, 3074; Dec. Dig. § 1158.*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Benjamin F. Ostrander was convicted of burglary, and, from an order granting him a new trial, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., and H. S. Utley and W. Wirt Francis, both of San Diego, for the People. Robbins & Bauer, of San Diego, for respondent.

JAMES, J. Defendant was charged by an information filed by the district attorney of the county of San Diego with having, on or about the 24th day of April, 1913, in said county, committed the crime of burglary. More particularly stated, the information charged that defendant at the time and place mentioned entered a certain building known as the Z. L. A. C. Rowing Club with intent therein to commit the crime of larceny. A trial was had before a jury, and a verdict of guilty of burglary of the first degree was returned. Defendant thereafter moved that a new trial be granted him upon several grounds, one of which was that the verdict was contrary to the evidence. By a general order the trial judge granted this motion, and the people have appealed.

[1, 2] The evidence showed that the defendant was apprehended by an officer immediately after he had removed a pane of glass from a door of the building of the rowing club and effected an entrance into one of the rooms. It was shown that some person had on several prior occasions broken into the building and into certain lockers used by members of the club, from which various articles were stolen. The defendant on his own behalf offered himself as a witness and admitted having broken the glass and entered the building. He testified that he had accompanied a young woman for a promenade and that while on this expedition he and the woman had gone down to the rowing clubhouse; that the girl said she was tired and

wanted to sit down; and that he tried the door, intending to enter the building only for the purpose of allowing the girl to rest, and upon finding the door locked broke the pane of glass and so effected an entrance. To make out the offense charged in the information it was essential that the defendant had the intent to commit the crime of larceny at the time he entered the building. This intent he denied having had and offered as a reason for his act the explanation just referred to. The trial judge was called upon to review the testimony in determining whether the verdict was sustained by the evidence, and he evidently gave credit to the statement made by the defendant. It may be remarked that, as the testimony appears in the cold record, the explanation made by defendant is hardly worthy of credence, particularly as no young woman was seen or heard to be about the clubhouse at the time of defendant's arrest; still, having seen and heard the witnesses, the trial judge was authorized and required to draw his conclusions as to the sufficiency of the evidence to sustain the conviction, and in such a case this court cannot interfere with his determination of that matter. There was a conflict of evidence, and therefore on this appeal a question of law is not presented.

The order is affirmed.

W concur: CONREY, P. J.; SHAW, J.

DAVIDOW et al. v. GRISWOLD et al. (ASPLUND et al., Interveners). (Civ. 1,168.)

(District Court of Appeal, Third District, California. Nov. 7, 1913. Rehearing Denied by Supreme Court Jan. 6, 1914.)

1. PLEADING (§ 176*)—DENIAL—SUFFICIENCY.

In a suit to quiet title, where the question was whether plaintiffs were estopped to deny certain dedications by their grantors which appeared in plats and conveyances of record, plaintiffs cannot deny the allegations of the answer setting up those facts, by way of information and belief, on the ground that they had no information.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 343, 345-353; Dec. Dig. § 176.*]

2. PLEADING (§ 122*)—DENIALS—INFORMATION AND BELIEF.

An answer, alleging that plaintiffs have no information, upon the subject of the complaint in intervention, sufficient to enable them to answer all of the allegations, and basing their denial upon that ground, is not a good denial upon information and belief within Code Civ. Proc. § 437.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 249-252; Dec. Dig. § 122.*]

3. DEDICATION (§ 39*)—WHAT CONSTITUTES.

Where the owner of land, after platting streets and public parks, sold lots to purchasers who relied on the dedication as shown by the plat, neither the owner nor his grantees could thereafter claim that there was no valid dedication to the public.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 77; Dec. Dig. § 39.*]

4. DEDICATION (§ 81*)—WHAT CONSTITUTES.

The mere laying out of lots, and the making of a map showing streets, does not deprive the owner of the right to use the property as his own; the platting being a mere offer of dedication, which must be accepted to vest the public with the title to the streets.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. § 81.*]

5. LIMITATION OF ACTIONS (§ 11*)—RUNNING OF LIMITATIONS—PUBLIC.

Limitations do not run against the public; and, where the number of purchasers of lots who relied upon the grantors' representations of dedication of streets and parks was considerable, limitations will not run against them.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 36-39; Dec. Dig. § 11.*]

6. EASEMENTS (§ 36*)—PRESCRIPTION—ADVERSE CLAIM—EVIDENCE—SUFFICIENCY.

In a suit to quiet title, evidence held sufficient to show that the intervenor's use of the way was of an adverse nature, so that he acquired a right of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.*]

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Action by B. Davidow and others against Anna E. Griswold and others, in which John A. Asplund and another intervened. From a judgment for defendants and interveners, plaintiffs appeal. Affirmed.

Walter H. Robinson, of San Francisco, and W. F. Cowan, of Santa Rosa, for appellants. Chas. M. Buford, of San Francisco, for respondents Asplund and others. Chas. M. Buford, of San Francisco, and U. S. Webb, Atty. Gen. for other respondents.

BURNETT, J. This is an action to quiet title, and the main question is whether plaintiffs are estopped from denying the dedication of certain parks and streets as delineated on a map of the town site of Los Guillicos, afterwards known as Kenwood, in the county of Sonoma. There is little controversy as to the vital facts, most of them having been stipulated at the trial. It is not disputed that two maps were filed, one on the 9th day of August, 1887, entitled, "Map of the Town of Los Guillicos, Sonoma County, Cal.," and the other on the 20th day of February, 1893, entitled, "Revised Map of the Town of Kenwood, Formerly Los Guillicos, Sonoma Co., California," and that the latter was a duplicate of the former except as to the name of the town. It is admitted by appellants that, by reason of the filing of these maps, there was an offer of dedication of the property in controversy, but it is contended that the offer was not accepted, and it was afterwards withdrawn and revoked. On the other hand, respondents claim that, by reason of the filing of these maps and the sale of many lots in accordance therewith, an acceptance of the offer of dedication was necessarily implied, and that thereby the dedication became complete, and beyond the power of recall or

revocation. The common source of title is the Sonoma County Land & Improvement Company, and it was stipulated: "That on January 30, 1887, Sonoma County Land & Improvement Company, then a corporation, became the owner in fee simple of those portions of subdivisions 6 and 7 of Los Guillicos rancho, Sonoma county, lying south and west of the county road leading from Sonoma to Santa Rosa; that all the land delineated upon the maps introduced in evidence in this action is included within said portions of said subdivisions of said rancho; that between January 30, 1887, and October 18, 1894, said Sonoma County Land & Improvement Company executed and delivered to a large number of persons about 75 deeds to a large number of parcels of land in said town site, describing them in nearly every instance as the same are numbered and indicated on the map filed August 9, 1887, and in such deeds made reference to said map, all of which deeds were subsequently recorded in the office of the county recorder of Sonoma county; that the chain of title through which plaintiffs acquired the property described in the complaint contains a number of deeds, wherein it is described by lot and block numbers, referring to the one or the other of the two maps of 1887 and 1893; that the Sonoma County Land & Improvement Company, on January 24, 1890, executed and delivered a deed to the North Pacific Land & Improvement Company, its successors in interest, conveying all unsold lots in the town site of Kenwood, and therein described them by lot and block number, and referred to the map of 1887; that between February 20, 1893, and September 14, 1898, the Sonoma County Land & Improvement Company executed and delivered to some 20 different grantees deeds to a large number of parcels of land in said town site, describing the same in nearly every instance by lot and block number, as they appear on the map filed February 20, 1893, and in such deeds referred to such map, all of which deeds were later recorded."

These maps, it may be said, and the surveys therein delineated, were made by Preston R. Davis, county surveyor of Sonoma county, under the direction of the said land and improvement company, and the town site as shown by said maps was laid out on the ground and indicated by appropriate monuments. The said company and its successor in interest, the North Pacific Land & Improvement Company, caused copies of said maps to be published in print, and to be furnished to intending purchasers, and they represented to the purchasers of lots that the same was a true map of said town site as the same had been laid out and dedicated to public use, and, in making deeds to said purchasers, they described the lots with reference to the streets and avenues and block and lot numbers indicated on said maps, and the pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

chasers bought their lots in reliance upon said representations and said maps, and many of said purchasers and their successors in interest, upon the faith of said representations and said maps, placed expensive improvements upon their respective holdings.

[1,2] We are justified in saying that all the foregoing facts are shown by the evidence, the stipulations of the parties, and the admissions of the pleadings. Indeed, it is hardly necessary to go beyond the pleadings themselves. The said facts, with others, are set out in the verified complaints in intervention, and the purported denial is so equivocal and evasive that plaintiffs could have no just cause for complaint if their answer were treated as an admission of the existence of the facts not covered by the stipulation. Their answer is in this form: "These plaintiffs have no information upon the subject sufficient to enable them to answer all of the allegations contained in the complaint in intervention, and, basing their denial upon that ground, these plaintiffs deny," etc. The matters were of such character that the plaintiffs could not hide behind the pretense of want of information. *Zany v. Rawhide Gold Min. Co.*, 15 Cal. App. 373, 114 Pac. 1026. Besides, in the absence of an averment to the contrary, we must assume that the plaintiffs *believed* the facts to be as alleged in the complaint in intervention. They did not even bring themselves within the provision of the Code permitting an answer upon the ground of want of "information or belief." Section 437, Code Civ. Proc.

[3,4] If we may state it more concisely, we have, then, this situation: The owner of a tract of land has it surveyed and platted as a town site. He has a map of it, upon which are delineated streets and parks, filed in the recorder's office. He sells lots all over this town site, described by reference to this map, and, moreover, upon the positive representation that the streets have been laid out and dedicated to public use, and, in reliance upon these representations, the lots are purchased and improved. This may not be *dedication* in the strict acceptance of that term but the result is the same. The owner has voluntarily placed himself in a position where equity will not permit him to deny thereafter that the said streets and parks are as represented by him; and, independent of the statement that they have been dedicated to public use, the other acts of the owner, considered in connection with the said purchases under the conditions mentioned, would preclude the said owner from contending, at least as far as said purchasers are concerned, that they are not streets and parks. And if they are to be considered as really streets and parks when we regard the rights of the purchasers, it is difficult to understand how their status would be changed when we regard the rights of the public generally.

We think the principles covering the case are clearly stated in *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405, and *Archer v. Salinas City*, 93 Cal. 43, 28 Pac. 839, 16 L. R. A. 145.

In the former it is said: "It is settled law that where one owning land lays off a town or village thereon, and makes a map of the town site showing it to be divided into streets, alleys, blocks, and lots, and then sells lots with reference to such map, he thereby makes an irrevocable dedication of the space represented on the map as streets to the use of the public. There are many cases to this effect, but only a few need be cited. * * * And if there be public squares or plazas represented on the map, the same rule applies to them, and dedication thereof may be established in the same manner" (citing cases).

In the *Archer Case* it is said: "Dedication is an ultimate fact, dependent upon the establishment of other facts, and is to be found from the evidence presented to the court. *Harding v. Jasper*, 14 Cal. 648. It results from the acts of the owner of the land, coupled with the intent with which he does those acts. It may be express, and completed by a single act, as when the land is dedicated by deed, or it may be implied from a series of acts, as when the owner subdivides a tract of land into blocks and streets, and causes a map of such subdivision to be recorded, and sells the several subdivisions which front upon those streets. Whenever the dedication is complete, the property thereby becomes public property, and the owner loses all control over it or right to its use. * * * If the dedication is complete by his act, whether express or implied, it is thereafter irrevocable by him, and the effect of such dedication cannot be qualified by any act or declaration thereafter made on his part. The property dedicated has become public property, impressed with the use for which it was dedicated, and neither can the public divert it from that use, nor can it be lost by adverse possession. Nor is the effect of such dedication impaired by any delay in the use of the land for which it was set apart. Such failure to make use of the land does not authorize the owner to resume possession. The public can thereafter appropriate the land to the use for which it was dedicated, whenever convenience or necessity may suggest."

A very large number of cases from other jurisdictions holding similarly is cited by respondents, but we may forego specific consideration of them. In some it is assigned as a sufficient reason for saying that the dedication is complete that the purchasers represent the public; that the latter is not a distinct class from the former; that the purchasers are as much a part of the public as those who use the streets for the purpose of travel; and that they have equal authority

to accept a dedication of the street for the public.

Of course, it is not to be understood that the mere laying out of lots and making a map showing streets deprive the owner of the right to use the property as his own. This would constitute at most an offer of dedication, and an acceptance must follow to vest the public with a right which the owner cannot gainsay. The sale and purchase of the lots "describing the streets as boundaries constitute covenants with the purchasers that the streets are dedicated to their use and to the use of the public," and are sufficient proof of dedication.

Different courts, as already stated, have adopted different terminology to describe the situation involved in a case like this, but it is probably more a difference in words than in doctrine.

The United States Supreme Court, in the case of *City of Cincinnati v. Lessees of White*, 6 Pet. 431, 8 L. Ed. 452, characterizes the principle as "in the nature of an estoppel in pais, which precludes the original owner from making such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

It is virtually conceded by appellants that the contention of respondents is supported by their citations, but it is insisted that the said California decisions were subsequently overruled, and that they do not declare the law as it obtains now in California. We do not think the conclusion is warranted by a fair examination of the cases to which attention is invited. It is true that there are expressions found in some of these cases inconsistent with the statements that we have already quoted, but it is quite apparent that they were not necessary to the decision.

The *San Leandro* Case is criticized, and its doctrine repudiated in *People v. Reed*, 81 Cal. 70, 22 Pac. 474, 15 Am. St. Rep. 22, but that in the latter the Supreme Court was confronted by an entirely different situation appears from the recital of the following facts: The map made of the property was never recorded; the part of the alleged street in controversy was never opened as a street, but for many years had been fenced and occupied by substantial and permanent buildings; no sales of lots thereon were ever made, and there was no finding that the individuals who purchased property in other parts of the alleged street had ever seen the map of the property, or had any information at the time they purchased that a street was laid out at the place in controversy. It was therefore properly held that the acts of the owner did not constitute an irrevocable dedication of the street, and it is to be observed, also, that as to some of the statements in the opinion this comment is made in the *Archer* Case: "There is nothing decided in *People*

v. Reed inconsistent with the foregoing principles, although there are certain expressions in the opinion in that case that may seem at variance therewith; but they were obiter dicta, or side remarks, and *unauthoritative* views of the justice who wrote the opinion." The *San Leandro* Case is, in the *Archer* opinion, approved in the following language: "The principles relative to dedication and an offer to dedicate which are laid down in that case are in accord with the law upon that subject, as well as with previous decisions in this state, and should have controlling effect in the present case."

The decision in *Schmitt v. San Francisco*, 100 Cal. 302, 34 Pac. 961, was grounded upon the proposition that the purchasers of lots "could have no interest in having a cul-de-sac established in a block which was then entirely unimproved," and in which they "owned no property," but it is conceded in the opinion that the purchasers from the original owner "had a right to insist upon the entire scheme under which they were induced to purchase, so far as any benefit could possibly accrue to them therefrom," and it was declared that: "It will not be disputed that the survey and map, accompanied by the solemn declaration of the owner, followed by sales and conveyances of a large portion of the property described by reference to the map, constituted, as to the owner, a complete dedication of the property designated on the map as streets." This last remark describes the condition here, and it is additional assurance of the soundness of respondents' position.

In *Sacramento v. Clunie*, 120 Cal. 29, 52 Pac. 44, the evidence is reviewed, and, while conceding that it was probably sufficient to support a finding of dedication, it was held not sufficient to reverse a finding of no dedication. The peculiar and persuasive circumstances in that case are disclosed by the following quotation from the opinion: "In this case there never has been any acceptance upon the part of the city by user, of the offer of dedication made by the parties filing the *Ruth* map. Forty years have gone by. During all this time these streets have been barred from travel, and valuable and permanent improvements placed thereon. Under such circumstances, in the absence of user, it would seem that a direct and explicit acceptance upon the part of the city of an offer of dedication might well be demanded by the trial court before dedication as a fact would be found."

In *City of Los Angeles v. Kysor*, 125 Cal. 463, 58 Pac. 90, it was held that the evidence was conflicting as to dedication, and, furthermore, that "the record of a map with the designation of streets and parks thereon, and the sale of lots by such map, * * * cannot conclusively establish the dedication of a park designated thereon to public use," but that a finding of no dedication will be sustained "where no public ac-

ceptance of the offer is established and the evidence tends to show a revocation of the offer."

City of Anaheim v. Langenberger, 134 Cal. 608, 66 Pac. 855, was a similar case, and it was said therein: "By the facts of this case, there appears to be nothing more than an offer to dedicate the plaza to the public. The offer was made more than 30 years before this action was brought. During that entire time the city never made a sign that it accepted the offer. No formal acceptance was entered; no implied acceptance is shown. The first intimation the city gave of its claims to the plaza is found in the commencement of the present action. Certainly, the commencement of this action can hardly constitute an acceptance of an offer to dedicate made 20 years before."

In the three foregoing cases it is to be noticed that the actions were brought by the city in each instance, and that the vital question involved was whether there was support for the finding of "no dedication to the public."

The judgment against the plaintiff in *City of Monterey v. Malarin*, 99 Cal. 290, 33 Pac. 840, was affirmed on the ground as stated by the Supreme Court, "that the owner never intended or offered to dedicate to the public the strip of land referred to for a public use, or ever acquiesced in or assented to the use thereof for such purpose, or ever had any knowledge of such use by the public, or that the municipal authorities ever performed any act or asserted any right whatever thereto."

In *Prescott v. Edwards*, 117 Cal. 298, 49 Pac. 178, 59 Am. St. Rep. 186, the judgment was in favor of plaintiff for a private right of way, the finding being therein that there was no dedication of the land to the public as a highway. The judgment was affirmed on the ground that the defendant, at the time plaintiff purchased his lot, pointed out to the latter the strips of land fronting on said lot as streets, and that, under the circumstances, it would be a gross injustice for the owner to deprive the purchaser of the privilege of using such strips of land as streets, and it is said: "The decisions of this court, where it is declared that as to the purchase of lots adjoining platted streets such streets are dedicated by the owner, mistake the true doctrine in form rather than in substance, for it is the doctrine of estoppel in pais that gives the vendee his remedy, and prevents the practice of injustice by the vendor."

In *Myers v. City of Oceanside*, 7 Cal. App. 87, 93 Pac. 686, the evidence showed "no express dedication, and no filing of any map having the park delineated thereon, and nothing beyond an implied offer of dedication," and it was held that the evidence was sufficient to support the conclusion of the trial court that there was no dedication to the public. It was declared that "the question of intention is the controlling one in all

matters of dedication, and it is a question of fact on which the finding of the trial court must be sustained, if there is any evidence to support it."

In *Wolfskill v. Los Angeles County*, 86 Cal. 412, 24 Pac. 1004, *People v. Marin County*, 103 Cal. 223, 37 Pac. 203, 26 L. R. A. 659, and *Los Angeles v. McCollum*, 156 Cal. 148, 103 Pac. 914, the evidence was reviewed by the Supreme Court, and held in each instance to be sufficient to support the claim and finding of dedication.

We conclude that there is ample authority and sound reason for holding that there was here a complete dedication, or what is equivalent thereto, of said streets and parks.

[5] There has been no abandonment by the public of their right, and the surrender by the owner of these public places for the use of the people is still operative and effective for the purposes which, as we have already shown, were clearly intended and designated.

The statute of limitations was, indeed, urged by appellants, but of course this could be of no avail against the public, and if we consider the dedication available only to the large number of persons who purchased lots, there is sufficient evidence in the record to support the finding against the bar of the statute.

[6] Another finding which is assailed by appellants is that interveners, John A. and Anne Kirstine Asplund, are the owners of an easement of way along a certain road known as Kenilworth avenue. The claim to the easement was based upon an asserted title by prescription, and we think the court was justified in upholding it. Mr. John Asplund testified: "Kenilworth avenue starts from Mervyn avenue and goes across Sonoma creek and past my house up in the canyon, and from there it extends through. There are several property owners along the road, among them Pederoncelli and Mrs. Knell and Parker. It was there ever since Kenwood started in 1887 or 1888. Mr. Rohrer lived up there in the canyon, and built a road. It was used by the different people who had to go up there. The road would be a mile long, probably. I have ridden over it thousands of times, sometimes every day, going to get the cows. No one has ever objected to my passing over it. There was objections some 15 years ago; Mr. Crozier lives on it, and he put a gate across the road, and Mr. Parker sued him, and Supervisor Thompson cut the wire, and it has been open ever since. I have graded and graveled that part of it from Mervyn avenue up to my house on my own account. It is used by a great many people right along every day." The only fair inference from the foregoing is that the use of the road was under a claim of right. The manner of the use is the best evidence of its character. Asplund having used the road all these years as though he had the right to do so, the conclusion rationally follows that he intended to assert his adverse

claim, and that his acts were indicative of a purpose to maintain it.

Some other questions are discussed, but we deem it sufficient to say further that, in our opinion, there is no prejudicial error shown by the record, and we think the judgment and order should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

B. & W. ENGINEERING CO. v. BEAM et al.
(Civ. 1,235.)

(District Court of Appeal, First District, California. Nov. 6, 1913. Rehearing Denied by Supreme Court Jan. 5, 1914.)

1. ACCORD AND SATISFACTION (§ 26*)—COMPROMISE AND SETTLEMENT (§ 23*)—FINDINGS—EVIDENCE.

In an action to recover the balance due on a contract, evidence held to justify a finding that plaintiff's assignor had accepted a payment of \$1,070 in full satisfaction of the amount due, and that the same constituted an executed accord and satisfaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 162-165; Dec. Dig. § 26;* Compromise and Settlement, Cent. Dig. §§ 91-94; Dec. Dig. § 23.*]

2. ACCORD AND SATISFACTION (§ 1*)—COMPROMISE AND SETTLEMENT (§ 16*)—WHAT CONSTITUTES.

The phrase "accord and satisfaction," as applied in law, means the substitution of a new agreement for and in satisfaction of one pre-existing between the same parties; an agreement whereby one of two parties, having a right of action against the other on a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might have been recovered on the original obligation; the effect of such agreement being to extinguish the antecedent liability as provided by Civ. Code, §§ 1521, 1523.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 1-13; Dec. Dig. § 1;* Compromise and Settlement, Cent. Dig. §§ 116-122; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 1, pp. 81-84; vol. 3, p. 7561.]

3. ACCORD AND SATISFACTION (§ 10*)—COMPROMISE AND SETTLEMENT (§ 6*)—PRE-EXISTING AGREEMENT—BONA FIDE DISPUTE.

While an accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under a pre-existing agreement, and before a dispute concerning a claim for money under an existing contract can be made the basis of an accord and satisfaction it must be shown that the dispute is bona fide, it is, nevertheless, not required in order to validate an executed agreement of accord and satisfaction that the circumstances of the transaction on which it was based should affirmatively show that there was foundation for an honest dispute, the test being whether such dispute was in fact honest or fraudulent, and, if honest, it affords a basis for an accord, whether or not the owner of the claim could have enforced the same at law.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 67-74; Dec. Dig. § 10;* Compromise and Settlement, Cent. Dig. §§ 35-50; Dec. Dig. § 6.*]

4. ACCORD AND SATISFACTION (§ 27*)—COMPROMISE AND SETTLEMENT (§ 24*)—BONA FIDE DISPUTE—QUESTION OF FACT.

On an issue as to accord and satisfaction, whether there was a bona fide dispute concerning the sum due under the contract between the parties, which could form the basis of an accord, was primarily a question of fact to be determined by the trial court from all the circumstances surrounding the transaction.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 31, 59, 83, 97, 110, 135, 150; Dec. Dig. § 27;* Compromise and Settlement, Cent. Dig. § 95; Dec. Dig. § 24.*]

5. ACCORD AND SATISFACTION (§ 22*)—EXECUTED AGREEMENT—EFFECT.

Where parties to an executed accord and satisfaction met on equal terms, without fraud, misrepresentation, or mistake, and adjusted the differences as to their relative rights and obligations arising out of a valid, pre-existing agreement, it is neither necessary nor permissible to go behind the settlement actually made to ascertain which of the parties was right in a controversy which preceded, and was the basis of, the settlement.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 144-145; Dec. Dig. § 22.*]

6. JUDGMENT (§ 256*)—FINDINGS.

Where, in a suit to recover the balance due on a contract, defendant pleaded an executed accord and satisfaction, and the bona fides of the dispute, which was expressly found to be the basis of the accord and satisfaction, followed necessarily from all the circumstances of the case and the acts of the parties found by the court to have attended the execution of such agreement, a finding that plaintiff's assignor had accepted a payment in accord and satisfaction of all liability under the contract was sufficient to support a judgment for defendant, though there was no express finding that the dispute was in good faith.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446-454; Dec. Dig. § 256.*]

7. PRINCIPAL AND AGENT (§ 170*)—AUTHORITY OF AGENT—ACCORD AND SATISFACTION—RATIFICATION.

Where, after the agent of plaintiff's assignor had made an executed agreement of accord and satisfaction with defendants by which a claim was settled for less than the amount due, plaintiff's assignor, with full knowledge of the facts, neither repudiated the settlement within a reasonable time, nor returned the money, but used the same in its business, the act of the agent was thereby ratified, and whether he had original authority to make the contract was immaterial.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 638-643; Dec. Dig. § 170.*]

8. ACCORD AND SATISFACTION (§ 4*)—COMPROMISE AND SETTLEMENT (§ 5*)—REQUISITES—WRITING—STATUTES.

Civ. Code, § 1524, provides that part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, extinguishes the obligation. Held, that such section applies only to agreements of release and satisfaction made where the obligation is neither doubtful nor disputed, and does not apply to an executed agreement of accord and satisfaction founded on the settlement and extinction of a disputed debt so as to prevent a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

valid agreement of accord and satisfaction by parol.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 32-39; Dec. Dig. § 4;* Compromise and Settlement, Cent. Dig. §§ 10-16; Dec. Dig. § 5.*]

9. ACCORD AND SATISFACTION (§ 17*)—COMPROMISE AND SETTLEMENT (§ 20*)—ACCORD WITHOUT SATISFACTION—DEFENSE.

An accord without satisfaction will not operate to bar an action on a disputed debt.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. § 123; Dec. Dig. § 17;* Compromise and Settlement, Cent. Dig. §§ 83-88; Dec. Dig. § 20.*]

10. FRAUDS, STATUTE OF (§ 139*)—PAROL EVIDENCE—ACCORD AND SATISFACTION—PERFORMANCE.

Parol evidence, though involving the subject-matter of an executory contract which in itself would be within the statute of frauds, may be resorted to to prove performance in satisfaction of an accord.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 334-341; Dec. Dig. § 139.*]

11. ACCORD AND SATISFACTION (§ 19*)—COMPROMISE AND SETTLEMENT (§ 6*)—EXECUTED AGREEMENT—EFFECT.

Where an agreement to accept in full payment a sum less than the amount in dispute has been shown to have been fully executed by payment and acceptance of the lesser sum, the original obligation is thereby extinguished.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 136-139; Dec. Dig. § 19;* Compromise and Settlement, Cent. Dig. §§ 35-50; Dec. Dig. § 6.*]

12. ACCORD AND SATISFACTION (§ 25*)—DEFENSES—PLEADING.

The defense of accord and satisfaction is not available unless pleaded, except that if plaintiff, as a part of his case, proves a payment, and the circumstances under which it was made tends to show an accord and satisfaction, defendant may rely on the facts as constituting such defense, though not pleaded in the answer.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 151, 153-160; Dec. Dig. § 25.*]

13. PLEADING (§ 259*)—ANSWER—AMENDMENT—DISCRETION.

Where during the trial it appeared that there had been an executed agreement of accord and satisfaction between the parties, it was a proper exercise of the court's discretion to permit defendants to amend their answer so as to plead such defense in bar.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 783-792; Dec. Dig. § 259.*]

14. ACCORD AND SATISFACTION (§ 25*)—COMPROMISE AND SETTLEMENT (§ 22*)—DEFENSES—PLEADING.

An amended answer, alleging that on and prior to January 11, 1907, defendant B. disputed the bill theretofore rendered by plaintiff's assignor, protested that there was no greater sum due on the obligation than \$1,000, and offered to pay \$1,070 in full settlement, satisfaction, and extinction of the obligation; that thereupon, pursuant to the agreement of defendants' assignor to accept such amount, it was duly paid and received in settlement of the bill so rendered; and that plaintiff's assignor used the money so paid in its business, etc.—sufficiently pleaded accord and satisfaction, under the rule that nothing more need be pleaded to present such defense than the payment and acceptance on a mutual agreement, express or implied, of a certain sum of money or other

thing of value in full satisfaction of the pre-existing and previously disputed obligation.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 151, 153-160; Dec. Dig. § 25;* Compromise and Settlement, Cent. Dig. § 90; Dec. Dig. § 22.*]

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by B. & W. Engineering Company, a corporation, against Sarah C. Beam, as executrix, etc., and W. Jessup & Sons, Limited, a nonresident corporation, and others. From a judgment for defendants, plaintiff appeals. Affirmed.

William P. Hubbard, of San Francisco, for appellant. Myrick & Deering, of San Francisco, for respondents.

LENNON, P. J. The cause of action sued on herein was assigned to the corporation plaintiff by a pre-existing copartnership of the same name. The plaintiff sought to recover from the defendants the balance of a sum of money alleged to be due upon a contract entered into between plaintiff's assignor, the B. & W. Engineering Company, and I. Willard Beam, wherein the latter acted for himself and as the representative of the defendant W. Jessup & Sons, Limited. Upon the death of Beam his widow was appointed executrix of his last will and testament, and in due time a claim, founded upon the contract in suit, was presented to and rejected by her as such executrix. Said contract consisted of a proposal in writing by plaintiff's assignor which was accepted in writing by Beam, the deceased, for himself and the defendant W. Jessup & Sons, Limited. By the terms of the contract plaintiff's assignor contracted to clear a certain lot of land for the actual cost of the work plus 15 per cent. commission thereon. The contract in question when proposed and as finally accepted contained this clause: "We wish to state * * * that our estimated figure is one thousand dollars for clearing this lot. * * *"

The action was defended in part upon the theory that the sum claimed by plaintiff's assignor to be due for and on account of the actual cost of clearing the lot in question exceeded the sum specified therefor in the contract by \$411.86, and that such excess in part covered and called for the cost of additional and unauthorized work and labor. The action was further defended upon the ground specifically pleaded in an amended answer that plaintiff's assignor had accepted the sum of \$1,070 in full settlement and extinction of the obligation sued upon. Upon the general issue covering the character and cost of the work to be performed under the contract, the trial court found in effect that plaintiff's assignor had completed the work contracted for in accordance with the terms of the contract, but had included in its charge therefor an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

item of expense for certain work and labor performed in addition to the work and labor called for in the contract. Upon the special issue of accord and satisfaction the trial court found in substance that the payment of \$1,070 was made and accepted in full settlement of the obligation sued upon, and in this behalf found further that Beam, the deceased, had previously disputed the bill rendered by plaintiff's assignor in the sum of \$1,411.86 for the actual cost of clearing the lot, and had at all times protested that there was no other or greater sum due than \$1,000. It was further found that plaintiff's assignor accepted said sum of \$1,070 with full knowledge of the intent and extent of its purported payment, and thereupon deposited the same in bank to the credit of a general account, and thereafter drew upon and expended said sum of \$1,070 in the transaction of its business. Upon this issue of accord and satisfaction the trial court further found that Beam, the deceased, and the defendant W. Jessup & Sons, Limited, understood that the maximum charge of plaintiff's assignor for clearing the lot in question would not exceed the sum of \$1,000. Upon these findings of fact the trial court concluded as a matter of law that the defendants were entitled to judgment for their costs, which was entered accordingly.

[1] Upon this appeal (which is from the judgment and an order denying the plaintiff a new trial) it is insisted that the evidence does not support the findings upon the issue of accord and satisfaction.

This contention cannot be sustained. The evidence adduced upon the whole case, briefly stated, shows that the actual cost of clearing the lot amounted to the sum of \$1,411.86, which with the addition of 15 per cent. thereof, namely, \$211.78, aggregated the sum of \$1,623.64. This was the amount claimed to be due plaintiff's assignor upon the completion of the work. As against this, however, there appeared a credit of \$15 for certain material which was accepted by plaintiff's assignor as part payment in lieu of cash, and a subsequent payment by check in the sum of \$1,070, which left the sum of \$532.64 as the net balance claimed to be due plaintiff at the commencement of the action. The check referred to was received by one Crowley, the authorized and acknowledged manager for plaintiff's assignor, and by him accepted in full payment of the claim for \$1,623.64 previously presented in writing; and his receipt to that effect was indorsed upon said claim in the following words and figures: "Received of I. W. Beam \$1,070 in full settlement of this bill. B. & W. Engineering Company, E. D. Crowley."

The evidence tended clearly enough to show that prior to the presentation and acceptance of the check for \$1,070 the deceased Beam had disputed and refused to pay the claim upon the ground not only that the contract covenanted that the actual cost of the

work would not exceed the sum of \$1,000, but that the charge therefor of \$1,411.86 as made by plaintiff's assignor included the cost of work and labor not called for by the contract.

Finally it was shown in evidence clearly and without contradiction that plaintiff's assignor had received and used in its business the sum of \$1,070, which was paid by check to Crowley, its manager, with full knowledge that such check was given and receipted for by Crowley in full settlement and satisfaction of all claims arising out of the contract in suit.

Plaintiff's claim that the evidence as outlined above does not support the findings upon the issue of accord and satisfaction is founded largely upon the contention that the clause in the contract relating to the cost of the work was nothing more nor less than an estimate, which could not be fairly considered or construed as a covenant that the cost of such work would in no event exceed the sum of \$1,000. With this contention as a basis, it is insisted that the facts of the transaction show that the claim of plaintiff's assignor as originally presented could not have been honestly disputed; and from this it is argued that the finding of accord and satisfaction was not as a matter of law established by the evidence.

We are unable to agree with these contentions, and we are satisfied that the circumstances surrounding the transaction as revealed by the evidence upon the whole case afford ample support for the lower court's finding of fact to the effect that the original claim of plaintiff's assignor was extinguished by the execution of an accord and satisfaction.

[2] The phrase "accord and satisfaction" as it is known and applied in the law means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties. More minutely defined, an agreement of accord and satisfaction is one whereby one of two parties, having a right of action against the other upon a claim arising out of an existing agreement, agrees to accept from the other party something in satisfaction of such right of action different from and usually less than that which might be recovered upon the original obligation. Civ. Code, § 1521. The effect of such agreement when executed is to extinguish the antecedent liability. Civ. Code, § 1523.

[3] As a matter of course an agreement of accord and satisfaction presupposes a prior controversy concerning the relative rights of the parties under the pre-existing agreement; and it may be conceded to be the law, as counsel for the plaintiff contends, that, before a dispute concerning a claim for money alleged to be due under an existing contract can be made the basis of an agreement of accord and satisfaction, it must be

shown that such dispute was bona fide. It is not required, however, in order to validate an executed agreement of accord and satisfaction, such as we have in the present case, that the circumstances of the transaction upon which it was founded should affirmatively show that there was room for an honest dispute. The rule in this behalf is clearly and concisely stated in the case of *Simons v. American Legion of Honor*, 178 N. Y. 263, 70 N. E. 776, where it is said that: "If a debt or claim be disputed at the time of payment, the payment, when accepted, of a part of the whole debt, is good satisfaction, and it matters not that there was no solid foundation for the dispute. The test in such cases is: Was the dispute honest or fraudulent? If honest, it affords a basis for an accord between the parties, which the law favors, and the execution of which is the satisfaction."

[4] It will thus be seen that, in so far as the defense of an executed accord and satisfaction was concerned, the trial court was not called upon to decide the question as to whether or not the covenant of the contract in controversy covering the cost of the work to be performed thereunder was fairly susceptible of the construction contended for by Beam. Upon this phase of the case the only question to be considered was whether or not there was in fact at the time of the acceptance and retention of the check in question a bona fide dispute concerning the sum due under the contract. This primarily was a question of fact to be determined by the trial court from all of the circumstances of the transaction (*Lapp-Gifford Co. v. Muscocy Water Co.*, 134 Pac. 989); and in the determination of that question the mere fact that it might have been held, in an action involving the construction of the original contract, that plaintiff's assignor could not have been compelled to relinquish any portion of its original claim, was of no consequence in the face of the established fact that it did actually and knowingly accept a lesser amount in full satisfaction and settlement of its claim. *Taylor v. Nussbaum*, 9 N. Y. Super. Ct. 302; *Roach v. Gilmer*, 3 Utah, 389, 4 Pac. 221.

[5] In other words, where the parties to an executed agreement of accord and satisfaction have met upon equal terms, and without fraud, misrepresentation, or mistake have adjusted existing differences concerning their relative rights and obligations arising out of a valid, pre-existing agreement, it is neither necessary nor permissible to go behind a settlement actually made for the purpose of ascertaining which of the parties was right in the controversy which preceded and constituted the basis of such settlement. *Farmers' Bank, etc., v. Blair*, 44 Barb. (N. Y.) 641, 652; *Minor v. Fike*, 77 Kan. 806, 93 Pac. 264; *Killer v. Wohletz*, 79 Kan. 716, 101 Pac. 474; 1 Page on Contracts, 321.

But apart from these considerations it will

be remembered that the evidence shows that the claim of plaintiff's assignor was disputed not only upon the ground that the contract in controversy covenanted that the actual cost of the work to be done thereunder would not exceed the sum of \$1,000, but also because the charge made therefor included the cost of additional and unauthorized work and labor. This additional and unauthorized work consisted of straightening a quantity of steel. Standing alone the preponderance of the evidence upon this phase of the case fully supports the finding of the lower court that such work was not called for by the contract, and in addition discloses ample justification for a bona fide dispute as to whether or not any charge could be rightfully made for such work. Therefore, aside from the question as to what construction might be fairly put upon the clause of the contract covering the actual cost of the work of cleaning the lot, it may be safely said that the evidence upon the whole case sufficiently shows that the sum sued for was honestly in dispute at the time the settlement in question was made.

[6] It is next insisted that the findings of fact upon the issue of accord and satisfaction do not support the judgment, in this, that it was not specifically and affirmatively found that the dispute which preceded the payment of the claim in controversy was genuine and made in good faith.

Conceding, without so deciding, that the good faith of a dispute which is claimed to be the basis of an executed agreement of accord and satisfaction should be affirmatively found, still the finding at which this criticism is aimed, when read in conjunction with the findings made upon the whole case, is not open to attack upon that ground. The bona fides of the dispute, which in the present case was expressly found to be the basis of an executed agreement of accord and satisfaction, follows as an irresistible inference from all the facts and circumstances of the case and the acts of the parties which were found by the trial court to have attended the execution of the agreement. This being so, the finding as made sufficiently supports the judgment. *Emmal v. Webb*, 36 Cal. 197; *Coveny v. Hale*, 49 Cal. 552; *Smith v. Acker*, 52 Cal. 217; *Water Company v. Richardson*, 72 Cal. 598, 14 Pac. 379; *Mott v. Ewing*, 90 Cal. 231, 27 Pac. 194.

[7] The further claim is advanced that the evidence is insufficient to support the finding made upon the issue of accord and satisfaction, in this, that it was shown in evidence that Crowley, the agent of plaintiff's assignor who affected the compromise in question, was merely the foreman of the work, and was neither expressly authorized, nor ostensibly empowered by virtue of his employment, to accept less than the full sum in dispute.

This contention, in so far as it relates to

the nature and scope of Crowley's employment, is answered by the record before us, which shows unequivocally that it was an admitted fact in the case that he was the acknowledged and authorized general manager of the business conducted by plaintiff's assignor. The question as to whether or not his duties as general manager ostensibly or in fact empowered him to commute the claim in controversy need not be discussed or decided in view of the fact found by the trial court and established by the evidence that plaintiff's assignor finally accepted, retained, and eventually used in its business the money paid to Crowley, with full knowledge that such payment was made, accepted, and receipted for upon the express condition that it was in full settlement of the disputed claim. Such payment must have been accepted and retained upon the terms and conditions upon which it was originally offered and finally receipted for, or else it should not have been accepted at all. That is to say, if plaintiff's assignor was not willing to accept such payment in full satisfaction of its claim in keeping with the settlement made by Crowley it should, within a reasonable time, have repudiated such settlement and returned the money paid thereunder. *Looby v. West Troy*, 24 Hun (N. Y.) 78. Falling in this, the acceptance and retention of the payment in question was, under all the circumstances of the transaction, tantamount to an express ratification of the compromise made by Crowley, and operated to estop plaintiff's assignor from denying the authority of Crowley to execute such agreement. *Code Civ. Proc.* § 1962, subd. 2; *Civ. Code*, §§ 1589, 3519; *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 34 Pac. 527; *Creighton v. Gregory*, 142 Cal. 35, 75 Pac. 569; *Dover v. Pittsburg Oil Co.*, 143 Cal. 501, 77 Pac. 405; *Conde v. Dreisam G. M. Co.*, 3 Cal. App. 583, 86 Pac. 825.

Incidental to the discussion of the sufficiency of the evidence generally to support the findings, the claim is made that the evidence called for and required a finding to the effect that the work and labor of straightening the steel which was removed from the lot were necessarily included in the work called for by the contract. The finding in question is important only in so far as it relates to the further finding that the claim of plaintiff's assignor was in dispute prior to the execution of the agreement of accord and satisfaction. The result of the action would not, however, have been altered even if the fact involved in the finding in question had been found in favor of plaintiff. The trial court nevertheless would have been justified in finding, as it did, that the claim of plaintiff's assignor was in fact disputed, and obviously therefore the judgment would be sufficiently supported if it were rested solely upon the findings of a pre-existing dispute and an executed agreement of accord and satisfaction.

But aside from this, the evidence adduced upon this phase of the case preponderates in favor of the finding as made; and, even if this were not so, such evidence is in substantial conflict, and consequently its sufficiency to support the finding referred to cannot be reviewed by this court.

[8] Finally it is insisted that the evidence does not support the finding upon the issue of accord and satisfaction, and that such finding in turn does not support the judgment, because it was not shown in evidence nor found as a fact that the agreement to accept less than the sum originally claimed to be due was in writing.

In support of this contention we are cited to section 1524 of the Civil Code, which provides that "part performance of an obligation, either before or after breach thereof, when expressly accepted by the creditor in writing in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation." The Code section just quoted is evidently but a modification of the rule of the early common law which in effect provided that payment of an amount less than that due upon a liquidated and undisputed debt did not operate as a satisfaction, even though accepted as such.

The reason for the common-law rule rested largely, if not entirely, upon the theory that an agreement to accept a part payment in satisfaction of a liquidated and undisputed debt was without a good and sufficient consideration, and therefore was but a mere nudum pactum. Accordingly, it was uniformly held that such an agreement could not be relied upon nor pleaded as a defense to an action brought for the recovery of the whole of an indebtedness which admittedly was due and unpaid at the time the part payment was made. In this state, however, a written instrument was, contemporaneously with the enactment of section 1524 of the Civil Code, declared by section 1614 of the same Code to be presumptive evidence of the existence of a consideration; and doubtless these two sections when read and construed together were intended as a relaxation of the rigors of the common law. However that may be, it is certain that section 1524 of the Civil Code has reference only to agreements of release and satisfaction made in cases where the obligation is neither doubtful nor disputed, and has no application to an executed agreement of accord and satisfaction founded upon the settlement and extinction of a disputed debt. *Simmons v. Hamilton*, 56 Cal. 493; *Rued v. Cooper*, 119 Cal. 463, 51 Pac. 704; *Flaningham v. Hogue*, 59 Ill. App. 315; *Reynolds v. Silvers*, 17 N. J. Law, 275; *Farmer's Bank, etc., v. Blair*, 44 Barb. (N. Y.) 641.

[9-11] Of course an accord without satisfaction will not operate to bar an action upon a disputed debt (*Simmons v. Oullahan*, 75 Cal. 508, 17 Pac. 543); but parol evidence

even though it involve the subject-matter of an executory contract which in itself would be within the statute of frauds, may be resorted to for the purpose of proving performance in satisfaction of the accord. 1 Beach on Modern Law of Contracts, § 437. And where an agreement to accept in full payment a sum less than the amount in dispute has been shown to have been fully executed by the payment and acceptance of the lesser sum, the original obligation is thereby extinguished. *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58.

But one other point remains to be considered, and that involves the claim that the lower court abused its discretion in permitting the defendants, when the taking of evidence was concluded, to amend their answer to conform to the proof by specifically pleading the existence of an executed agreement of accord and satisfaction as a defense to the action. In this connection it is further contended that the answer as amended did not state facts sufficient to constitute such defense. At one time, in this state, there existed a confusion if not a conflict of authority upon the question as to whether or not the defense of accord and satisfaction was required to be specially pleaded.

[12] In the very early case of *Gavin v. Annan, Lord & Co.*, 2 Cal. 494, it was held that the defense of accord and satisfaction might be relied upon and established under a mere general denial. To the same effect was the decision in the case of *McLarren v. Spalding*, 2 Cal. 510. Shortly thereafter, however, it was held in the case of *Fitch v. Brockmon*, 2 Cal. 575, that it was error to consider the defense of accord and satisfaction unless specially pleaded, and subsequently the rule declared in the earlier cases above referred to was expressly repudiated in the cases of *Piercy v. Sabin*, 10 Cal. 22, 30, 70 Am. Dec. 692, and *Coles v. Soulsby*, 21 Cal. 47, where it was held that the defense of accord and satisfaction involved new matter which, if established, would avoid the action, and therefore should be specially pleaded. Later this was declared to be so because under our practice as codified a general denial puts in issue only the allegations of the complaint, and consequently would not suffice to apprise the adverse party of the new matter which he would be required to encounter and overcome at the trial. *Glazer v. Clift*, 10 Cal. 303.

The rule enunciated in the cases of *Piercy v. Sabin* and *Coles v. Soulsby*, supra, was reiterated in the later case of *Sweet v. Burdett*, 40 Cal. 97. True it is that *Pomeroy*, in his work on Code Remedies (4th Ed. § 541), contends with strong reason that, inasmuch as the defense of payment is permissible under a general denial, "similar defenses such as release, accord and satisfaction and the like, cannot with consistency be rejected"; but the rule declared and followed in the series

of cases commencing with *Piercy v. Sabin*, supra, has not only never been disputed or departed from, but it has been cited with approval in the comparatively recent case of *Wilson v. Cal. R. R. Co.*, 94 Cal. 166, 29 Pac. 861, 17 L. R. A. 685. It may therefore be said with certainty that the settled rule of pleading in this state requires an agreement of accord and satisfaction to be specially pleaded before it can be availed of as a defense.

This rule, however, we take it is subject to the exception that if a plaintiff, as a part of his case, proves a payment, and the circumstances under which it was made tend to show an accord and satisfaction, the defendant may rely upon the facts thus shown as constituting an accord and satisfaction though not pleaded as such in the answer. *Looby v. West Troy*, supra.

[13] Conceding, as we must, the established rule of pleading to be as stated, nevertheless we see no abuse of discretion in the order of the lower court permitting the defendants to amend their answer in the particular stated. Liberality in the allowance of an amendment to a pleading, particularly an amendment to an answer is the rule rather than the exception; and, in cases where such an amendment can be made in furtherance of justice without jeopardizing the rights of an adverse party, it should be freely allowed.

In the present case the evidence up to the time of the interposition of the amended answer tended strongly to show the existence of an executed agreement of accord and satisfaction. This being so, we are at a loss to perceive how the situation of the plaintiff could have been materially altered or his rights seriously impaired by permitting the defense of accord and satisfaction to be formally pleaded. It is the general rule that a defendant may plead as many defenses as the circumstances of the transaction in suit will permit. In the present case the defense of accord and satisfaction might have been rightfully interposed in the first instance, and therefore the amendment complained of could not and did not have the effect of rendering the situation of the plaintiff different from what it would have been if such defense had been specifically pleaded in limine.

[14] The amended answer of the defendants in pleading the defense of accord and satisfaction alleged: "That on and prior to the 11th day of January, 1907, said I. Willard Beam did dispute the bill theretofore rendered by the said B. & W. Engineering Company, and did protest that there was no other or greater sum due upon the obligation sued upon in plaintiff's complaint than the sum of \$1,000; that on the said 11th day of January, 1907, the said I. Willard Beam offered to pay, and the said assignor of plaintiff did agree to accept, the sum of \$1,070 in full settlement, satisfaction, and extinction

of the said obligation sued upon in plaintiff's complaint; that thereupon, pursuant to said agreement, the said sum of \$1,070 was paid to and received by said assignor of plaintiff, and receipt in full settlement of said obligation was executed by said assignor of plaintiff; and that the said assignor of plaintiff received the said sum of \$1,070 so paid as aforesaid in extinction of said obligation, and in settlement and satisfaction of the bill rendered therefor, and did use the said money in the business of the said plaintiff."

The plaintiff did not demur nor seek time to demur to the answer as thus amended; but upon this appeal and for the first time assails the sufficiency of the facts alleged therein to constitute the defense of accord and satisfaction. However, with or without demurrer, the answer as amended is invulnerable. Upon principle the defense of accord and satisfaction at the very best requires nothing more to be pleaded than the payment and acceptance, upon a mutual agreement express or implied, of a certain sum of money or other thing of value in full settlement and satisfaction of a pre-existing and previously disputed obligation. The pleading assailed in the present case more than meets these requirements. Indeed, it would be difficult to formulate a pleading embodying the essentials of a good accord and satisfaction with greater perspicuity and precision.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

BINGHAM COAL & LUMBER CO. v. BLOM et al.

(Supreme Court of Utah. Dec. 11, 1913.)

1. APPEAL AND ERROR (§ 913*)—PRESUMPTIONS—PARTIES.

Where, when an action was commenced against a firm to foreclose a mechanics' lien, one of the partners had parted with all his interest in the real estate to the other partner, who had since died, and a personal judgment was not asked, it will be presumed that such partner was made a defendant as a surviving partner, and hence it cannot be claimed by the administratrix of the deceased that the survivor was not a party as surviving partner, and that hence the firm, the real defendant, was not in court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3690-3692; Dec. Dig. § 913.*]

2. PARTNERSHIP (§ 200*)—ACTIONS AGAINST FIRM—PARTIES.

If, in an action against a copartnership, one of the firm is duly served with summons, he is in court both as a surviving partner, if he is such, and an individual.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 369-371; Dec. Dig. § 200.*]

3. APPEAL AND ERROR (§ 913*)—PRESUMPTIONS—PARTIES—CAPACITY.

In an action against a copartnership to enforce a mechanics' lien, it will be assumed

that a surviving partner who joined in a general demurrer did so as surviving partner; that being the only capacity in which he was properly a party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3690-3692; Dec. Dig. § 913.*]

4. PARTIES (§ 71*)—DETERMINATION OF CAPACITY.

Whether one is sued as an individual or copartner or otherwise is determined from the pleadings and not from the summons or return of service.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 113; Dec. Dig. § 71.*]

5. MECHANICS' LIENS (§ 291*)—ENFORCEMENT—JUDGMENT.

Where, in an action to foreclose a mechanics' lien against a firm and the administratrix of a deceased partner, all claims against other assets of the estate are specifically waived, and a deficiency judgment was not allowed, a judgment requiring the property to be sold and the proceeds applied to the payment of the lien and any balance paid to the administratrix sufficiently protected the rights of the parties.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 599-605, 607, 610; Dec. Dig. § 291.*]

Appeal from District Court, Salt Lake County; Geo. C. Armstrong, Judge.

Action by the Bingham Coal & Lumber Company against Matt Blom and another, copartners doing business as Blom & Winter, and Emma Winter, administratrix of Axel Winter, deceased, and others. From a judgment for plaintiff, the administratrix appeals. Affirmed.

Thomas Kane, of Salt Lake City, for appellant. W. H. Bramel, of Salt Lake City, for respondent.

FRICK, J. This is an action in equity to foreclose a mechanic's lien upon property which, when the lien was acquired, was owned by a copartnership. The complaint is in the usual form in such actions, and, in view that it is not assailed, we ordinarily would not set forth any of the allegations, but, considering the character of the errors assigned by appellant, we deem it necessary to at least set forth some of the material allegations of the complaint. It is alleged that one Matt Blom and one Axel Winter were copartners, doing business under the name of Blom & Winter, and as such owned the real estate involved in this action; that at the request of said Blom & Winter respondent furnished material for the construction of a certain building which was to be and was erected upon the real estate owned as aforesaid, and which material was of the value of \$2,005.90, no part of which had been paid except the sum of \$100, and that respondent had complied with all of the provisions of our statute relating to mechanic's liens, and had thus acquired a mechanic's lien against said real estate and building thereon; that, after said building was erected as aforesaid, said Matt Blom and wife had duly conveyed all of their right, title, and interest in said real estate to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said Axel Winter; that after said conveyance was made said Axel Winter died intestate, leaving surviving him the defendants, Emma Winter, his wife, and Sylvia, Ebba, and Judeth H. Winter, his children, as his only heirs at law; that, subsequently to the death of said Axel Winter, said Emma Winter was duly appointed administratrix of said estate, and she as such administratrix was also made a party defendant to this action. It was also alleged in the complaint that respondent waived (as it might do under our statute) all claim to any part of the estate of said Axel Winter except the property covered by said mechanic's lien and conveyed to him as aforesaid. A general demurrer was interposed to the complaint as follows: "Come now the defendants Matt Blom and Axel Winter, copartners, doing business under the firm name of Blom & Winter, Emma Winter, Judeth H. Winter, a minor, Sylvia Winter and Ebba Winter, minors, and Emma Winter, administratrix of the estate of Axel Winter, deceased, and demur to the complaint on file, and for ground of demurrer allege that the said complaint does not state facts sufficient to constitute a cause of action." The demurrer was signed by the attorney, who states that he is the attorney for all of the defendants named therein, specifically naming them again after signing his name. The record also shows that summons had been personally served upon all of the defendants named in said demurrer except Axel Winter. None of the defendants named in the demurrer except Emma Winter, as administratrix of said estate, made any further appearance in the action, and she appeared and filed an answer in which she, upon the ground of want of information and belief, denied all of the allegations of the complaint.

A trial was had to the court, after which it made findings of fact covering all of the matter necessary in such cases, and also found the facts which we have stated herein, including the further fact that all of the defendants had been duly served with summons. Upon these findings conclusions of law were also made directing that a judgment or decree be entered foreclosing the mechanic's lien aforesaid, and that the property described in the complaint be sold and the proceeds, so far as necessary, applied to the payment of said lien, and the balance, if any, paid to the defendant Emma Winter, as administratrix of said estate. Judgment or decree was accordingly entered in which respondent's rights were expressly limited to the property described in the complaint. Emma Winter, as administratrix of the estate aforesaid, alone appeals.

The principal error assigned, as we understand appellant's counsel, may be stated thus: That the court erred in entering judgment as it did because the debt, if any existed, was contracted by, and therefore was the debt of, the copartnership of Blom & Winter; that

when Winter died said partnership was dissolved, and Matt Blom thereafter, as surviving partner, could alone represent the copartnership, and that he never was made a party to this action as such surviving partner; hence the real debtor never was in court, and, not having been in court, it was error to enter a judgment foreclosing the mechanic's lien.

It should be remembered that it is Emma Winter, as the administratrix of the estate of Axel Winter, who raises the objection; she being the representative of one of the copartners of Blom & Winter and of the one who succeeded to the property in question during his lifetime. Blom is not here insisting that he was not in court as the surviving partner of the copartnership of Blom & Winter.

[1] But suppose he did make such an objection, could it avail him anything? We think not. As we have pointed out, Blom had parted with all of his interest in the subject of the action, namely, the real estate on which the mechanic's lien was sought to be foreclosed before the action was commenced, and must be presumed to have received payment for such interest. Again, in the complaint no personal judgment was asked as against any one, not even Matt Blom. The only reason, therefore, that existed for making Matt Blom a party to the action was because he was the surviving partner of the copartnership of Blom & Winter, which had contracted the debt to secure which the mechanic's lien was claimed. Beyond this he had no more interest in the action than, so far as appears, has appellant's counsel, and hence would not have been a proper party but for the reason suggested. It must be assumed, therefore, that Matt Blom was made a party because he was the surviving partner of the copartnership of Blom & Winter. It is urged upon us, however, that, in order to make Blom a party to the action as such surviving partner, it was necessary to state in the summons that he was a party in that capacity. We have already pointed out that, under the undisputed facts of this case, he could not properly be made a party except as the surviving partner of the copartnership aforesaid.

[2] But apart from all this we are of the opinion that when a copartnership is sued, and one of the members thereof is duly served with summons, he is in court for every purpose (that is, he is in court as a partner and as an individual); and in case he happens to be the surviving partner, and all of the facts are made to appear in the complaint, as in this case, he is also in court as such surviving partner. This is not a case where it is sought to bind one partner by merely serving process upon another partner, nor is it one where a person is sued as an individual when he is liable only in a representative capacity, but it is a case where a partner has appeared in court personally.

[3] Moreover, in filing the general demurrer it must be assumed that Matt Blom joined in it as the surviving partner, since that was the only capacity in which he had, or could have, any legal connection with the case whatever.

[4] Whether a person is sued as an individual or otherwise must be determined from the pleadings and not from the summons or the return of service. It clearly appears in this case that nothing was claimed against Matt Blom as an individual. We are of the opinion that, under the undisputed facts and circumstances, Matt Blom was in court as the surviving partner of the copartnership of Blom & Winter. The contention made by appellant's counsel, therefore, that the debtor which contracted the debt on which this action was based never was in court is not tenable.

[5] There is also some objection made that the judgment is not in the proper form. It may be that the judgment is somewhat irregular in form; but inasmuch as all claims against the other assets of the Winter estate are specifically waived, and a deficiency judgment is disallowed, the judgment is quite sufficient as it is, and no one could be either benefited or hurt if the language were changed in conformity with counsel's suggestion.

We can discover no reversible error in this record, and the judgment is therefore affirmed, with costs.

McCARTY, C. J., concurs.

STRAUP, J. I concur. Appellant's real complaint relates to defect or nonjoinder of parties. Such matters are not raised by a general demurrer and are not reviewable thereunder.

STATE v. JOHNSON.

(Supreme Court of Utah. Dec. 16, 1913.)

1. SODOMY (§ 1*)—COMMON LAW.

Under Comp. Laws 1907, § 2488, providing that the common law of England, except in so far as it is repugnant to the federal Constitution and the state Constitution and statutes, shall be the rule of decision, the definition of the infamous crime against nature with man or beast denounced by section 4228 must be sought in the common law, not being defined by statute.

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

2. SODOMY (§ 1*)—OFFENSE—WHAT CONSTITUTES—"CRIME AGAINST NATURE."

At common law the term "sodomy" was equivalent to the term infamous crime against nature; hence, as sodomy could be accomplished only by copulation in anum, the infamous crime against nature denounced by Comp. Laws 1907, § 4228, but not defined, does not include copulation by one male person in the mouth of another, the definition being dependent on the common law (citing Words and Phrases, vol. 2, p. 1740; vol. 7, p. 6539).

[Ed. Note.—For other cases, see Sodomy, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

3. CONSTITUTIONAL LAW (§ 70*)—PROVINCE OF JUDICIARY.

In view of Const. art. 5, § 1, separating the powers of government and prohibiting each department from exercising the functions of the others, the Supreme Court cannot declare any conduct a crime, no matter how morally reprehensible it may be, where it is not so declared by the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.*]

Appeal from District Court, Beaver County; Joshua Greenwood, Judge.

Andrew G. Johnson was convicted of the infamous crime against nature, and he appeals. Reversed.

L. A. Miner, of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and G. A. Iverson and E. V. Higgins, Asst. Attys. Gen., for the State.

MCCARTY, C. J. The defendant, a negro, was convicted in the district court of Beaver county, Utah, of the infamous crime against nature. He was prosecuted under Comp. Laws 1907, § 4228, which provides that "every person who is guilty of the infamous crime against nature committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than three years nor more than twenty years." It is alleged in the information that the defendant committed the act therein charged with his mouth. He demurred to the information on the ground that "it does not state facts sufficient to constitute a public offense," and after conviction moved the court for a new trial. One of the grounds alleged in the motion was that the verdict is "contrary to law." The acts charged in the information constitute an unlawful assault, but the court did not submit that to the jury, nor was it requested to do so. The only issue submitted to them relates to the direct acts charged. The only important question presented by the appeal and necessary to be considered is whether or not the infamous crime against nature can be committed by one male person upon another with the mouth.

[1] The statutes of this state do not designate or mention any particular act or acts constituting the crime; therefore, in determining whether or not the acts charged constituted a crime, we, under Comp. Laws 1907, § 2488, must look to and be governed by the common-law definition. That section provides that "the common law of England, so far as it is not repugnant to, or in conflict with the Constitution of the United States, or the Constitution and laws of this state shall be the rule of decision in all of the courts of this state." (Italics ours.)

[2] At common law "sodomy" and the term "infamous crime against nature" meant the same thing and were used interchangeably. In 4 Blackstone's Commentaries, 215, the author refers to and characterizes sodomy as the infamous crime against nature. Nor is

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there any distinction made as to the meaning of these terms by the more modern writers on criminal law. In 2 McClain's Criminal Law, 1153, it is said: "This offense is sufficiently described by calling it, with Blackstone, the crime against nature, committed either with a human being or a beast." In 1 Wharton's Criminal Law (11th Ed.) § 753, the crime is defined as follows: "Sodomy is the 'crime against nature' or the 'infamous crime against nature'; these phrases being used as synonymous with the word 'sodomy' in all its various branches or designations." 25 A. & E. Ency. L. (2d Ed.) 1144; Black's Law Dict. 299; Anderson's Law Dict. 958. See, also, 2 Words and Phrases, 1740, and 7 Words and Phrases, 6539.

The courts of last resort of practically all of the jurisdictions of this country in which this question has arisen, and where the statutes as in this state, fail to define the crime of sodomy other than as "the infamous crime against nature committed with mankind or any animal," or "with mankind or beast," seem to accept and apply the common-law definition in determining whether the particular acts charged in an indictment or information do or do not constitute the crime. We deem it unnecessary to cite and review all these decisions. Attention, however, is invited to 25 A. & E. Ency. L. (2d Ed.) 1145, and the numerous cases cited in the footnotes to the text in which the crime in all of its phases is discussed.

This brings us to the question of whether or not the acts charged in the information, tested by the common-law definition of the infamous crime against nature, constitute a violation of the penal statute under consideration. In 1 Wharton's Criminal Law (11th Ed.) § 754, it is said: "Sodomy proper is the carnal copulation of human beings in other than the natural manner; that is, 'against nature' and per anum." This, says the author, is the common-law definition; and, while he says this definition has been much modified "under the present doctrine," it will be noticed, by pursuing his discussion of the subject, that the modification is largely, if not solely, due to the broadening of the term by legislative enactments rather than by judicial construction. In section 757 of the same volume the author says: "Statutes have been passed in the majority of the states defining and punishing the crime of sodomy in all its branches. * * * Many of these statutes designate the offense as 'the crime against nature,' or the 'detestable and abominable crime against nature,' 'the infamous crime against nature,' and the like, including thereunder all such acts, whether with man or beast. Some of these statutes provide for the punishment without any attempt at a definition of the crime, in which case, in all states in which the common law originally prevailed or has been adopted by statute, the common-law definition of the

crime will prevail." In 3 Russell on Crimes, 249, it is said: "The offense consists in a carnal knowledge committed against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast." Again, on page 250, the author says: "To constitute this offense, the act must be in that part where sodomy is usually committed. The act in a child's mouth does not constitute the offense." In 2 Bishop's Criminal Law (7th Ed.) § 1191, the crime is defined as follows: "Sodomy is a carnal copulation, by human beings, with each other against nature, or with a beast." Again, in section 1194 of the same volume, he says: "A penetration of the mouth is not sodomy." In 2 McClain's Criminal Law, § 1153, the author, in defining the manner in which the crime may be committed, uses the same phraseology as that used by Mr. Russell. It clearly appears from the foregoing authorities that, under the common-law definition of the offense and where, as in this state, the definition has not been broadened or enlarged by statute, the acts charged in the information do not constitute a penal offense. Our conclusion is supported by the following cases: Commonwealth v. Poindexter, 133 Ky. 720, 118 S. W. 943; People v. Williams, 59 Cal. 397; Prindle v. State, 31 Tex. Cr. R. 551, 21 S. W. 360, 37 Am. St. Rep. 833; Lewis v. State, 36 Tex. Cr. R. 37, 35 S. W. 372, 61 Am. St. Rep. 831; Harvey v. State, 55 Tex. Cr. R. 199, 115 S. W. 1193; Kinnan v. State, 86 Neb. 234, 125 N. W. 594, 27 L. R. A. (N. S.) 478. The last is cited in 21 Ann. Cas. 335. We there invite attention to an extended note in which the annotator cites and reviews the leading cases on the subject both in this country and in England.

Counsel for the state rely upon the following cases: Means v. State, 125 Wis. 650, 104 N. W. 815; Honselman v. People, 168 Ill. 172, 48 N. E. 304; State v. Whitmarsh, 26 S. D. 428, 128 N. W. 580; State v. Start, 132 Pac. 512; Herring v. State, 119 Ga. 709, 46 S. E. 876. In Means v. State the Wisconsin court held that an act similar to the acts charged in this case was a violation of section 4591 of the statutes of that state. But that statute provides that the "crime may be committed by the penetration of the mouth," etc. Because of that dissimilarity of the statute we think the case is not applicable. The Illinois statute provides that every person "convicted of the crime of * * * sodomy or other crime against nature * * * shall be deemed," etc. In Honselman v. People that court held, and we think correctly, that, "while the crime against nature and sodomy have often been used as synonymous terms," the Criminal Code of that state, defining infamous crimes, "plainly shows that the Legislature included in the crime against nature other forms of the offense than sodomy or buggery." The phrase "other crime against nature," associated as it is with the word

"sodomy" by the disjunctive, is broad and comprehensive in its meaning and might well include any act of copulation that is contrary to or against the order of nature. That decision, therefore, is also not in point. The Georgia statute provides that "sodomy is the carnal knowledge and connection against the order of nature," etc. In the case of *Herring v. State*, supra, the Georgia court, construing the statute, said: "It will be noted that this definition contains no limitation as to the organ with which such unnatural connection may be made." The statute, as thus construed, and we are not prepared to say that the construction is an unreasonable one, includes acts of unnatural copulation not included in the common-law definition of sodomy or the infamous crime against nature. The Georgia case, therefore, is of no assistance to us in this case. The Oregon statute defining sodomy is much broader than ours. Section 1939 of the Criminal Code of that state provides that, "if any person shall commit sodomy or the crime against nature either with mankind or beast, such person, upon conviction thereof, shall be punished," etc. Section 1405, that "proof of actual penetration into the body is sufficient to sustain an indictment for * * * the crime against nature." In the case of *State v. Start*, where it was alleged that the crime was committed in the same manner as is alleged in the case at bar, the Supreme Court of Oregon, in that case, construing the foregoing statute, said: "No particular opening of the body into which penetration can be made is specified in this section (1405). It follows that the actual penetration of the virile member into any orifice of the human body except the vaginal opening of the female is sufficient for the establishment of the crime in question." That such is a reasonable construction of the Oregon statute is too plain to admit of serious discussion; hence this case, like the three preceding it, is no authority either for or against our conclusion. The South Dakota statute defining sodomy is substantially the same as our own. In the South Dakota case (*State v. Whitemarsh*), where the acts charged were of the same character as charged in the case at bar, it was held that the acts constituted in the language of the statute, "the detestable and abominable crime against nature," but it is said in the opinion that "It must be conceded that under the common law sodomy could not be committed by means of the mouth." The court further says: "Certainly this unusual act is many times more 'detestable and abominable' than that made criminal at common law. As was well said by the court in *State v. Vicknair*, 52 La. Ann. 1921, 28 South. 273: 'But why, in the common-law courts, the use of the mouth should not have been considered as much against nature as though the act were committed per anum is incomprehensible.'" We thus have copied somewhat copiously from

the South Dakota case because we think it is the only case cited which in any degree holds contrary to our conclusion; and while it is held in that case that under the South Dakota statute, which is substantially the same as ours, the acts charged in the information constitute the crime in question, that court, nevertheless, concedes that such acts do not amount to sodomy as defined by the common law. When it is shown, as we have, that, under the statutes of this state, we, in determining whether the acts charged constitute the "infamous crime against nature," must resort to and be governed by the common-law definition, the decision, to some extent, is an authority supporting our conclusion. The Louisiana case cited by the South Dakota court can have but little, if any, bearing upon the question here under consideration for the reason that the Louisiana statute provides that any one convicted of the crime against nature "committed with mankind or beast, with the sexual organs, or with the mouth, is punishable," etc. The Oregon Supreme Court in *State v. Start*, supra, observes that "It is an offense against nature. There can be no difference in reason whether such an unnatural coition takes place in the mouth or in the fundament. * * * The moral filthiness and iniquity against which the statute is aimed is the same in both cases. Each is rightfully included in the true scope and meaning of the common-law definition quoted from Hawkins." In *State v. Whitemarsh* the same thought is expressed in language somewhat different but no less emphatic. Hence counsel for the state, in their brief, strenuously insist that these expressions furnish a "rational and enlightened solution of the question involved, whether the common-law definition of sodomy or the crime against nature is resorted to or not. We do not think so.

[3] While we, from the standpoint of decency and morals, fully concur in all that these and other courts have said regarding the loathsome and revolting character and enormity of the act charged, yet we cannot, in the absence of legislative enactment making such acts criminal and punishable, denounce and punish them as crimes. To do so would in effect be judicial legislation. *Kinnan v. State*, supra. This view is well expressed in *Davis v. Brown*, 27 Ohio St. 326, in an action for slander where general damages only were sought to be recovered. That court says: "The words alleged to have been spoken charged the plaintiff, a young man, with what is known in the text-books as the crime against nature. This is not made an indictable offense by the laws of Ohio." In response to the contention that the words spoken were actionable per se notwithstanding they charged plaintiff with an act which was not an indictable offense in that state, the court, in referring to jurisdictions where sodomy is an indictable offense, further said:

"Wherever such a statute exists, the charge is actionable; but, in the absence of legislation on the subject, it would savor of judicial legislation to make any further innovation on the rule." The court also observed: "In view of the injurious consequences of such a shocking charge, we confess to being strongly tempted to make one further innovation; but looking back to that period of doubt and uncertainty to which we have referred, and remembering that it is of more importance to have a rule, well understood and easily defined, of practical application, and sufficiently comprehensive to meet the ordinary demands of justice, than to have one varying with the changing views of the judges or variable standards of moral conduct in different communities, or at different periods, we are unwilling to make any further innovation, but prefer to remit the matter to the only proper tribunal—the lawmaking power of the state." This principle is also embedded in our Constitution. Section 1 of article 5 of the Constitution of this state provides that "the powers of the government of the state of Utah shall be divided into three distinct departments, the legislative, the executive, and the judicial; and no person charged with the exercise of the powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted." There is no provision of the Constitution that either expressly or otherwise directs or permits the courts of this state to denounce and punish as crimes acts and omissions not made punishable by statute; hence to do what we are urged would be in violation of both the letter and the spirit of the Constitution.

It is to be regretted that there is no statute in this state making the acts charged in the information punishable as a crime. The Legislature can, and no doubt will, when its attention is called to the matter, denounce them as crimes and prescribe proper penalties.

For the reasons herein stated, the judgment is reversed.

STRAUP and FRICK, JJ., concur.

JENSEN v. DAVIS AND WEBER COUNTIES CANAL CO.

(Supreme Court of Utah. Dec. 16, 1913.)

1. WATERS AND WATER COURSES (§ 262*)—IRRIGATION CANAL—LEAKAGE.

Comp. Laws 1907, § 1288x29, requiring the owner of any canal, etc., to maintain the same in repair so as to prevent waste of water or damage to the property of others, requires the owners of an irrigation canal to exercise ordinary care to prevent injury to adjoining land.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 323; Dec. Dig. § 262.*]

2. WATERS AND WATER COURSES (§ 263*)—IRRIGATION CANAL—ACTION.

In an action for injury to land caused by the seepage of water from an irrigation canal, evidence held sufficient to take to the jury the question of the canal owner's negligence.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. § 263.*]

3. WATERS AND WATER COURSES (§ 263*)—WATER COURSES—IRRIGATION CANAL—INJURIES—ACTIONS.

Though, in an action for injury to land caused by seepage of water from an irrigation canal, evidence that after the injury defendant cemented the canal, when the seepage ceased, was not competent to prove negligence, it was competent to rebut defendant's contentions that the water causing the injury did not seep from the canal, and that if it did, it could not have been avoided.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 324; Dec. Dig. § 263.*]

4. TRIAL (§ 255*)—OFFER OF PROOF—EVIDENCE FOR PARTICULAR PURPOSE.

If defendant desired to present the question as to the admissibility of such evidence to prove prior negligence, he should have requested a charge confining and limiting it to the purposes for which it was admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

5. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Though, in an action for injury to land caused by leakage from an irrigation canal, the measure of damages was the diminution of the value of the land, it was not prejudicial error to admit evidence of injuries to crops, where the court correctly charged the jury upon the measure of damages in accordance with appellant's request, and the evidence was admitted only to show the extent of the injury, and the amount of the verdict showed the jury were not misled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Appeal from District Court, Davis County; J. A. Howell, Judge.

Action by Jacob Jensen against the Davis and Weber Counties Canal Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hancock & Barnes, of Salt Lake City, for appellant. John E. Bagley, J. D. Murphy, and Valentine Gideon, all of Ogden, for respondent.

FRICK, J. [1, 2] This was an action to recover damages alleged to have been caused by seepage or percolation from an irrigating canal. The plaintiff, respondent here, as a cause of action, after stating the corporate capacity of the defendant, appellant in this court, in substance alleged that at the time of the injuries complained of he was the owner and in possession of certain lands in Davis county, Utah, on which were growing fruit trees and alfalfa grass; that the appellant for many years prior to the injuries complained of had owned and operated, and then owned and operated, through a portion of respondent's land a certain canal, through

which it conducted large quantities of water used for irrigation and other purposes; that in the fall of 1910 and the winter of 1911 appellant caused said canal to be enlarged by widening and deepening the same at the point where it passes through respondent's land, and at which places the soil is sandy and very porous; that the enlargement of said canal was negligently done, and it was thereafter during the seasons of 1911 and 1912 negligently maintained, by reason of which a large quantity of the water flowing in said canal was caused and permitted to seep and percolate through the porous soil aforesaid, and to be and remain underneath and near the surface of respondent's orchard and alfalfa growing on the land aforesaid, causing a large number of the fruit trees growing in said orchard and a part of said alfalfa to die, all of which injured and damaged said land to the extent of \$1,500, for which sum he demanded judgment. The appellant answered the complaint, and in its answer, after admitting its corporate capacity, ownership, enlargement, and use of said canal for the purposes stated by respondent, in effect, denied all other allegations of the complaint. It further averred that the enlargement of said canal was carefully and prudently done, and that it was thereafter carefully operated and maintained. It also interposed the plea of the statute of limitations. Respondent, in substance, proved that for many years prior to 1910, appellant had owned and used said canal for the purpose of carrying water through it, which was used for irrigation and other purposes; that for eight years immediately preceding 1910 respondent had an orchard, alfalfa, and other vegetation growing on his land along and near said canal; that during all of said years he suffered no injury from seepage or percolating water to his trees or crops; that in the fall of 1910 and winter of 1911, appellant enlarged said canal by widening it about six feet and deepening it to some extent, and that after such enlargement, in the growing seasons of 1911 and 1912, large quantities of water seeped and percolated through the porous soil that was exposed by the enlargement of said canal, a large portion of which water seeped and percolated underneath and near the surface of respondent's land, on which was growing a large number of bearing fruit trees and some alfalfa, and which water remained standing in large quantities underneath and near the surface of said soil, as aforesaid, and caused a large number of said fruit trees and a portion of said alfalfa to die; that by reason of the facts and conditions aforesaid respondent's land was damaged, and the amount of such damage was proved; that during the fall and winter of 1912 appellant had caused the sides and bottom of said canal where it passed through respondent's land to be cemented, after which the seepage and percolation and injury ceased. The evidence relating to the cement-

ing of the canal was admitted, over appellant's objections and exceptions. Upon substantially the foregoing evidence appellant interposed a motion for a nonsuit upon the ground that no negligence had been proved, which motion the court denied. After the motion was denied the appellant submitted its evidence, and upon the whole evidence the cause was submitted to the jury, which found in favor of respondent, and assessed the damages to his land in the sum of \$240. Judgment was accordingly entered, which we are asked to reverse for the reasons herein-after stated.

It is insisted that the court erred in overruling the motion for a nonsuit, for the reason that no negligence was shown. We have a statute (Comp. Laws 1907, § 1288x29) which, so far as material here, provides: "The owner or owners of any ditch, canal, flume, or other water course shall maintain the same in repair, so as to prevent waste of water or damage to the property of others." This statute imposes upon the owners of canals or ditches used for irrigation the duty of exercising ordinary care so as to prevent injury and damage to others. This court has, in several cases, held that owners of irrigating canals or ditches are liable for injuries or damages which are directly caused by their acts of omission or commission, if such acts constitute negligence and damage follows. In other words, if by the exercise of ordinary care and prudence, as those terms are ordinarily defined in negligence cases, the damage could have been avoided, a failure to exercise such care and prudence may constitute actionable negligence. *Jepkins v. Hooper*, 13 Utah, 100, 44 Pac. 829; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 54 Pac. 1009, 72 Am. St. Rep. 784; *Belnap v. Widdison*, 32 Utah, 246, 90 Pac. 393; *Wiel, Water Rights*, etc. (3d Ed.) § 461. We are of the opinion that there was sufficient evidence to take the case to the jury. Upon the question of negligence, therefore, the court did not err in refusing to grant a nonsuit.

The reasons just stated also dispose of the assignment that the court erred in not directing a verdict for appellant.

[3, 4] Error is also assigned because the court permitted respondent to show that after the injury to his land by the seepage, appellant had caused the sides and bottom of the canal to be cemented. From the statement made by respondent's counsel when the evidence was offered, it is apparent that it was offered for the purpose of proving negligence. Appellant's counsel strenuously insist that the evidence was not proper for that purpose, and hence they say it was error to permit it to go to the jury. It has been settled by numerous decisions emanating from the courts of last resort that in this country repairs or alterations made after the injury complained of are not competent evidence for the purpose of proving actionable negligence. We need not pause here to cite the

numerous authorities on that point. A large number are collated in counsel's brief, to which reference is hereby made. It does not necessarily follow, however, that because subsequent acts of omission or commission may not be shown to prove prior negligence, such acts may not under some circumstances, be competent evidence for some other purpose. While the evidence objected to was not proper for the purpose for which it was offered by counsel for respondent, yet it was competent and proper for at least two other purposes. The reasons assigned by appellant's counsel in their brief why a nonsuit should have been granted are that "there is no evidence to show that something had not been done that should have been done, nor that something had been done improperly" in the enlargement of the canal, and in the subsequent maintenance and use thereof. Again, one of the principal contentions of appellant's counsel all through the trial of the case in the court below was, and in this court is, that the damage to respondent's land was not caused by water which seeped or percolated from the canal. Two contentions thus somewhat contradictory were made by appellant: (1) That the water on respondent's land, causing the damage, did not seep from the canal; and (2), if it did, such seepage could not have been avoided. As we shall attempt to show, the evidence objected to tended to disprove both contentions, and hence for that purpose was admissible. Before respondent could recover, and the court so charged the jury, he was required to prove, by a preponderance of the evidence, that the damage of which he complained was actually caused by seepage water coming from the canal. Respondent did prove that before its enlargement the canal had been used for many years, and that, although during all that time practically the same quantity of water was flowing therein during the irrigating seasons, yet no damage had ever resulted to the land or the trees growing thereon, but that immediately after the canal was enlarged the seepage water began to accumulate on his land. By the evidence to which counsel objected it was shown that after the sides and bottom of the canal had been cemented, the seepage ceased. The inference to be deduced from all the foregoing evidence is obvious, and therefore it was shown that it was the water which seeped and percolated from the canal that in all probability caused the damage complained of. The evidence, therefore, was properly received as tending to prove the foregoing issue.

But, as pointed out, counsel also assert that it was not shown that anything was omitted that should have been done. There is but one inference to be deduced from the fact that the seepage ceased as soon as the sides and bottom of the canal had been cemented. These facts, or the inferences to be deduced therefrom, therefore, also constitut-

ed evidence tending to show that there was a feasible and practical method by which the seepage could have been avoided. Counsel's contentions, therefore, must fail. But suppose respondent had produced experts by whom he had shown that it was practical to cement the sides and bottom of the canal, and if that had been done, or if the sides and bottom had otherwise been made impervious to water, the seepage and consequent damage would have been avoided, would not such evidence have been competent upon the question of whether the seepage could have been avoided in the first place, or arrested afterwards? Respondent was, however, not limited to the foregoing method of proving these elements. If he proved that the canal was actually cemented, and immediately thereafter the seepage ceased, then we think he at least proved facts from which the jury had the right to infer that there was a feasible and practical method which, if it had been applied when the canal was widened, would have avoided the seepage and consequent damage. While the evidence, therefore, was not proper to show antecedent negligence, it was nevertheless proper for the purposes just indicated. If counsel desired to present the question of the admission of the evidence for review to this court, they could have done so by requesting the court to charge the jury that, while they could consider the evidence for the purpose above stated, yet they could not consider it for the purpose of proving negligence on the part of appellant. If the court had refused, to so limit the evidence, counsel could have excepted to such refusal, and then have presented the question upon the exception for review. Counsel did not do this, but they predicate error upon the broad ground that the evidence was not admissible for any purpose. This, as we have pointed out, is not tenable, since the evidence was admissible for some purpose. While the opinion written by Mr. Justice Zane in *Jenkins v. Hooper*, supra, seems open to the construction that subsequent alterations and repairs might be shown for the purpose of proving negligence, yet when the facts of that case are carefully considered, the evidence there admitted was admissible for the same reasons that it was admissible in this case.

[5] It is also contended that the court erred in admitting evidence respecting the injury to the growing trees and alfalfa. That evidence was admitted only for the purpose of showing the extent of the injury, and the court charged the jury upon the measure of damages just as appellant's counsel insisted should be done, namely, that respondent could recover only for the diminution, if any, of the value of his land. No complaint is made of that charge. It is manifest, however, from the amount of damages found by the jury, that they could not have been misled by anything that was either said or omitted with respect to the amount of damages

that might be allowed. Under respondent's evidence the jury could have allowed a much larger sum than they did.

The contention that the action was barred by our statute of limitations is clearly untenable, and requires no special consideration.

We find no reversible error in the record, and the judgment therefore should be, and it accordingly is, affirmed, with costs.

McCARTY, C. J., and STRAUP, J., concur.

SALT LAKE CITY et al. v. UTAH & SALT LAKE CANAL CO. et al.

(Supreme Court of Utah. Dec. 12, 1913.
Rehearing Denied Jan. 12, 1914.)

1. MOTIONS (§ 2*)—SUPPLEMENTAL DECREE—CONFORMITY TO PLEADINGS.

Where, in a controversy among several irrigation companies as to property rights to the water of a river, the court, in its original decree, determined and adjudicated such rights, ordered the parties to construct proper appliances, etc., for the correct measurement and diversion of the amounts to which each was respectively adjudged entitled, appointed a commissioner to superintend such measurement and diversion, and also expressly retained jurisdiction to make any supplemental orders necessary to make effectual the rights awarded by the original decree, additional pleadings were not necessary to invoke such further action of the court; but a motion, filed by one of the parties six years afterwards, which stated that it was advised by the commissioner that certain improvements were needed to properly distribute the waters, etc., and moved for an order directing the parties to appear in court for a hearing to determine such improvement, was sufficient, and a decree ordering certain improvements to be made was not coram non judice, since, as such decree was only supplemental to the original decree, the issues formed by the original pleadings were sufficient, though the motion was informal, and the better practice would have been to have supported it by affidavits, yet, as the parties were in court and evidence introduced, this was not fatal.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 1; Dec. Dig. § 2.*]

2. MOTIONS (§ 32*)—APPEARANCE—WAIVER OF OBJECTIONS.

Since, as the court, by the retention of jurisdiction in the original decree, had jurisdiction of the subject-matter, the parties, by appearing and taking part in the proceedings, waived any defect in the motion.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. §§ 12, 25; Dec. Dig. § 32.*]

3. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—PLEADING.

Though pleadings should have been filed, yet the failure to file them was not prejudicial, since part of the evidence introduced on the hearing was a very elaborate report by the commissioner and two other engineers setting forth in detail just what improvements were necessary, which showed plainly the matters before the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4075-4083; Dec. Dig. § 1039.*]

4. APPEAL AND ERROR (§ 882*)—WAIVER OF OBJECTIONS TO WANT OF PLEADINGS.

A party whose counsel filed the motion upon which the action of the court was invoked,

and on the hearing repeatedly stated that pleadings were unnecessary, and other parties who acquiesced in such action were estopped to thereafter complain that pleadings were not filed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

5. WATERS AND WATER COURSES (§ 33*)—APPROPRIATION—ACTION TO DETERMINE RIGHTS—EVIDENCE.

Evidence, on a hearing to determine whether a supplemental order was necessary to make effectual an original decree fixing the rights of irrigation companies in water of a stream, held to sustain a finding that certain improvements were necessary for the proper measurement of the water to which each was entitled.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.*]

6. WATERS AND WATER COURSES (§ 33*)—APPROPRIATION—ACTION TO DETERMINE AND PROTECT RIGHTS—EVIDENCE.

In a proceeding to determine whether certain improvements were necessary to make effectual water rights awarded to irrigation companies, and, if so, to apportion the cost, evidence held not to sustain a finding that the construction of a dam and measuring devices below the intakes of two of the companies would be for the joint benefit of all.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.*]

7. WATERS AND WATER COURSES (§ 33*)—DETERMINATION OF WATER RIGHTS—SUPPLEMENTAL DECREE.

Where an original decree, after determining the rights of irrigation companies in the water of a river, provided that the parties should "construct at their own cost proper appliances for the measurement of the waters awarded to them respectively," a supplemental decree, prorating to all the cost of a dam and weir located below the intakes of two of the companies, conflicted therewith, and was void.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.*]

Straup, J., dissenting in part.

Appeal from District Court, Salt Lake County; C. W. Morse, Judge.

Proceedings by Salt Lake City against the Utah & Salt Lake Canal Company and others to determine whether certain improvements were necessary to be made in a river to protect water rights awarded to the parties by the original decree. From a decree ordering certain improvements to be made, and prorating the costs, the Utah & Salt Lake Canal Company, the Telluride Power Company, and the East Jordan Irrigation Company appeal. Affirmed.

Thurman, Wedgwood & Irvine, of Salt Lake City, for Utah & Salt Lake Canal Co. S. A. Bailey and E. C. Lackner, both of Salt Lake City, for Telluride Power Co. Powers, Marloneaux, Stott & McKinney, of Salt Lake City, for East Jordan Irr. Co. F. S. Richards, of Salt Lake City, for Salt Lake City. Stewart, Stewart & Alexander, of Salt Lake City, for North Jordan Irr. Co. John M. Cannon, of Salt Lake City, for South Jordan Canal Co.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

MCCARTY, C. J. On July 19, 1901, a decree was entered in the district court of Salt Lake county in an action brought to quiet the title to the waters of the Jordan river. That decree, among other things, provides that "the persons and corporations, parties to this suit, shall respectively construct or cause to be constructed at their own cost, and under the direction and supervision of the commissioner appointed by the court, proper appliances for the correct measurement of the waters awarded to them respectively, and thereafter shall maintain and keep in place dams, headgates, flumes, canals, penstocks, and other means by which said water is diverted, conveyed, or used in a good state of repair, together with appliances for the measurement of such water, to the end that no unnecessary loss from seepage or leakage shall occur, and that the water shall be economically applied to the uses for which it is awarded." The decree further provides that the court shall retain "original jurisdiction in this case and the subject-matter thereof and of the parties thereto * * * for the purpose of all necessary supplementary orders and decrees which may be required to make effectual the rights awarded and preserved by this decree." The decree also provides that, "for the purpose of carrying into effect this decree according to its true intent and purpose, J. Fewson Smith, Jr., is hereby appointed as a commissioner * * * to superintend and direct the measurement and division of all the water distributed by this decree in accordance therewith, to direct, supervise, and inspect all means and appliances for the diversion, conveyance, and use of the same, and to report from time to time to the court any violation of the provisions of this decree." The case was appealed to this court, and the decree affirmed. 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648.

In the year 1892 the Utah Salt Lake Canal Company, the East Jordan Irrigation Company, and the South Jordan Canal Company constructed a dam across the head of the Jordan river, the outlet of Utah Lake, for the purpose of holding back the flow of the waters of the lake, and regulating the volume of discharge thereof, and in connection therewith installed a pumping plant at the point where the lake empties into the Jordan river. This pumping plant consisted of four pumps, each of which was and is capable of pumping 100 cubic feet of water per second of time. The commissioner, during the latter part of the year 1901, made certain improvements at the impounding dam of the Jordan river, and installed a weir at a point in the river near the power plant in what is known as the Jordan Narrows, and on the 13th day of January, 1902, by consent of all the parties, the court made a supplemental decree affirming the report of the commissioner relating to such improvements,

and assessed the costs thereof in different amounts against each of the parties to the original decree. In the year 1902 Salt Lake City acquired a one-fourth interest in the pumps mentioned and the lands upon which they are located. In January, 1904, a contract was entered into between Salt Lake City, South Jordan Canal Company, East Jordan Irrigation Company, Utah & Salt Lake Canal Company, and the North Jordan Irrigation Company, all parties to this proceeding, by the terms of which the North Jordan Irrigation Company became the owner of a one-fifth interest in the pumping plant and the lands upon which it is situated and adjacent thereto. That contract, among other things, provided that: "It is hereby expressly understood and agreed by the parties to this contract that from this day (January 26, 1904) the parties hereto are to be co-owners each of an undivided one-fifth interest in said pumping plant. Nothing in this contract contained shall in any manner bind any party hereto to any specific expenditure in the future in relation to said pumping plant save only the cost of maintenance and operation at its present capacity without the consent of said party. It is expressly further understood and agreed between the parties hereto that this contract or instrument is made solely with reference to the pumping plant and property connected therewith as hereinbefore described, and is not intended and shall not be construed to in any way alter, change, or modify the existing water rights or privileges of the parties hereto."

The pumping plant referred to was enlarged from time to time by the installation of additional pumps to meet the requirements and demands of Salt Lake City and the irrigation companies mentioned for an increased supply of water, and supplemental decrees were made and entered by the court to meet the changed conditions, and for the carrying into effect of the provisions of the original decree under such changed conditions.

The relative locations of the respective points of diversion of the waters of Jordan river by the several canal companies are, approximately, as follows: Ten miles from the source of the Jordan river is the intake of the East Jordan Irrigation Company. At the same point, and on the other side of the stream, is the intake of the Utah & Salt Lake Canal Company and the Telluride Power Company, hereinafter referred to as the Power Company. A mile farther down the river is the joint intake of Salt Lake City and the South Jordan Canal Company. A mile below the latter location is the power plant of the Power Company, at which place the waters utilized by it are required to be returned to the stream or canals. Eight miles below the last location is the intake of the Gardner Mill Race.

On November 17, 1910, the following motion was filed in the cause by the Utah &

Salt Lake Canal Company: "Comes now the Utah & Salt Lake Canal Company, and respectfully represents to the court that it is advised by J. Fewson Smith, Jr., the commissioner of this court, that certain improvements are necessary in the Jordan river in order that the waters thereof, to which the respective parties to this action are entitled, may be properly and economically distributed. Wherefore, the said Utah & Salt Lake Canal Company moves the court that an order of this court issue directed to J. Fewson Smith, Jr., the said commissioner, and to each and all the parties to appear before this court, at a time fixed in said order, and that then a hearing be had, and that at the conclusion thereof the character of such improvements necessary, if any, be determined, fixed, and established by order of this court, and that the proportionate part of the expenses of such improvements to be paid by each of the parties to this action be fixed and determined, and that a proper order be made as to the manner, and form, and time of payment thereof."

No petition or pleading other than the foregoing motion was presented to the court or filed in the cause to invoke the action of the court in regard to the subject-matter of the motion. On January 10, 1911, the matter came on for hearing, and counsel for the East Jordan Irrigation Company interposed an objection to the taking of testimony, which, so far as material here, was as follows: "The East Jordan Irrigation Company desires to interpose a formal objection on the ground there is no issue before the court upon which testimony may be taken; upon the further ground there is no pleading in the case, original or otherwise, which justifies the proposed procedure."

The objection was overruled, and evidence was introduced showing the necessity of repairing the dams, weirs, and devices used in distributing the waters of Jordan river, and of making additional improvements to enable the commissioner theretofore appointed by the court to efficiently and equitably distribute the waters to the several irrigation companies and others entitled thereto. Before the taking of testimony was concluded, the court, with the approval of the parties to this appeal, temporarily suspended the proceedings, and appointed J. Fewson Smith, Jr., the commissioner, and two other civil engineers, namely, A. F. Doremus and Willard Cannon, as a board of engineers to personally examine the dams, weirs, and devices then installed, and to make such recommendations regarding the improvement of the system as they might deem necessary for the proper and equitable distribution of the waters mentioned. On June 8, 1911, the engineers filed their report, in which they recommended the making of improvements, such as dams, headgates, and measuring devices, such as they deemed necessary for the

distribution of the waters. The report recited, and the evidence showed, that: "The devices now employed for measuring and diverting the water are old, inaccurate, and generally dilapidated contrivances that involve much labor and considerable risk in their operation. In most cases the measuring devices are situated from one to three miles below the head of the channel for which they are used to measure the water. This compels many miles of unnecessary travel between head of ditch and measuring device in order to determine and apportion the allotted flow." After making those observations, the engineers specify and point out in their report what, in their judgment, would be proper devices, such as dams, weirs, and headgates, for measuring the waters, and distributing the same to the parties entitled thereto, and recommend that such devices be installed in and along the Jordan river at the intakes of the several canals diverting water therefrom as a "means (2) for accurately measuring the common water supply, (3) for equalizing and regulating the common flow, (4) for effective apportionment and diversion, (5) for measuring each individual ditch supply, (6) for regulating each individual ditch flow, and (7) for preventing damage by floods." And they further recommended that "all devices employed to meet these requirements should be durable, of reasonable cost, and the most effective and economical in operation." The report further recites that: "To accomplish these results, the equipment should be carefully planned, so that the various individual ditch devices will not only effectually perform their special functions, but at the same time constitute essential units of the completed whole, which should be as nearly as possible automatic in its operations throughout. We recommend that such equipment should consist of the following units: (a) A principal dam in the river at the head of the system to serve (1) for impounding water in the river channel above to the extent needed to equalize the fluctuations in the flow of water from the lake; * * * (4) for supporting a substantial weir (at or near the intake of the East Jordan Irrigation Company's canal) to measure the flow of water into the system below; and (5) for containing gates that can be opened for the passage of water in excess of that of the storage capacity of the lake, and for flushing out the basin of forebay immediately above such dam (the impounding dam)." Continuing, the report recites that, in the judgment of the engineers, a dam and gates should be placed in the river at the several points of diversion below the weir above mentioned; that the devices mentioned in their report are "absolutely necessary to the common uses of the system, and therefore advise that all should be provided at the common expense; and that the total cost

thereof should be apportioned among the several canals and ditches of the system in the same proportion that the total common water supply is now apportioned among them."

When the report was submitted to the court, the East Jordan Irrigation Company made timely objections to its adoption. One of the grounds of objection was that certain recommendations made therein by the board of engineers would, if adopted by the court, be in conflict with the provisions, heretofore referred to, of the original decree. The court, for the time being, reserved its decision on the question raised by the objection, and permitted the parties to this appeal to introduce evidence as to the necessity of making the improvements and installing the devices recommended in the report of the engineers. After much evidence was introduced, all of which was without conflict, the court overruled the objections made to the adoption of the report, and entered an order approving the plans and specifications submitted by the commissioner, which seem to have been in conformity with the recommendations of the board of engineers, for the construction of dams, weirs, and devices mentioned in the report.

The court made findings of fact and conclusions of law and entered a decree which, in the main, are based upon and are responsive to certain agreements and stipulations made and entered into in open court by and between the parties to these proceedings. We deem it unnecessary to review or to consider the findings and decree in so far as they are based upon the agreements and stipulations mentioned.

The findings of fact complained of by the appellants are as follows:

"(a) That Utah Lake, Jordan river, and appliances for the diversion of water from said lake and river into the canals constitute one complete and entire irrigation system. That, in order to properly regulate the flow of water in the Jordan river, so that the various parties may draw therefrom, with substantial accuracy, the quantity of water to which they are respectively entitled under said decree, it is necessary that certain controlling dams and devices, with proper weirs thereon and waterways therein, shall be constructed, particularly in the Jordan Narrows near the old Turner dam, near the intake of the Gardner Mill Race, and near the intake of the South Jordan and Salt Lake City Canals; and such devices are for the joint benefit of all the parties to said action.

"(b) That a concrete diversion dam and measuring weir shall be constructed in the Jordan Narrows at or near the intake of the East Jordan and Utah & Salt Lake Canals, a concrete dam and measuring weir at the intake of the Salt Lake City and South Jordan Canals, and a concrete dam and measuring weir at the intake of the North Jordan Canal, at what is known as the Gardner Mill Race.

That the design and general construction of said dams and measuring weirs should conform substantially to the plans and specifications prepared by J. Fewson Smith, Jr., and D. H. Blossom, copies of which should be filed with and approved by the court, prior to the commencement of the construction of said improvements, which should be made under the supervision of the commissioner of the court, and be prosecuted with reasonable diligence. That the cost and expense of the construction of said improvements should be borne by Salt Lake City, Utah & Salt Lake Canal Company, North Jordan Irrigation Company, and the Telluride Power Company in the following proportions, to wit:

Salt Lake City.....	150/1000
Utah & Salt Lake Canal Company....	240/1000
Eastern Jordan Irrigation Company....	170/1000
South Jordan Canal Company.....	142/1000
North Jordan Irrigation Company....	120/1000
Telluride Power Company.....	270/1000

After the court had signified its intention of making and filing the foregoing findings of fact, and before the same were filed in the cause, the Utah & Salt Lake Canal Company filed written objections to the construction of the dams mentioned in the findings of fact. The third and fourth grounds of objection are as follows:

"(3) That the construction of the proposed dam with openings as planned below the level of the top of the 'old dam' will add to the expense of the construction of a diverting dam for the Utah & Salt Lake Canal Company without benefit to it.

"(4) It [the Utah & Salt Lake Canal Company] objects to the construction of the proposed dams and proposed channel changes in the Jordan river below the proposed upper dam so far as any portion of the cost thereof may be deemed chargeable against it. It is in no way interested in said dams and channel changes, and the same serve no purpose in diverting water into its canal."

The Power Company made timely objections which were in effect the same as those filed by the Utah & Salt Lake Canal Company. The objections were overruled, and a decree in conformity with the findings made by the court was duly rendered. From the decree, the Utah & Salt Lake Canal Company, the Telluride Power Company, and the East Jordan Irrigation Company appeal.

Appellants contend that the court acted without jurisdiction in declaring (1) that the improvements mentioned in the findings of fact above set forth shall be made, and (2) that the cost and expense of constructing the same shall be prorated according to the respective interests of the parties in the waters of Jordan river. The principal grounds urged against this portion of the court's decision are (a) that it is not predicated upon any pleading in the cause, and (b) that it is in conflict with the provisions heretofore set forth of the original decree. On the other

hand, it is earnestly contended by respondents that no part of the last decree is in conflict with the original decree; that the last decree was entered as a supplemental decree only to meet the changed conditions brought about since the entry of the original decree by the increased volume of water in the Jordan river during portions of the irrigation season produced by the pumping of water from Utah Lake. In other words, they contend that the decree is merely supplemental to and in aid of the original decree.

[1] Courts of equity undoubtedly have the power to make such orders as may be necessary to carry out and give effect to their decrees. 4 Pom. Eq. Jur. (3d Ed.) 1317. In proceedings of this character, where no change or modification is sought, and the only effect of the proceedings is to carry out the provisions of the decree, and make them effective, a motion supported by affidavits setting forth the facts upon which the movant relies is ordinarily sufficient to invoke the action of the court. While this is the usual, and, as we think, the better practice, yet, where the parties to the decree appear in court, and evidence is introduced in support of and against granting the motion, as was done in this case, the failure to file an affidavit in support of the motion is not necessarily fatal to the proceedings. Where, however, a party to a decree seeks to have it changed or modified as to substance, his remedy is by a bill of review setting forth the facts upon which he relies for relief. Story's Eq. Pl. § 338; 3 Ency. Pl. & Pr. 570, 571; 16 Cyc. 517. It is vigorously contended on behalf of appellants that the decree entered in these proceedings cannot be upheld, because no pleadings were filed, and hence there are no issues upon which to base a decree. These proceedings were had in an action over which the court had, and for certain purposes still retains, jurisdiction. As hereinbefore pointed out, the court retained, and still retains, jurisdiction "for the purpose of [making] all necessary supplemental orders and decrees which may be required to make effectual the rights awarded and preserved by the decree." In this proceeding the action of the court was invoked, not for the purpose of adjudicating property rights and conflicting interests of the parties pertaining to the subject-matter of the action, but to carry into effect the provisions of the decree. The pleadings forming the issues and the judgment rendered thereon, in which the property rights of the respective parties to the action are adjudicated, were, and will continue to be, sufficient to authorize any of the parties to the decree to invoke the jurisdiction and action of the court when necessary to carry out and make effectual the provisions of the decree. This is not, as counsel for appellants seem to infer, a proceeding to adjudicate property rights between the parties to the action, but a proceeding in which the action of the court is in-

voked to preserve rights which have been adjudicated by the decree. Therefore pleadings were not necessary to invoke the jurisdiction and action of the court in the premises. The filing of a motion by any of the parties to a decree inviting the court's attention to the particular matters or things necessary to be done in order to carry out and make effectual the provisions of the decree, and due service thereof on all the parties whose rights will be affected by the proceedings, is sufficient, and especially where, as in the case at bar, the parties appear in court, and take part in the proceedings.

[2, 3] Moreover, after the action of the court had been invoked, and evidence was being taken, the court, as hereinbefore stated, temporarily suspended proceedings and appointed the board of engineers mentioned. The report and recommendations made and filed by the engineers are very elaborate, containing a full and detailed statement of the improvements, and general character thereof, that they deemed necessary at each point of diversion along Jordan river to enable the commissioner to efficiently and equitably distribute the waters of the stream in accordance with the provisions of the original decree. The commissioner, J. Fewson Smith, Jr., prepared plans and specifications of the improvements recommended by himself and the other members of the board of engineers and a statement of the estimated cost of the improvements recommended at each of the points of diversion. These plans and specifications, with a detailed statement of their estimated cost, were submitted to the court, and the commissioner was examined and cross-examined at great length by counsel of the respective parties to this appeal. It was this report, not the motion, upon which the proceedings were in effect had. No pleading, however perfect as such, could contain a more complete and lucid statement of the facts of the subject-matter of inquiry than was contained in the report and recommendations made by the board of engineers, supplemented, as the report was, by the plans and specifications of the improvements and the estimated cost thereof submitted to the court by the commissioner. The parties were not, as has been suggested, left to grope in the dark, and to surmise and conjecture as to what was really before the court for investigation, or the purposes thereof. On the contrary, they were advised of and fully comprehended the purpose of the proceeding and the scope that it would probably take. After the report of the engineers was filed, Salt Lake City, one of the plaintiffs in the action, filed a notice, which, so far as material here, is as follows:

"To the Defendants and Interveners in the Above-Entitled Action, and the Respective Attorneys:

"Please take notice that on a hearing of all undisposed-of matters in the above-entitled action, before Hon. O. W. Morse, Judge,

on Tuesday, the 9th day of April, 1912, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, the plaintiff Salt Lake City will move the court to consider and determine the following undisposed-of pending matters in said cause, to wit: (1) What, if any, improvements recommended in the report of Commissioners A. F. Doremus, Willard T. Cannon, and J. Fewson Smith, Jr., heretofore filed herein, shall be made, and the time for making the same, and how the expense thereof shall be apportioned."

In response to this notice, appellants and other parties to the action appeared in court, and took part in the proceedings. The court having jurisdiction of the subject-matter of the action, the parties, by appearing in court, and taking part in the proceedings, waived whatever defects, if any, there were in either of the notices because of the failure to recite more fully therein the matters which the action of the court was invoked to consider.

[4] Let us assume for the sake of argument that, because of the importance of the questions involved, some document in the nature of a pleading setting forth in detail the matters to be considered by the court should have been filed in the first instance. The record conclusively shows that appellants were not prejudiced because this was not done. Nor were they, or either of them, prejudiced because of the informal manner in which the proceedings were conducted.

While the motion upon which these proceedings were inaugurated is not as broad and comprehensive in its recital of facts as it should be, and especially so as no affidavit setting forth the facts was filed in support of the motion, yet we think appellants are estopped from assailing or challenging the provisions of the decree which are not in conflict with and in no way antagonistic to the original decree. The motion upon which the action of the court was invoked and these proceedings were had was filed by appellant the Utah & Salt Lake Canal Company, and its counsel, the author of the motion, during the proceedings, repeatedly in open court expressly waived the filing of pleadings. This waiver was, at least tacitly, acquiesced in by the other two appellants. On one of these occasions, counsel said: "I don't care about any formal pleadings. I don't think there is any need of any. I think the request of the commissioner is enough to set the case." On another occasion he said: "So far as I am concerned, on behalf of the Utah & Salt Lake [Canal Company] I stipulate the decision in this case may be made on the facts submitted to the court, taking into consideration all the legal rights as shown by the evidence as to any and all of the parties concerned, the same as if each and every legal right upon which there is evidence has been set forth fully in the pleadings."

In response to the foregoing statement,

counsel for appellant the East Jordan Irrigation Company said: "I will supplement that on behalf of the East Jordan to this extent, that such contracts as have been read into the record as your honor may desire to have transcribed by the reporter for reference may be transcribed at the expense of the parties."

Later on in the proceedings, counsel for appellant the Utah & Salt Lake Canal Company said: "We will concede, as matter of law, that the court has the power reserved at this time. Questions of what shall be done, cost, and how it shall be paid for, the court has the power, as a matter of law, under the decree, to order that suitable measuring devices be put in these two places."

One of the "places" referred to by counsel is the Jordan Narrows, at or near the intake of the canals of the East Jordan and Utah & Salt Lake Companies. The assignment of error in which the decree is assailed on the ground that it is not based upon issues made by proper pleadings is overruled.

[5] The original decree, as hereinbefore stated, provides that the parties to the suit shall respectively construct and maintain, or cause to be constructed and maintained, "at their own cost, and under the direction or supervision of the commissioner appointed by the court, proper appliances for the accurate measurement of the waters awarded to them respectively;" and, as stated, the decree further provides that "original jurisdiction of this cause, and the subject-matter thereof, and the parties thereto, is hereby retained for the purpose of all necessary supplementary orders and decrees which may be required to make effectual the rights awarded and preserved by this decree." The evidence, without conflict, shows that the dams, weirs, and appliances that have been and are now in use are inaccurate and inadequate for the proper distribution of the waters in accordance with the terms of the decree, and the undisputed evidence shows that the commissioner and his assistants are obliged to incur considerable danger in regulating and distributing the waters under present conditions. On this point the commissioner testified, and his testimony is not disputed, in part as follows: "The old dam must be renewed. It is impossible to operate any longer with it in its present condition without danger to the life of the man who tries to make any division there. * * * The old Turner dam which is used for diverting water into the Utah & Salt Lake Canal, and for passing everything that belongs to all other parts of the system except the East Jordan Canal, * * * is dangerous. * * * It is risky for one man to handle the head boards on the top of the platform under the condition that dam is now in. If a man gets in there, he is very apt to drown."

The evidence also shows, in fact it is in effect conceded, that some of the parties to the

decree get more water than they are entitled to receive under the decree, and that this inequality in the distribution cannot be obviated under present conditions. Appellants, in their briefs, say: "It may be true some irrigation companies have at times been getting more water and others less than the original decree specified to be the carrying capacity of their canals. * * * It may be true that at times both the Utah & Salt Lake and East Jordan, for intermittent periods, get more water than they are entitled to."

The undisputed evidence shows that the improvements referred to, if made, would enable the commissioner to overcome these obstacles, and to properly and economically distribute the waters substantially as provided for in the decree. On this point the commissioner testified, and his testimony is not disputed, as follows: "The structures I proposed will enable us to practically overcome the principal variations and fluctuations. In my opinion, I think we could regulate the flow of the water with substantial accuracy with these appliances. I do not know of any other appliances or any other way that those appliances can be constructed that would combine the elements of efficiency and be substantial."

We are of the opinion, and so hold, that the court, under the facts and circumstances as shown by the record, was fully warranted in ordering and decreeing that the improvements be made in accordance with the plans and specifications submitted by the commissioner and recommended by him, and that it did not exceed its jurisdiction in so doing.

[8] We now come to the questions presented by the assignment directed to the findings of fact and decree, wherein it is held that the improvements mentioned are for the "joint benefit of all the parties to said action," and that the cost of putting in and maintaining the improvements should be borne by the parties to the action according to their respective interests in the waters distributed. The record shows, and the court found, that Salt Lake City, Utah & Salt Lake Canal Company, the East Jordan Irrigation Company, and the North Jordan Irrigation Company have a common interest in the impounding dam and in the pumping plant. Counsel for appellants discuss and criticize the court's findings regarding the circumstances and conditions under which the pumps may be put in operation each year, and the basis upon which the cost of starting and operating them shall be prorated among the parties benefited thereby. We think it sufficient to here state, without reviewing the evidence bearing upon this question, that this assignment is without merit, and is therefore overruled. It is conceded that the dam near the intake of the canal of the Power Company and the Utah & Salt Lake Canal Company and the intake of the East Jordan Company canal, and referred to in the evidence as the "main" dam,

is used, not only as a diverting dam for these canals, but that it is also used and is necessary to measure and determine the amount of the flow of the river over the dam to the appropriators down the stream. This dam and weir being for the joint benefit of the appellants and of Salt Lake City, South Jordan Canal Company, and the North Jordan Irrigation Company, the court held, and, as we think, correctly, that the cost of their construction should be prorated between the parties, and that each party should pay in proportion to his interests in the stream. The Power Company, however, takes the position that it ought not to be required to pay any portion of the cost of constructing and maintaining this dam, on the ground that it does not, so it contends, "receive any substantial benefits therefrom." Its counsel, in their printed brief, say: "If there is to be any equity in the apportionment of these costs, it must be on the basis of benefits received, and not on a mere possibility. To the extent to which the parties use these improvements, they should pay therefor. That seems to us to be the only fair basis upon which to divide these expenses. And if the Power Company does not actually receive any substantial benefits therefrom, * * * it should not be required to pay any of the costs thereof."

The commissioner testified, and his evidence is not disputed: "If the Telluride Power Company has the right to use the water of the South Jordan Canal under the decree, that water would have to be taken through the Utah & Salt Lake Canal, and would require a sufficient diversion dam to turn, not only the water to which the Utah & Salt Lake Canal is entitled, but also the quantity the Telluride Power Company might have the right to use of the South Jordan water. The same is true of the North Jordan water and the City water. * * * The improvements here suggested take that into consideration." Further along in his testimony, he says: "If the city, prior claimants, and the North Jordan are using the water, the Telluride Power Company cannot get all the water it sees fit on account of the incapacity of the canal to carry it. Leaving that out, there is no reason why they can't get it. It depends entirely upon their providing means of using it. I know of no reason why it is not under their control, if they see fit to exercise it."

The extent of the Power Company's right to the use of the water for power purposes is determined and fixed by the original decree as follows: "The Power Company is the owner of and entitled to the right to use all the water of Jordan river flowing in and through the channel thereof, at and above a point on said river where the power plant of said company is situated, to the use of which the several persons and claimants diverting the water of the river north and be-

low the said power plant are entitled as appropriators, with fixed and primary rights, as awarded by this decree, and to convey such water to its power plant for use in the operation of the same, and to deliver the same, after such use, back into the river * * * at a point opposite the place of the use by the said company."

The decree also specifically provides that the Power Company also has the right to the use "in the same manner," for operating its power plant, the water awarded by the decree to the South Jordan Canal Company and to Salt Lake City. The evidence shows, in fact it is conceded, that the Power Company has two wheels in its plant, and that it requires from "between 86 and 100 to 120 second feet of water to operate each wheel. That is, to operate both wheels at the same time, it requires approximately from 200 to 240 second feet of water. In other words, the maximum amount of water required to operate the power plant to its full capacity is 240 second feet. The Utah & Salt Lake Canal Company has decreed to it 246 second feet of water. The carrying capacity of this canal is 300 second feet only. Because of the limited carrying capacity of the canal, the Power Company is, and has been, unable to run more than one wheel at a time, and hence has not at any one time used to exceed 120 second feet of water. The Power Company, nevertheless, under the decree, has the right to the use of sufficient water (240 second feet) to run its plant at its full capacity, and, whenever it provides the necessary facilities for carrying the water to which it is entitled from the dam in question by enlarging the Utah & Salt Lake Canal Company's canal, or otherwise, the commissioner will, under the decree, be required, if requested so to do, to distribute this amount of water to it. It is nowhere suggested or intimated in the record that the Power Company has any intention whatever of disclaiming or of abandoning any portion of its right to the use of the water decreed to it. For aught that appears in the record the Power Company may at any time provide the necessary means for carrying the amount of water (240 second feet) necessary to operate its power plant to its full capacity. We therefore know of no good reason, and certainly none has been suggested, why the Power Company should not be required to contribute to the cost of constructing and maintaining the dam in question in proportion to its maximum right to the use of water. But in the apportionment of costs it ought not be assessed and required to pay for water that it does not need and cannot possibly use. Under the undisputed facts the Power Company, in the apportionment of the costs of the construction of the dam and weir in question, should be assessed for 240 second feet of water only, instead of 270 second feet as found by the court. The court, there-

fore, erred in its apportionment of the costs and expenses in that regard.

[7] Appellants object to the construction of the kind of a dam recommended by the commissioner and found by the court to be proper and suitable for measuring and partially distributing the water at that point, on the ground that it will be a much more expensive dam than the necessities of the situation demand. The estimated cost of the dam is \$12,180. We do not think that, under the facts and circumstances as disclosed by the record, the court exceeded its power, or abused its discretion, in ordering the improvements as planned and recommended by the commissioner. Up to this point we think the court clearly acted within the powers retained by it in the original decree. But there is no evidence whatever in the case which sustains, or tends to sustain, that part of the decision wherein it is held that the construction of a "concrete dam and measuring weir at the intake of the Salt Lake City and South Jordan Canal, and a concrete dam and measuring weir at the intake of the North Jordan Canal, at what is known as the Gardner Mill Race," would be "for the joint benefit of all the parties to said action." As hereinbefore pointed out, the intake of the Salt Lake City and South Jordan Canal is approximately one mile, and the intake of the North Jordan Canal is ten miles farther down the stream than the intakes of the canals of appellants. We have carefully examined the record, and have considered every phase of the question urged and discussed by counsel in their oral arguments and in their printed briefs, and we fail to see, and are unable to conceive of, any benefit whatever, either directly or indirectly, that would inure to appellants, or either of them, by the construction of dams and measuring devices in the river channel below where the stream passes the intakes of their canals. The finding, therefore, cannot, upon any legal or equitable principle, be upheld. Neither can that part of the decision be sustained in which it is held that the cost of the construction of the dams and measuring weirs last mentioned shall be prorated between the parties to the action according to their respective interests in the waters of Jordan river. The decree in that regard is in conflict with and in effect nullifies certain parts of the original decree herein set forth, wherein it is provided that the parties to the suit "shall respectively construct or cause to be constructed at their own cost * * * proper appliances for the correct measurement of waters awarded to them respectively, and thereafter shall maintain and keep in place dams, headgates, flumes, canals, and penstocks, and other means by which said water is diverted and used." Respondents contend with much earnestness that this part of the decree was entered by agreement of the parties, and at the urgent request of appellants. This, we

think, is true as to the Utah & Salt Lake Canal Company; but the record shows that the East Jordan Irrigation Company repeatedly, during the proceedings in the lower court, objected to having any portion of the cost of the construction of the improvements in the river below their diverting dam assessed against it, and the Power Company objected to paying any portion of the cost of the construction of the contemplated improvements, regardless of where, or at what point on the river, they may be installed. And we fail to find anything in the record that is susceptible of being construed as an agreement or even as an acquiescence on the part of these two appellants, or either of them, that that part of the decree apportioning costs should or might be entered.

The cause is remanded, with directions to the trial court to set aside that part of the findings of fact, conclusions of law, and decree in which the costs of improvements mentioned are apportioned between the parties to these proceedings, and also that part in which appellants are required to pay a portion of the cost of the improvements made in the river below the diverting dam at the intakes of their canals, and to make findings thereon, and to enter judgment in accordance with the views herein expressed. Each party to this appeal to pay its own costs.

FRICK, J. I concur with the CHIEF JUSTICE. In view, however, of the able dissenting opinion of Mr. Justice STRAUP, I desire to briefly state a few of the reasons which impel me to arrive at the conclusion aforesaid.

I fully concur with Mr. Justice STRAUP'S statements and conclusions as abstract propositions of law; but in my judgment they are not applicable, and it would be unjust to apply them in this case in view of the whole record. There can be no doubt that the trial court had jurisdiction of the subject-matter, of the subject of the particular proceeding, and of the parties. Such jurisdiction was specifically retained in the original decree entered in this action in 1901 as pointed out in the opinion of the CHIEF JUSTICE, and it was so retained for the express purpose of making "all necessary supplementary orders and decrees which may be required to make effectual the rights awarded and preserved by this decree." This means, if it means anything, more than merely to retain jurisdiction for the purpose of the enforcement of the judgment or decree, which every court retains as a matter of right. Let me ask what order or decree is approved by the CHIEF JUSTICE, except such as is clearly comprehended within the foregoing reservation found in the original decree? Again, can any one doubt that, in order to enforce the true spirit and intent of the original decree, had it become necessary to make the orders in question and as sustained by the CHIEF JUSTICE as part

thereof, that such orders could not have been made a part thereof without any further pleadings in the case? Are not such matters, however complex, merely incidental to the right to appropriate, divert, and use the waters of a stream or system, which right is to be enjoyed in connection with others who may have rights to the use of water flowing in the same stream or system? Suppose the action had been brought to determine and fix the rights of all the appropriators of water from the Jordan river, and the court had found, and in the decree had declared, those rights, and had also determined at what points, and how often, and in what amounts, and by what means each appropriator should divert his water from the waters flowing in the stream; could not the court, as a mere incident to the determination of such rights, also have determined the kind and character of the necessary diverting appliances, and fixed the cost thereof, without special pleadings or any special statement in the pleadings setting forth just what these things should consist of, and at what point or points they should be placed? I, at least, entertain no doubt but that the court could have done all of these things as merely incidental to the principal thing, namely, the determination and fixing of the rights to the use of water. If I am right thus far, then the court in the present proceeding could also do these things without special pleadings, and what it did in that regard, however informal or erroneous, would, nevertheless, not be open to the objection that the court acted without jurisdiction. While it is quite true that under our jurisprudence a court is not an autocrat, and can only award relief according to the forms of law and procedure, yet, when the court's powers are once set in motion in a particular proceeding in a proper manner, whatever the methods pursued may be called, subsequent errors and departures from the regular course of procedure, although gross, do not rob a court of general jurisdiction of its powers, and make its actions in the premises void.

The record in this case conclusively shows that all the parties affected by the decree had their day in court. It shows that the proceedings in question were pending, and hearings were had, from time to time covering a period of almost two years. During that time numerous stipulations, oral and written, were entered into by the parties, and some special matters were from time to time referred to special experts, and the reports made upon the matters so referred were all submitted to protracted hearings before the court, and before they were approved by it. Not only is it apparent from the record that the parties, with the exceptions stated by the CHIEF JUSTICE, were willing to and did proceed without special pleadings or statements of any kind, but the record further shows that such has been the course of pro-

cedure in this case ever since the original decree was entered. At various times since 1901 the district court has been called on to make "orders or decrees" which were deemed necessary for the more equitable and better enforcement of the terms of the original decree. These orders involved the expenditure of thousands of dollars, and, if it be now held that the orders in this proceeding are void for the reasons stated by Mr. Justice STRAUP, then it unavoidably follows that practically all of the orders made subsequent to the original decree are void and of no force or effect for the same reasons. To so hold would unavoidably lead to turmoil and endless litigation. This should be avoided, if avoidance be possible under the forms of law. Moreover, the record, in my judgment, is all but conclusive that, if the decree is modified as directed by the CHIEF JUSTICE, none of the parties to the action is or can be prejudiced in any substantial legal right. If the court had jurisdiction, therefore, no cause for reversing the entire decree and again setting the case at large exists. Again, if it were necessary to have pleadings for the purpose of completing a proper judicial record, an order to supply them could be made nunc pro tunc. While this could be done as to the nonobjecting parties without question, it, in my judgment, under the circumstances of this case, may also be done as against the objecting parties for two reasons: (1) Because the decree, to all intents and purposes, has been modified to conform to their objections which were proper; and (2) after the decree is so modified, neither of the objecting parties will be affected in a substantial right, if pleadings, or any other necessary statements, are permitted to be filed nunc pro tunc for the purposes aforesaid. Not only will the objectors not suffer in any substantial right, but, if pleadings are necessary to make a complete judicial record, they, as all other parties, will be benefited, since their rights under the original decree will all the better be preserved. But it is vigorously insisted that, although it be conceded that the court had jurisdiction of the subject-matter and of the parties, yet it did not have the power to make the findings and decree in this proceeding, because its judicial powers have not been properly invoked. This, it is contended, is so because the motion was utterly insufficient to set in motion the court's powers. As a basis for this contention, it is pointed out that the findings and decree include a multitude of things. Let it be conceded that the findings and decree do cover all of the things enumerated by Mr. Justice STRAUP, and yet my conclusions, in my judgment, are not at all affected thereby. None of the things mentioned were really litigated or contested matters, but were merely incidental to the only question that was before the court for determination, namely: Should the court order different diverting and measuring appliances to be

installed, in order that the waters of Jordan river might be more equitably and justly measured and distributed among all of the appropriators and users thereof? All of the facts found by the court were so found as the basis for the order or decree that, in order to accomplish the purposes of the original decree, such appliances were necessary at certain points on the stream, and hence should be installed.

I think it cannot be doubted that it was necessary for the court to hear evidence upon all of the matters found by it in order to arrive at a just conclusion with respect to the only question litigated, namely, the necessity of installing new diverting and measuring appliances. But it was not necessary, nor was it intended by making those findings, to settle, adjudicate, or determine any of them, because those matters had all been settled and adjudicated in the original decree, and by orders and decrees made subsequent thereto, and before this proceeding was instituted. As already stated, therefore, these matters were purely incidental. I am of the opinion, therefore, that the motion, although quite informal, was, nevertheless, sufficient to properly invoke the powers of the court, and especially so in view that the court always had jurisdiction of the cause for the very purposes that the framer of the motion had in view in presenting it to the court. If, therefore, there is any defect in the motion at all, it is merely one of defective statement, and not one which is entirely lacking in substance, and therefore of no force or effect. Courts, in the administration of law and justice, may not lose sight of the utilitarian and practical side of things. All rules, excepting those which confer jurisdiction, should always be liberally construed and applied when such is necessary in furtherance of justice. And under some circumstances even jurisdictional matters should not be too strictly invoked. To now set aside the whole decree, and again set the whole matter at large, could result only in injustice, for the reason that it would entail a very large and unnecessary expense upon both public and private interests, without any corresponding good whatever. As I view the matter, the district court had full and complete jurisdiction to hear, determine, and declare the matters covered by the findings and decree, with the exception of those things that are modified as pointed out in the opinion of the CHIEF JUSTICE. The order or decree should therefore as modified be affirmed.

STRAUP, J. I concur in that part of the order reversing the judgment, and dissent from that affirming it.

Let it be conceded that the court, when its action was properly invoked, had power as claimed to make such supplemental and additional orders in the premises as were necessary and proper to give effect to and execute

the original decree, the judgment of 1901; yet I am of the opinion such action was not properly invoked, especially not to hear or adjudge what was attempted to be adjudged as shown by the findings and the supplemental decree. Though it should be further conceded that the party invoking the action, and the parties proceeding without objection, and with consent, as though pleadings of some kind had been filed, and issues presented, may not complain, still, how stands the matter as to those who timely and properly did object?

A judgment in a case of numerous parties was entered in 1901, whereby the ownership in severalty of the parties in and to the use of the waters of Jordan river and Utah Lake, and the quantity thereof to which each was entitled, were defined and decreed, and, among other things, their rights and obligations fixed with respect to the construction and maintenance of measuring and diverting appliances, dams, headgates, flumes, canals, etc., and the payment of costs and expenses connected therewith. Nine years thereafter one of the parties, one of the appellants here, the Utah & Salt Lake Canal Company, filed in that cause a written notice, the first notice set forth in the opinion of the CHIEF JUSTICE, and upon that, and nothing else, invoked the action of the court, and obtained an order requiring all the parties to appear. Now, I care little what the thing filed is called, whether a complaint, petition, statement, affidavit, notice, or some other name, or the remedy pursued, whether by supplemental and additional proceedings in the original case, or by a new bill, or by some original proceeding. Still the thing filed, whatever name may be given it, or whatever remedy may have been pursued, must have substance to properly invoke action and power of the court to hear, try, and adjudicate. Though formal pleadings were not necessary, yet something of substance was essential to properly invoke such action, and to invest the court with jurisdiction to proceed. How was that action and jurisdiction invoked? By the filing of the written notice. What matter of substance does it contain? The only similitude of anything of substance—the only allegation or statement—is that the party filing it was “advised” by the commissioner “that certain improvements are necessary in the Jordan river, in order that the waters thereof to which the respective parties to this action are entitled may be properly and economically distributed.” Upon that an order was asked and obtained that all the parties be ruled in, “the character of the improvements determined,” and the “proportionate part of the expense fixed.” What, therefore, by that notice, and upon which such order was asked and made, was presented for judicial consideration and determination? That the party filing the notice was advised that certain improvements in the river were

necessary. It is not stated or alleged that they were necessary or ought to be made, nor are they in any particular identified, described, or characterized. Nothing could be more indefinite, more general, or nameless. True, the party filing the notice repeatedly, during the trial, asserted and proclaimed, as did some of the other parties, a waiver of pleadings, issues, everything, and urged the court on to hear anything and everything offered, and, like the mariner without rudder or compass, went splashing on without let or hindrance. Though the court, for want of pleadings or issues, or something defining and restricting judicial inquiry, at different times during the proceedings questioned its power to proceed, nevertheless it was urged on by all of the parties except two of the appellants. The inquiry took a wide range, involving about everything relating to the irrigating system, and to the use, diversion, and distribution of the waters of the river, except the appropriations and the rights of the respective parties in and to a beneficial use of the waters and the quantity thereof to which each was entitled. Those matters were left undisturbed as fixed by the decree of 1901. Nowhere were the investigations limited or prescribed until they were stated by the court in the findings. The findings and conclusions are lengthy, covering 21 printed pages; the decree 10. By them the court decreed and adjudged the ownership of a large and expensive pumping plant at or near the source of the river, and the respective rights of the parties therein and thereto, when and under what circumstances it could be operated, the manner of its control and operation, the ownership of lands, easements, appurtenances, and rights of way, the diversion, distribution, and control of the waters of the respective parties, the kind and number of impounding, and diversion dams, measuring weirs, diverting and controlling devices along the river, the payment and apportionment of costs and expenses for the construction, operation, and maintenance of them, and the payment of damages occasioned by overflows and inundations.

Two of the appellants, however, the East Jordan Irrigation Company and the Telluride Power Company, at the very threshold, made timely objections, on the ground that there were no pleadings or issues with respect to which evidence could be received, and that the court, for that reason among others, was without jurisdiction to proceed to trial. These objections were overruled. And during the trial counsel for these parties, upon these grounds, at different times, objected to testimony offered, and, when the report of the commissioners was about to be received in evidence, the court inquired of counsel, “Is there any of the parties that object to the court entering upon the consideration of having these improvements made?” Counsel for the East Jordan Irriga-

tion Company answered that they did object upon the grounds theretofore stated, and upon the further ground that to order the improvements, and to apportion the costs therefor, would be in violation of the decree of 1901. But the court overruled the objections, and proceeded. On the record I do not see anything to justify the conclusion that these parties waived anything. Clearly, as to them, the judgment is bad.

But how about the claimed waiver of the other appellant, the party invoking the action of the court? If a proceeding, for want of some sort of a pleading, issue, statement, something of substance—I do not care what it is called—to invoke action of the court, and to authorize it to hear and try some nameless and indescribable thing presenting no matter of controversy and no point of fact or law whatever for determination, is waivable, then has this appellant waived it, and ought it to be held to the waiver, if the law permits it. But I do not see on what principle such a holding can be made, for the waiver goes directly to substance and to jurisdiction. It is fundamental that what is not juridically presented cannot be judicially decided; that pleadings of some sort, a complaint, petition, affidavit, statement, notice, something of substance, presenting some sort of issue either of fact or law for adjudication, are the juridical means of investing a court with jurisdiction of the subject-matter to adjudicate it. How often have we heard it said that pleadings, allegations, or statements of some sort are essential to jurisdiction; that what ought to be of record must be proved by record, and by the right record; that, if there is no issue, there is no authority to try; that a court cannot act without its record, and, if it does, its acts are *coram non jure*; that a judgment without allegations is void, and subject both to direct and collateral attack, for, when the foundation falls, all goes to the ground; and that a judgment rendered where no cause has been stated is as much a judgment *coram non jure* as one rendered on a case perfectly stated before a court not clothed with jurisdiction to hear and determine it. In harmony with this is the Code that objections to the jurisdiction of the court, and that no cause of action is stated, are not waived by failure to make them on demurrer or by answer, and are the repeated holdings of courts under it, that these objections are always available both on direct and collateral attack. There are many things pertaining to the formal or adjective law which parties may waive. They may as to matters personal to themselves override the law, and stipulate one for themselves. They may acquiesce in error, and by acquiescence avoid its effect. But matters of substance cannot be waived. These need neither objection, exception, nor assignments of error. With respect to them, courts *sua sponte* open the record and take notice of defects of substance without regard to the

wishes of either party named on the record. Again, how often do we read that the judgment record must stand the test of a general demurrer which, at all its stages, and by whatever name called, whether motion, demurrer, motion in arrest of judgment, or non obstante veredicto, or of *repleader*, review in appellate procedure, or requirements to resist objections on collateral attack, or requirements for *res adjudicata*, attaches to substance or the state's substantive law, which cannot be waived. The public, the sovereignty, the state, requires and demands a *coram jure* proceeding. No other suffices; no other will be recognized. The state gives much freedom to suitors to stipulate a law for themselves as to matters personal to themselves; but it has not given them the right to waive or contract away what concerns the state itself, *coram jure* proceedings. As to that the state cannot be foreclosed by the compact or conduct of the parties named upon the record. Hence the Code that, by failure to demur, and by answering a party, waives many things of formal or adjective law, but not jurisdiction of the court, nor sufficiency of the pleading or thing filed to invoke the action of the court, and to invest it with jurisdiction to hear, try, and adjudge. Courts under the Code cannot, any more than they could at common law, or in equity, sit as a godfather over suitors, granting to or withholding from them whatever may seem to the court just and proper. They cannot choose their cases. They can only decide those and the matters therein involved which the parties have presented by their statements of the cause of action and ground of defense. I use the term "cause of action" in the broadest sense; any right which a party has to institute and carry through a proceeding, whether original or supplemental, resulting in a judgment, that foundation which every judgment must have to support it. If a judgment ever was void for want of a statement or allegation, a foundation to support it, void because no jurisdiction was conferred upon the court to hear, try, and render a judgment, then is this judgment a nullity. That is self-evident when the notice, the thing filed to invoke the action of the court, and to invest it with power to hear and try something, is compared with the findings and the judgment, the matters presented with the matters adjudicated. The notice presenting not even the slightest similitude of an issue either of fact or law, the comparison is one of nothing with that of something requiring 30 printed pages to state it. And on that foundation—nothing—rests the judgment complained of.

True, the respondents contend that it also rests on the original pleadings of the cause. No doubt many orders and some judgments, made or rendered as the result of proceedings supplemental or additional to an original decree or judgment in the same cause, may be supported by the original pleadings in that cause. Whether they have such support is

dependent upon the contents of the original pleadings, and the matters adjudged both by the original judgment and by the supplemental or additional order or judgment. But from mere inspection it here is manifest that the supplemental judgment has no support from such a source. The adjudication here made by the supplemental judgment constitutes a complete and independent judgment or decree based on full, complete, and independent findings. In such respect the findings, conclusions, and the judgment are as full and complete as required in any original or independent action. A comparison of them with the original judgment record shows modifications and annulments of material portions of the original judgment, and adjudications not within the issues of the original pleadings. Surely the filing and presentation of the notice did not invest the court with any such power, nor apprise the parties of any such contemplated action. The case as presented by the original pleadings was not partly but wholly tried, and was fully and finally adjudicated on all the issues presented by the original pleadings nine years ago. They support that judgment, not this. The issues presented by them were then properly tried, not now. In this connection do the respondents also say that these proceedings were but in aid of the original decree, and to give effect to it, and were had in pursuance of a power or continuing jurisdiction retained by the court under the original decree. Let it be assumed that that was the intention of these proceedings, and that the parties, or some of them, had some right or obligation which, to assert and present, did not require a fresh or independent action, but could be presented, and judicial action invoked upon it, under the claimed continuing jurisdiction of the court; yet how did the court, nine years after the original decree, get jurisdiction to hear and adjudicate the particular matters and things here heard and adjudicated? Though the court retained and possessed a continuing jurisdiction, its powers, nevertheless, were not wound up and set like an alarm clock to automatically go off every irrigating season or every nine years. Notwithstanding such continuing jurisdiction, a presentation of allegations, or a statement of some kind as to the nature of some right, or obligation, or matter for judicial inquiry, was, nevertheless, essential to properly invoke the court's action, and to invest it with power to further hear, try, and adjudicate. That is, to invoke such action, the parties, nevertheless, were required to present something to the court to hear, try, and adjudicate, and concerning which the proceedings and trial resulted in the judgment here rendered and complained of. That something was the notice which is nothing.

It is further contended that the report of the commissioners, which was received in evidence, and incorporated in the bill of exceptions, may be regarded as something pre-

senting issues or matters for judicial inquiry and determination. I think not. The notice on which these proceedings were instituted was filed in November, 1910. The hearing began in January, 1911. After it had been carried on off and on for several months, much testimony given, the commissioners and other witnesses examined and cross-examined, and much other evidence adduced, respecting the subjects upon which findings later were made, and after the case had thus been partly tried, and upon divers contentions being made by counsel in argument concerning the improvements and the apportionment of the costs therefor, the court observed: "I will hear from all the parties with reference to that apportionment after we have determined what is to be constructed. Gentlemen, I will do this: I will ask Mr. Smith (the commissioner), and I will have some one associated with him, to make some estimates and computations to submit to the court at some future day, and I will fix the time, and notify all of the parties interested, so that they can be here and consider that report." Thereupon the court appointed the commissioner and two others, all of them civil engineers, to make a report, and the further hearing subject to future notice continued indefinitely. Later, in June, 1911, a report was made which, on a further hearing, was, over the objections of two of the appellants, put in evidence, and further evidence adduced. The hearing was then again continued, and finally, in April, 1912, Salt Lake City served the notice referred to by the CHIEF JUSTICE for a resumption of a further "hearing of all undisposed of matters in the above-entitled action," and respecting improvements recommended by the commissioners. A further hearing was had, the commissioners further examined, and further evidence adduced.

I cannot regard that as anything presenting issues. The report was not anything alleged, asserted, or presented by either party. I have already observed that courts cannot choose their cases, nor present the statement of the cause of action or ground of defense, the matter for judicial inquiry. Neither can they delegate that to a commissioner or other officer of the court. The parties, and they alone, must present the issue, the right, the obligation, the matter, whatever it may be, for judicial inquiry and determination. The report was made and received in evidence to aid the court in arriving at findings and conclusions. As such, I think, portions of it were properly received; much of it, however, was not even proper for that purpose. But I cannot regard it as performing any function other than evidentiary. It has no semblance of anything presenting allegations or issues of any kind, or of any jurisdictional element or juridical means investing the court with power to act, hear, try, and adjudicate. It is fundamental, and as true now as when first declared many years ago, that jurisdictional facts must arise from plead-

ings, a document of some sort containing allegations or statements of some substantive right or obligation invoking judicial action. It matters little how simple it is, or what it is called; but it must have sufficient substance to support not only a judgment but the judgment rendered. These jurisdictional facts must appear on the face of the judgment record. They cannot be gathered from the evidence, commissioners' reports, or other evidentiary documents. Even judicial recitals of them in the judgment will not suffice. They must appear elsewhere, and in the right document and right record.

When it is said a good judgment must bear the search and stand the test of a general demurrer by whatever name called, what does that mean? Sufficiency of evidence to support the judgment? Sufficiency of some report made during the trial and put in evidence, or of plans and specifications or other documents put in evidence, or of motions served and filed during the progress of the trial, things which are not even part of the judgment roll, and of which we only have judicial knowledge, because the proceedings concerning them are shown by a bill of exceptions? It means search of the judgment record, not of the bill of exceptions; the search and test of the sufficiency of that which was filed constituting the cause of action or ground of defense, that which invoked action, and invested the court with power to hear, try, and determine—that something which is the foundation of every judgment, and upon which it must rest, and is dependent. If the foundation here depends upon the commissioners' report, or the notice served for further hearing after the report was made, things not even part of the judgment record, and which can only be made to appear and do appear by a bill of exceptions, then, were there no bill, would there be no foundation. And if that fails, all must fall. Hence the basic rule so often heard, and so universally applied, that allegations or jurisdictional facts to support the judgment must be in the right document and the right record, and that what ought to be of record must be proved by record, and by the right record, here the judgment record. Following this rule conserves immutable principles of jurisprudence; departing from it results in wrecks of them, and leads to absurdities. If the matters and things referred to and appearing in the bill of exceptions, and which can only be shown and made to appear by a bill, may be looked to as the jurisdictional elements or allegations to support the judgment, then may the sufficiency of a complaint be tested and its insufficiency cured by proceedings had under or in pursuance of it as shown by a bill of exceptions, and which could not be made to appear and be shown other than by a bill.

Still, let us look at this report. It is somewhat elaborate, consisting of 15 printed pages. Much of it is historical, argumentative,

and narrative, made up of generalized statements, and, as stated in the report, relating "to the effective measurement, diversion, and apportionment of the waters of Jordan river among the users thereof," but respecting which nothing is described, or specified, or characterized. "A principal dam in the river at the head of the system" is recommended. The only description of it is this: "The dimensions of this dam should be such as will meet the requirements of the contract hereinbefore referred to," a contract which the commissioners advised the court was entered into 30 years ago, "and since confirmed by decree of the Supreme Court of this state." Seven other dams are recommended at designated places along the river. The only description of them is "this dam" or "this structure should be designed so that, except in cases of floods, it will automatically divert the quantity of water to which these canals are jointly entitled, and permit the remainder to pass down the river." Referring to the measuring devices, the commissioners recommend that in each individual canal or ditch there be placed "a substantial structure in the canal or ditch as near the head thereof as is practicable for the purpose of supporting gates that can be easily operated to regulate or entirely shut out the flow of water as may be desired, and be supplied with an effective device for securely locking the gates in any required position," and that all the structures and devices to be employed "should be durable, of reasonable cost, and most effective, and economical in operation." Any one ought readily perceive just what is meant by these graphic and perspicacious descriptions! The court is also advised of the quantity of water to which each party is entitled, the waters available for use, the kind and condition of the measuring and diverting devices then in use by the parties, the purposes and objects of the pumping plant, certain rights of the parties as fixed by "a perpetual contract" entered into 30 years ago, and of many other similar matters. Of course, the only way the court could ascertain and determine these was by having them chained and triangled by civil engineers. Arguments are made, reasons given, and opinions expressed by the commissioners why, in their judgment, the irrigating system should be regarded as "a single and complete system," as "one unit," and so, for fear the court may not view the matter in that light, and may think the conclusion at variance with the original decree, it is reminded of the impelling reasons which induced the appointment of a commissioner under that decree, and is assured that "our confidence in this view is strengthened by the action of the court in appointing a special commissioner to control and apportion the common water supply for the common benefit of the entire group." Say they further in their report: "Considered as a single system, its ultimate needs, as it appears to us, may be summarized as follows: (1) An ample

and dependable common water supply. (2) Means for accurately measuring the common water supply. (3) Means for equalizing and regulating the common flow. (4) Means for effective apportionment and diversion. (5) Means for measuring each individual ditch supply. (6) Means for regulating each individual ditch flow. (7) Means for preventing damages from floods." Then, further: "To accomplish these results the equipment should be carefully planned so that the various individual ditch devices will not only effectually perform their special functions, but at the same time constitute essential units of the whole, which should be as nearly as possible automatic in its operations throughout."

And that this thus far lucid exposition may be further clarified, the court is further advised, in language equally precise and definite, as to the structures and devices to be installed that: "As to the particular materials or peculiar form of structures to be employed in the several proposed units, we do not understand that any report is required of us relative to these and other minor details, and therefore deem it sufficient to add in this connection that, in our opinion, all of the proposed structures should, in the interests of both equity and ultimate economy, be made of good and durable material, assembled in such manner and form as to afford structures that will be both serviceable and symmetrical. We have, however, incidentally examined the detailed plans submitted by Commissioner Smith for the principal dam at the head of the system, and regard it as well suited to the place and purpose." That is, the structures and devices should be such as are "in the interests of both equity and ultimate economy," and as "will be both serviceable and symmetrical." Though it may be difficult for some to comprehend the exact character of such a vividly described structure, and though it may seem that what heretofore was left uncertain and ambiguous by the prior descriptions is rendered unintelligible by this, yet it must be remembered it is an engineer's description based on both mechanical philosophy and equitable principles considered from the standpoint of "ultimate economy."

The court is still further advised by the report, and put in possession of the technical knowledge acquired and possessed only by civil engineers through scientific research and investigations peculiar to their profession, that frequent storms occur on the lake, and of the effect of wind upon its waters; that Jordan river is a natural stream 40 miles long, originating in Utah Lake, and terminating in Great Salt Lake. As the report here ends on that subject, I assume the river was not further traceable. And, finally, in order that the court may be relieved from any further responsibility in the premises with respect to the apportionment of costs for the improvements and structures to be

placed in the river, they say: "In conclusion we desire to say that the more we have considered the matter the more we have become convinced that all matters of expense pertaining to the supply, measurement, regulation, apportionment, etc., of the water for this entire group of canals and ditches should hereafter be apportioned according to the same schedule as that for the apportionment of the common water supply." That is, as elsewhere stated in the report, the total cost of all the improvements "should be apportioned among the several canals and ditches of the system in the same proportion that the total common water supply is now apportioned among them, and which, in parts of the whole, is as follows," stating them—a conclusion in the very teeth of the original decree, but which, nevertheless, was followed by the court and the apportionment of costs so decreed. Nothing with respect to "estimates or computations" is contained in the report, the very things which to aid the court were required to be reported. Instead of advising the court as to the kind and character of structures and improvements that would be suitable and practical, and the probable or estimated costs thereof, the engineers merely reported that the structures and devices "should be durable, of reasonable cost, most effective, economical in operation, serviceable, and symmetrical, made of good and durable material, and should be in the interests of both equity and ultimate economy, language which, so far as aiding the court, is utterly useless and so general and indefinite as to mean nothing, and then advised the court that the system of irrigation and the waters thereof, which by the original decree had been adjudged in severalty, should now be considered as "one unit," a "single system," the rights of the parties treated as a common and joint interest, and the costs apportioned in proportion to the interest of each. In other words, the court asked the engineers to report to him "estimates and computations" of proper and suitable structures, and they, instead of making such a report, by brief and argument, advised the court what decree should be made and how the costs of the improvements should be apportioned. This certainly is a most remarkable and presumptuous report. But such a report, such a document, or such proceedings, however liberally or broadly considered, has no semblance whatever of anything presenting issues or of constituting a jurisdictional record to support a judgment. True, after it was received in evidence, the commissioners, or some of them, were called and further examined, and gave considerable testimony with respect to what improvements, in their opinion, were needed, including the character and number of dams, weirs, measuring and diverting devices, and other structures, and the estimated cost of each. And so, as shown by the bill of exceptions, were there also put in evidence plans and

specifications made by Commissioner Smith with respect to the dam at the head of the system, and testimony given by him with respect thereto. Of course we have much evidence before us, something like 1,000 pages—evidence to support most anything pertaining to the irrigating system. Yet all that is answered by the familiar maxim that probata will not supply allegata, and that it is vain to prove what is not alleged.

I think the judgment should be annulled and vacated.

NATIONAL UNION FIRE INS. CO. v. DENVER & R. G. R. CO.

(Supreme Court of Utah. Dec. 17, 1913.)

1. ASSIGNMENTS (§ 30*) — PARTIAL ASSIGNMENTS.

An assignment of only a part of a claim is not, in the absence of statute, enforceable at law, though good as an equitable assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 55-60; Dec. Dig. § 30.*]

2. PLEADING (§ 433*) — WAIVER — ACTION BY ASSIGNEE—PARTIAL ASSIGNMENTS.

Comp. Laws 1907, § 2902, requires every action to be prosecuted in the name of the real party in interest, and section 2489 requires that the statutes shall be liberally construed, and section 2967 provides that, if no objection be taken to the complaint, defendant is deemed to have waived the defect, except as to objections to jurisdiction, and that the complaint does not state a cause of action. *Held*, that the objection that the complaint showed that the action was brought to enforce an assignment of only a part of an entire claim could not be raised by general demurrer and was waived, if no specific objection was made on that ground until after judgment for plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1451-1477; Dec. Dig. § 433.*]

3. ASSIGNMENTS (§ 22*)—TESTS OF ASSIGNABILITY.

The only test of assignability is whether the cause of action survives and passes to the personal representative of the owner.†

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 35-39; Dec. Dig. § 22.*]

4. ASSIGNMENTS (§ 24*)—CLAIMS ASSIGNABLE.

A claim by the owner of property, negligently destroyed by a railroad company, for damages for its destruction is assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 42-46; Dec. Dig. § 24.*]

5. ACTION (§ 25*)—LEGAL OR EQUITABLE — PARTIAL ASSIGNMENT.

Under Const. art. 8, § 19, providing that "law and equity may be administered in the same action," an equitable right of an assignee of a part of a claim may be enforced in a civil action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 124-145, 147-149, 153, 156-159, 313; Dec. Dig. § 25.*]

6. ASSIGNMENTS (§ 121*)—PARTIES — "REAL PARTY IN INTEREST."

An insurance company receiving an assignment of a property owner's claim for damages against a railroad company for the negligent destruction of property, was the "real party in interest" within Comp. Laws 1907, § 2902, so as to entitle it to sue on such assignment in its

own name, even if the assignment was of only a part of the claim.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 200-205; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5938, 5939; vol. 8, p. 7779.]

7. ACTION (§ 53*)—SPLITTING CAUSES OF ACTION.

Plaintiff may not split up his cause of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-551, 553-623; Dec. Dig. § 53.*]

8. PLEADING (§ 406*)—WAIVER OF OBJECTION —SPLITTING CAUSES OF ACTION.

Defendant may waive an objection to the complaint on the ground that the cause of action sued on was split, and does waive it, if no objection be taken by demurrer or answer pursuant to Comp. Laws 1907, § 2987; the rule against splitting causes of action merely existing for defendant's benefit and not involving any public policy.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

Appeal from District Court, Wasatch County; A. B. Morgan, Judge.

Action by the National Union Fire Insurance Company against the Denver & Rio Grande Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Van Cott, Allison & Riter, of Salt Lake City, for appellant. A. O. Hatch, of Heber, for respondent.

FRICK, J. On May 4, 1912, the plaintiff insurance company, respondent in this court, commenced an action against the defendant railroad company, appellant here, to recover the sum of \$250. After alleging the corporate existence of both parties, the material allegations of the complaint in substance are: That on the 9th day of August, 1911, one Minnie Witt was the owner of a certain "barn, stables, and outbuildings" in Heber city, Wasatch county, Utah, of the value of \$600; that prior to said date said property was insured under a policy issued by the respondent in the sum of \$250, which policy was still in force on the date aforesaid; that on the said 9th day of August, 1911, said property was wholly destroyed by fire which was caused by the negligence of the appellant, to the damage of said Minnie Witt, the owner thereof, in the sum of \$600; that thereafter, in consideration of the payment of the sum of \$250 by respondent to said Minnie Witt, the same being the amount for which said property was insured by said policy as aforesaid, she duly assigned "her claim against the defendant (appellant) for damages sustained by reason of the burning of the buildings aforesaid," to the extent of \$250.

Upon substantially the foregoing allegations respondent demanded judgment against appellant for the sum of \$250, and for costs.

We have eliminated what we deem to be immaterial allegations from the foregoing statement. The appellant filed an answer

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Lawler v. Jennings, 12 Utah, 35, 55 Pac. 60.

in which, after admitting the corporate capacity of both parties, it in legal effect denied all other allegations of the complaint.

Upon these issues the case was tried to the court without a jury. The court made findings of fact which substantially covered the foregoing statements of the complaint, and also made conclusions of law in which it found that respondent, as the assignee of the said Minnie Witt, was entitled to judgment against appellant for said sum of \$250, and for costs. Judgment was entered accordingly, from which this appeal is prosecuted.

The only assignments of error are: That the district court erred in its conclusions of law that the respondent, as assignee of Minnie Witt, is entitled to recover against appellant, and that the court erred in "rendering a judgment for the plaintiff (respondent)."

The substance of the contention of appellant's counsel is that the judgment is erroneous for the reason that, in view of the allegations of the complaint that only a part of the claim against the appellant was assigned to the respondent, it cannot maintain an action against appellant for such part. It is insisted that in view that Minnie Witt, the assignor, retained an interest in the assigned claim, which appeared upon the face of the complaint, the action should have been prosecuted in her name, or she at least should have been made a party defendant, and for that reason the respondent, in suing alone, had no standing in court.

While the precise question, in the form it is presented here, is one of first impression in this jurisdiction, the principles that must control under our statute are nevertheless, we think, well established. Counsel cite authorities which they insist support their contention as outlined above. Among other cases to which they have referred us are the following: *Home Mut. Ins. Co. v. Oregon Ry. & Nav. Co.*, 20 Or. 569, 26 Pac. 857, 23 Am. St. Rep. 151; *German Fire Ins. Co. v. Bullene et al.*, 51 Kan. 764, 33 Pac. 487; *Norwich Union Fire Ins. Co. v. Standard Oil Co. et al.*, 59 Fed. 984, 8 C. C. A. 433; and *Dean v. St. Paul & D. Ry. Co.*, 53 Minn. 504, 55 N. W. 628.

[1] In all of the foregoing cases it is substantially held that an assignment of only a part of an entire claim, while good in equity, is not enforceable by the assignee in an action at law. It is further held in the first three cases referred to that when property is insured against loss by fire, and it is destroyed by fire through the negligence of another party while the insurance is in force, and such other is liable for the loss, the insurer is subrogated to the rights of the owner of the property to the extent that the former has paid the loss occasioned by the fire, and, in case he pays the full value of the property destroyed, he may sustain an action in his own name against the wrongdoer to recover such value; but if the property is insured for less than its full value,

and the insurer pays only the amount of the insurance, then he is subrogated to the rights of the insured to the extent of the payment made as aforesaid, and in such event the owner of the property who retains an interest in the claim against the wrongdoer should bring the action to which the insurer may be a party. The law with respect to the rights of subrogation in such cases is admirably stated by the author of *Joyce on Insurance* in volume 4, § 3537, to which we specially refer. The rule with regard to the bringing of an action, as outlined in the decisions above referred to, is based upon the theory that the claim against the wrongdoer for the destruction of the property is an entirety and cannot be split up into different parts by the owner. In other words, it is in effect held in those decisions that, inasmuch as the owner of the destroyed property cannot split up the claim against the wrongdoer into several actions, therefore this may not be done by splitting or dividing the claim among several assignees. Relying upon the foregoing statements of the law, counsel insist that the district court erred in entering judgment for the sum of \$250 in favor of the respondent, because it appears from the complaint that the property was worth \$600; and therefore the owner, Minnie Witt, assignor of respondent, still retained an interest of \$350 therein.

[2] In making the contention counsel, as it seems to us, entirely overlook or ignore the fact that in all of the foregoing cases some timely objection was interposed by the party sued in which the right to maintain or to proceed with the action was challenged. No objection of any kind was interposed in this case before judgment. It is not clear from the cases above referred to whether the demurrers referred to in the opinions were general; that is, whether they were directed to matters of substance or whether they were special and merely went to the right of maintaining the action in the form in which it was instituted. While there are some expressions in the opinions which would lead one to infer that the courts held that the objection could be reached by a general demurrer, yet we think that such was perhaps not the intention of the courts. Nor do we think that upon principle such is the law. We remark further that the objections to the maintenance of the actions in the foregoing cases all seem to have been based upon the somewhat narrow right of subrogation, as that right existed under the common law, rather than upon the broader right of assignment under our Code. If it shall be assumed that the foregoing cases, and others like them, are to be construed as holding that, in case timely and proper objection is made to the maintenance of an action by an assignee who sues only for a part of an entire claim which arises out of circumstances such as are disclosed in the complaint in this case, the court, upon such objection being made, should arrest the action from proceeding fur-

ther until the necessary parties are brought in, then we fully agree with the decisions. But if those decisions shall be construed as holding as counsel contend, namely, that an objection is good although not made until after judgment, or that the question can be reached by merely interposing a general demurrer for want of facts, we cannot yield assent to the proposition. Under our statute we think the rights of assignees, under circumstances like those in the case at bar, are very clear.

Comp. Laws 1907, § 2902, provides: "Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section." It will be observed that this section is most sweeping in its terms. It is what Mr. Pomeroy in his *Code Remedies* (4th Ed.) § 124, characterizes as the "sensible and comprehensive form." While the Codes of all the states in some form provide that every action must be prosecuted in the name of the real party in interest, yet in some states exceptions are made with respect to the assignment of causes of action arising *ex delicto*. For instance, in the state of Kansas (2 Gen. St. 1889, § 4103), the exception is expressed in the following terms: "But this section shall not be deemed to authorize the assignment of a thing in action, not arising out of contract." This exception is also found in the Codes of Indiana, Missouri, Wisconsin, South Carolina, Kentucky, Oregon, Nevada, North Carolina, Washington, and Arizona.

[3] The only test of assignability in this state is whether the cause of action survives and passes to the personal representative of a decedent. *Lawler v. Jennings*, 18 Utah, 35, 55 Pac. 60.

[4] In our judgment it cannot be doubted that the claim involved in this action would have survived and passed to the personal representative of a decedent in whose favor the cause of action had accrued during his lifetime. The assignability of the claim sued on is therefore indubitably established by our own statute. But that such a claim is assignable has also been judicially determined. See *Caledonia Ins. Co. v. Northern Pac. Ry. Co.*, 32 Mont. 48, 79 Pac. 544.

[5] But it is contended, and to that effect are the decisions to which reference has been made, that the assignment is good only in equity and is not enforceable in an action at law. Upon this question we must again have recourse to and be governed by our own laws rather than by what it is contended the law is in some foreign jurisdiction. In order to destroy, so far as this may be done in the enforcement of existing rights,

the effect of the distinction between law and equity in the administration of justice, our Constitution (article 8, § 19) provides: "There shall be but one form of civil action, *and law and equity may be administered in the same action.*" (Italics ours.) It should not be overlooked in this connection that, while that part of the foregoing section which is not italicized is general to all the code states, yet that portion which is italicized is, so far as we are aware, found only in the Constitution of this state, and being found there must be given full effect by the courts. It follows, therefore, that while under the common law, and under some general statutes in some of the states, rights in respect to assignments of a part only of an entire claim may be qualified and enforceable only in an action in equity, yet, under our Constitution, this, in our judgment, may clearly be done in an action at law. By this we do not mean that purely equitable rights may be enforced in a law action, but what we mean is that, where under our statute a legal right, or even an equitable right, is clearly given, such a right may be enforced in a civil action whether the action be denominated an action at law or one in equity. Therefore in the case at bar we think the right was clearly enforceable under our Constitution.

The foregoing conclusion is in our judgment, clearly sustained by Comp. Laws 1907, § 2489, which, so far as material here, provides: "The Revised Statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice." Where the statute, therefore, creates a right, the possessor thereof is entitled to have the same enforced in accordance with the rules of procedure outlined by our own statutes rather than by those of some other state. Starting out with the postulate that under our own statute the claim in question was assignable and that the real party in interest must sue, why could not respondent bring this action upon the cause of action in this case precisely the same as it might sue on any other cause of action? Does the fact that some other person or persons may also have or claim to have some interest in the claim sued on deprive the respondent of the right to sue? We think not.

[6] But, even if it be granted that respondent only obtained an equitable or a qualified interest as contradistinguished from an absolute and unqualified interest, still, under our Code, it was the real party in interest, so far its interest extended, and the action could be commenced and maintained in its name. Mr. Pomeroy, in his excellent work on *Code Remedies* (4th Ed.) § 127, in referring to the rule that all actions should be prosecuted in the name of the real party in interest, says: "Not only does the rule prevail when the assignment is absolute and

complete and the assignee is the legal owner of the demand; it prevails with equal force in cases where the assignment is simply equitable in its character; and the assignee's title would not have been recognized in any form by a court of law under the old system but would have been purely equitable. Such assignee, being the real party in interest, must bring the action in his own name." The question, as we shall see, is merely one of bringing into the action all those who claim an interest in the subject-matter of the action, and not one respecting the right to bring an action by any one of the interested parties. Nor is the contention that, inasmuch as the original owner of the claim may not split it up into several actions, therefore this may not be done by making assignments to different parties of the claim an insuperable obstacle to the right of bringing an action by one of the assignees of a part of the claim. The real question to be answered is: Does the rule against splitting the cause of action affect the assignee in his right to bring an action?

[7] In our judgment the whole contention in this respect arises out of the assumption that the owner of a claim may not bring an action for less than the whole amount of his claim without being guilty of infringing the salutary and well-recognized doctrine that one may not split up his cause of action and thus base several actions upon what is but a single cause of action. But the real question still is: When is a single cause of action split, within the purview of the doctrine? Is it when the first action is commenced, or is it when the attempt is made to bring a second action upon the same cause of action? A moment's reflection will make clear that it is not when the first action is commenced, but it occurs, if it occurs at all, when the second action is brought. To illustrate: Let us assume that A. has a claim against B. arising out of a tort which arose out of the negligent destruction of A.'s property by B., which claim amounts to the sum of \$1,000. Let us assume further that A. brings an action against B. in which he alleges the destruction of the property and the value thereof but sues only for the sum of \$250, or a part of the entire claim. In such a case can B. successfully interpose a demurrer upon the ground that A. does not state a cause of action because from his complaint it appears that the value of the property (that is, the whole loss to him) was \$1,000, whereas he sues only to recover one-fourth of that amount and apparently reserves the right to sue for the other three-fourths in some other action or actions? In the supposed case does not A. state a good cause of action although he does not sue to recover the full amount of his loss? In bringing such an action, is he splitting the cause of action within the purview of the doctrine against the splitting up of causes of action? Clearly not. Would any lawyer seriously contend

that a judgment in favor of A. for the sum of \$250 would be vulnerable to attack merely because it appeared upon the face of the complaint that he only sued for part of the \$1,000 claim, and that the attack could be made upon the sole ground that the action was not brought for the whole claim? The answer is obvious, and the reason is equally clear, since in seeking to recover only a part of the \$1,000 he nevertheless states a good cause of action, and hence a general demurrer would be impotent to reach the defect, if any defect exists. Now, let it be further assumed that it is also made to appear from A.'s complaint that there is at least one other who also claims an interest in the \$1,000. Does A. for that reason fail to state a good cause of action? The answer is again obvious. What then, is B.'s remedy? Has he any? He most certainly has a plain and adequate remedy. If it appears upon the face of the complaint that either one or more persons are interested in the claim of \$1,000, B., under our practice (Comp. Laws 1907, § 2962), may interpose a special demurrer upon the ground "that there is a defect of parties plaintiff." The court will then require the party bringing the action either to make the party in interest a plaintiff, or, if such party refuse to come in as plaintiff, he may be made a defendant, and the action may then proceed to a final determination. But suppose it does not appear upon the face of the complaint that there is another party interested in the subject of the action? Then B. may proceed under section 2966, which provides that, if the matter does "not appear upon the face of the complaint, the objection may be taken by answer." If the objection is taken by answer, it constitutes what is usually termed a plea in abatement to the action. Section 2967 provides: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

The supposed evil consequences that it is asserted will happen to a defendant if a plaintiff be permitted to sue upon a claim for less than the amount thereof, or in case he is permitted to bring an action upon a claim in which others, as assignees, may also claim or have an interest without in the first instance joining those other claimants, are easily avoided by making the proper objections at the proper time.

Again, let us suppose that A. brings a second action upon a single cause of action on which he has either another action pending or has already obtained judgment. B.'s remedy is again clear, speedy, and adequate. If the fact that another action is pending or that a judgment has already been obtained for the same cause of action between the same parties is apparent from the face of the complaint, the whole matter may again

be reached by special demurrer, and, if it does not so appear, then by answer, which, if a judgment has already been obtained, would be in the nature of a plea in bar, otherwise in the nature of a plea in abatement. If, however, the defendant fails to make any objection until after judgment, as in the case at bar, he has waived his right to be heard upon the foregoing question except upon the broad ground that the court lacked jurisdiction, or that the complaint failed to state facts sufficient to constitute a cause of action which in one sense is equivalent to a lack of jurisdiction. In any view, therefore, that can be taken, the defendant has a clear, speedy, and adequate remedy, and no fundamental principle of law or justice is disregarded, as must be the case in many cases, at least if it be held that a plaintiff may not bring and sustain an action on only a part of an entire claim or upon one in which another has an interest, although no objection is interposed by the defendant until after judgment. Moreover, to hold that a plaintiff may not proceed as outlined above is to hold that, although he has a legal right, yet he cannot enforce it in the regular way.

[8] It should also be remembered that the rule that a single cause of action may not be split up into several actions was created and exists for the benefit of the defendant, and it being a matter which involves no special public policy and one that a defendant may waive, and does waive, as provided by section 2967, supra, unless timely and proper objection is made. The fact that it may be waived is but another way of stating the legal conclusion that the objection cannot be raised either by a general demurrer or after judgment. If the complaint states a cause of action, a general demurrer cannot reach the defect, and for the same reason the objection against the judgment must fail.

We think that appellant's counsel would concede that the judgment in this case is not void upon its face. Yet, if their contention is granted, it must be upon the ground that the judgment is void, since their objection is grounded upon but one claim, namely, that the complaint entirely fails to state a cause of action. All this merely goes to show that the defect in cases like the one at bar must be reached in the way pointed out herein, or it must be deemed waived. While the cases in which the matter has been considered in the light we have considered it herein may be few, yet we think that under our statute, and upon sound principles of both substantive law and procedure, no other conclusion is permissible than the one outlined above.

We are of the opinion that upon principle the case of *Grain v. Aldrich*, 38 Cal. 514, 99 Am. Dec. 423, is not distinguishable from the one at bar. In that case it was square-

ly held that although an entire claim is sought to be split up by making several assignments of parts thereof, and although that fact is made to appear from the face of the complaint, yet the complaint for that reason is not vulnerable to a general demurrer that it does not state a cause of action.

From what has been said, it follows that the judgment should be, and it accordingly is, affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

FIRST STATE BANK OF MANNSVILLE v. HOWELL et al.

(Supreme Court of Oklahoma. Aug. 6, 1913.)

(Syllabus by the Court.)

1. PLEADING (§ 345*)—JUDGMENT ON PLEADINGS—EFFECT OF GENERAL DENIAL.

A motion for judgment on the pleadings was properly overruled, in an action in replevin, where the answer contained several defenses in addition to a general denial. The general denial raised an issue of fact, and did not render the pleading inconsistent, no matter what the other defenses may have been.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

2. PLEADING (§§ 345, 382*)—JUDGMENT ON PLEADINGS—EFFECT OF GENERAL DENIAL.

Ordinarily a motion for judgment on the pleadings is proper where the answer admits, or leaves wholly undenied, the allegations of the petition; but in replevin a general denial puts in issue every fact pleaded, and in such case a motion for judgment on the pleadings should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059, 1280-1294; Dec. Dig. §§ 345, 382.*]

3. DAMAGES (§ 40*)—BREACH—DAMAGES RECOVERABLE.

Loss of profits, or damage to a crop, if within the contemplation of the parties at the time a contract is made, and was such a loss or damage as flowed directly or proximately from the breach of such contract, and is capable of accurate measurement or estimate, is recoverable in an action for damages for the breach of such contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

4. CHATTEL MORTGAGES (§ 211*)—ASSIGNEE OF MORTGAGE—EQUITIES BETWEEN PARTIES.

In an action in replevin by the assignee of a nonnegotiable note and a chattel mortgage against the mortgagor to foreclose the chattel mortgage, it is competent to prove failure of consideration and damages caused by the fault of the original payee; such evidence is permissible only to defeat the assignee's right of possession, and not for the purpose of recovering damages from him.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 458; Dec. Dig. § 211.*]

5. REPLEVIN (§ 76*)—MEASURE OF DAMAGES—WRONGFUL DETENTION.

The measure of damages for the wrongful detention of a team of work mules is the usable value thereof during the time they were wrongfully detained.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 305, 306; Dec. Dig. § 76.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—42

Commissioners' Opinion, Division No. 1. Error from County Court, Marshall County; J. W. Falkner, Judge.

Action in replevin by the First State Bank of Mannsville against J. L. Howell and others to recover possession of a team of mules for the purpose of foreclosing a chattel mortgage thereon. Judgment for defendants, and plaintiff brings error. Affirmed.

E. D. Slough, of Ardmore, for plaintiff in error. Chas. A. Coakley, F. E. Kennamer, E. S. Hurt, and Geo. S. March, all of Madill, for defendants in error.

ROBERTSON, C. On December 15, 1908, one J. B. Wall, a merchant, sold to J. L. Howell two mules for \$275, said sum to be paid October 1, 1909. On the same day the said J. L. Howell executed and delivered to the said J. B. Wall two promissory notes (secured by chattel mortgage on the said mules and other property), one in the sum of \$275, the other in the sum of \$219.93, which said notes were also signed by Chas. Lewis, as surety. Wall, the merchant, was indebted to plaintiff in error in the sum of \$2,400 in the month of December, 1908, and shortly after the execution of the notes by Howell, as above set out, he indorsed and delivered to the said plaintiff in error said notes as collateral security for the payment of his indebtedness to the bank. In January thereafter Wall was adjudged a bankrupt. It may be fairly inferred, and is in fact alleged by the plaintiff in error, that the mules were charged on the books of Wall, the merchant, in the sum of \$275, together with merchandise and credit given for the notes, and that at the time the last item was furnished by Wall to Howell the latter was entitled to a credit of \$49.50; or, in other words, Howell had items charged on Wall's books sufficient to cover both notes, less the sum of \$49.50. At the time of the trial Wall and his bookkeeper, J. D. Tanner, were deceased. The defendant Howell answered plaintiff's petition by general denial, and, in addition, admitted the execution of the notes and mortgage, but denied that plaintiff was the owner, and entitled to maintain the action. He also alleged that the price of the mules was \$200 only, and that the excess, to wit, \$75, as shown by the note, was usurious interest; that by the wrongful taking of the property by plaintiff he was damaged in the sum of \$250, and that by breach of warranty as to the age of the mules he was damaged in the sum of \$80. He also alleged that he had a contract with Wall to furnish supplies for the year 1909, and that by reason of Wall's failure to furnish such supplies he was damaged by having to work away from home, and out of his crop, for two months, at \$1 a day, when his team at work in the crop would have been worth \$3 a day, and, further, that he was prevented from planting his crop in time by reason of such failure to

furnish supplies, and that therefore his crop was late, and was damaged by drouth in the sum of \$250. Plaintiff demurred generally to the answer, and especially to paragraphs 4 and 7; the first being with reference to usurious interest, and the latter with reference to damages occasioned by the failure to furnish supplies. The court sustained the demurrer to paragraph 7, but later sustained a motion to set aside the demurrer, and permitted said paragraph to stand. Plaintiff filed a motion for judgment on the pleadings, which was overruled. The cause was tried to a jury February 7, 1911, and a verdict was returned in favor of the defendant for the return of the mules or their value in the sum of \$100 each, and for \$100 damages for the wrongful detention of the same. Motion for a new trial was filed, considered, and overruled, and judgment was entered on the verdict, and plaintiff brings this appeal to reverse said judgment, and assigns as error: (1) The court erred in not rendering judgment for the plaintiff on the pleadings. (2) The court erred in setting aside the order sustaining a demurrer to paragraph 7 of defendants' answer. (3) The court erred in overruling motion of plaintiff for a new trial.

[1, 2] Judgment on the pleadings is a permissible practice in the courts of this jurisdiction when the state of the pleadings warrant such disposition of the case. The case in hand being one in replevin, the gist of the action is the wrongful detention of the property. Defendants answered by general denial, and, in addition, pleaded affirmative defenses. In the latter they admit the execution and delivery of the notes and mortgages, default in payment of which is made the basis of plaintiff's claim to the right of possession. At any event it was incumbent on plaintiff, before it could recover, to establish its right of possession. Even though the special defenses set up in the answer should fail, yet the defendants, under the general denial, had a right to defeat plaintiff's claim by showing right of possession in some third party. Hence such an answer, containing different defenses, is not an inconsistent pleading in replevin, and, where an issue of fact is raised, as it was in this case, by the general denial, it is not error for the trial court to overrule a motion for judgment on the pleading. Ordinarily a motion for judgment on the pleading is proper where the answer admits, or leaves wholly undenied, the material allegations of the petition; but in this case no such condition exists. It might in some cases be proper to award judgment on the pleadings where the answer does not deny all the facts alleged, but denies legal conclusions only; but we are again, in this case, met with the principle that a general denial in replevin puts in issue every fact pleaded in the petition. 11 Ency. P. & P. 1031. This being true, there was no error in the action of the trial court in overruling the motion for judgment on the pleadings as

interposed by plaintiff. *Thomas v. Ray*, 48 Colo. 423, 110 Pac. 77.

[3] It is next contended that the court erred in refusing to sustain plaintiff's demurrer to the seventh paragraph of defendant's answer. This paragraph in substance charged that at the time defendant executed the notes and mortgage in controversy the said Wall agreed to furnish Howell such supplies, out of his store, as would enable him to make a crop during the year 1909; that he failed and refused to do so, and, on account of such failure, Howell was compelled to work out for \$1 per day, when he should have been in his crop, and that the services of himself and team in his crop during such time was worth \$3 per day; that, on account of the fact that his team and other personal property was mortgaged to Wall, he was prevented from obtaining credit elsewhere, all of which was known to Wall at the time the notes and mortgage were executed; that, as a direct and proximate result of such failure and refusal on Wall's part to comply with the terms of his said agreement, and furnish Howell the supplies necessary to enable him to plant and care for his crop, he was compelled to and did neglect planting it for two months, and the same was damaged and his profits thereon reduced thereby in the sum of \$250. The notes were nonnegotiable, and any defense Howell may have had as against Wall would be available to him as against plaintiff. No reply was filed by the bank to the affirmative matter set up in the answer, nor was there any motion to strike the same; but a demurrer was interposed, which at first was sustained, but later overruled, by the court, at the request of defendants, over the objection of plaintiff. The jury, by its general verdict, found that such an agreement as set up by paragraph 7 of the answer was the consideration for the execution of the notes secured by the chattel mortgage involved in this action, and by said verdict found for defendants on every material fact necessary to sustain his theory under the issues formed by the pleadings. This, therefore, brings us to the question, Is the damage to a crop such as charged and proved in this case such an one as would be recoverable in an action for the breach of the contract between Howell and Wall? Or, in other words, is the loss of prospective profits on a crop under the facts charged and proved a proper element of damage for breach of the contract set up in the answer and found to exist by the verdict of the jury? If this element (loss of profits or damage to crop) was within the contemplation of the parties at the time the contract was made, and was such a damage as flowed directly and proximately from the breach of the contract, and was capable of accurate measurement or estimate, then the verdict must stand; otherwise it must be set aside.

We find this proposition to have been

carefully considered and this question decided by *Harrison, C.*, in *Ft. S. & W. Ry. Co. v. Williams*, 80 Okl. 726, 121 Pac. 275, 40 L. R. A. (N. S.) 494, wherein it is said: "It is well settled in this state that damages based upon prospective profits which would have been realized had the contract been performed may be allowed, providing they are fairly within the contemplation of the parties, are the direct natural consequence of the breach of the contract, and are susceptible of being ascertained with reasonable certainty."

In *Bell v. Reynolds*, 78 Ala. 511, 56 Am. Rep. 52, the chief point in controversy was one relating to the proper measure of damages claimed by defendant by way of set-off to plaintiff's action. Plaintiff sued to recover the value of certain fertilizer sold and delivered to defendant. The defense set up was that plaintiff agreed to sell and deliver defendant 20 tons, at a stipulated price, with notice of its intended use. Defendant failed to deliver the full amount purchased, and plaintiff, not being able to obtain it elsewhere, failed to make as good crop on the land he had intended to use it on as on that which was fertilized. The land upon which the fertilizer was designed to be used was prepared and cultivated in a farmerlike manner. Upon a portion of it was used the fertilizer furnished under the contract, and this portion produced between 300 and 400 pounds of seed cotton to the acre more than that adjoining, which was also planted in cotton; the quantity and cultivation of each being the same. It was contended that the amount of defendant's damage for the failure of plaintiff to deliver the balance of the fertilizer is measured by the profits which he has lost in the depreciated production of cotton on the land upon which he intended to use it. The court held that the rule or true measure of damages was in fact the difference in value between the cotton raised on the land on which the fertilizer was used and that raised on the adjoining land of the same quality and cultivated in the same manner on which no fertilizer had been used.

As a general rule in ordinary cases the true measure of damages, where the seller fails to deliver goods sold where the purchase price has not been paid, is the difference between the agreed price and the market price at the time and place of delivery, with interest, and this is on the theory that the purchaser can go on the market and purchase the goods from another by paying the difference in price. But, when this cannot be done, the rule does not apply. Such is the condition in the case at bar. And it is also true that ordinarily profits are not included in the injury for which compensation is made, and yet again it is frequently held that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718.

In *Bell v. Reynolds*, 78 Ala. 514, 56 Am. Rep. 55, the rule is stated as follows: "The true rule seems to be that profits which have been sustained as the natural consequence of the breach or wrongful act complained of are recoverable, unless they are objectionable either on the ground of remoteness or of uncertainty. Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent on collateral engagements and enterprises, not brought to the notice of the contracting parties, and not, therefore, brought within their contemplation, or that of the law." Our own statute seems to contemplate such a rule as may be seen by reference to section 2852, Revised Laws 1910, where it is provided that: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all detriment proximately caused thereby, or which, *in the ordinary course of things, would be likely to result therefrom.* No damages can be recovered for a breach of contract, which are not clearly ascertainable in both their nature and origin."

[4] As was said hereinbefore, the notes and mortgage are but evidences of the principal contract alleged to have been made and entered into by Wall and Howell. This alleged contract is not denied by the bank by reply or otherwise. The jury found, as it had a right to find, that the contract was made as charged. Therefore we are bound to say that the parties, at the time they made the contract, had in mind the profits that would arise from the making of a crop; that was, and of necessity must have been, in contemplation of the parties at the time the mortgage was executed, for the mortgage covered all the crops to be grown by Howell as well as the mules in question. This being true, we have no hesitancy in saying that the rule fixing the measure of damages heretofore announced is not only supported by reason and authority but by the statute above quoted. See, also, in support of this rule, *Jones v. George*, 61 Tex. 345, 48 Am. Rep. 280; *Rice v. Whitmore*, 74 Cal. 619, 16 Pac. 503, 5 Am. St. Rep. 479; *Joyce on Damages*, § 1374.

However, this evidence in support of this element of damage in the case at bar was competent only for the purpose of showing that the notes and mortgage had been satisfied, or that the consideration therefor had failed, and could not, on that account, be made to support a verdict for damages against the bank in this action in replevin. The only purpose in admitting such evidence was to show that the consideration for the notes had failed, and that no damage could be recovered from the bank by reason of Wall's failure to furnish the supplies in accordance with the terms of his contract, and for this reason, and this alone, it was not

error for the court to permit paragraph 7 of the answer to stand, and to allow the introduction of evidence in support of the plea of failure of consideration in the notes, and thereby defeat the right of recovery in the replevin action. Of the correctness of the foregoing position, we do not think there can be any question. It is undisputed that there was such a contract made as alleged in Howell's answer; that its terms were broken by Wall; that Howell was damaged as alleged in his answer; the testimony was amply sufficient to sustain the verdict, and which warrants us in finding that Howell's story is true, wherein he says that he could not get supplies from Wall; that, in order to support his family, he had to work away from home by the day, when his services, with the team, were required in his own crop, and were worth at least \$3 per day; that thereby his crop was planted late, and was caught by the drouth; that he had 25 acres of corn that made only 5 bushels per acre, while his neighbors, with the same labor on the same quality of land, made 25 bushels per acre, which was worth 50 cents per bushel. On this basis he showed a damage of \$250 on testimony wholly undisputed. Thus his damage was ascertainable by the plainest, easiest, and most accurate measure possible, by showing the loss of property occasioned by the damage done the crop. Making a crop was one of the principal thoughts the parties had in mind when the contract was made. It was for that purpose he made the contract; had he wanted to work out by the day, there would have been no necessity for the contract and mortgage. But, if he made a crop, he must needs make provision for the sustenance of his family and team while doing so, and, when he made the contract with Wall (the principal contract between them, evidenced partially by the notes and mortgage), it was in the contemplation of their minds that no crop could be made unless the supplies were furnished, and that to fail to furnish the supplies at the time they were needed could result only in damage to Howell, and therefore the allegation and proof to support the same were properly presented to the jury in order to make defendants' legitimate defense. It is not sufficient objection to this conclusion to say that the damages sought to be recovered upon profits to be made on crops renders them too remote or speculative. As a matter of fact such damages, as has been pointed out in *Ft. S. & W. Ry. Co. v. Williams*, supra, are easily and accurately ascertainable because they are not only within the contemplation of the parties at the time the contract was made but are the direct and natural consequences of the breach of the contract, and are susceptible of being ascertained with reasonable certainty.

The court, in the case last above cited, in speaking of the manner of computing damages such as arise in this case, says: "There is more or less inaccuracy in every action for

damages for breach of contract; but, in order to justify a recovery in any case, assuming that a breach has been committed, there are two necessary elements to be considered: One that a damage has been done; the other that such damage is the result of the breach. The amount of the one should be computed with reasonable accuracy. The fact of the other must be determined with reasonable certainty. A less degree of accuracy is required in the former than of certainty in the latter; but neither is required to be absolute or beyond conjectural possibilities. Where it reasonably appears that a party has been damaged, and that such damage is the direct result of the breach, then a recovery is justified. The next step is to ascertain how much will reasonably compensate the injured party. This should be computed by the plainest, easiest, and most accurate measure which will do justice in the premises, and if, from the conditions in the contract, and the nature of the breach, it reasonably appears that the extent or amount of damages may be more readily, easily, correctly, and justly ascertained by applying the loss of profits as a measure, if it is evident that profits were lost, and the amount thereof can be calculated with reasonable accuracy, then such profits are the true measure to be applied."

Hence, from the foregoing, follows necessarily the conclusion that paragraph 7 of defendants' answer stated good grounds of defense, and the court committed no error in refusing to set aside his order reinstating the same, or in refusing to sustain a demurrer thereto.

It is urged under the next assignment of error that the verdict is contrary to law, for that the evidence is insufficient to disprove that plaintiff was the owner and holder of the notes at the time of the commencement of the action, and that of warranty as to the age and other qualities of the mules at the time of the sale; but these were both questions of fact for the jury, and inasmuch as they were both submitted as such, under instructions which were not objectionable to the plaintiff, and which fairly states the law applicable thereto, we are not at liberty to interfere with the finding of the jury on a simple question of fact, if there is any evidence in the record reasonably tending to support the same, and in this case there is evidence sufficient under the foregoing rule to sustain the verdict, and these specifications of error must therefore fail.

[5] It is also charged that the court erred in giving instruction No. 10, fixing the measure of damages. This instruction standing alone would be an erroneous statement of the law, but taken in connection with instruction No. 11, immediately following, it states the law applicable to the facts of this case, and is therefore not open to the criticism lodged

against it. The court properly instructed the jury that the damages to which plaintiff would be entitled, if any, as against the bank, would be the usable value of the mules during the time they were wrongfully detained. There is evidence in the record to show that the usable value of the team from the time it was taken in October, 1909, up to date of trial on February, 1911, nearly 16 months, was \$1 per day. This is in no wise disputed or contradicted. The jury gave only \$100 damages; under the evidence a verdict for three times that amount would stand.

We can see no error in the record justifying interference by this court, and the judgment should therefore be affirmed.

PER CURIAM. Adopted in whole.

FIRST STATE BANK OF MANNSVILLE v. LAWSON et al.

(Supreme Court of Oklahoma. Aug. 6, 1913.)

Commissioners' Opinion, Division No. 1. Error from County Court, Marshall County; J. W. Falkner, Judge.

Action in replevin by the First State Bank of Mannsville against A. P. Lawson and others to recover possession of personal property for the purpose of foreclosing a chattel mortgage thereon. Judgment for defendants, and plaintiff brings error. Affirmed.

E. D. Slough, of Ardmore, for plaintiff in error. Chas. A. Coakley, F. E. Kennamer, E. S. Hurt, and Geo. S. March, all of Madill, for defendants in error.

ROBERTSON, C. This case involves the consideration of the identical question decided by this court in case No. 2823, First State Bank of Mannsville v. J. L. Howell et al., 137 Pac. 657, decided August 4, 1913, not yet officially reported. The opinion in that case is conclusive as to the issues herein, and we hereby adopt and promulgate that opinion as and for the opinion in this case.

For the reasons assigned, the judgment of the county court of Marshall county should be affirmed.

PER CURIAM. Adopted in whole.

PERKINS v. BAKER.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 696*)—REVIEW OF EVIDENCE—RECITAL IN CASE-MADE.

This court will not examine the evidence on a given subject unless the case-made contains an averment, by way of recital, to the effect that it contains all the evidence introduced at the trial. And this is especially true where the sufficiency of the case-made is properly challenged, and no answer thereto is made by the opposite party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2916, 2917; Dec. Dig. § 696.*]

2. APPEAL AND ERROR (§ 207*)—MISCONDUCT OF COUNSEL—PRESENTATION BELOW—NECESSITY.

To present the question of misconduct of counsel, as making improper statements to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury in his argument, for appellate review, there must be an objection seasonably made, and an exception properly taken, if it is overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1500; Dec. Dig. § 207.*]

3. EVIDENCE (§ 318*)—DOCUMENTARY EVIDENCE—HEARSAY.

It is not error to exclude from evidence a copy of the enrollment records offered for the purpose of proving the age of a Seminole allottee at the time he executed a warranty deed in January, 1905, especially where no predicate has been laid for the admission of secondary or hearsay evidence, and no other proper or sufficient reason being apparent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1193-1200; Dec. Dig. § 318.*]

4. EVIDENCE (§ 291*)—AFFIDAVIT—PROOF OF AGE.

It is not error to refuse admission in evidence of an affidavit of the deceased mother of an alleged minor, unless it is shown that such affidavit was made in good faith, unbiased by any issue between the parties likely to be affected thereby, and made before the litigation was commenced in which such evidence is to be used.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1150; Dec. Dig. § 291.*]

5. WITNESSES (§ 345*)—IMPEACHMENT—CONVICTION OF CRIME.

Record examined, and held not error to allow a witness to be asked if he had ever been convicted of a crime in the tribal courts of the Seminole Nation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1126-1128; Dec. Dig. § 345.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Seminole County; Tom D. McKeown, Judge.

Action for ejectment by J. A. Baker against J. M. Perkins. Judgment for plaintiff, and defendant brings error. Affirmed.

Crump, Fowler & Skinner, of Wewoka, for plaintiff in error. J. A. Baker, of Wewoka, pro se.

ROBERTSON, C. This action in ejectment was brought in the district court of Seminole county in November, 1909, by J. A. Baker against J. M. Perkins. The answer denied the claim of ownership set up and relied upon by Baker, and set up ownership in the defendant, Perkins; Baker claimed by virtue of a deed dated January 4, 1905. It was the contention of the defendant at the trial below that, at the time Baker took his deed to the land in controversy, the grantor therein, Tippie Alberta, was a minor, and, being a Seminole freedman, was not capable of transferring the title to said land, and the deed under which Baker claims was therefore void. The jury returned a verdict in favor of Baker and against Perkins, upon which judgment was entered, and to reverse which this appeal is brought. The principal question in the case, and that upon which the verdict of the jury turned at the trial, was the age of the grantor, Tippie Alberta. There are many assignments of error in the petition; but, in the defendant's brief, attention is

given only to the second, fifth, eighth, ninth, and eleventh, the others being waived.

[1] The second assignment is that "the verdict and judgment rendered thereon in said cause was contrary to and not sustained by the evidence." The plaintiff objects to the consideration of this assignment by this court, for the reason that the case-made does not contain a certificate showing that it contains all the evidence introduced at the trial, and upon which the verdict was rendered, and the judgment was entered. A careful examination of the case-made proves this assertion to be correct, and under the uniform holdings of this court we are not at liberty to examine any of the testimony given on a subject, unless the case-made contains the positive averment, by way of recital, to the effect that it contains *all the evidence* introduced at the trial. This objection to the sufficiency of the case-made stands before us unanswered, and for that reason we presume the same must be true, and that the record cannot be amended. *Baldwin Lumber Co. v. Sanders*, 134 Pac. 387, and the cases there cited.

[2] The next assignment of error urged has to do with the alleged improper conduct of counsel for plaintiff in his argument to the jury. Considerable space is taken up in defendant's brief on this subject, and many authorities are cited in support of his contention. Stress was also laid on this purported impropriety at the oral argument had before us; but, counsel for the plaintiff insists that this court has no jurisdiction to hear and determine this question, for that no exception was made or saved to the ruling of the trial court on the subject, and that this is not such a matter as can be raised for the first time in this court on appeal. An examination of the record shows (pages 69 to 70) that the following took place:

"By Mr. Fowler: The defendant excepts to the remarks of counsel for the plaintiff.

"By the Court: The jury are admonished to go by the testimony and the charge of the court."

Section 5026, Rev. Laws 1910, provides that an exception is an objection taken to a decision of the court or judge upon a matter of law. Section 5027 provides that the party objecting to a decision must except at the time the decision is made, and time may be given to reduce the exception to writing, but not beyond the term, etc.

In this case, as disclosed by the record, defendant objected to plaintiff's argument, and the court ruled upon the objection. We must presume the ruling of the court was satisfactory to defendant's counsel, else an exception would have been taken thereto. No such exception was taken so far as the record shows, and no complaint that the record is insufficient in that respect has been heard. No request was made that the jury be in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

structed to disregard the alleged improper remarks of counsel, yet it seems that the court, in effect, voluntarily instructed them to go by the testimony and the charge of the court, and this evidently was satisfactory to defendant, as it ended the controversy, and no exception was noted to the failure of the court to rule directly on the objection, nor to the instruction given the jury. *Alexander et al. v. Oklahoma City*, 22 Okl. 838, 98 Pac. 943; *St. L. & S. F. R. R. Co. v. Davis*, 132 Pac. 337; *McLain v. State*, 18 Neb. 154, 24 N.W. 720. In *1 Thompson on Trials*, § 962, the learned author says: "The more correct view is that such irregularity can only be saved for appellate review by an objection seasonably made, an exception properly taken, if it is overruled, which exception is incorporated in a bill of exceptions, signed and sealed by the presiding judge." This rule was quoted with approval and followed by the court in *Coalgate Co. et al. v. Bross*, 25 Okl. 244, 107 Pac. 425, 138 Am. St. Rep. 915, in the following language, by Mr. Justice Kane, in the syllabus: "To present the question of misconduct of counsel in making improper statements to the jury in his argument for appellate review, there must be an objection seasonably made, and an exception properly taken, if it is overruled." This precludes further consideration, at our hands, of this assignment of error.

[3] It is next urged that the court erred in not permitting the introduction in evidence of a certified copy of the enrollment record, showing the age of Tippie Alberta.

In this connection it is asserted that said copy of the enrollment record should have been received in evidence, first, as conclusive evidence of the age of said allottee under the provisions of the act of Congress of May 27, 1908 (35 Stat. 312, c. 199, § 3); second, as a circumstance tending to show his age; third, as evidence *prima facie* of his age.

We cannot agree with counsel's contention in this behalf. The deed challenged was executed in January, 1905, and the age of the allottee in such instances is a fact to be proved as any other fact provable at that time, and the rule of evidence enunciated by the act of Congress, *supra*, does not control.

This act of Congress provides a new rule of evidence; not a general rule, but an arbitrary, limited rule for a particular class of cases. No predicate was laid at the trial below for the introduction of secondary or hearsay evidence, and at the time the deed was executed the enrollment record, without a predicate for such evidence having been laid, would have been incompetent. Not so, however, had the transaction occurred after the passage of the act of Congress, *supra*.

It was said by Brewer, C., in *Rice v. Ruble*, 134 Pac. 49: "While, as has been stated, it is not required that we here decide whether the enrollment records, or a certified copy thereof, would, in such a case as this, be

admissible in evidence at all to be considered with other proof, yet it is not amiss, we think, to say that its admissibility, in such cases as this, on the question of age is very doubtful, under the doctrine of *Hegler v. Faulkner*, 153 U. S. 109, 14 Sup. Ct. 779, 38 L. Ed. 653." See, also, *Rice v. Anderson*, 134 Pac. 1120; *Williams et al. v. Joins*, 34 Okl. 783, 126 Pac. 1013.

We are of opinion, and so hold, that, in the absence of a reason to the contrary, the certified copy of the enrollment records, offered for the purpose of proving the age of a Seminole allottee at the time he executed a deed in January, 1905, is incompetent and hearsay, and that the court did not err in refusing to permit its introduction in evidence. We do not attempt to decide whether or not the same, under any circumstances, would not be competent; but under the facts in this case, no reason or excuse of any kind being offered, and no predicate being laid, we hold the same to be incompetent.

[4] The next point urged is that the court erred in excluding from evidence the affidavit of the mother of Tippie Alberta concerning his age. This affidavit was made on October 14, 1907. The deed, as has been hereinbefore mentioned, was executed in January, 1905. Ordinarily the declarations of a parent concerning the age of his child (and that is the sole effect of this affidavit under consideration) is admissible in evidence if made before the cause of action arose wherein the same is offered. *David v. Sittig*, 1 Mart. N. S. (La.) 147, 14 Am. Dec. 179. *Wigmore*, in his admirable work on Evidence (volume 2, § 1480 et seq.), declares this principle to be one of the oldest exceptions to the hearsay rule, and is known as the rule of necessity; but before such declaration is admissible, even under this rule, it must be shown that the evidence offered by this method is the best evidence of which the case is susceptible, and that the declaration was made in good faith, unbiased by any issue between the parties likely to be affected thereby, and made before the litigation was commenced in which such evidence is to be used. Then, too, ordinarily this class of evidence is admissible only to prove age in *pedigree*, and not age as a *fact*.

It has been held that a witness cannot testify that he heard the mother of a grantor in a deed say that he was an infant at the time of its execution, unless it is first affirmatively shown that the declaration was made *ante litem motam*, and that the declarant is dead. *Hodges v. Hodges*, 106 N. C. 374, 11 S. E. 364; 1 *Greenleaf*, § 131. The question of the age of Tippie Alberta, for the purpose of this case being one of fact, instead of pedigree, was for the jury, and the issues thus formed and submitted, having been resolved in favor of plaintiff on conflicting evidence, will not be disturbed in this court on appeal.

[5] The only remaining assignment is that

the court erred in permitting plaintiff, for the purpose of impeaching a witness, to ask him if he had ever been convicted of a crime in the tribal courts of the Seminole Nation.

This court will take judicial notice of the history and government of this Nation, as well as of the various subordinate divisions thereof, including that of the Five Civilized Tribes of Indians. We know that the Seminole Nation had an organized form of government, with a judiciary having jurisdiction of the various crimes and offenses, including those involving moral turpitude; these governments and the courts organized thereunder were recognized and fostered by the federal government. We also know that a witness may, for the purpose of impeachment, and as affecting his credibility, be asked whether or not he has been convicted of any crime involving moral turpitude. This sort of examination, however, must be confined to reasonable limits, subject to control by and through a wise discretion of the trial court. In the instant case no abuse of discretion is shown. No motion was made by defendant's counsel to withdraw the alleged objectionable matter from the consideration of the jury, or to instruct the jury to disregard the same; hence, if any harm was done, the effect thereof has been waived.

From a careful consideration of the whole case, we are convinced that no error of sufficient magnitude to warrant a reversal was committed, and that therefore the judgment should be affirmed.

PER CURIAM. Adopted in whole.

WILLIAMSON v. HUMAN.

(Supreme Court of Oklahoma. Dec. 16, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 756*)—BRIEF—DISMISSAL.

For failure to comply with rule 25 of this court (95 Pac. viii), the appeal is dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3091; Dec. Dig. § 756.*]

Error from County Court, Bryan County; J. L. Rappolee, Judge.

Action by Ola Human, by her next friend, C. M. Spell, against C. E. Williamson. Judgment for plaintiff, and defendant brings error. Affirmed.

Kyle & Newman and H. B. Hays, all of Durant, for plaintiff in error. Chas. C. Parker and Deck & Elting, all of Durant, for defendant in error.

KANE, J. This was an action for forcible entry and detainer, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover possession of a certain tract of land. Upon trial to a jury in the justice's court there

was a verdict in favor of the defendant, upon which judgment was duly entered, whereupon the losing party appealed to the county court.

In the county court a demurrer to the answer of the defendant was sustained, and, upon his refusal to plead further, judgment upon the pleadings was rendered in favor of the plaintiff, to reverse which this proceeding in error was commenced.

An examination of the briefs discloses that rule 25 of this court (95 Pac. viii) has not been complied with. The rule requires in effect that the brief of the plaintiff in error shall contain an abstract or abridgement of the transcript, setting forth the material parts of the pleadings, proceedings, facts, and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision so that no examination of the record itself need be made in this court. In the case at bar, the only questions raised are whether the answer states facts sufficient to constitute a defense and the sufficiency of the pleadings to support the judgment rendered. As neither the bill of particulars or the answer thereto are set out in the abstract required by rule 25, which this court has often held to be mandatory, it is impossible for the court to pass upon the questions raised without an examination of the record itself. That counsel for plaintiff in error did not attempt to comply with the rule is apparent from such extracts as the following, which occur frequently throughout the brief: "The court will see from an examination of the record;" "the record shows as will be seen from an examination thereof;" etc., etc., etc.

For failure to comply with rule 25 of this court, the appeal is dismissed. All the Justices concur.

SCHAFER v. MIDLAND HOTEL CO. et al.
(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. TRIAL (§ 404*)—GENERAL FINDING—CONSTRUCTION.

In an action tried to the court and a general finding is made in favor of the defendant, such general finding necessarily includes a special finding in favor of the defendant of every particular fact necessary to sustain the general finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

2. REFORMATION OF INSTRUMENTS (§ 45*)—GROUNDS—"MUTUAL MISTAKE"—PROOF.

The law does not authorize the reformation of a written contract on the ground of mutual mistake (i. e. a mistake by each of the parties thereto) unless the proof of such mutual mistake is clear and convincing.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157-193; Dec. Dig. § 45.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. APPEAL AND ERROR (§ 1009*)—GENERAL FINDING—EVIDENCE.

Where the defendant seeks in a cross-petition to reform a written contract, sued upon on the ground of mutual mistake of the parties thereto, and the cause is tried to the court, and there is a general finding in favor of the defendant, and an exception is urged on the ground that the same is not supported by the evidence, *held*, this court will examine the testimony so far as necessary to ascertain whether or not the finding of the court is reasonably supported by the evidence, and if it be found that the general finding, or any particular finding necessarily included in the general finding, is not reasonably supported by the evidence, the general finding will be set aside and a new trial ordered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; T. J. Johnson, Judge.

Action by Henry Schafer against the Midland Hotel Company, a corporation, and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

R. B. Forrest and Forrest & Sansom, all of El Reno, and Geo. D. Key, of Tulsa, for plaintiff in error. B. M. Parmenter and Stevens & Myers, all of Lawton, for defendants in error.

GALBRAITH, C. Henry Schafer commenced an action in the district court of Comanche county against the Midland Hotel Company, a corporation, which had been promoted by himself and Geo. H. Block, on a promissory note of the company for \$5,000, which had been indorsed by Schafer and Block and paid by Schafer, and on an account amounting to \$2,200 for money advanced by Schafer in the prosecution of the work of completing the hotel. It was alleged that Block was liable for these claims against the Midland Hotel Company by virtue of a written contract entered into between Schafer and Block on the 13th day of April, 1910, which evidenced a sale by Schafer to Block of his stock in the Midland Hotel Company, and wherein Block undertook and agreed to pay all the liabilities outstanding against the company.

The defendants answered, admitting the execution of the note by the company and the advancement of the \$2,200 by Schafer and the signing of the contract of April 13, 1910, but alleged by way of cross-petition that the note and account and the plaintiff's interest therein had been sold to the defendant Block, and that the plaintiff had no further interest in the note and could not maintain the action, and that by mutual mistake of the parties this part of the agreement by which Schafer sold his interest in the note and account to Block was omitted from the written contract of April 13, 1910, and prayed that the plaintiff take nothing by the said action, and that the contract of April 13, 1910, be reformed according to the real

and true agreement of the parties, and that Schafer be required to execute an assignment of the insurance policy according to the agreement of the parties, and for costs and general relief.

When the cause came on for trial, each of the parties waived a jury and agreed that the cause might be tried to the court. The cause was tried on the 5th of January, 1911, and the argument of counsel was deferred until about a month later, and then the cause was taken under advisement by the court and judgment rendered thereon on the 7th of July following. The record shows that on this last date the court "here and now announces to the parties his finding of fact and the law in the case in favor of the defendants," and that judgment was thereupon rendered in favor of the defendants, and that the plaintiff take nothing by his action, and that the costs be taxed against him, and further adjudged that the defendant Geo. H. Block be subrogated to all the rights of Henry Schafer in a certain insurance policy for \$12,500, described in the answer and cross-petition. From this judgment Schafer perfected an appeal to this court.

One of the assignments of error urged by the plaintiff in error is that the finding of the court is not supported by the evidence. The record does not show that either party requested the court to make special findings of fact. He was therefore justified in making a general finding.

It has been many times announced by this court that, where a jury is waived and the cause is submitted to the court for trial, the finding of the court will not be disturbed, where it is reasonably supported by the evidence. That the findings of the trial court come to this court with the same force as the verdict of the jury on disputed questions of fact. However, the rule is equally well settled that, if the findings are wholly unsupported by the evidence, the findings of the court will be set aside, and that this court will examine the testimony so far as to ascertain whether or not there is evidence in the record to support the findings of the court. *Reeves & Co. v. Brennan*, 25 Okl. 544, 106 Pac. 959; *First Nat. Bank v. Arnold*, 28 Okl. 49, 113 Pac. 719; *De Vitt v. City of El Reno*, 28 Okl. 315, 320, 114 Pac. 253; *Bretch Bros. v. Winston & Sons*, 28 Okl. 625, 115 Pac. 795; *Hampton v. Thomas*, 35 Okl. 529, 130 Pac. 961; *Hall v. Bruner*, 36 Okl. 474, 127 Pac. 255.

[1] It has been repeatedly announced by decisions of this court that, where a cause is tried by the court and the finding of the court is general, it is a finding of every special thing necessary to be found in order to sustain the general finding. *Farmers' & Merchants' Natl. Bank v. School District No. 56, Kiowa County*, 35 Okl. 506, 130 Pac. 549; *City of Chickasha v. Looney*, 36 Okl. 155, 128

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Pac. 136; *Wat-tah-noh-zhe v. Moore*, 36 Okl. 631, 129 Pac. 877. It follows, therefore, from the application of this rule to the case at bar, that the general finding made by the court in favor of the defendants was a special finding of fact that there had been a mutual mistake made by Schafer and Block, and that on account of such mutual mistake the agreement between Block and Schafer, whereby Block purchased the interest of Schafer in the note and account in suit, and that Schafer agreed to transfer the same to Block, was omitted from the written contract of April 13, 1910.

[3] We have carefully examined the testimony to ascertain whether or not there is any testimony in the record that would sustain this finding that there was a mutual mistake between these parties on this disputed question. After such examination we are constrained to say that such finding is wholly unsupported by the evidence. The testimony of Block himself would scarcely support this finding of the court. The evidence shows that, at the time the trade was made between Schafer and Block, Schafer was in the city of Lawton, and after some three days' negotiations an agreement was reached, and that he and Block then proceeded to the office of Block's attorney, and each made a statement to the attorney of the terms and conditions of the deal; that the attorney took notes of these statements and then, in the presence of the parties, dictated the contract to his stenographer; and that the agreement was then typewritten and read over to the parties, and some changes made therein, and then signed by each of the parties. This contract is plain and unambiguous in its terms. In three separate places therein distinct reference is made to what Schafer sold and Block purchased, and each time particular recital is made that it was the 250 shares of stock in the Midland Hotel Company of the par value of \$100 each. Schafer testified positively that the contract expressed the real agreement entered into between himself and Block, and he is strongly corroborated by the contract itself, and also by the fact that, although Block knew that Schafer had taken up the \$5,000 note and had it in his possession at the time the trade was made and the contract of April 13, 1910, entered into, he never at that time or at any subsequent date prior to filing the suit asked that the note be turned over to him. The only ground on which this contract is sought to be reformed is on account of mutual mistake. "That, by mutual mistake of the parties and the scrivener who wrote the contract, said provisions were omitted from the same."

[2] Under the law the court could not reform the contract on this ground, unless the evidence that there had been a mutual mistake was positive, clear, and overwhelming. Even if the written contract did not embody

the terms of the agreement as Block understood them, and there was a mistake on his part, it is clear that there was no mistake on Schafer's part. The written contract expressed the agreement as he understood it, and it is clear that there was no mutual mistake. In the case of *Hope v. Bourland*, 21 Okl. 864, 98 Pac. 580, Mr. Justice Turner, in rendering the opinion of the court, said: "It is well settled that to warrant a reformation, in the absence of fraud or imposition, there must be a mutual mistake (that is, a mistake shared by both parties); that to justify the reformation of a deed delivered, accepted, and acted upon, on the ground that it did not correctly express the agreement made by the parties, the proof must be clear and convincing; and, until a mistake has been established by such proof as leaves no rational doubt of the fact, no change will be made in the writing sought to be reformed." This statement of the law is supported by abundant authority referred to in the above opinion.

It is also contended that the judgment is not responsive to the issues. While this is true, yet, since the cause should go back for a new trial, this condition can be remedied in the decree that may be entered in said cause upon such trial.

We find that the judgment appealed from should be vacated and said cause remanded for a new trial.

PER CURIAM. Adopted in whole.

BALTZ v. MITCHELL.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

INDIANS (§ 13*)—DECISIONS OF INTERIOR DEPARTMENT—REVIEW BY COURTS.

The courts will not disturb decisions by the Department of the Interior based purely upon findings of fact from the testimony submitted, where there is no fraud nor apparent error of law in such department decisions.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 30; Dec. Dig. § 13.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Rogers County; T. L. Brown, Judge.

Action by Franklin P. Mitchell against Foster Baltz. Judgment for plaintiff, and defendant brings error. Reversed.

A. F. Mood, of Claremore, for plaintiff in error. W. H. Kornegay, of Vinita, for defendant in error.

HARRISON, C. This was an action by Franklin P. Mitchell against Foster Baltz, née Stone, for possession of an allotment which had been awarded to Foster Baltz by the Commission to the Five Civilized Tribes, and from their decision Franklin P. Mitchell

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appealed to the Commissioner of the General Land Office, where the decision of the Commission to the Five Civilized Tribes was affirmed, and then appealed to the Secretary of the Interior, where it was again affirmed and the allotment awarded to plaintiff in error, Foster Baltz. Mitchell then brought this action in the district court of Rogers county to have the title to said allotments declared in him. The cause was tried and judgment rendered decreeing title in Mitchell; and from such judgment Foster Baltz appeals to this court.

This is one of three companion cases, all resting upon the same state of facts and involving the same question of law; the other two cases being No. 2878, *Bell v. Mitchell*, 135 Pac. 1136, and No. 2880, *Foster Baltz, née Stone, v. Reece B. Mitchell*, 135 Pac. 1137, both of which were decided at a former term and which are determinative of the same question, viz., whether the Department of the Judiciary will disturb decisions of the Department of the Interior based purely upon findings of fact from the testimony submitted where there is no fraud nor apparent error of law in such department decision.

In *Bell v. Mitchell*, supra, the same state of facts and question of law involved herein are fully discussed and the following holding announced: "The trial court committed error. It is the law that where the department has erred in a matter of law, or the losing party before the department had fraud practiced upon him, or the department has committed such gross error that its finding of fact practically amounts to fraud, its action is not final and conclusive upon the court, and that the party who had been wronged by its action may obtain relief. *Rector v. Gibbon*, 111 U. S. 276 [4 Sup. Ct. 605, 28 L. Ed. 427]; *James v. Germania Iron Co.*, 107 Fed. 597, 46 C. C. A. 476; *Garrett v. Walcott*, 25 Okl. 574, 106 Pac. 848. But the action of the department in its decision in contest cases should not be set aside or disturbed for slight reasons or merely because of a preponderance of the evidence. See *Quinby v. Colan*, 104 U. S. 420, 28 L. Ed. 800. The Commission to the Five Civilized Tribes was vested with authority to hear contests and to determine conflicting rights of applicants to allot land in the Indian Territory, and it is only in exceptional cases and under unusual and extraordinary circumstances that the action of the department should be disturbed." And after further discussing the facts in the case, which were the same as the facts in the case at bar, the court concludes as follows: "Not only did the letter of the law give it to him under the rule announced, but equity also entitled him to select the land as his allotment. Mitchell had invested nothing in the land. It seems clear from the record that Mitchell was not the beneficial owner of the land but was holding it simply as a cloak for Schmoy, who was the actual owner.

There is nothing in law or equity to entitle plaintiff in this case to a judgment, and it should be reversed and remanded, with instructions to the trial court to dismiss the action." This opinion was followed in *Foster Baltz, née Stone, v. Reece B. Mitchell*, supra, for the reasons stated in the opinion.

There is no substantial difference between the facts in the case at bar and those in the above companion cases; the decisive question of fact in each case being, Who owned the improvements on the allotment in question at the time same awarded to the allottee? the department finding from the testimony that one James A. Bell owned said improvements. We find nothing in the record that takes the case at bar out of the rule announced in *Bell v. Mitchell*, supra, and the rule there announced is followed here.

Hence the judgment of the trial court must be reversed, and the action of plaintiff below ordered dismissed.

PER CURIAM. Adopted in whole.

LAWSON et al. v. ROWLEY.

(Supreme Court of Oklahoma. Dec. 16, 1913.)

(Syllabus by the Court.)

1. REVIEW OF EVIDENCE.

Record examined, and held, that there is not sufficient evidence to support a judgment against Mollie Lawson.

2. APPEAL AND ERROR (§ 1026*)—HARMLESS ERROR.

All the other assignments of error presented relate to alleged defects in the proceedings, and we are not at liberty to reverse the case upon such grounds, unless it appears that the errors complained of affect some substantial right of the adverse party. *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 359. We have examined all the assignments of error presented by counsel for plaintiff in error, and are satisfied that none of them affect any substantial right of the plaintiff in error. *T. R. Lawson*.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4029, 4030; Dec. Dig. § 1026.*]

Error from District Court, Oklahoma County; John J. Carney, Judge.

Action by R. E. Rowley against T. R. Lawson and another. Judgment for plaintiff, and defendants bring error. Modified and affirmed.

Bennett & Pope, of Oklahoma City, for plaintiffs in error. Wm. L. McCann and W. A. Smith, both of Oklahoma City, for defendant in error.

KANE, J. This was an action for damages, growing out of alleged misrepresentations as to the boundaries of real estate, commenced by the defendant in error, plaintiff below, against the plaintiffs in error, defendants below. Upon trial to a jury, there was a verdict for the plaintiff in the sum of \$1,000, upon which judgment was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

duly rendered, to reverse which, this proceeding in error was commenced.

The errors relied upon all relate (1) to errors of the court in sustaining objections to the introduction of certain evidence; (2) that the demurrer to the evidence ought to be sustained on behalf of Mollie Lawson, because there is no testimony, either direct or circumstantial, which tends to establish liability against her; and (3) excessive damages appearing to have been given under the influence of passion and prejudice. The second assignment of error must be sustained. We can find no evidence in the record, and none has been called to our attention, which tends to establish any liability on the part of Mollie Lawson. In all other respects, the judgment of the court below is affirmed. There is very little conflict in the evidence on any point except as to the measure of damages, and in that regard the evidence is sufficient to support the verdict.

All the other assignments of error presented relate to alleged defects in the proceedings, and we are not at liberty to reverse the case upon such grounds, unless it appears that the errors complained of affect some substantial right of the adverse party. *Mullen v. Thaxton*, 24 Okl. 643, 104 Pac. 359. We have examined all the assignments of error presented by counsel for plaintiff in error, and are satisfied that none of them affect any substantial right of the plaintiff in error, *T. R. Lawson*.

There is absolutely nothing in the record indicating that the verdict was in any wise influenced by passion or prejudice on the part of the jury.

The judgment of the court as modified herein is affirmed. All the Justices concur.

**PURCELL BRIDGE & TRANSFER CO.
v. HINE.**

(Supreme Court of Oklahoma. Dec. 16, 1913.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773*)—SCOPE OF REVIEW—FAILURE TO FILE BRIEF.

Where plaintiff in error has completed his record and filed it in this court and has served and filed a brief, in compliance with the rules of this court, and the defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.*]

Appeal from District Court, Cleveland County; *R. McMillan*, Judge.

Action by the Purcell Bridge & Transfer Company against George Hine. Judgment

for defendant, and plaintiff appeals. Reversed and remanded.

J. W. Hocker, of Los Angeles, Cal., for plaintiff in error.

KANE, J. Originally this was a suit in equity, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to enjoin him from taking possession of and removing certain property which it is alleged he purchased at a void tax sale. The defendant by way of answer set up his claim as purchaser under the tax proceeding, but at the trial this defense seems to have been abandoned and the cause proceeded to a determination upon the sole question as to the amount of damages the plaintiff should recover for the conversion of his property. Upon trial to a jury there was a verdict in favor of plaintiff for \$40, upon which judgment was duly entered, and the plaintiff, being dissatisfied with the amount of recovery, commenced this proceeding in error to review the action of the court below. The plaintiff has filed an exhaustive brief in this court which was duly served upon the opposite party, wherein he urges several grounds for reversal which seem to us to be well taken. The defendant in error has filed no brief, nor is any reason given for his failure to do so.

It is well settled by numerous decisions of this court that where plaintiff in error has completed his record and filed it in this court, and has served and filed a brief, in compliance with the rules of this court, and defendant in error has neither filed a brief nor offered any excuse for such failure, the court is not required to search the record to find some theory upon which the judgment may be sustained; and, where the brief filed appears reasonably to sustain the assignments of error, the court may reverse the judgment in accordance with the prayer of the plaintiff in error or the rights of the parties. In *Taby v. McMurray*, 30 Okl. 602, 120 Pac. 664, one of the latest cases holding as above, some of the authorities to the same effect may be found collected.

For the reason stated, we think the judgment should be reversed, and the cause remanded for a new trial. It is so ordered. All the Justices concur.

FIRST NAT. BANK OF LAWTON et al. v. THOMPSON.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. SET-OFF AND COUNTERCLAIM (§ 33*)—ACTION IN TORT—BILLS AND NOTES—"SET-OFF."

Under the statute which limits the use of a set-off thus, "A set-off can only be pleaded in an action founded on contract, and it must be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a cause of action arising upon contract or ascertained by the decision of a court," a defendant, when sued in tort for damages for the wrongful conversion of a span of mules, cannot use a note given by plaintiff to a stranger to the suit, assigned to defendant, as a set-off.

[Ed. Note.—For other cases, see Set-off and Counterclaim, Cent. Dig. §§ 1, 32, 54, 55; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6439-6444; vol. 8, pp. 7798, 7799.]

2. SET-OFF AND COUNTERCLAIM (§ 34*)—“COUNTERCLAIM”—BILLS AND NOTES.

Neither, in such suit, can the notes be used as a counterclaim, under a statute providing that “a counterclaim * * * must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action,” where the note does not arise out of, and is in no way connected with, and has no relation to, the contract or transaction made the basis of plaintiff's suit, and which does not come under certain exceptions mentioned in the statute.

[Ed. Note.—For other cases, see Set-off and Counterclaim, Cent. Dig. §§ 56, 57; Dec. Dig. § 34.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1645-1660; vol. 8, pp. 7620, 7621.]

3. SET-OFF AND COUNTERCLAIM (§ 34*)—BILLS AND NOTES.

Neither can such note be set up, in such suit, as a basis for affirmative relief, when it is not concerning the subject of plaintiff's action, is in no way related to or connected therewith, and where it is not necessarily or properly involved in the action for a complete determination thereof, or settlement of the questions therein involved.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 56, 57; Dec. Dig. § 34.*]

4. TROVER AND CONVERSION (§ 44*)—MEASURE OF DAMAGES—RIGHT TO ELECT.

In a suit for damages for the conversion of a span of mules, ordinarily the measure of the damages is the fair market value of the mules at the time and place of the conversion, together with lawful interest thereon, and a fair compensation for the time and money properly expended in pursuit of the property. However, if plaintiff has prosecuted his suit with diligence, he can elect to have as his damages the highest fair market value of the property at any time between the conversion and the verdict, without interest, together with proper cost of pursuit.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 260, 261; Dec. Dig. § 44.*]

5. APPEAL AND ERROR (§ 1053*)—CURE OF ERROR—EVIDENCE—ELEMENTS OF DAMAGE.

An error in the improper admission of evidence as to nonrecoverable elements of damage is cured when the court's instructions forbid a recovery of any sum on account of such improper elements.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

6. APPEAL AND ERROR (§ 1068*)—STATES (§ 9*)—HARMLESS ERROR—VERDICT—RENDITION.

In a suit commenced prior to statehood, though tried after the erection of the state, the parties were entitled, as a matter of law, to a unanimous verdict of the jury, and an instruction that nine of the jury concurring could re-

turn a verdict was erroneous; but, where the verdict notwithstanding such instruction was unanimous, it was error without injury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068;* States, Cent. Dig. § 4; Dec. Dig. § 9.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by F. F. Thompson against the First National Bank of Lawton and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Stevens & Myers and T. B. Orr, all of Lawton, for plaintiffs in error. W. E. Earl, of Lawton, for defendant in error.

BREWER, C. F. F. Thompson, defendant in error, as plaintiff below, brought this suit against the First National Bank of Lawton and Chas. C. Hammonds, as sheriff, to recover damages for the unlawful conversion of a span of mules, alleging that the defendant Hammonds, as sheriff, had taken them under a writ of attachment, issued and running against persons other than the plaintiff. The defendant Hammonds filed a general denial for answer. The defendant bank alleged that it was an attachment creditor of one J. W. Morrison, and that the mules sued for were in fact the property of the judgment debtor, and that the plaintiff, Thompson, had confederated with such judgment debtor to wrong, cheat, and defraud defendant, and to make the false claim that the property belonged to plaintiff, while in fact it belonged to Morrison, and was subject to the attachment, and therefore properly taken. The bank then proceeded to set up what it denominates a counterclaim, and, to support same, alleged in substance that the plaintiff did, on the 1st day of December, 1906, make, execute, and deliver to the said J. W. Morrison his certain promissory note in the sum of \$1,100, whereby the said Thompson agreed to pay to the said Morrison or order the said sum of \$1,100 for value received, with interest thereon at the rate of 10 per cent. per annum from date until paid, on or before the 1st day of December, 1907; that the said Morrison, being desirous of securing a loan from the bank, executed the note upon which the attachment in plaintiff's petition complained of was executed, and among other things as collateral to said note at the time of the execution thereof, did sell, assign, transfer, set over, and deliver unto the bank the aforesaid note and thereby the said bank became and is now the owner and holder thereof; that the plaintiff has failed and refused to pay said note or any part thereof as requested so to do; and that, by reason of the premises, plaintiff now owes the bank the sum of \$1,100, with interest. The counterclaim closes with a prayer for judgment against the plaintiff for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

that sum and costs. The plaintiff attacked this counterclaim by demurrer, the overruling of which he objected to, and filed unverified reply. The cause was submitted to a jury, and a verdict was rendered in favor of the plaintiff in the sum of \$500, with interest thereon from the time of conversion of the mules. From a judgment founded on this verdict, the defendants below appeal to this court on properly certified case-made.

The first point urged for reversal is: "The court erred in overruling a motion of the plaintiffs in error for a continuance of said case."

The continuance mentioned was asked for in the middle of the trial on the ground of surprise, and arose in this way: After the plaintiff had testified in the case, and had later been recalled, and was being cross-examined by defendant, he was shown the note by defendant's counsel, and asked: "You owed Morrison a note at that time for \$1,100, didn't you?" This was objected to by plaintiff's counsel as not proper cross-examination. The court replied that it was not proper cross-examination, but that plaintiff would be a competent witness, and the following examination was had: "Q. Is that your signature? A. It is not. Q. That is not your signature? A. It is not. Q. Do you know who wrote that on there? A. I do not. Q. You don't know who wrote that on there? A. No, sir; I do not. I never saw it before. Q. Never seen that before? A. I didn't."

After completing a lengthy cross-examination, and hearing another witness, counsel for the bank asked for a continuance on the ground of surprise, and based the same upon the testimony he had brought out, over objections from the plaintiff, relative to the execution of the note. It will be noted that the defendant brought out this evidence, not as proper cross-examination, but as its own evidence on its counterclaim, and defendant insists that, inasmuch as its counterclaim declared on a written obligation, and the reply thereto was unverified, therefore the execution of the instrument was admitted, and plaintiff could not deny the same. Of course this is ordinarily true under our statute (section 5648, Comp. L. 1909 [section 4759, Rev. Stat. 1910]) and the decisions construing same (G. & W. R. R. Co. v. Rhodes, 19 Okl. 21, 91 Pac. 1119, 21 L. R. A. [N. S.] 490; Commonwealth Nat. Bank v. Baughman, 27 Okl. 175, 111 Pac. 332; Railway Co. v. Cake, 25 Okl. 227, 105 Pac. 322; St. L. & S. F. Ry. Co. v. Phillips, 17 Okl. 264, 87 Pac. 470); but, as we view this phase of the case, it is hardly necessary to discuss the rather peculiar situation presented in the record, for we do not believe that the counterclaim as alleged herein was available to defendant, either as a counterclaim or a set-off, or as relief sought.

It may be well to consider, somewhat in detail, what is proper to assert by a defendant when sued. Under section 4745, Rev.

Stat. 1910, an answer shall contain, first, a general or specific denial; second, a *defense, counterclaim, set-off*, or a right to relief concerning the subject of the action; third, these defenses of counterclaim, set-off, or for relief, may be either legal, equitable, or both. They must refer in an intelligible manner to the cause of action they are intended to answer.

[1-3] Section 4746, Rev. Stat. 1910, defines and applies the terms used above thus: "A counterclaim * * * must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim or connected with the subject of the action. * * *"

Certain exceptions, expanding the rule in cases of wrongful attachment when set aside, and giving an individual defendant the right, whether it exists in his codefendant or not, need no critical examination at this time.

On the question of affirmative relief by defendant, it is said: "The right to relief concerning the subject of the action mentioned in the same section *must be a right to relief necessarily or properly involved in the action for a complete determination thereof, or settlement of the questions involved therein.*"

Section 4747, Rev. Stat. 1910, limits the use of a set-off thus: "A set-off can only be pleaded in an action founded on contract, and it must be a cause of action arising upon contract or ascertained by the decision of a court."

The answering defendant denominates his plea a counterclaim; but the court must test a pleading by its averments, and a mere name applied to it will not alone determine its character. *Brown v. Massey*, 19 Okl. 487, 92 Pac. 246; *Meeker v. Dalton*, 75 Cal. 154, 16 Pac. 764; *Kimball v. Connor*, 3 Kan. 414. This part of the answer certainly cannot, technically speaking, be classed as a counterclaim. It does not arise out of the transaction—the tort of converting the mules—which is not only the foundation of but is all of plaintiff's cause of action, nor is it in any way connected with the subject of plaintiff's action, nor does it fall within any exception named in the statute. *Pomeroy's Code Remedies* (4th Ed.) 618 et seq.; *Allison v. Shiner*, 7 Okl. 272, 54 Pac. 471; *Wyman v. Herard*, 9 Okl. 35, 59 Pac. 1009.

It cannot avail as a right to relief, because it is not concerning the subject of plaintiff's action, nor is the right to relief necessarily or properly involved in the action for a complete determination or settlement of the questions involved. The defense pleaded has not, in the remotest degree, any connection or relation to the cause of action, or subject of the action, or transaction, upon which plaintiff's action is founded.

It cannot be used as a set-off, under the

Code, for the simple reason that it is based on contract, and the cause of action sued on is purely a tort, in no sense growing out of or founded upon a contract or breach of one. In *Kennett v. Fickel*, 41 Kan. 212, 21 Pac. 93, it is said: "The first point made is that the court erred in striking out all of Kennett's answer except a general denial. This answer consisted, first, of a general denial, and second, a cause of action upon a promissory note alleged to have been executed by George W. Fickel and Catharine E. Fickel, which was pleaded by way of set-off. In pleading the set-off, it was incidentally stated that George W. Fickel had an interest in the property, and also that one Henry Perry claimed to be the owner, and had replevied the same from Kennett, which action was still pending and undetermined. He asked that both of these parties be brought in, and for judgment upon his promissory note for the sum of \$247, and interest thereon. The court ruled correctly in striking this count from the answer. The second cause of action, setting forth a set-off, cannot be pleaded as a defense in an action of replevin. Such an action is founded upon the tort or wrong of the defendant, and not upon contract; and section 98 of the Code specifically provides that 'a set-off can only be pleaded in an action founded on contract.' If either of the parties named owned and had the right of possession to the property, and the plaintiff wished to rely upon that fact, he could have shown it under the general denial. *Wilson v. Fuller*, 9 Kan. 176; *Yandle v. Crane*, 13 Kan. 344; *Bailey v. Bayne*, 20 Kan. 657; *Holmberg v. Dean*, 21 Kan. 73."

Neither can a tort be set off against a suit on contract, except it be within the exceptions named in our statute. In the case of *Carver v. Shelley*, 17 Kan. 474, it is said by Valentine, J.: "(2) The defendant does not claim that his supposed set-off is a counterclaim, and it is not. It has no connection with the 'foundation' or 'subject' of the plaintiffs' action. Civil Code, § 95. (3) Neither is his supposed set-off a set-off. A set-off 'must be a cause of action arising upon contract, or ascertained by the decision of a court.' Civil Code, § 98. There is no pretense in this case that the defendant's set-off is founded upon any contract, or upon the decision of any court. It is founded purely and entirely upon a tort."

The following authorities bear on the question, but are not cited as strictly in point: *Van Arsdale et al. v. Edwards*, 24 Okl. 41, 101 Pac. 1123; *Johnson v. Acme, etc.*, 24 Okl. 468, 103 Pac. 638; *St. L. & S. F. Ry. Co. v. Bradford*, 18 Okl. 154, 88 Pac. 1050; *Richardson v. Penny*, 10 Okl. 32, 61 Pac. 584; *Willoughby v. Ball*, 18 Okl. 535, 90 Pac. 1017. Nor have we overlooked the holding of a number of courts, that a party having a cause of action founded in tort may

waive the tort, and declare on an implied contract growing out of same, and thus make use of it as a set-off. Bliss, *Code Pleading* (2d Ed.) 381, and authorities cited.

This pleading, then, being an improper one, as presenting a question that could not be properly raised in this suit, defendant has suffered no injury, regardless of how badly he was surprised, and regardless of whether, having brought out the evidence, he could ordinarily have taken advantage of the result he obtained, which is not decided. This also eliminates the question raised regarding requested instructions on this phase of the case.

[4, 5] 2. The second point urged is the admission of incompetent evidence, and refers first to the testimony of plaintiff denying the execution of the note, which was caused to be repeated by plaintiff after being first brought out by defendant. This point fails under the first subdivision of this opinion. The other evidence complained of referred to the measure of plaintiff's damages, and goes to that offered as to the proof of the value of the mules and also to certain damages claimed for the loss of their use.

There was some evidence offered as to the value of the mules that was entirely competent by both parties. The evidence as to damage suffered by plaintiff by being deprived of the use of the animals, whereby he failed to make so valuable a crop as he otherwise would have made, was incompetent, but rendered entirely harmless by the court, in refusing to allow plaintiff any such damages. The jury were instructed correctly (section 2910, Comp. L. 1909) that, this being a suit for conversion, all that could be recovered was the value of the animals, and interest. It may be added that the recovery was based on this positive instruction of the court. Therefore the admission of other elements was expressly taken from the jury, and did not enter into the verdict.

3. The third point urged in the brief—that the court should have sustained defendant's demurrer to the evidence—is entirely without merit. Plaintiff's proof of ownership and possession of the mules, and the wrongful taking and conversion of same by the defendants, was ample, clear, and convincing. Very little evidence was produced by defendant controverting same. On this point, plaintiff's evidence greatly preponderated. In fact, on the question of the ownership of the mules, very little of defendants' evidence was competent. The most of it consisted of statements, oral and written, that Morrison, the defendant, in the attachment suit, had, in the absence and without the knowledge of plaintiff, claimed to be the owner. This was only competent on the question of good faith and want of malice in taking the mules, and, as a malicious taking had been set up, this evidence was competent, but not as against plaintiff's title.

4. Under the fourth point made by defendant, it is claimed that the court erred in refusing to give three instructions offered by it. The first was "not to allow damages to plaintiff for loss of or failure of crops." The court, as has been seen, refused to allow such recovery, and none such was had. The next was a refusal to give defendants' instruction on the measure of damages. The one given by the court is almost identical with the one refused, and was stronger in defendants' favor than the one it had offered. The next one refused referred to the \$1,100 note, upon which relief was asked, and has been disposed of elsewhere.

[6] 5. The next and last point urged is that the court erred in instructing the jury that three-fourths of the jurors could return a verdict, as the suit was filed before statehood; inasmuch, however, as a unanimous verdict was returned, this was error without injury, and will not reverse the case. We have examined the entire record, and feel like the verdict was right—in fact we do not see how any jury could have found otherwise—and that there has been no substantial error in the case.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

VAUGHAN et al. v. HOLDER.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 13*)—WHEAT CONSTITUTES.

A possession, to be adverse, must be open, visible, continuous, and exclusive, with a claim of ownership such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants. Following *Flesher v. Callahan*, 32 Okl. 283, 122 Pac. 489.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 65, 67-76; Dec. Dig. § 13.*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 227-235; vol. 8, p. 7568.]

2. CHAMPERTY AND MAINTENANCE (§ 7*)—GRANTS OF LAND HELD ADVERSELY—VALIDITY.

A conveyance of land made in contravention of sections 2214 and 2215, Comp. Laws 1909, is void as against persons holding adversely, either by themselves or tenants, and claiming to be owners of the land under color of title. Following *Larney v. Aldridge*, 31 Okl. 447, 122 Pac. 151.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

3. CHAMPERTY AND MAINTENANCE (§ 7*)—GRANTS OF LAND HELD ADVERSELY—VALIDITY.

A deed from a person out of possession of real property, and who has not been in possession within a year, and who has not within that time taken the rents and profits, is void as

against persons in adverse possession. Following *Johnson v. Myers*, 32 Okl. 421, 122 Pac. 713.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. §§ 54-110; Dec. Dig. § 7.*]

Commissioners' Opinion. Division No. 2. Error from District Court, Grady County; Frank M. Bailey, Judge.

Action by E. A. Vaughan and another against George W. Holder, to quiet title. Judgment for defendant, and plaintiffs bring error. Affirmed.

Wm. Stacey, of Chickasha, for plaintiffs in error. F. E. Riddle, of Chickasha, for defendant in error.

HARRISON, O. In March, 1910, plaintiffs, E. A. and Irene Vaughan, began an action in the district court of Grady county to quiet title to a certain 25-acre tract of land situated in said county, the same being part of the 100-acre surplus allotment of Mary Crowder. Each party traced title to the same source, Mary Crowder. Plaintiffs set up the following chain of title, to wit: Deed from Mary Crowder to J. B. Champion, dated September 4, 1908, recorded October 5, 1908, conveying the entire 100-acre surplus allotment, and on the same day J. B. Champion conveyed the same land to Sam Noble; both deeds being recorded on the same day. On July 6, 1909, Sam Noble and wife conveyed for a consideration of \$1 and other valuable considerations the 25 acres in controversy to the plaintiffs, E. A. and Irene Vaughan. Previous to the latter date, namely, October 3, 1908, however, W. C. Kendall and wife executed a quitclaim deed to Sam Noble, relinquishing and quitclaiming all their title to the entire 100-acre tract, which quitclaim deed was recorded October 5, 1908. This constituted plaintiffs' chain of title. As against this, the defendant, Holder, offered the following chain of title, to wit: Deed from Mary Crowder to W. C. Kendall, dated October 25, 1907, recorded November 8, 1907, conveying an undivided one-fourth interest in and to the entire 100-acre allotment. Also deed from Mary Crowder to W. C. Kendall, dated December 27, 1907, recorded October 23, 1908, conveying the 25 acres in controversy, and deed dated January 4, 1908, recorded January 30, 1908, from W. C. Kendall and wife to G. W. Holder, the defendant, conveying the same 25 acres. The record discloses that the defendant, Holder, took possession of the land in controversy in February, 1908, erecting thereon substantial and valuable improvements, consisting of two barns and hog sheds, building a residence and digging a well, and held and cultivated same during the years 1908 and 1909, holding open and notorious possession and undisturbed control over the land during such period. In the latter part of 1909, however, after the crop had been gathered, the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tenant of G. W. Holder left the country. There is some intimation in the record that his leaving was procured by the plaintiff Vaughan in order that plaintiff might get possession. However that may be, it is apparent that as soon as Holder's tenant left, Vaughan took possession through his tenant. The cause was tried by the court, and judgment rendered, decreeing the title to the land in question in G. W. Holder; the court holding that the chain of title through which Holder claimed was superior and paramount to that of plaintiff Vaughan, and that the deeds through which Vaughan claimed title, in so far as they affected the title of the defendant, G. W. Holder, were to be canceled and held for naught. From such judgment the plaintiff appeals upon seven assignments of error.

The fourth, fifth, sixth, and seventh assignments relate to the court's ruling on the admission and rejection of testimony. We have examined the record, and find no material error in this regard. The first, second, and third assignments, however, go to the action of the court in denying motion for a new trial, and to the questions whether the verdict was contrary to law and not sustained by sufficient evidence. The testimony consisted almost wholly of record evidence, with the exception of the testimony in reference to the adverse possession of the land by defendant Holder through his tenant during the period from February, 1908, to the latter part of the year 1909, and, there being no conflict in this testimony, it merely presents a question of law as to whether the facts disclosed constituted such adverse possession as is contemplated by section 2026, Statutes 1893, which statutes were in force at the time of the controversy.

[1] The elements which constitute adverse possession have been fully defined by this court in *Smith v. Phillips*, 9 Okl. 297, 60 Pac. 117; *Wade v. Crouch*, 14 Okl. 593, 78 Pac. 91; *Flesher v. Callahan*, 32 Okl. 283, 122 Pac. 489; *Martin v. Cox*, 31 Okl. 543, 122 Pac. 511; *Long-Bell Lumber Co. v. Martin*, 11 Okl. 192, 66 Pac. 328.

In *Flesher v. Callahan*, *supra*, adverse possession is defined as follows: "A possession, to be adverse, must be open, visible, continuous, and exclusive, with a claim of ownership, such as will notify parties seeking information upon the subject that the premises are not held in subordination to any title or claim of others, but against all titles and claimants."

The facts in the case at bar bring the defendant, Holder, clearly within the rule laid down in the above cases. As to the legal effect of the deed to real estate held adversely and under color of title, see *Huston v. Scott*, 20 Okl. 142, 94 Pac. 512, 35 L. R. A. (N. S.) 721; *Jennings v. Brown*, 20 Okl. 294, 94 Pac. 557; *Powers v. Van Dyke*, 27 Okl.

27, 111 Pac. 939, 36 L. R. A. (N. S.) 96; *Martin v. Cox*, 31 Okl. 543, 122 Pac. 511; *Bell v. Cook* (C. C.) 192 Fed. 597; *Larney v. Aldridge*, 31 Okl. 447, 122 Pac. 151; *Johnson v. Myers*, 32 Okl. 421, 122 Pac. 713.

[2] In *Larney v. Aldridge*, *supra*, this court held: "A conveyance of land made in contravention of sections 2214 and 2215, Comp. Laws 1909, is void as against persons holding adversely, either by themselves or tenants, and claiming to be owners of the land under color of title."

[3] In *Johnson v. Myers*, *supra*, it was held: "A deed from a person out of possession of real property, and who has not been in possession within a year, and who has not within that time taken the rents and profits, is void as against persons in adverse possession."

In the case at bar the plaintiff Vaughan not only purchased premises which were being held possession of within the rule laid down by this court, but accepted a conveyance with at least constructive knowledge that W. C. Kendall, by virtue of a deed executed to him by Mary Crowder, original allottee, on October 25, 1907, duly recorded November 8, 1907, to an undivided one-fourth interest in the 100-acre allotment, in which the 25 acres in question was included, and with constructive knowledge of a deed from W. C. Kendall and wife to George W. Holder, recorded January 30, 1908, to the identical land in question. Hence, from an examination of the entire record and the authorities applicable to the facts and issues involved in this cause, we find no error in the judgment of the trial court.

The judgment is therefore affirmed.

PER CURIAM. Adopted in whole.

In re BUTLER.

POPHAM v. CROSS.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD—RIGHT OF MOTHER.

The legal right of the mother of a minor child, its father being dead, to its custody and control is superior to that of a third person, whose claim is based upon the fact that he has cared for and supported the child for some two or three years.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.*]

2. HABEAS CORPUS (§ 99*)—CUSTODY OF CHILD.

The husband, whose wife undertook the care of an infant child for an uncertain compensation, and who cared for and supported it for two or three years, has no legal right to the custody of such child against the claim of its mother, and the mother, having obtained its custody, cannot be deprived thereof by writ of habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 84; Dec. Dig. § 99.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—43

Commissioners' Opinion, Division No. 2. Error from County Court, Kingfisher County; John M. Graham, Judge.

Application of F. F. Cross for a writ of habeas corpus against Viola Popham, to recover the custody of A. M. Cross. Order granting the writ, and defendant brings error. Reversed and remanded, with directions.

Cunningham & Weiss, of Kingfisher, and Willis & Willis, of Canadian, for plaintiff in error.

GALBRAITH, C. This action was commenced in the county court of Kingfisher county by F. F. Cross filing a petition for writ of habeas corpus, setting out that Admiral Mason Cross, a minor four years old past, was unlawfully restrained of his liberty in Kingfisher county by Viola Popham, and that he was entitled to the care, custody, and control of said minor, and praying that the court so adjudge. The writ was issued, and the return made thereto by Viola Popham denied that said minor was unlawfully restrained of his liberty, and alleged that the minor was the son of the respondent and William Butler, and that his name was not Cross, but that his true name is and was Admiral Mason Butler; that the father of said minor was dead, and that she was entitled to his care, custody, and control, and that she was able and willing to educate and care for him, and that Cross had no right, either in law or equity, to the custody or control of said child. A hearing was had, and the custody of the child was awarded to Cross. The mother appeals to this court from that order.

It appears from the testimony taken at the hearing that William Butler, the father of the child, died a few months before it was born; that its mother Viola Butler, now Popham, plaintiff in error in this action, was without property, and was compelled to work for a living; that when the child was some four months old she obtained work in a hotel and attempted to care for it, but after several months' effort along that line found that she was unable to perform her work and care for the child, and upon the advice of her physician she arranged with Mrs. Cross, the wife of the petitioner, to care for him. Her testimony as to the arrangement with Mrs. Cross is undisputed, and is as follows: "Q. Now, Mrs. Popham, why was it, what induced you at the time you made this arrangement with Mrs. Cross with reference to taking care of the baby? A. Dr. Caylor, and also his wife and several other ladies there that visited during the sickness, advised me to let some good lady take the baby and take care of it, and I let Mrs. Cross take the baby to take care for me and I paid her. Q. Why did they advise you to do that? A. They said I couldn't work and take care of the baby and give it the proper attention. Q. What was the agreement you

made with Mrs. Cross? A. I took the baby down there for her to take care of for me, and she was to take care of the baby for me and I was to pay her whatever I was able. I was to clothe the baby and give her what I was able. Q. Did you make any agreement with Mr. Cross with reference to taking care of the baby? A. No, sir. Q. Or with reference to taking the baby and placing it in the care of his mother? A. No, sir; I did not. Q. After that time, did you work, and, if so, where did you work? A. After I took the baby down to Mrs. Cross I went out on a ranch and worked eight months. Q. What kind of work were you doing? A. Helping cook and take care of the house, general house work. Q. How far from town? A. Twenty miles. Q. On a ranch? A. Yes, sir. Q. Did you pay Mrs. Cross at any time out of the wages you had? A. Yes sir. Q. What amounts did you pay her? A. I paid her \$20 at one time and \$12 and \$10 and \$5. Q. Did you send it to her? A. I would send the money to her. There was one time I paid her \$20 I gave it to her. She came to Canadian, and I went to town and gave it to her. Q. Now, Mrs. Popham, did you ever agree, or ever give your child to Mrs. Cross or Mr. Cross? A. No, sir; I didn't give my baby away to them. Q. Did you ever have any other agreement with Mrs. Cross in reference to your child; the only one was that with reference to paying the money? A. No, sir; I never made any other." This testimony shows that Mrs. Cross, the wife of the defendant in error, undertook the care of the child for hire—an uncertain and indefinite amount that its mother could spare from her wages—and clearly refutes the idea of abandonment, or any intention on the part of the mother to relinquish or abandon her natural right to the care and custody of her child. It also appears from the record that after Mrs. Cross had cared for the child some two years she became afflicted with some mental disorder that rendered her incapable of caring for herself, much less the child, and that Mr. Cross then removed from Ellis to Kingfisher county, taking the child with him, and placed him in the care of his (Cross's) mother, with whom he also lived; that near the time Cross moved to Kingfisher county, Mrs. Butler, the mother of the child, married a man by the name of Popham, at Cannon City, Tex., and that he is a man of considerable means, and is willing and anxious that the mother of the child shall take it to their home, that he may support, maintain, and educate it; that Cross refused to give up the child; that the day this action was commenced Mrs. Popham, the mother, by consent of Cross, took the child for a drive, and that Cross, fearing that she intended to take it to her home in Texas, sued out the writ of habeas corpus.

It was said by Commissioner Robertson, in rendering the opinion of the court, in *Zink v. Milner et al.*, 135 Pac. 1: "The question of

the custody of an infant child is one always fraught with danger and grave responsibilities. As a general rule, this court will be slow to interfere with the judgment of a trial court in a case in which this delicate question is involved. The reasons for this hesitancy on the part of the appellate courts are obvious, and it is unnecessary to enter into a discussion of them at this time. Suffice it to say, however, that when from the record before us it is clearly apparent that an injustice has been done in a given case, this court, in the exercise of its corrective and superintending power, will not hesitate to enter upon an examination of the record, or to correct any error that for any reason may have been committed by the trial court."

[1, 2] There is no doubt that Cross, having the care and custody of this child for a number of years, had become attached to him, and had a fatherly affection for him, and there is no complaint as to the care and attention he gave him, still his claim to the care and custody of the child cannot be successfully maintained against the claim of the mother. It appears from the record that the mother was better able to care for, maintain, and support the child at the time of the trial than Cross, and that she was a proper person to be intrusted with its care.

The trial court gave no reason for awarding the custody of the child to Cross and denying the claim of the mother thereto. The record does not show any justification for making the order appealed from. The mother has the right to the care, custody, and control of her boy, now that she is properly able to care for him, and no reason appears from the record why this right should be denied her. *State of Louisiana ex rel. Della Kearney v. Steel*, 121 La. 215, 46 South. 215, 16 L. R. A. (N. S.) 1004.

For these reasons the order appealed from should be vacated, and said cause remanded to the county court of Kingfisher county, with directions to enter an order awarding the custody of the minor, Admiral Mason Butler, to his mother, Viola Popham, and taxing the costs of the proceeding against the defendant in error.

PER CURIAM. Adopted in whole.

HINES v. MODERN WOODMEN OF AMERICA et al.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. INSURANCE (§ 719*) — FRATERNAL BENEFIT SOCIETY — EFFECT OF REGULATIONS — CONTRACT OF INSURANCE.

The terms of a contract between a fraternal benefit society and its members are to be determined by the constitution and laws of the society as they exist at the beginning of the membership, and as they may be lawfully amended from time to time thereafter, and by agreement

made pursuant thereto between the incoming members and the society.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

2. INSURANCE (§ 719*) — FRATERNAL BENEFIT SOCIETY—POWER TO CHANGE REGULATIONS — CONTRACT OF INSURANCE.

The power accorded to such a society in its charter to alter and repeal its constitution, by-laws, rules, and regulations enters in and forms part of the contract of insurance between the society and its members, when the latter, as applicant for membership, promises not only to conform to and abide by the constitution and laws of the society as they then exist but also as they may be thereafter altered or amended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

3. INSURANCE (§ 719*) — FRATERNAL BENEFIT SOCIETY—RIGHT TO CHANGE REGULATIONS.

Such reserve powers of amendment and repeal does not, however, give the society any right to adopt a by-law which will divest, impair, or disturb the rights once vested in its members, for such a by-law would be unreasonable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.*]

4. INSURANCE (§ 783*) — FRATERNAL BENEFIT CERTIFICATE—RIGHTS OF BENEFICIARY.

A beneficiary named in a fraternal benefit certificate only acquires a vested right in the benefits accruing thereunder on the member's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1949; Dec. Dig. § 783.*]

5. INSURANCE (§ 778*) — FRATERNAL BENEFIT SOCIETY—AMENDMENT TO BY-LAWS—EFFECT OF DEATH OF BENEFICIARY.

Though a benefit certificate, naming the member's mother as beneficiary, provided that, in case of death of the beneficiary before death of the member, a failure by him to designate another beneficiary, the benefit should be paid to his heirs, a like provision was in the by-laws in force when the certificate was issued; yet it being provided in the application that the association's laws "now in force or hereafter enacted" enter into and become a part of every contract between it and a member and govern all rights thereunder, and it being declared by the by-laws a purpose of the association to furnish indemnity to the beneficiaries of members, "in accordance with the articles of association, by-laws, rules, and regulations" of the association, not inconsistent with the laws of the state, a change in the by-laws, whereby, on death of the named beneficiary and failure of the member to make a new designation, his wife at the time of his death should take, in preference to his heirs, being reasonable and in harmony with the general purpose of the association, and not in derogation of any right secured to him, and fully authorized by the terms of the contract, governed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1945; Dec. Dig. § 778.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Kingfisher County; Jas. B. Cullison, Judge.

Action by Maggie E. Hines against the Modern Woodmen of America and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

F. L. Boynton, of Kingfisher, for plaintiff in error. Hinch & Bradley, of Kingfisher, for defendant in error Redmond.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

GALBRAITH, C. This was an action commenced in the district court of Kingfisher county, by Maggie E. Hines, widow of John Hines, deceased, upon a benefit certificate issued by the Modern Woodmen of America, a fraternal, beneficial association with an insurance feature, incorporated under the laws of the state of Illinois and authorized to do business in the state of Oklahoma. The certificate was issued to John Hines under date of March 1, 1901, and provided for the payment of \$1,000 to the beneficiary named therein, or the heirs, or widow, upon the death of John Hines. It was alleged in the petition that the deceased, John Hines, was a member of the Local Camp Modern Woodmen of America, at Cashlon, Kingfisher county, Okl., and that the certificate was issued to him, as provided by the constitution and by-laws of said society, and that he had complied with all the provisions of the contract on his part to be performed up until the time of his death on March 22, 1910; that said certificate at the time it was issued named as beneficiary Mary Hines, the mother of said deceased, and that Mary Hines died in January, 1905, prior to the death of said John Hines, and that John Hines never exercised the right given him by the by-laws of said society to nominate another beneficiary; that the by-laws of said association at the time said certificate was issued provided that in case of the death of the beneficiary named in the certificate prior to the death of the insured, and the insured failing to nominate another beneficiary, then the amount of the certificate should be paid to his heirs upon his death, but that prior to the death of said John Hines, to wit, in March, 1908, the by-laws of said association were regularly changed, providing that, in case of the death of the beneficiary named in the certificate and the failure of the insured to nominate another, the amount of the certificate should be paid to the surviving widow, if any; that this amended by-law controlled the disposition of the amount due under the certificate involved in this suit, and that thereunder the plaintiff, as the surviving widow, was entitled to the entire amount; that Mary Redmond, a sister of the deceased, and Daniel Hines, a brother, were claiming an interest in the proceeds of said certificate as the heirs of John Hines, deceased, and were not lawfully entitled to any part thereof; and that the defendant Charles Goetsinger, the duly qualified administrator of the estate of John Hines, deceased, was claiming the amount of said certificate, provided the same was due and payable to the heirs of deceased. The prayer was that the claim of these heirs and the administrator be denied, and that the entire amount of the certificate be adjudged due the plaintiff, as the widow, and that judgment be rendered accordingly against the defendant the Modern Woodmen of America.

It appears that Daniel Hines filed a disclaimer, as did also Charles Goetsinger, as administrator, and the Modern Woodmen of America filed an answer admitting the execution of the certificate and the death of John Hines, and that they owed on said certificate the sum of \$1,000; that demand was being made on them by the widow for the full amount and by the brother and sister of the deceased; and that they did not know which was entitled to payment, and asked for their own protection that the court determine to whom the amount should be paid, and offered to pay the amount of the certificate in to the clerk of the court in order that the court might direct the distribution thereof.

The case was submitted to the court for trial: the facts being admitted by stipulation of the parties. The court found that the allegations of the petition were true and concluded, as a matter of law, that the amendment to the by-laws of the Modern Woodmen of America, subsequent to the issuance of the benefit certificate, was inoperative to modify the terms of the certificate making the heirs of John Hines contingent beneficiaries in the event of the death of the beneficiary named before that of John Hines, and held that the amount of the certificate was payable to the heirs of John Hines, and entered judgment against the defendant Modern Woodmen of America in favor of the plaintiff for \$500 and in favor of Mary Redmond for \$250, and left \$250 of the amount due undisposed of by the judgment.

An appeal from the judgment was duly perfected to this court by Maggie E. Hines, and the only assignment of error is that the court erred in its conclusions of law in holding that the changes in the by-laws of the Modern Woodmen of America subsequent to the issuance of the certificate in suit was inoperative thereon.

[4] Counsel for Mary Redmond argue that she, as an heir of John Hines, had a right in this certificate, and that the same became a vested right at the time of the death of Mary Hines, the beneficiary therein named, since the by-laws of the association at that time made the heirs the contingent beneficiaries upon the death of the beneficiary named and the failure of the insured to name another. We cannot agree with this contention, since the law is well settled that the beneficiary named in a fraternal benefit certificate only acquires a vested interest in the benefits accruing thereunder upon the member's death. *Holden v. Modern Brotherhood of America*, 151 Iowa, 673, 132 N. W. 329; *Masonic Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189, 10 N. E. 79, 11 N. E. 449; *Masonic Mut. Ben. Ass'n v. Severson*, 71 Conn. 719, 43 Atl. 192; *O'Brien v. Supreme Council*, 176 N. Y. 597, 68 N. E. 1120; *Miller v. Natl. Council, K. of L.*, 69 Kan. 234, 76 Pac. 830; *Farmers' Mut. Ins. Co. v. Kinney*, 64 Neb. 808, 90 N. W. 923; *Ross v. Mod.*

Bros., 120 Iowa, 692, 95 N. W. 207; Pain v. Soc. St. J. B., 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287. Prior to the death of the member, the right of the beneficiary is intangible and purely contingent, depending upon the chance of the beneficiary being changed either by the act of the member or by the association prior to the death of the member.

[6] The application for membership in the society made by John Hines provided, among other things, as follows: "I further understand and agree that the by-laws of this society now in force, or hereafter enacted, enter into and become a part of every contract of indemnity by and between the members and the society and govern all rights thereunder." And also: "I further agree that the foregoing answers and statements, together with the preceding declarations, shall form the basis of the contract between me and the Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any benefit certificate that may be issued on this application and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof; and that they shall be construed together as one entire contract."

[1-3] The Supreme Court of Connecticut said in regard to this question: "The power of amendment thus reserved gave the order the right to change its laws, so long as these were not contrary to law or unreasonable; and the terms of the contract of insurance with its members made such changes a part thereof. *Gilmore v. Knights of Columbus*, 77 Conn. 58, 61, 58 Alt. 223 [107 Am. St. Rep. 17, 1 Ann. Cas. 715]; *Reynolds v. Royal Arcanum*, 192 Mass. 158, 78 N. E. 129 [7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776]. The promise of the members is to abide by all by-laws then existing or thereafter adopted which carry out the purposes of the order or help fulfill its obligations arising through its contracts of insurance." *Kane v. Knights of Columbus*, 84 Conn. 96, 105, 79 Atl. 63, 66.

The Supreme Court of Missouri has recently passed upon this identical question in construing a similar contract of indemnity to that involved in this suit. In *Dieterich v. Modern Woodmen of America*, 161 Mo. App. 97, at page 103, 142 S. W. 460, at page 461, said: "The by-laws of the defendant, providing for a substitute beneficiary in case of the death of the named beneficiary prior to the death of the member, were changed in 1901, and again in 1908, in both of which it was provided that in such a case the benefit should be first paid to the wife or widow, and, if no widow was left, then to other persons in the order therein named. The question for our determination is whether, under the amendment to the by-laws, made after this certificate was issued, by which, on failure of the named beneficiary

and failure of the member to make a new designation, the wife at the time of the death of the member should take in preference to the heirs. This question must be determined by the construction of the contract between the association and its members, which is evidenced by the application for membership, the benefit certificate, and the by-laws of the association, as far as they are applicable. We first call attention to the expressed purposes of this association, as given in its by-laws in force at the time this certificate was issued. It is as follows: 'Purposes. The purposes of this society shall be, the affording of substantial benefits to and the promotion of fraternal relations among its members during life, and the furnishing of financial aid and indemnity to the beneficiaries of beneficial members (after death of such beneficial members), *in accordance with the articles of association, by-laws, rules and regulations of this society and not inconsistent to the laws of the state of Illinois.*' (The italics are ours.) It is here made a declared purpose of the association to do certain things and to do them in accordance with its own articles of association, by-laws, rules, and regulations. The member is presumed to know the provisions of the articles of association and by-laws of the association of which he is a member (*Harvey v. Grand Lodge A. O. U. W.*, 50 Mo. App. 472, 477; *McMahan v. Maccabees*, 151 Mo. 522, 537, 52 S. W. 384) and must have contracted in this case with full knowledge that the by-laws might be amended at any time, for they so provided. He also contracted with knowledge that it was the purpose of this association to perform its functions according to its own by-laws, rules, and regulations; and hence, if there was any feature connected with his purpose in becoming a member which, under the law, was subject to change, and which he wished to guard against possible change, he should have erected such guard in terms in his contract. As to the amount of the indemnity and the person to whom it should be paid, and his right to name a substitute in case of the death of the beneficiary, his rights were clear and beyond the power of the association to change against his will. The provision for disposition of the fund, in case of failure of the beneficiary and failure on his part to renominate the beneficiary, is not touched upon in his application for membership and indemnity. From this fact alone, it would appear that at the time he secured the certificate he only had in mind provision for his then wife, Frances Dieterich, for she was the only person he named in his application to whom he desired the indemnity paid. This application, like the certificate itself, was upon a blank form, evidently prepared by the association to conform to the by-laws, and the absence of any provision in the application for a substitute beneficiary is important as indicating the absence of any intention at the time on the part of the member to

make provision for any one, except his then wife, and emphasizes the correctness of our position that it was the intention of the parties at that time to permit the question of a substitute beneficiary to be settled by the by-laws. The by-laws were changed during the life of the named beneficiary, and the change was in force at the time of Dieterich's marriage to plaintiff, and he must have known that fact; and if he wanted the benefit paid to his heirs, in preference to his second wife, to whom it would go under the by-laws as then in force, he could easily have made it so by naming them as substituted beneficiaries in the manner provided by the by-laws. Having failed to designate a new beneficiary, he must be held to have intended to let that matter be settled by the by-laws. Our conclusion is that the change in the by-laws was reasonable and in harmony with the general purposes of the association, and not in derogation of any right secured to the member, and was fully authorized by the terms of the contract between the member and the association. In so holding we are in harmony with the decided cases in this state. See *Lewine v. Supreme Lodge K. of P.*, 122 Mo. App. 547, 99 S. W. 821, where the authorities are reviewed, and the relation of the parties to each other and their respective rights are exhaustively treated. Also *Zimmerman v. Supreme Tent Knights of Macca-bees*, 122 Mo. App. 591, 99 S. W. 817. The judgment in this case should have been for plaintiff."

This decision of the Missouri Supreme Court leaves little, if anything, to be said upon the question, and its reasoning is so clear and convincing that we are constrained to adopt it and to hold it conclusive in favor of the contention made in the case at bar on behalf of the plaintiff in error. The association, under the express terms of its contract with John Hines, reserved the right to change and amend its by-laws and in that way change and modify its contract with him so long as such change was reasonable and fair. There can be no serious question about the change effected by the amendment of the by-laws of 1908; naming the surviving widow in place of the heirs as the beneficiary under the certificate was reasonable and fair and intended to uphold and advance the beneficial purposes of the association. The heirs have no legal right to complain at this change and are concluded thereby.

It follows that the conclusions of the trial court as to the law of the case were wrong. He should have found that the entire amount of the certificate should be paid to the surviving widow, and rendered judgment accordingly.

For these reasons the judgment appealed from should be vacated, and said causes remanded to the district court of Kingfisher county, with directions to enter judgment

against the Modern Woodmen of America in favor of the plaintiff in error, Maggie E. Hines, for \$1,000.

PER CURIAM. Adopted in whole.

BIG JACK MINING CO. v. PARKINSON.
(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. MASTER AND SERVANT (§ 124*)—MINE EMPLOYEES—DUTY OF OPERATORS.

Sections 3983 and 3984, Rev. Laws 1910, prescribing certain duties of mine operators towards employees, including the duty of daily inspection, applies to the operators of lead and zinc as well as coal mines.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

2. DEATH (§ 31*)—RIGHT OF ACTION—PARTIES.

An action for damages for wrongful death of the husband may be maintained by the surviving wife for the benefit of herself and minor children, under section 5281, Rev. Laws 1910, where there has been no administration on the estate of the deceased.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

3. DEATH (§ 95*)—MEASURE OF DAMAGES.

In such action the measure of damages is the pecuniary loss suffered by the widow and minor children by reason of being deprived of the care, protection, and support of the deceased, to be determined by the age, physical condition, occupation, earning capacity, habits, and the use made by the deceased of his earnings.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 108, 109, 111-115, 120; Dec. Dig. § 95.*]

4. APPEAL AND ERROR (§ 1064*)—HARMLESS ERROR—INSTRUCTIONS.

"Whether, in a given case, there should be a reversal for error in giving an instruction depends quite as much upon the evidence before the jury to which the instruction might be applied as upon the abstract accuracy of the language of the instruction, and so, if it is apparent that the language of the instruction, though inaccurate, yet, when applied to the evidence before the jury, it could not have misled the jury to believe their duty was different from what it actually was, the inaccuracy can afford no reason for reversal."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Ottawa County; Preston C. Davis, Judge.

Action by Ella Parkinson against the Big Jack Mining Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Vern E. Thompson, of Miami, G. W. Earnshaw, of Joplin, Mo., and F. D. Fulkerson, of St. Joseph, Mo., for plaintiff in error. W. H. Kornegay, of Vinita, for defendant in error.

GALBRAITH, C. This is an action commenced in the district court of Ottawa county, by the widow, for damages for the wrongful death of the husband, resulting in depriva-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

tion of protection, care, and means of support. The petition charges, in brief, that on the 6th day of July, 1910, the Big Jack Mining Company was operating a lead and zinc mine in Lincolnville, in Ottawa county, Okl.; that for some months prior to the 1st day of July, 1910, the mine had been shut down, and had become filled with water, and that the water was pumped out the latter part of June, and the active operation of the mine commenced about the 1st of July, 1910; that Andrew F. Parkinson was employed as a miner to work in said mine; that there was a drift in the mine some 250 feet in length, and at one time this drift had been timbered, but the company had carelessly and negligently allowed the timbers that formerly protected persons from loose rocks in the roof thereof to fall down, and that the defendant failed to replace these props, or to furnish timbers to make them; that said roof was some 20 feet from the bottom of the drift, and, on account of the height thereof, and the means of inspection afforded by the defendant, a person working in the drift could not inspect the condition of the roof, and ascertain the dangers from loose or hanging rock therein; that while the mine was idle it filled with water, and the roof in the drift became brittle, and the rocks therein liable to fall; that the company placed Andrew F. Parkinson at work in said drift, knowing its dangerous condition, and without proper inspection, and that on the 6th day of July, 1910, while the said Parkinson was engaged in his regular work in said mine, and passing along said drift, with a can of dirt, conveying it toward the shaft, a large rock in the roof of said drift gave way and fell upon said Parkinson, crushing, mutilating, and mortally injuring him, from which injuries he, a short time thereafter, died; that he was ignorant of the dangerous condition of said drift, and had no means by which he could ascertain its dangerous condition, and was relying upon the defendant to furnish him a safe place to work; that the defendant not only negligently failed to inspect the said drift and the roof thereof, as required by the statute to do, but knowingly placed the deceased to work therein without taking any care or precaution to ascertain that it was a safe place in which to work; that the deceased was at the time of his death a resident of Ottawa county, Okl., and was a vigorous young man, 26 years of age, capable of doing all kinds of manual labor, and was earning the sum of \$75 per month, which he used in the support and maintenance of the plaintiff and her minor children; that the plaintiff is the surviving widow of Andrew F. Parkinson, deceased; and that there had been no administration on his estate, and the plaintiff prosecutes this action for damages for the benefit of herself and her three minor children.

The answer of the defendant was, first, a

general denial, and, second, alleged that the defendant exercised due care and diligence in warning the deceased of the hazards incident to his employment; that when he was employed he represented himself to be, and the defendant believed him to be, a capable miner of many years' experience in underground work in lead and zinc mines; that when he was employed he undertook the duty of trimming and sounding the roof and walls of the drift in which he was working, and to keep the same in a safe condition; and that a short time prior to the accident the deceased did inspect and examine the roof and walls of said drift, and declared the same to be in a safe condition, and that thereafter he continued to work, and was constantly warned to examine the roof and walls of the drift and to keep the same free from dangerous rocks, and requested to report the condition to the ground boss or superintendent—and specially denied that the accident was due to the mine having been filled with water or the removal of the timber, and alleged that the defendant furnished him with every safeguard and convenience for the pursuit of the work assigned him, and that the injury was not caused by the negligence of this defendant or its servants, but was due to his own negligence and fault, and was a risk incident to the work which he assumed by his employment. The new matter alleged in the answer was specially denied by way of reply.

On the issues thus formed, the cause was tried to the court and jury and a verdict returned for the plaintiff in the sum of \$10,000. A motion for new trial was denied. Judgment entered upon the verdict. An appeal to this court has been duly perfected.

Errors are assigned, first, in overruling the motion for new trial; second, that the verdict is not sustained by the evidence, and is contrary to law; third, that the verdict is excessive; fourth, in the giving of instructions Nos. 4, 5, 6, 7, 8, 9, 10, 16, and 17; and, fifth, refusing to give instruction No. 1, requested by the plaintiff in error.

While these are the assignments made in the petition in error, counsel for the plaintiff in error confine their argument and discussion in the brief entirely to the instructions excepted to and given by the court. Under the rules of this court, we are only called upon in passing upon the case to consider the errors argued in the brief.

In instruction No. 4, complained of, the court directed the jury as to the law of contributory negligence and assumption of risk, and in so doing practically adopts the language of the statute on this subject. This practice is not objectionable, and it does not appear that the court was called upon to improve or enlarge upon the language used by the Legislature in the statutes in stating the law on these propositions.

Again, complaint is made of instruction

No. 5, which reads as follows: "Under the laws of this state applicable to the case at bar, it was the duty of the defendant to provide a mine foreman, and it was the duty of said mine foreman or his assistant to visit and examine every working place in the mine where the deceased, in the performance of his duty, was required to go, at least once every day, and it was the duty of said foreman or his assistant to direct that each and every place where the deceased, in the performance of his duty, was required to work should be properly secured by props of timbers, and it was further the duty of such mine foreman or his assistant to direct that the deceased be not permitted to work in an unsafe place except for the purpose of making the place safe, and, if you find from the evidence that as a result of the failure to make this daily inspection the injury occurred, the defendant is liable therefor, unless you should find that the deceased was guilty of negligence which caused the injury."

[1] It was evidently the intention of the court in giving the above instruction to advise the jury of the duty which the defendant owed the deceased, as prescribed by sections 3983 and 3984, Rev. L. 1910. This is conceded by the plaintiff in error; but it is contended that these sections of the statute apply only to operators of coal mines, and have no application to persons operating lead and zinc mines, and for that reason the instruction should not have been given. We cannot agree with the labored argument of counsel that these sections of the statute were intended by the Legislature to protect only workers in coal mines. That such was not the intention of the Legislature seems evident from even a casual examination of the statute. These sections are found in chapter 47, Rev. L. 1910, being a part of article 3 thereof. This chapter is entitled "Mines and Mining." Article 1 of said chapter creates a state mining board, and provides for mine inspectors, and divides the state into three mining districts, in one of which every county of the state is included; Ottawa county, where the injury involved in this case occurred, being included in the Third mining district thus created. Then we find in section 3958 the language, "any coal or other mine," and in section 3961, "any coal or other mine;" in section 3977, "coal or other mineral;" section 4008, "every coal or other mine;" section 4009, "every coal or other mine;" section 4011, "any coal mine or other mine." We do not believe that the Legislature intended to provide with such minute care for the protection of workers in coal mines, and to leave similar workers in lead and zinc mines without any protection whatever, particularly when these statutes bear such conclusive evidence that they were intended by the Legislature to protect the laborer not only in coal mines but in every other mine that may be operated within the state. We are constrained to

hold that the trial court correctly interpreted the meaning, purpose, and intent of the Legislature in enacting these statutes, and in holding that the duty imposed on the operator of a mine thereby was a duty that the plaintiff in error owed to the deceased in this instance. While the statement of the latter part of the instruction in regard to the negligence of the defendant contributing to the injury may be objectionable as a general statement of the rule of contributory negligence, still, under the evidence in this case, the plaintiff in error could not have been injured by such careless statement, since practically all of the evidence showed that Parkinson was not negligent, and that his death was due primarily to the negligence and carelessness of the plaintiff in error and its foreman. The evidence of the foreman himself, whose duty it was, under the statute, to inspect the mine daily, testified that the last time he had inspected this shaft was some two weeks before the accident resulting in the death of Parkinson. The evidence not only showed this carelessness and negligence on the part of the mine foreman, but it further showed that he put men to work in this mine immediately after the water was pumped out of the shaft, which was located on the 90-foot level, before the shaft was dry, and when he knew that the shaft was not in a safe condition, by reason of the mine having recently been filled with water, and standing in that condition for months prior to that time; that some of the timbers and props fell, and they were not replaced, but were simply thrown to one side of the shaft, and the work of mining proceeded. And it also appeared that there had been blasting in the mine the night preceding the day on which Parkinson was killed, and that the place where the stone fell from the roof of the shaft upon Parkinson was only some 10 or 15 feet from where the shaft had passed through dirt into shale rock, and through this shale formation were layers of soapstone, certainly a very unsubstantial character of formation to leave without props or support. The evidence of the defendant alone would have supported a verdict for the plaintiff on account of defendant's negligence.

Again, complaint is made of the giving of instruction No. 7, which was on the burden of proof, and instructed the jury that while, under the law, the burden of proof was upon the plaintiff to prove her cause of action by a preponderance of the evidence, yet, if they should find from the evidence that the same preponderated in the plaintiff's favor but slightly, that would be sufficient to warrant them to find the issues in her favor. While the language of this instruction is possibly not fortunate, and the instruction might be misleading in the form given, under the evidence as disclosed by the record, it is clear that the plaintiff in error could not possibly have been prejudiced by it, for the reason

that the evidence of the company's negligence was so clear that this instruction as to a slight preponderance was entirely uncalled for, still the error in giving it was not prejudicial to the plaintiff in error, and it is not cause for reversal.

Again, complaint is made of the giving of instruction No. 8, in which it is urged that this instruction singled out one duty of the plaintiff in error, and impressed it upon the minds of the jury. It may be said that the court was not called upon to include all of the duties imposed upon the defendant in one instruction, and it does not seem objectionable that only one of its duties was embraced in this instruction.

Complaint is made of instruction No. 9, which advised the jury as to the law making it the duty of the plaintiff in error to provide a reasonably safe place for the deceased to work. In a carefully prepared opinion by Commissioner Harrison, the law of this question is set out as follows: "In 20 Am. & Eng. Enc. of Law (2d Ed.) 55, we find the following text supported by more than 200 decisions from 37 different states, and from the United States Supreme Court, and the courts of Canada and England, viz.: 'In accordance with the rule that reasonable care must be taken to protect one's servants from injury, masters owe to their servants the duty of providing them with a reasonably safe place in which to work, and of maintaining it in a reasonably safe condition during the employment, having regard to the character of services required, and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and it is not one of the perils or risks assumed by a servant in his contract of employment, and the servant is entitled to rely upon the assumption that the master has performed the duty imposed on him by law of providing a reasonably safe place to work.' In 28 Cyc. 1097, the following rule is stated: 'It is the positive duty of a master to furnish his servant with reasonably safe instrumentalities wherewith, and place wherein, to do his work, and, in the performance of these obligations imposed by law, it is essential that regard should be had, not only to the character of the work to be performed, but also to the ordinary hazards of the employment; and the servant may assume that the master has performed his duty.' This rule is supported by decisions from 43 states, and from the United States Supreme Court, and the courts of England and Canada. Our own court, in the case of McCabe & Steen Construction Co. v. Wilson, 17 Okl. 355, 87 Pac. 320, uses the two terms interchangeably, or treats the terms as having the same legal effect. In the course of the opinion, the court quotes from Ruemmell-Braun Co. v. Cahill, 14 Okl. 422, 79 Pac. 260, as follows: 'It is the positive duty of the master to use

reasonable care in providing safe tools, machinery, and appliances to work with, and a safe place to work in, safe material to work on.' And after quoting the above language, the court says: 'As above stated, it is now the fundamental and well-settled law of the land that it is the duty of the master to furnish the servant safe tools, materials, and structures to work with and upon, and to keep them in proper repair.'" Frederick Cotton Oil & Mfg. Co. v. Trover, 36 Okl. 723, 724, 129 Pac. 747, 749. This instruction is a fair statement of the law and the duty imposed upon the master thereby.

Complaint is also made of instruction No. 10, by which the jury were advised that the defendant relied upon the defense of contributory negligence, that this was an affirmative defense, and the law required them to establish it by a preponderance of the evidence, and, in the absence of such evidence, the law presumed that the deceased acted with due care. This instruction fairly states the rule as announced by this court in St. L. & S. F. R. Co. v. Rushing, 31 Okl. 231, 120 Pac. 973, where it is announced that: "The servant is not charged with the duty of inspection. He is entitled to rely upon the assumption that the master has performed his duty." See, also, Frederick Cotton Oil & Mfg. Co. v. Trover, *supra*.

[3] Again, complaint is made of instruction No. 16, which reads as follows: "The measure of damages in this case, in the event you find the defendant to be liable, is the pecuniary loss suffered by the plaintiff and the minor children by reason of the loss of the deceased. You cannot allow for grief or anguish of mind arising from the death of the deceased; but you may take into consideration the position the deceased occupied, and the support and protection that he would have afforded to the plaintiff and her minor children had he lived, and, in arriving at this, you will take into consideration his earning capacity, physical condition, his habits, and all the surrounding circumstances as you find them to be from the evidence."

[2] The petition alleged the wrongful death of the husband by the negligence of the defendant, and that there had been no administration on his estate, and that he was a resident of Ottawa county, Okl., at the time of his death, and that the plaintiff was his surviving widow, and also set out the names of his minor children, clearly bringing the right of the plaintiff to maintain the action within the provisions of section 5281, Rev. L. 1910, and it will be observed that this section provides, "the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." It appears that the action was rightfully brought by the widow, and that the measure of damages was correctly stated in the above instruction, under the rule announced in the following author-

ities: Oklahoma Gas & Electric Co. v. Lukert, 16 Okl. 397, 84 Pac. 1076; Western Union Telegraph Co. v. McGill, 57 Fed. 699, 6 C. C. A. 521, 21 L. R. A. 818; Bartlett v. Chicago, R. I. & P. R. Co., 21 Okl. 415, 96 Pac. 468.

Lastly, complaint is made of the giving of instruction No. 17, which advised the jury that it was not the duty of the deceased to inspect the roof of the drift in which he was employed, that he had a right to rely upon the presumption that the defendant had performed its duty as to inspection, since the sections of the statute herein referred to makes it the duty of the operator to inspect the mine daily, and, the provisions of section 4014, Rev. L. 1910, making it a misdemeanor to fail to perform this duty, in addition to making a mine operator liable in a civil action for any damages resulting from the failure to perform this duty, it would seem that this instruction was not misleading or a misstatement of the law. St. Louis & S. F. R. Co. v. Rushing, 31 Okl. 231, 120 Pac. 973.

[4] In the case at bar the court gave 25 instructions, and evidently made an earnest effort to cover every feature of the case, and, while this duty may have been performed with more elaboration than is necessary, and some of the instructions may be open to just criticism, still, considered and taken as a whole, taking those excepted to by the plaintiff in error, as well as those not excepted to, it seems that the law of the case arising under the issues presented by the pleadings and the evidence admitted at the trial was fairly stated to the jury, we do not find that the verdict of the jury in this case should be set aside, and a new trial ordered, even if all the instructions of the court were not model statements of the law. Mr. Justice Schofield, in the case of Bressler v. People, 117 Ill. 422, 8 N. E. 62, quoted with approval by the Supreme Court of Oklahoma Territory in Hodge v. Territory, 12 Okl. 115, 69 Pac. 1077, 1079, said: "It has often been said by this court—and its correctness is obvious although it may never have been said—that whether, in a given case, there should be a reversal for error in giving an instruction depends quite as much upon the evidence before the jury to which the instruction might be applied as upon the abstract accuracy of the language of the instruction, and so, if it is apparent that the language of the instruction, though inaccurate, yet, when applied to the evidence before the jury, it could not have misled the jury to believe their duty was different from what it actually was, the inaccuracy can afford no reason for reversal."

So we find in this case that the evidence shows such careless and negligent failure to perform the duty of inspection by the plaintiff in error, when the inspection might have, and probably would have, avoided the

accident resulting in the death of the deceased, and its liability is so clear, that, although some of the instructions which the court gave to the jury may have been inaccurate statements as abstract propositions of law, yet, when applied to the evidence before the jury, these could not have misled the jury to believe its duty was different from what it actually was, and we therefore find that the judgment appealed from ought to be affirmed.

PER CURIAM. Adopted in whole.

VEVERKA v. FRANK et al.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 347*)—TIME OF TAKING—MOTION FOR NEW TRIAL—NECESSITY.

An action tried before a referee who reports to the trial court findings of fact, and both plaintiff and defendants move for judgment on such findings, these motions present questions of law only, and a motion for new trial is not necessary in order to a review of the judgment on appeal, and the time for appeal in such case runs from the date of the judgment, and the filing of the motion for new trial does not extend or suspend the running of the time for appeal or for service of a case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1897-1899; Dec. Dig. § 347.*]

2. APPEAL AND ERROR (§ 564*)—CASE-MADE—DELAY IN FILING.

A case-made not served within the time fixed by statute, or within the time as extended by the court before the expiration of the statutory time, is a nullity and cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.*]

3. APPEAL AND ERROR (§ 544*)—RECORD—MOTION FOR NEW TRIAL—REVIEW.

A motion for judgment on the findings of fact made by the referee, and a motion for new trial, and exceptions to the ruling of the trial court thereon, are not part of the record proper, and can be preserved and presented for review on appeal only by incorporating the same in a bill of exceptions or case-made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. § 544.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Oklahoma County; Edward D. Oldfield, Judge.

Action by Max Frank and others, doing business as the Michigan Leather Company, against V. Veverka. Judgment for plaintiffs, and defendant brings error. Dismissed.

J. H. Beaty, of Oklahoma City, for plaintiff in error. Scothorn, Caldwell & McRill, of Oklahoma City, for defendants in error.

GALBRAITH, C. This was an action commenced in the superior court of Oklahoma county by the defendant in error against the plaintiff in error on an account for merchan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

dise alleged to have been sold and delivered. By agreement of the parties the case was referred to a referee for trial to take testimony and return findings of fact and conclusions of law. The report of the referee was filed in the trial court on the 26th day of May, 1911. Both plaintiff and defendant moved the court for judgment in his respective favor on the findings of fact made by the referee. The motion of the plaintiff (the defendant in error) was granted on the 8th day of July, 1911, and judgment was entered in their favor on that date. The plaintiff in error, as defendant in the court below, filed a motion for new trial on the 10th day of July, 1911, which was overruled on the 12th day of August, 1911, and defendant asked and was given 60 days in which to prepare and serve case-made on appeal to this court, and on September 23, 1911, was given 30 days additional time in which to serve case-made. The case-made was served on the 4th day of November, 1911, and was thereafter settled by the trial judge and filed in this court on November 11, 1911.

The errors assigned in the petition in error attached to the case-made are as follows: First, the action of the court in sustaining the defendant's motion for judgment on the findings of fact; and, second, the overruling the motion for new trial.

The defendant in error insists that this court has no jurisdiction of the case, and moves to dismiss the appeal on the ground that the case-made was not served within three days after the entry of judgment, or within the extension of time given before the expiration of the three days.

[1] The record shows that the judgment appealed from was entered on the 8th day of July, 1911, and that the motion for new trial was overruled on the 12th day of August, 1911, and the extension of time was then given to make and serve case-made. It has recently been held by this court that, where a cause is tried on an agreed statement of facts, no motion for a new trial is necessary in order to a review of such judgment on appeal. *C. v. R. I. & P. R. Co. v. City of Shawnee*, 136 Pac 591, filed November 18, 1913, not yet officially reported. It has also been held by this court that: "Where a motion for a new trial is unnecessary to present to this court for review an order or judgment appealed from, such motion and decision thereon by the trial court are ineffectual to extend the time within which to perfect an appeal." *Cowart v. Parker-Washington Co. et al.*, 136 Pac. 153.

[2] We take it that the decision in *C. v. R. I. & P. R. Co. v. Shawnee*, 136 Pac. 591, supra, is controlling in this case, since both plaintiffs and defendant moved for judgment on the facts found by the referee, and each thereby said to the court, "We agree that these are

the facts in this case, and upon these facts the law justifies a judgment in my favor;" and for that reason the motion for judgment presented to the trial court questions of law only, and that no motion for new trial was necessary to entitle the losing party to have such judgment reviewed upon appeal. Hence the time for serving a case-made, as fixed by the statute, commenced to run on the 8th day of July, 1911, the date of the entry of judgment in the cause; and since the case-made was not served within three days of that time, or within the extension of time granted within such three days, the case-made is a nullity and presents no question for review to this court.

[3] The record in this cause cannot be considered as a transcript, even if the certificate of the clerk thereto was sufficient, and this seems to be fatally defective, for the reason that the errors assigned in the petition in error challenge the ruling of the trial court on the motion of the defendant for judgment and the overruling of the motion for new trial. Neither of these motions are a part of the record proper, and neither has been made a part of the record in the manner provided by law. It has been held by this court: "Motions presented in the trial court, including a motion for a new trial and the ruling thereon and exceptions taken, are not a part of the record proper and can be reserved and presented for review on appeal only by incorporating the same into a bill of exceptions or case-made." *Tribal Development Co. v. White Bros.*, 28 Okl. 525, 114 Pac. 736.

The case-made being a nullity because not served within the time prescribed by the statute, and the errors assigned being based upon motions presented to the trial court, and these motions and the exceptions taken thereto not having been incorporated into a bill of exceptions, cannot be reviewed in this court on a transcript for the reason that they are not a part of the record presented by the transcript.

For these reasons there is nothing in the record in this case that properly invokes the jurisdiction of this court, and the motion to dismiss the appeal should be sustained.

PER CURIAM. Adopted in whole.

THURSTON, County Treasurer, v. CALDWELL et al.
(Supreme Court of Oklahoma. Dec. 16, 1913.)

(Syllabus by the Court.)

1. TAXATION (§ 24*)—IMPOSITION OF TAXES—POWER OF STATE—MUNICIPALITIES.

Section 20, art. 10, Williams' Const., which provides, "The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper author-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ities thereof, respectively, the power to assess and collect such taxes," applies to purely municipal affairs, and does not constitute a limitation upon the power of the supreme Legislature of the state to impose taxes for purposes which, although of a municipal character, the state has a sovereign interest in, such as taxation for police protection, for streets, highways, and bridges, for the purpose of establishing and maintaining a public school system, etc.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 57; Dec. Dig. § 24.*]

2. TAXATION (§ 610*)—ENFORCEMENT—RIGHT TO ENJOIN—CONDITIONS PRECEDENT.

In all matters pertaining to taxation, a party who seeks equitable relief against an assessment of which he complains must himself offer to do equity. He must offer to pay the amount of taxes the facts show would be properly chargeable against him under a proper assessment.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1244; Dec. Dig. § 610.*]

Error from District Court, McClain County; R. McMillan, Judge.

Action by W. E. Caldwell and others against J. B. Thurston, County Treasurer of McClain County. Judgment for plaintiffs, and defendant brings error. Reversed and remanded.

Chas. West, Atty. Gen., C. J. Davenport, Asst. Atty. Gen., Wayne Wadlington, Co. Atty., of Purcell, and Warren K. Snyder, of Oklahoma City, for plaintiff in error. J. W. Hocker, of Los Angeles, Cal., for defendants in error.

KANE, J. This was a suit in equity, commenced by the defendants in error, plaintiffs below, against the plaintiff in error, defendant below, to enjoin the defendant as county treasurer from selling certain real estate belonging to the plaintiffs to satisfy certain assessments and taxes imposed or attempted to be imposed on said real estate for what is alleged to be city, town, school district, and county purposes, under the general revenue law of the state. Upon trial to the court, a decree was issued as prayed for, to reverse which this proceeding in error was commenced. The taxes involved cover the years 1908, 1909, 1910, 1911, and 1912. The petition shows that during part of that time the city of Purcell was a chartered city under a commission form of government, with duly organized legislative and executive departments. The principal contention of the plaintiffs is that the general revenue law of 1909 (Sess. Laws 1909, c. 38, §§ 14, 15), which empowered the county clerk to make the tax roll for county, city, town, township, and school district purposes and certify the same to the county treasurer, together with his warrant directing the county treasurer to collect the taxes for the city, as well as for the county, township, and school district, and the act of 1910 (Sess. Laws 1910, c. 64, §§ 3, 4), known as the "County Excise Board Act," which directs and empowers a board

composed of certain executive and judicial officers of the county to levy taxes for city, as well as for county, purposes, and the act of 1911 (Sess. Laws 1910-11, c. 152), creating the office of county assessor and abolishing township assessors, are unconstitutional in so far as they relate to counties, cities, and townships, because they are repugnant to section 20 of article 10, Williams' Constitution, which provides: "The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes."

[1] We gather from the able brief of counsel for plaintiffs that broadly his contention is that in the matter of the imposition, assessment, and collection of taxes upon property for the purpose of any county, city, township, or other municipal corporation, each governmental subdivision is supreme, and the Legislature of the state is without power to impose any taxes thereon for such purposes, even though the tax sought to be imposed may be as necessary to the health, happiness, and welfare of the state at large as to the people of the particular municipal corporation involved. We cannot agree with this sweeping interpretation of the constitutional provision under consideration. Several state Constitutions contain similar provisions which had been construed by their highest courts prior to the adoption of our Constitution, but we are unable to find where the construction contended for by counsel for plaintiffs had been adopted by any of them.

In the note to this section in Williams' Constitution it is said: "This section was taken from Kentucky." Whilst no decision by the highest court of that state passing directly upon the exact question herein involved is to be found, there are several cases to the effect that this provision does not deprive the Legislature of the power to provide for the assessment of property which shall be the basis of all levies for city, town, township, and other subdivisions of the state. *South Govington, etc., Ry. Co. v. Town of Bellevue*, 105 Ky. 283, 49 S. W. 23, 57 L. R. A. 50; *Paducah St. Ry. Co. v. McCracken County*, 105 Ky. 472, 49 S. W. 178; *Levi v. City of Louisville*, 97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480. *State ex rel. City of Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428, a Washington case, which state also has a similar provision, is more directly in point. It was held: "Const. art. 7, § 9, and article 11, § 12, providing that for all corporate purposes municipal corporations may be vested with authority to assess and collect taxes, and that the Legislature shall have no power to impose taxes on municipal corporations for municipal purposes, do not render invalid Act March 9, 1893, making the assessment roll of a city of the first class the same as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that of the county, and making the county treasurer ex officio collector of taxes for the city."

The Supreme Court of Missouri, where there is a provision identical with our own, in *State ex rel. v. Owsley*, 122 Mo. 68, 26 S. W. 659, speaking generally of its purpose and effect, and construing it in connection with other provisions of the Missouri Constitution, which in effect are also found in our Constitution, says: "The crying evil that the people of the state were laboring under at the time these provisions were introduced into the Constitution was excessive indebtedness, incurred by counties and other municipalities under authority of the Legislature, to meet which oppressive taxes had to be imposed, and it was to meet this evil, and remove it for the future, that these provisions were introduced into the organic law of the state. It was not sought to deprive the Legislature of the taxing power and confer it upon municipalities to any extent. On the contrary, the plenary taxing power of the General Assembly as it had theretofore been exercised is recognized as a premise of the proposed legislation. It is only the exercise of it by the assembly that is limited and regulated by the Constitution. All taxes since the adoption of the Constitution or before are levied and collected under and by the authority of the General Assembly of the state. Under these limitations of the Constitution, the taxes must be uniform within the territorial limits of the authority levying them, they must be levied in pursuance of a general law of the assembly directly authorizing them for state purposes, and authorizing them indirectly, through power conferred upon municipal authorities, for local purposes. And in each case the rate of taxation must be within the limit allowed for such purpose. And the General Assembly was inhibited from imposing upon municipalities a tax for local purposes, except by a general law authorizing such tax to be imposed by the local authorities, or releasing any municipality from its proportionate share of taxes levied for state purposes."

In the *Owsley* Case, it was contended that a section of the act of the General Assembly which provided for the registration of voters in, and for the appointment by the Governor of, a recorder of voters in cities of more than 100,000 inhabitants, and which further provided that all the costs and expenses of such registration and election and of the office of recorder of voters, required by this article in any such cities, shall be paid one-half out of the city treasury and one-half out of the county treasury, was unconstitutional, as being repugnant to the section of the Missouri Constitution. It was held: "Revised Statutes 1889, §§ 989-1013 (revising and amending the act of March 31, 1883, Laws, p. 38), providing for the registration of voters in cities having a population of more than 100,000, and the appointment by the Governor of a recorder of voters for such cities,

and the payment of the costs and expenses of registration and election and of the office of recorder of voters equally out of the county and city treasuries, in cities situated within counties, are not unconstitutional as authorizing the levy of a municipal local tax for other than local purposes."

In *State ex rel. Hawes et al. v. Mason*, 153 Mo. 23, 54 S. W. 524, the authority of the state to create a metropolitan police force and to compel the city of St. Louis to maintain the same was questioned upon the ground that it imposed a tax upon the municipality contrary to the same section of the Missouri Constitution construed in the *Owsley* Case. Mr. Chief Justice Gantt said: "Still another constitutional objection is raised to this act. It is charged that it violates section 10 of article 10 of the Constitution of Missouri, which prohibits the General Assembly from imposing 'taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.' In view of the discussion already had in the first paragraph of this opinion, in which we hold that the preservation of the peace and protection of life and property is a state and not a municipal function, it would seem obvious that this provision of the Constitution has no application to the fund required to support the police department. The inhibition does not extend to a state tax, but to municipal taxes, and this is distinctly a state tax, for a strictly state purpose."

In *State ex rel. v. Field*, 119 Mo. 614, 24 S. W. 757, the same court, sitting in banc, said: "We deem it within the power of the Legislature to impose a tax upon a particular subdivision or municipality of the state, when, in its judgment, it is for the benefit of that locality as well as the state at large."

In support of this proposition, *State ex rel. v. Owsley*, supra, and *State ex rel. v. Board of Education of St. Louis*, 141 Mo. 45, 41 S. W. 924, are cited. We think the Missouri rule is sound and correctly construes the constitutional provision involved.

It has been held by this court that municipalities have no inherent jurisdiction to make laws or adopt regulations of government. All the power that a municipality has, or the citizens of a municipality may exercise, in framing a charter, or an organic law for such city, is such as may be delegated to it by the Constitution of the state, or such authority pertaining to local government as may be conferred by the Legislature. *State ex rel. Reardon v. Scales*, 21 Okl. 683, 97 Pac. 584. In *Lackey et al. v. State ex rel. Grant et al.*, 29 Okl. 255, 116 Pac. 913, this court, speaking generally of the power of cities under a charter form of government, followed the Missouri rule. Mr. Justice Hayes, who delivered the opinion for the court, quotes approvingly from Dillou on

Municipal Corporations, vol. 1, § 63 (5th Ed.), as follows: "Provisions of the freeholders' charter which are purely municipal in their character supersede provisions of the general laws which are inconsistent therewith. * * * Their charters do not prevent legislation upon matters not municipal in their character, but affecting the state at large, although such legislation necessarily applies to cities that have framed their own charters, and overrides express provisions contained therein. The words of the Missouri Constitution declaring that a city of prescribed population 'may frame a charter for its own government' do not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality. These words mean that the city may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and the regulation of the duties of the inhabitants in the city, as between themselves. But the Legislature may, if it should see fit, confer on a city having a freeholders' charter power not necessary or incident to the city government. There are governmental powers, the just exercise of which is essential to happiness and well-being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city; but, until so delegated, they are reserved."

In that case it was held that the matter of providing municipal officers for the city government was purely a municipal affair and that the charter provision in relation to that subject, which was repugnant to the general law, prevailed. Other cases that tend to throw some light on the question under discussion and illustrate the distinction between a purely municipal affair and an affair of a municipal character, in which the state has a sovereign interest, are: *Board of Education of City of Ardmore v. State ex rel. Best*, 28 Okl. 866, 109 Pac. 563; *Coleman v. Frame*, 28 Okl. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556; *Dingman v. City of Sapulpa*, 27 Okl. 116, 111 Pac. 319; *City of Ardmore v. State*, 24 Okl. 862, 104 Pac. 913; and *State v. Barnes*, 22 Okl. 191, 97 Pac. 997.

Counsel for plaintiff in his brief and argument does not distinguish between the power of the Legislature to impose taxes for purely municipal purposes, and for purposes which, whilst they are beneficial to the particular municipality, the state nevertheless has a sovereign interest in. From the record we have before us, it is apparent that a large proportion of the taxes enjoined belong to the latter class. No doubt that at least a portion of it was imposed for the maintenance of the public schools. In *Board of Education of City of Ardmore et al. v. State ex*

rel. Best, supra, this court said: "The organization and maintenance of a free public school system for the education of the children of cities containing a population of 2,000 or over ought to be a matter of as much general state concern as the education of the balance of the children of the state, and ordinarily this function of government is not delegated to such municipalities. 'In modern days it is not only considered a governmental function, but, also, and especially in the United States, an imperative governmental duty to provide for and maintain a system of public education. This is true not only because through education is the individual rendered better capable of rational and good government, but also because education adds to his economic efficiency. 3 Abbott on Municipal Corporations, 2379.' And the court concludes that, from a casual examination of the provisions of the Constitution pertaining to public schools, it is apparent 'that it was not the intention of the framers of the Constitution to intrust this important function of government to a minor political subdivision of the state.'"

Judge Cooley expresses himself on this subject as follows: "Whenever a system of public instruction is established by law, to be administered by local boards, who levy taxes, build schoolhouses, and employ teachers for the purpose, it can hardly be questioned that the state, in establishing the system, reserved to itself the means of giving it complete effect and full efficiency in every township and district of the state, even though a majority of the people of such township or district, deficient in proper appreciation of its advantages, should refuse to take upon themselves the expense necessary to give them a participation in its benefits. Possibly judicial proceedings might be available in some such cases, where a state law for the levy of local taxes for educational purposes had been disobeyed; but the Legislature would be at liberty to choose its own method for compelling the performance of the local duty." *Cooley on Taxation*, p. 1299.

Wilkinson v. Lord, Treas. of Richardson County, 85 Neb. 136, 122 N. W. 699, 24 L. R. A. (N. S.) 1104, also is instructive on this phase of the case, and is authority for the proposition that the section of the Nebraska Constitution containing the provision that "all municipal corporations may be vested with authority to assess and collect taxes, is not a limitation upon the power of the Legislature." The taxes enjoined, no doubt, were imposed for purposes in which the state at large was as much interested as any of its minor subdivisions. It was never intended, by the constitutional limitations above referred to, that the supreme Legislature should be prohibited from imposing taxes for such purposes. It is true that some courts and text-writers have taken the view that the local institutions of self-government, regardless of its express constitutional limita-

tions, are so integral a part of American institutions that they are to an extent independent of legislative control. But even those who press this view most extremely acknowledge the absolute supremacy of the Legislature in many matters of chiefly local interest in which, nevertheless, the state has a sovereign interest, among which may be mentioned, state control over local police protection; state control over local taxation for streets, highways, and bridges; state control over local taxation for schools; state control over local taxation for the public health. This subject is instructively treated by Mr. Gray, in chapter 7 of his work on "Limitations of Taxing Power and Public Indebtedness," where the authorities will be found collected in the notes.

[2] As the petition in the case at bar does not specifically show that the taxes involved herein were imposed for purely municipal purposes, as herein defined, or that the plaintiffs tendered the amount due for such taxes as were legally imposed, it does not state facts sufficient to constitute a cause of action, and the demurrer to it filed in the court below should have been sustained. In all matters pertaining to taxation, a party who seeks equitable relief against an assessment of which he complains must, himself, offer to do equity. He must offer to pay the amount of taxes the facts show would be properly chargeable against him under a proper assessment. *Kellogg v. Ely*, 15 Ohio St. 64; *Wiggin v. Mayor, etc.*, of New York, 9 Paige (N. Y.) 16; *City of Burlington v. Gilbert*, 31 Iowa, 356, 7 Am. Rep. 143.

The judgment of the court below is therefore reversed, and the cause remanded, with directions to proceed in accordance with this opinion. All the Justices concur.

BILBY et al. v. GILLILAND.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(*Syllabus by the Court.*)

INDIANS (§ 15*)—ALLOTMENT—RIGHT TO ALLENTATE.

"Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of act of Congress approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory and for other purposes' [30 Stat. 495, c. 517], died subsequent to the 1st day of April 1899, but before having received the allotment of lands to which he was entitled as a member of said tribe of Indians, said lands, by reason of section 28 of the Original Treaty with the Creek Tribe of Indians [Act March 1, 1801, c. 678, 31 Stat. 861], descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians [Act June 30, 1902, c. 1323, 32 Stat. 500], and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee-simple title thereto"—follow-

ing *Deming Inv. Co. v. Bruner Oil Co.*, 35 Okl. 396, 130 Pac. 1157.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 84, 37-44; Dec. Dig. § 15.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Hughes County; John Caruthers, Judge.

Action by John W. Gilliland against Nicholas V. Bilby and others to quiet title. Judgment for plaintiff, and defendants bring error. Reversed.

Lewis C. Lawson, of Holdenville, for plaintiffs in error. Warren & Miller, of Holdenville, for defendant in error.

HARRISON, C. This was an action by John W. Gilliland against Nicholas V. Bilby, John S. Bilby, and Indian Land & Trust Company to quiet title to the S. W. ¼ of section 5, township 6 north, range 9 east. The land in question had fallen to the heirs of a deceased member of the Creek Tribe of Indians whose name had been placed upon the rolls as a full-blood but who had died before receiving his allotments.

The plaintiff alleged that he was the legal and equitable owner of the land in question but did not disclose his chain of title but did allege that defendant Nicholas V. Bilby claimed an interest in said land by virtue of a warranty deed from the heirs of the deceased, and that defendant John S. Bilby claimed an interest by virtue of a lease for a period of 99 years which had been executed by Nicholas V. Bilby to the Indian Land & Trust Company and by the trustee of said Land & Trust Company assigned to John S. Bilby, and that such conveyances constituted a cloud on his title which he prayed to have removed. Defendants Nicholas V. and John S. Bilby filed separate demurrers and, same being overruled, filed separate answers to plaintiff's petition; Nicholas V. Bilby setting up his chain of title.

The cause was tried in April, 1911, and judgment rendered in favor of plaintiff, Gilliland, decreeing title to the land in question in said Gilliland and ordering the deeds through which Nicholas V. Bilby claimed to be canceled and held for naught and the lease through which John S. Bilby claimed to be canceled also. From such judgment plaintiffs in error appeal to this court.

The material facts in the case are: That Little Peter, a full-blood Creek Indian, died in 1899; that his name had been placed on the rolls of such Tribe but that at the time of his death he had not received his allotment; that after his death, under the provisions of the Original and Supplemental Treaty with the Creek Indians, an allotment which could have been selected by deceased, had he lived, was allotted to his heirs, who were Jennie, Millie, Sallie, and Louis Peters; that on August 15, 1904, the heirs of Little Peter, who were then adults, executed a deed

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of conveyance of said land to Nicholas V. Bilby, which deed was duly recorded August 24, 1904, pursuant to which he went into possession of the land, made substantial and valuable improvements thereon, and remained in exclusive and undisturbed possession of same in person and through tenants, receiving all the rents and profits therefrom and exercising complete control over same up to the time this controversy arose. The further facts appear that in October, 1908, one J. O. Chapman procured a deed of conveyance from the same heirs to the same land and in January, 1910, executed a quitclaim deed to said land to the plaintiff, John W. Gilliland. It also appears that the deed from the heirs of Little Peter to J. O. Chapman was approved by the county judge of Hughes county.

While plaintiffs in error present and argue at great length each of 12 separate assignments of error occurring during the trial of the cause, the question whether Nicholas V. Bilby held a valid title is, under the record, the only question that it is necessary to decide. If his deed was valid, it is unnecessary to determine whether or not Chapman's deed would have been valid had none ever been made by the heirs to Bilby. We will therefore consider the validity of Bilby's deed. In considering this, however, let it be borne in mind that the father of these heirs died before the allotment was taken, and that after his death an allotment which, under the treaty, could have been taken by him, had he lived, was taken by his heirs. The question then is whether such allotment, coming to his heirs in this wise, could be alienated or conveyed by them in August, 1904. This identical question with reference to a full-blood Choctaw Indian was before this court in the case of *Hancock v. Mutual Trust Co.*, 24 Okl. 391, 103 Pac. 566, in which case the syllabus is as follows: "Lands allotted (homestead and surplus) under the provisions of section 22, c. 1362, 32 Stat. 641, approved July 1, 1902, in the name of a deceased member of the Choctaw Tribe of Indians, are alienable by his heirs after lawful selection, prior to the lapse of one, three, or five years, and prior to the issuance of certificate or patent." In the body of the opinion, supra, this court, speaking through Mr. Justice Dunn, after discussing the provisions of section 12 of the treaty between the United States and the Choctaws and Chickasaws, said: "So that to our minds, from the language, it is clear that if the member, with his designated homestead, lived so long as 21 years from the date of the certificate, during that period he cannot lawfully sell this portion of his allotment; but to us it appears equally clear that, should he die even the next day after receiving his certificate to his homestead allotment, his heirs then (so far as this act is concerned) might sell the same free from any restriction on its alienation. * * * Now, if the heirs of a

member of the tribe, as to his homestead, and the heirs of a freedman, may sell the lands allotted to their ancestor, immediately on his death, what possible reason can be assigned, or where is the language in the act which would preclude an immediate alienation by the heirs of those 'persons' (which word includes members, citizens, and freedmen) provided for under section 22, who never in fact selected their allotment, but whose allotments were selected solely for the benefit of and in the interest of the heirs? To our minds both are wholly wanting. Nor in our judgment is this restriction in any wise modified or limited by the terms of sections 15 and 16. To our minds it is reasonable to say and hold that lands or other property coming to an individual either by descent or purchase comes to him with no restriction upon his rights to dispose of them, except the specific restriction with which their title is by clear terms burdened. This rule, we think, is applicable to the lands which were granted to these people under this treaty. If there is no specific language fixing a restriction, and no language from which an implication thereof may be plainly derived, then, in our judgment, none ought to be held to exist."

In the case of *Mullen v. United States*, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 835, the same question was before the United States Supreme Court involving the validity of conveyance made by Choctaw heirs of an allotment selected after the death of the parent and before patent had issued, in which case the United States Supreme Court, speaking through Mr. Justice Hughes in reference to an allotment of this character, said: "The heirs of a deceased Indian allottee under the supplemental agreement of July 1, 1902, with the Choctaws and Chickasaws, have a complete equitable interest which, in the absence of restrictions, they may convey before patent"—the court further holding that conveyances by heirs of allotments of this character were valid. The court, however, in discussing the questions involved in the Choctaw Case and their right to convey allotments under the conditions above referred to, compares the similar provisions pertaining to the Creeks, saying: "It is true that under the Creek agreement, in cases where the ancestor died before allotment, the lands were to be allotted directly to the heirs, while under the Choctaw and Chickasaw agreement the allotment was to be made in the name of the deceased member and 'descent to his heirs.' This, however, is a mere formal distinction and implies no difference in substance. In both cases the lands were to go immediately to the heirs, and the mere circumstance that, under the language of the statute, the allotment was to be made in the name of the deceased ancestor instead of the names of the heirs furnishes no reason for implying a requirement that there should be a designation of a portion of the lands as homestead. We

have, then, a case where all the allotted lands going to the heirs are of the same character, and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting the homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22, where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases, so as to make it applicable to all the lands taken by the heirs, and there is no occasion or authority for creating a division of the lands so as to impose a restriction upon a part of them. There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyance."

It is evident from the opinion, *supra*, that the court makes the comparison of the provisions of the Choctaw and Chickasaw Tribes with the provisions of the treaty with the Creek Tribe pertaining to lands inherited in this wise, for the reason that the court believed that the construction placed on the provisions of the Creek Treaty by the Attorney General's department, the Assistant Attorney General's letter to the Secretary of the Interior being quoted in the opinion, and that the construction placed thereon by the Commissioners to the Five Tribes and by the Department of the Interior, was correct, and, seeing no substantial difference between the provisions of the Creek Treaty and those of the Choctaw and Chickasaws, that therefore there should be no restriction, and was none, as to the alienation of lands descending to the Choctaws and Chickasaws in this wise.

And following this conclusion in the case of *Reed v. Welty*, 197 Fed. 419, the United States District Court for the Eastern District of Oklahoma, in opinion rendered June 26, 1912, where the question involved was whether London and Ramsey Knight, full-blood Creek citizens who took as heirs of their father and mother who were entitled to allotments but died before taking same, could validly convey their interest in the land as they attempted to do by warranty deed dated July 26, 1904. The court, in an opinion rendered by Campbell, District Judge, quotes at length from the opinion of Mr. Justice Hughes in the Mullen Case, *supra*, and concludes as follows: "By section 20 of the Supplemental Agreement it appears that it was intended to modify and supplement the

Original Agreement and repeal any conflicting provision in that agreement or any prior agreement, treaty, or law. So that, if the land was allotted to these heirs before the taking effect of the Supplemental Agreement, then their rights are fixed by the Original Agreement; if afterward, then, so far as the inquiry here is concerned, their rights are fixed by the Original Agreement as amended by section 16 of the Supplemental Agreement above quoted. The bill, however, while not giving the date of the allotment, alleges that the lands passed to the heirs under and by virtue of the Original Creek Agreement. Does the provision of section 7 of the Original Agreement, or of section 16 of the Supplemental Agreement, that the lands allotted to citizens shall not be alienable by the allottee or his heirs for the period of five years, apply to lands of the character involved in this case, or is that restriction to be confined in its application to lands allotted direct to living members and not to the lands allotted to heirs of deceased members? In the Choctaw-Chickasaw Agreement, after providing for allotments to living members and for the selection of homesteads by them, inalienable for life, not exceeding 21 years, section 16 provided a term of restrictions upon the sale of lands other than homesteads allotted to members. Then section 22 provided that the lands of any member dying before receiving his allotment should be allotted in his name and should descend to his heirs according to the Arkansas law. Justice Hughes decides that in such case there is no warrant of law for selecting a homestead out of such an allotment. He further decides that the Choctaw-Chickasaw Agreement contemplated two classes of allotments: (1) Allotments to members of the tribes and to freedmen living at the time of the allotment; and (2) allotments made in the case of enrolled members entitled to allotment but dying before actual allotment had been made, and that the restriction prescribed in section 16 applies to the former and not to the latter. In the Creek Agreement the Commission is dealing with another one of the Five Tribes, but with the same object in view, that of the allotment of the tribal lands to the individual members, and the agreement is so similar to the Choctaw-Chickasaw Agreement in terms and arrangement that the two classifications of allotments found by Justice Hughes in the latter agreement may also be said to exist in the former, and, as in the Choctaw-Chickasaw Agreement, the restrictions upon alienation must be held to have only applied to the first class; that is, allotments to members of the tribe living at the time of allotment. It follows that on July 26, 1904, London and Ramsey Knight had an alienable interest in the land in question. * * *

To the same effect is *Rentle v. McCoy*, 35 Okl. 77, 128 Pac. 244, which was a Creek allotment, the facts in which case are stated in the syllabus as follows: "Scott Rentle,

a minor, and a duly enrolled Creek freedman, died July 2, 1899, without a surviving widow or children; his allotment not then having been selected. On August 15, 1902, his distributive share of land, as a member of said tribe, was allotted to his heirs. On April 8, 1905, Morris and Katie Rentie, who were the father and mother of Scott Rentie, and his surviving heirs, executed in due form a warranty deed covering said allotment to D. On May 25, 1905, D. conveyed by warranty deed to E. M., who then and there took possession of said premises and remained in possession until he conveyed to H. M., to whom he surrendered possession. H. M. continued in possession until 1909, when an ejectment action was brought for possession. Held: (a) That said land passed to Morris and Katie Rentie free from restrictions. (b) That said land was alienable on April 8, 1905, when Morris and Katie Rentie conveyed to D."

Also in *Deming Inv. Co. v. Bruner Oil Co.*, 25 Okl. 395, 130 Pac. 1157; the facts being stated in the syllabus as follows: "Where a member of the Creek Tribe of Indians, entitled to be enrolled under section 21 of act of Congress approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory and for other purposes' [30 Stat. 495, c. 517], died subsequent to the 1st day of April, 1899, but before having received the allotment of lands to which he was entitled as a member of said tribe of Indians, said lands, by reason of section 28 of the Original Treaty with the Creek Tribe of Indians [Act March 1, 1901, c. 676, 31 Stat. 861], descended to his heirs, free from restrictions upon alienation imposed by section 7 of said Original Creek Treaty and by section 16 of the Supplemental Treaty with the Creek Tribe of Indians [Act June 30, 1902, c. 1323, 32 Stat. 500], and a warranty deed, executed by the heirs after the allotment of said lands to them, conveyed the fee-simple title thereto."

We deem it unnecessary to cite further authorities, as the question is well settled in this court that in the case of a full-blood Creek Indian entitled to enrollment but, who died after April 1, 1899, after he had been enrolled but before receiving his allotment, his heirs took such allotment free from restrictions as to alienation and on August 15, 1904, could convey valid title to same.

It follows, therefore, that if Little Peter died in the latter part of 1899, after having been enrolled, but before taking his allotment, that the allotment which he could have taken had he lived passed to his heirs, and that the deed executed August 15, 1904, by such heirs, conveying said allotment to Nicholas V. Bilby, was a valid deed and conveyed all the title which said heirs had in said land, and that therefore the deed executed by said heirs on October 31, 1908, pretending to convey said land to J. O. Chapman, was void and of no effect for the reason that at

that time said heirs had no title in said land, having conveyed all their title to Nicholas V. Bilby on August 15, 1904. This being true, it follows that the lease through which John S. Bilby claimed was valid, and that John S. Bilby was entitled to possession of said premises as against any and all parties claiming under or through defendant in error, John W. Gilliland.

Hence the judgment of the lower court must be reversed, with instructions to render judgment in accord with this decision.

PER CURIAM. Adopted in whole.

BILBY v. GILLILAND.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. USE AND OCCUPATION (§ 8*)—RENTS—RIGHT TO RECOVER.

In an action brought by the owner of real estate, entitled to the possession thereof, against the occupant, to recover for the use and occupation of the lands occupied, it is not necessary to allege in the petition either that the relation of landlord and tenant existed between the parties or that there was any contract between them, either express or implied, to pay rent.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 24; Dec. Dig. § 8.*]

2. USE AND OCCUPATION (§ 8*) — RENTS — RIGHT TO RECOVER.

Under our statute (section 4094, Comp. Laws 1906) the occupant of lands is, without special contract, liable for the payment of rents to any person entitled to the same.

[Ed. Note.—For other cases, see Use and Occupation, Cent. Dig. § 24; Dec. Dig. § 8.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Hughes County; John Caruthers, Judge.

Action by John W. Gilliland against Nicholas V. Bilby. Judgment for plaintiff, and defendant brings error. Affirmed.

Lewis C. Lawson, of Holdenville, for plaintiff in error. Warren & Miller, of Holdenville, for defendant in error.

BREWER, C. The defendant in error sued the plaintiff in error in the district court; the petition being as follows: "Petition. The plaintiff, John W. Gilliland, states that he is the owner of the S. W. ¼ of section 5, township 6 north, and range 9 east, in Hughes county, Okl., and that he was the owner of said land during all the year 1910 from the 15th of January of the said year, and that at all time thereafter during the said year 1910 he was entitled to the possession of said land and to the rents from same; that the defendant, Nicholas V. Bilby, was wrongfully in possession of the said premises from the 15th day of January, 1910, until the crops for said year were gathered, and collected the rents on said land for said year of 1910; that the said Nicholas V. Bilby was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not in possession of said premises with the consent of the plaintiff but held the same over his protest; that the said Nicholas V. Bilby collected the said rents and profits without the consent and over the protest of the said plaintiff, and that his said acts in holding possession of said lands and collecting the rents therefrom were wrongful and deprived plaintiff of the rents from said lands, and that plaintiff was damaged thereby; that the reasonable rental value of the said premises for the year 1910 was the sum of \$800. Wherefore the plaintiff, John W. Gilliland, prays judgment against the defendant, Nicholas V. Bilby, in the sum of \$800, for the costs of this action, and for all proper relief."

The defendant in the trial court interposed a demurrer to the petition, which was overruled, and he brings the case to this court on case-made to have this ruling of the court reviewed.

[1] The demurrer set up that the petition did not state a cause of action; that it was so indefinite and uncertain that its nature cannot be determined; that, if it is an action to recover rents, it is so indefinite and uncertain that it does not entitle the plaintiff to recover as prayed for therein.

We are unable to agree with the appellant. While this petition has not been drawn with care, and its averments may be open to criticism, yet we believe that the purpose of the suit can be easily gathered from the language used. That the facts stated, if true, show that the defendant has wrongfully held, occupied, and used plaintiff's land, and has wrongfully appropriated the rents and profits thereof to his own use, when in fact plaintiff was entitled to the same. This petition clearly shows that plaintiff was the owner of the lands and was entitled to the possession of the same and to the rents and profits thereof. That defendant was wrongfully in possession of the lands throughout the crop season of the year 1910 and actually took unto himself the rents and profits of the land for that period, all of which was done over the protest of plaintiff. That the reasonable value of the rents was a certain sum, and that plaintiff had been damaged to that extent.

[2] We are fully aware that at common law, and under the law of many of the states, a suit of this kind would not lie in the absence of a contractual relation, express or implied, between the parties; but under our statute (section 4004, Comp. L. 1909) the occupant of lands is made liable for rents to any person entitled thereto and without special contract. The case of *Earl v. Tyler*, 36 Okl. 179, 128 Pac. 269, is directly in point. In that case the syllabus is as follows: "In an action brought by the owner of real estate, entitled to the possession thereof, against the occupant, to recover for the use and occupation of the lands occupied, it is

not necessary to allege in the bill of particulars either that the relation of landlord and tenant existed between the parties or that there was an express or implied agreement to pay rent." That case discusses the point quite fully and the view is therein expressed: "We are of the opinion that the Legislature intended to furnish a remedy, not alone to the landlords, within the usual legal meaning of the word, but to those entitled by reason of their title to remuneration for the use and occupation of lands occupied by another." This holding is supported by *Storv v. McCormick*, 70 Kan. 323, 78 Pac. 819, and *Winings v. Wood*, 53 Ind. 187, in which states the same statute is construed. *Rodman v. Davis*, 34 Okl. 766, 127 Pac. 411.

We think the petition states a cause of action and that the demurrer was properly overruled.

The cause should be affirmed.

PER CURIAM. Adopted in whole.

BILBY v. BEAN et al.

(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER (§ 29*)— GROUNDS—FORCIBLE DISPOSSESSION.

In an action of forcible entry and detainer, where the undisputed evidence shows that the plaintiff had been in possession of the premises for some five or six years, and the defendants, during his temporary absence, and without his consent, entered upon the premises and held possession by force of arms, a verdict for the defendants should be set aside and the cause remanded, with direction to the trial court to enter judgment for the plaintiff.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 134-140, 147; Dec. Dig. § 29.*]

(Additional Syllabus by Editorial Staff.)

2. FORCIBLE ENTRY AND DETAINER (§ 6*)— SCOPE OF PROCEEDING—TITLE.

In an action of forcible entry and detainer, the right of possession only, and not the title, can be tried.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 29-32; Dec. Dig. § 6.*]

Commissioners' Opinion, Division No. 2. Error from County Court, Hughes County; John L. Coffman, Special Judge.

Action by Nicholas Bilby against William Bean and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

L. C. Lawson, of Holdenville, for plaintiff in error. Warren & Miller, of Holdenville, for defendants in error.

GALBRAITH, C. This was an action in forcible entry and detainer tried in the county court of Hughes county, before John L. Coffman, a member of the bar of that county, elected as special judge after the regular

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

judge had been disqualified by the defendants. The action involved the right of possession of 40 acres of land, being a part of the allotment of Little Peter, a Creek citizen of full blood; the allotment being made to the heirs of Little Peter after his death, he having died either in 1900 or 1901.

[1] Plaintiff's claim of title to the land was based upon a warranty deed from the heirs of Little Peter, executed on August 5, 1904. The defendants were tenants of John W. Gilliland, who claimed title under a quitclaim deed from John O. Chapman, dated January 17, 1910. Chapman held a deed from the heirs of Little Peter under date of October 31, 1908, which deed had been approved by the judge of the county court of Hughes county on the 31st day of October, 1908. The evidence is undisputed that Bilby was in possession of the land in February, 1911, and that he had possession of the land for some five or six years prior to that date; that Bilby had grown a crop of corn on the land for the year 1910, all of which was not gathered until the latter part of January or the early part of February, 1911, and immediately after the corn was gathered Bilby turned cattle and hogs upon the land; that on the 8th day of February, 1911, the defendants, without the consent of the plaintiff, entered upon the land and commenced plowing; that when the plaintiff's tenants found the plows on the land they removed them out on the highway and nailed up and locked the gates in the fence inclosing the land. To show the manner in which the defendants obtained and held possession of the premises in controversy, a few excerpts from the testimony of the witnesses will be given.

Ed Turner, a witness for the plaintiff, testified in part as follows: "Q. Would you please state to the jury if you know how they got in possession of these lands? A. Well, Mr. Bilby was plowing there on the 9th and Mr. Bean and Mr. Brown come over and I was sent down there to tell them to stay off, and they came over in the morning and asked Mr. Bryant and Mr. Ayers who they rented from, and they told them they rented from Mr. Bilby, and then I come up, and they asked me what Mr. Bilby had said about it and what I was doing there, and I told them that he had sent me down there to tell them to stay off. Q. Just state what they did there to get in? A. They said they would go to town that afternoon and see what could be done about it. The next morning about 5 o'clock I got up and went down to the field and about 6 they come over to the field and come in. Q. Who? A. Bill Bean and Bill Brown and Ira Bean. Q. The defendants in this case? A. Yes, sir. I rode down there and got there just before they came up to where I was and says: 'Ed, we have cut the fence. You had better guard the cattle to keep them from getting out through the gate to the road.' Then he

went on back to where their plows were and went to plowing, and they took and set Mr. Bilby's plows outside the fence. Q. What time was that? A. About 6 o'clock. Q. You say they had been there the day before? A. Yes, sir. Q. Who was in possession the day before? A. Mr. Bilby had two men working there. Q. Who was working there the day before? A. Bryant and Ayers. Q. What Bryant and Ayers? A. Coleman Bryant and George Ayers. Q. Were there any cattle in there on the 10th day of February, 1911? A. Yes, sir. Q. Whose? A. Mr. Bilby's. Q. About how many? A. About 50 or 55 head. Q. What was done with the cattle? A. They drove them back into the other field. Q. What time on the morning of the 10th did you get down to these premises? A. 5 o'clock. Q. Did you see anybody there at the time you got there? A. No, sir. Q. About how long from that time was it until Bean and Brown appeared? A. About 6 I think. Q. What was their attitude towards you? What did they do and say? A. I had gone down and built up a fire as it was pretty cold and I heard some one moving around back of the field. I didn't know who it was, so I rode over back of the field, and as I rode back I heard something sounded like knocking down the gate. I rode on down to the gate and Bill Brown hollered and said, 'We've tore down the gate and we're going down there and nail the other one up.' Q. What gate? A. The gate on the west side of the field. Q. Was it a small gate or a large one? A. It was a gate for wagon and team. Q. Back of the premises? A. Yes, sir. Q. Was that the gate that was wired up the day before? A. I don't know just when it had been wired up. Q. When you saw it the day before was it wired up though? A. Yes, sir. Q. That morning did you see any guns? A. Yes, sir; they had two. Q. Who had two? A. Bill Bean and Bill Brown. Q. What kind? A. Double-barreled shotguns. Q. What did they do with the shotguns? A. They didn't do anything with them, just carried them along in their hands and on their shoulders. Q. What did they do with the plows that Mr. Bilby had there the day before, plowing? A. Took them and set them outside in the road. Q. Was it daylight at that time? A. Not hardly. Q. What did you go up there for, Mr. Turner? A. I was sent over there to guard the field. Q. Did you guard it? A. No, I didn't get them out. Q. Why? A. I didn't want to have any racket or fight. Q. Did you tell them to stay out? A. Yes, sir. Q. Was that the gate that Mr. Bilby's men had been going in and out of the field? A. Yes, sir. Q. What did they say they were going to nail it up for? A. They didn't say. Q. Did they nail it up? A. Yes, sir. Q. How did you know that they had torn down the gate? A. They told me. Q. Which one? A. Bill Brown. Q. How far were they from you

at the time they came down to the gate that you spoke of and told you that? A. About 50 or 75 feet. Q. They got in before you got up there? A. Yes, sir. Q. What was done with their guns? A. One was carrying his gun in his hand and one carried his on his shoulder. * * * Q. What was the condition of the fence before that? A. It was up in good shape. Q. How do you know? A. I had been along it the day before on the 9th of February, 1911. Q. What condition did you leave the gate in on that night when you left there? A. Wired up and steepled. Q. Who did that? A. I think Mr. Gamble did. Q. Who had been in possession of those lands before that time? A. Mr. Bilby raised a corn crop on it. Q. What year? A. 1910."

George Ayers, a witness for the plaintiff, testified: "Q. Now just state to the court and jury what took place there on the 10th of February. A. We went down there on the 10th. I was driving the wagon and Mr. Bryant was leading some mules. We saw when we got there that Bean and Brown were over in the field and two boys were in there with them. We went up to the gate and it was locked and steepled up. We told them that we came there to plow some, and they said that they come there for the same purpose; said Mr. Turner was there to keep them out but it didn't do any good. Q. Did you see any guns? A. Yes, sir. Q. What kind? A. Shotguns."

Coleman Bryant, a witness for the plaintiff, testified: "Q. Didn't they tell you why they didn't want you to come in? A. Yes, they said they had rented that place and they were going to cultivate it. I think those were their exact words. Q. Did you see any guns? A. Yes, sir; I saw two. Q. What kind? A. Double-barreled shotguns. Q. You say that was on the 10th? A. On the morning of the 10th. Q. Then you and Mr. Ayers went away? A. Yes, sir; we went back home. Q. Didn't you make any attempt to go inside? A. No, sir. Q. Why didn't you? A. Because we didn't want to break no locks to get in. It was locked up."

The defendant William Bean testified in part as follows: "Q. Who did you find there on the place? A. Ed Turner. Q. Tell what took place. A. We went down there and the gate was fastened up and we taken it down. Then we went 50 or 75 yards and met Ed Turner and he told us that Mr. Bilby had given orders for us to stay off of that place. We told him that we guessed we'd give him the same orders; that we were going to work that place this year. Then we went on back and struck their plows and set them out and went on down to the other gate and it was locked and we stayed there at that gate and along come these boys to plow again. They come up and we talked a little bit. We told them to stay out. That's about all. Q. Did they stay out? A. Yes, sir. Q. You say you tore the gate down?

A. Yes, sir. Q. Which one? A. The north gate. Q. That went into these lands in controversy, this 40? A. Yes, sir. Q. What day was that you tore it down? A. I don't remember. Q. Was it the day that Ed Turner come up and told you to get off? A. Yes, sir. Q. What did you tear it down for? A. To get in there to plow. Q. Didn't you know that Mr. Bilby was claiming possession of that land? A. I heard he was rowing about it. Q. You were told whose land it was before that, weren't you, that it was Mr. Bilby's? A. No, sir; I think not. Q. Didn't Mr. Gamble go around about a week before that and fix up the gate and fence? A. I don't know what Gamble done. Q. When was the first time you went there to plow? A. Some time about the 1st of February. Q. Wasn't the gate nailed up then? A. No, sir. Q. The next time you went there, was it? A. Yes, sir. Q. Was the other gate also locked? A. Yes, sir. Q. Who locked it? A. I don't know. Q. You never said anything to Mr. Bilby about going in there, did you? A. No, sir."

The defendant William Brown testified in part as follows: "A. We talked with them a few minutes and then we come up here and told Mr. Gilliland that Bilby's men were down there at work and he told us that he had rented the place to us and for us to go ahead and farm it. Q. You came up and counseled him about it? A. Yes, sir; we come up to see him about it. Mr. Lawson: We object. Q. What time did you go back to the 40? A. About 6 or 7 o'clock in the morning. Q. What took place there then? A. Mr. Turner was there; said Mr. Bilby told him to tell us not to farm there. We found our plows on the outside of the fence, and we forced the gate and carried them back in and put their plows out. Q. And you have been there ever since? A. Yes, sir. Q. You and Bean collected there that morning and went and tore that gate down? A. Yes, it was always open when we went there before. Q. Wasn't it fastened up before that? A. It was after they throwed our plows out. Q. You tore it loose? A. Yes, sir. Q. What did you tear loose? How was the gate fastened? A. It was fastened up with steeples and wire run down around it. Q. How did you get it open? A. Broke it open; kicked it open; any way to get it open. Q. That was on the 10th of February, 1911? A. Yes, sir. Q. That was the morning that Ed Turner was there, the morning that you found Mr. Bilby's cattle and hogs in there and drove them out of the field? A. Yes, sir. Q. And told Ed about it? A. Yes, sir. Q. Then you took Mr. Bilby's plows and threw them out of the field? A. Yes, sir. Q. Off of this 40? A. Yes, sir. Q. You say you let the matter alone until Mr. Bilby had gathered his crop. When did he get it off? A. He got the corn off about the 1st of February. Q. A little while before you went in? A. Yes, sir. Q. Was that the first time you went in there? A. We plowed in there be-

fore that. Q. You plowed in there about the 9th? A. I think it was about the 8th. Q. That was the first time you went over in there plowing around? A. That was the first time, yes. Q. Did you have permission from Mr. Bilby to go in there? A. No, sir."

It appears clearly from this testimony that the defendants, without the consent of the plaintiff, who was in the peaceable and quiet possession of the premises, entered thereon and held the possession literally *vi et armis*. While it is true they did not make any threats or demonstrations with the double-barrel shotguns that they had with them on the morning of the 10th of February, 1911, when the plaintiff's tenants came to the premises to renew their work, but that was not necessary. They had the arms there, and the presence of the arsenal had the desired effect in keeping the plaintiff's agent from entering upon the premises. This court cannot approve the "strong arm method" employed by the defendants in error to gain and hold possession of the premises in controversy. They were tenants of Gilliland. It was the duty of their landlord to place them in peaceable possession. They were not called upon to inject themselves into the controversy between Bilby and Gilliland. They had no legal right to dispossess Bilby, and there was no justification for their holding possession by force. They were wrongdoers from the beginning. Possession thus gained and held cannot be sustained by this court.

The plaintiff, at the close of the evidence, requested the court to give a peremptory instruction to the jury to return a verdict for the plaintiff, and this is one of the assignments urged on the appeal. This instruction should have been given, and a refusal to give it was reversible error, since there was no evidence to sustain a verdict for the defendants.

[2] The only theory upon which the verdict for the defendants can be explained is that the jury considered and tried the question of title to the land as between Bilby and Gilliland and found for the latter. In this action of forcible entry and detainer the right to the possession only and not the title can be tried. Sections 5503, 5504, Rev. L. 1910; *Olds v. Conger*, 1 Okl. 232, 32 Pac. 337; *McDonald v. Stiles*, 7 Okl. 327, 54 Pac. 487; *Dysart v. Enslow*, 7 Okl. 386, 54 Pac. 550; *Brown v. Hartshorn*, 12 Okl. 121, 69 Pac. 1049; *Anderson v. Ferguson*, 12 Okl. 307, 71 Pac. 225; *Jones v. Seawell*, 13 Okl. 711, 76 Pac. 154; *Zahn v. Obert*, 24 Okl. 159, 103 Pac. 702; *Vansellous v. Huene*, 26 Okl. 243, 108 Pac. 1102; *Turner v. Moore*, 34 Okl. 1, 127 Pac. 487; *Maples v. Smythe*, 35 Okl. 469, 130 Pac. 145.

On account of the error above set out, the judgment appealed from should be reversed, and the cause remanded, with directions to the county court of Hughes county to vacate the judgment and to enter a judgment for

the plaintiff in error and against the defendants in error for the possession of the premises, and costs.

PER CURIAM. Adopted in whole.

SHELTON v. WALLACE.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE (§ 66*)—VENDOR AND PURCHASER (§§ 85, 302, 303*)—RESCISSION OF CONTRACT—REMEDIES OF VENDOR.

W. sold S. some city lots; they entered into a written contract in which S. agreed to pay for the lots on the installment plan, he giving his promissory notes, due monthly, for the deferred payments, he also went into possession. W. agreed to convey when all payments should be completed. The contract contained many other provisions, among which was one to the effect that, in case of default on the part of S. in the payments, W. might keep all money paid, not as a penalty for the breach of the contract, but as liquidated damages for the use of the premises. S. decided to repudiate the contract, and refused to make payment of installments. W. sued on the past due notes in justice court. *Held*:

(a) That such an action would lie in W.'s favor.

(b) That such contract could not be rescinded except by consent of both parties.

(c) That W., in addition might have specific performance as against S., but that he was not compelled to resort to that remedy before enforcing payment, in a court of law, of the unpaid installment notes.

(d) That W. is not confined to one action for damages for breach of contract, but that that part of the contract providing for the installment notes was an independent and not a dependent or concurrent covenant, and, as such, could be enforced in an independent action.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 197; Dec. Dig. § 66;* *Vendor and Purchaser*, Cent. Dig. §§ 141-143, 845-861; Dec. Dig. §§ 85, 302, 303.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Oklahoma County; John W. Hayson, Judge.

Action by J. L. Wallace against D. M. Shelton on a promissory note. Judgment for plaintiff, and defendant brings error. Affirmed.

R. E. Gish and Dumars & Vaught, all of Oklahoma City, for plaintiff in error. J. V. Cabell, of Oklahoma City, for defendant in error.

ROBERTSON, C. On June 30, 1910, D. M. Shelton and J. L. Wallace made and entered into the following contract: "Contract with J. L. Wallace for lots in McCann's South Highland Addition to Oklahoma City, Oklahoma. I hereby contract for the purchase of Lots 35, 36, 37, 38, 46, 47, 48 in Block No. 16 in McCann's South Highland Addition to Oklahoma City, Oklahoma, on the following terms and conditions: The price of each lot shall be \$162.50 which I agree to pay as follows: \$40.00 cash in hand paid to agent,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

receipt of which is hereby acknowledged, and \$5.00 per lot each month until the full amount of the purchase price is paid in full at the office of The State Bank at Capitol Hill, Oklahoma. The buyer hereby on his or her part agrees that if default is made on any payment herein provided for that then all payments heretofore made shall be forfeited to J. L. Wallace at his option without notice, not as a penalty, but as compensation for the use of said property up to such time, and as liquidated damages for the breach of this agreement and thereupon this agreement shall be of no further force and effect and becomes null and void, and it is agreed that the possession of said property shall forthwith be surrendered to J. L. Wallace. Provided that if any purchaser shall become disabled by accident or sickness there shall be no forfeiture during times he is so disabled, and in case of death a receipt in full and deed will be executed to the heirs of the applicant without further payment. In consideration of the faithful performance of the agreement, herein set forth by the buyer herein, J. L. Wallace agrees and binds himself to execute and deliver to the buyer herein, a warranty deed conveying good title to the above-described lots at any time upon receipt of payment in full for said lots.

"Witness our hands this 30th day of June, 1910.

"[Signed] D. M. Shelton, Buyer,

"J. L. Wallace,

"By C. V. Eggleston."

Notes were given for the deferred payments. After making several payments in accordance with the terms of his contract, Shelton decided to rescind the same, which he attempted to do by defaulting in the payments. After four of the notes had become due, Wallace brought suit thereon in the justice of the peace court, where judgment in his favor had been rendered prior to the time of bringing of this suit, which was upon the fifth unpaid and past due note, and which also was brought in the justice of the peace court, where judgment was also entered for Wallace and against Shelton. On appeal to the county court, it was stipulated by the parties that the judgment entered on the four former notes should abide the final judgment in this case. After hearing in the county court, a motion for judgment was filed by Wallace, after Shelton had rested (the burden of the case having been properly assumed by him), which motion was sustained by the court, and from which order and judgment Shelton brings error and urges a reversal on the grounds: "First. Where an executory contract is not divisible, and one party makes default in the payment of installments when due, and announces his intention to make no further payments and to repudiate the contract, the other party cannot keep the contract in force and maintain a separate action for a failure to pay each in-

stallment when due, but must recover all his damages in one suit. Second. The repudiation of an executory contract, accompanied with a failure to pay installments when due, affords a defense to a recovery upon notes representing each installment on the theory of a failure of consideration, except in cases where the plaintiff brings an action for specific performance, in which event, only one action will lie for the enforcement of the entire contract. Third. The judgment in the case at bar cannot be sustained, because the defendant in error is entitled to a specific performance of the contract." These various propositions may properly be considered together.

By the contract, *supra*, the equitable title to the lots described was vested in Shelton, Wallace retaining only the mere naked legal title for the use of Shelton, and possession was given according to the terms of the agreement, while payment of installments and final conveyance was provided for by its terms at a future period. Thus the rights of the parties, fully understood and recognized by both, became fixed at the signing of the contract. Now, can Shelton, at his pleasure, repudiate his contract and refuse payment of his notes without a showing of fraud or failure of consideration? He claims that his repudiation of the contract and failure to pay the installment notes past due affords him an ample and complete defense to the notes which form the basis of this action on the grounds of no consideration, and further claims that the only time when he would be denied such defense would be when Wallace brings an action for specific performance, in which event, one action only would lie for the enforcement of the entire contract. We do not agree with this contention, and cannot understand how there can be a repudiation and rescission of the contract set up and relied upon except both parties agree thereto. This they have not done. Where the contract vests in the vendor a right of forfeiture, such as this one does, if the price is not paid as agreed, such a provision is personal to him, and he may maintain an action for the price, although the purchaser has defaulted. 39 Cyc. 1902.

As was said in *North Stockton Town Lot Co. v. Fischer*, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438: "An action to recover installments on a written contract for the sale of land, after the vendor had waived his right to terminate the contract and declare payments made forfeited for the purchaser's failure to make payments as prescribed, is an action of debt for money due on a written contract, and not a suit in equity in which plaintiff is required to prove damages."

In *Samuel v. Allen*, 98 Cal. 407, 33 Pac. 273, in speaking of an action similar to the one at bar, the court says: "There is, therefore, no statutory prohibition upon the right to a personal action to enforce the debt when

it becomes due. The action is for money due as much as though suit were upon a promissory note."

In *Niles v. Phinney*, 90 Me. 122, 37 Atl. 880, which was a suit on three promissory notes which were given as a part consideration of certain real estate, under circumstances somewhat similar to those in this case, it appears that, after the agreement had been executed and the purchaser had taken possession, which he retained for some time and then voluntarily abandoned the premises and refused to pay the balance of the purchase price represented by the notes sued on, it was held that neither the defendant's neglect or refusal to pay his notes at maturity nor his voluntary abandonment of the premises could have the effect to determine or rescind the contract with the plaintiff, and that the vendor had the right to request a strict compliance with the conditions of the agreement, and to enforce a forfeiture for breach thereof, also that he had a right to waive a forfeiture of the bond and to enforce payment of the notes by suit. He chose the latter course, and the court held that he had a right to sue on the notes and to enforce payment thereon, notwithstanding the other remedies that were open to him. The court cited, in support of its holding, *Manning v. Brown*, 10 Me. 49; *Shaw v. Wise*, 10 Me. 113; *Little v. Thurston*, 58 Me. 86; *Cook v. Walker*, 70 Me. 235; *Newhall v. Ins. Co.*, 52 Me. 180.

In *Cartwright et al. v. Gardner*, 5 Cush. (Mass.) 274, it was said: "Where, on a sale of land, the purchaser paid a part of the purchase money, and gave his notes for the residue, payable respectively, in one, two, three, and four years, and the vendor agreed, upon payment of the notes as they should become due, to convey the land to the purchaser; and it was further agreed that, if the purchaser should refuse or neglect, upon request, to pay either of the notes as they should respectively become due and payable, the vendor's obligation to give a deed should become void and of no effect, and all moneys previously paid on account of the purchase should be retained by the vendor, as liquidated damages, for the nonperformance of the contract on the part of the purchaser. It was held that this latter stipulation was for the benefit of the vendor, who might avail himself of it at his pleasure, but that it did not authorize the purchaser to refuse payment of his notes." See, in support of this principle, *Clark v. O'Loughlin*, *Morris* (Iowa) 375. (star page 495); *Shepherd v. Merrill*, 20 N. H. 415; *Curtis Land & Loan Co. v. Interior Land Co.*, 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

In some jurisdictions the vendor cannot, on a breach by the purchaser, maintain an action at law for the unpaid purchase price if the contract is executory (39 Cyc. 1900),

but his remedy is in equity for specific performance or rescission, or at law for damages for breach of the contract but this doctrine does not obtain in this state. Here, as a general rule, if a purchaser of real estate defaults in the performance of his part of the contract, as where he fails or refuses to pay the purchase money to the vendor who has performed, or who stands ready and willing to perform, the vendor has a right of action to recover the amount due and unpaid. Therefore the plea of no consideration in the light of the foregoing authorities cannot be sustained. The covenants of Shelton, as evidenced by his contract, notwithstanding it provides for payment by installments, were independent covenants and not dependent or concurrent, and recovery can be had thereon in this action as soon as the same, or any of them, become due. This answers in the negative, too, the assumption that the contract is entire and indivisible, and that the breach of one part thereof is a breach of the whole. The contract was mutual; the promise of one party was a good consideration for the promise of the other, and there can be no such thing as its rescission by one of the parties without the consent of the other. It is too much to say that Wallace will not convey when the conveyance is due. There is nothing in the record warranting such conclusion and, even though he should default and fail to perform, Shelton would have his remedy against such breach by way of specific performance or in damages or otherwise; and, while the contract in a sense is indivisible, yet it is also possessed of certain well-defined yet independent covenants, upon the breach of which the rights of the parties are automatically changed only to the extent that separate causes of action arise, and may be maintained by the parties thereon as the facts and circumstances of the case may require. This being true, it follows that the judgment of the lower court is right and should be affirmed, and that the status of the pending suits on the four preceding notes as stipulated by the parties should be determined by this conclusion.

PER CURIAM. Adopted in whole.

SEIBOLD v. RUBLE et al.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 427*)—ACTION BY ASSIGNEE—DEFENSE—PAYMENTS TO PAYEE.**

Where one, who assumes the payment of a nonnegotiable note and attached interest coupons, has no notice of the assignment of the note and coupons, or of the mortgage given to secure the payment thereof, proof of the payment of the note and coupons to the payee named therein, at the designated place of pay-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment, is a good defense against proceedings on the part of the assignee to enforce payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.*]

2. BILLS AND NOTES (§ 315*)—NONNEGOTIABLE NOTE—DEFENSE.

A nonnegotiable note, transferred to an innocent purchaser before maturity and for a valuable consideration, without notice to the maker thereof, or to one who assumes its payment, is subject to all legal defenses which might be interposed against the note in the hands of the original payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 751, 753, 756-759, 764, 766-769, 864; Dec. Dig. § 315.*]

3. BILLS AND NOTES (§ 427*)—ACTION BY ASSIGNEE—DEFENSE—PAYMENT.

Where the assignee of a nonnegotiable note, to which are attached interest coupons, which note and coupons are secured by real estate mortgage, takes the same by indorsement on the principal note alone, and by written assignment of the mortgage, which assignment is not put of record for over four and one-half years, and fails to give the maker any notice of the assignment, and allows the original payee to collect the interest coupons at the designated place of payment, either from the maker of the coupon notes or the subsequent owner of the mortgaged lands, and to forward the canceled coupons to the one making payment, the subsequent payment in good faith and without notice of the principal note, though before maturity, to the payee named therein, at the designated place of payment, protects the one making payment against liability to the assignee, although the note was not produced and delivered at the time it was paid, it not being known to the payer that the note was not in the possession or under the control of the one to whom payment was made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.*]

4. BILLS AND NOTES (§ 427*)—PAYMENT—EFFECT TO DISCHARGE LIABILITY.

Under the facts stated in the preceding paragraph, where such original payee is also the agent of the subsequent owner of the mortgaged land, for the purpose of procuring a new loan and paying off the old, his failure to pay over the proceeds of the loan by him received to the assignee of the note does not render the payer liable to a second liability thereon, the money having been received by the former and ostensible owner in settlement of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.*]

5. BILLS AND NOTES (§ 427*)—PAYMENT—EFFECT TO DISCHARGE DEBT.

Payment in such case having been made to the ostensible owner, who thereupon executes a release of the outstanding mortgage, it cannot be said that the failure to pay over to the assignee the money paid was an act for which the one causing payment to be made would be liable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.*]

Commissioners' Opinion, Division No. 1. Error from Superior Court, Custer County; J. W. Lawter, Judge.

Action by George M. Ruble against W. F. Seibold and another. From a judgment in favor of plaintiff, defendant named brings error. Affirmed.

George T. Webster, of Clinton, for plaintiff in error. M. L. Holcombe, of Clinton, for defendant in error.

SHARP, C. On July 28, 1903, James Abernathie executed to the defendant Winne & Winne his promissory note in the sum of \$720, payable ten years after date. To said note were attached 11 interest coupons, of which the first was for \$8.41, due October 1, 1903, 9 for \$50.40, due October 1st of each succeeding year thereafter, and one for \$41.59, due July 28, 1913. The note and interest coupons were secured by a real estate mortgage on a quarter section of land in Custer county. On June 18, 1904, James Abernathie sold said land to J. F. Lamb, who assumed the payment of the Winne & Winne mortgage indebtedness. On the 4th day of December, 1906, the land so mortgaged was sold by Lamb to the defendant in error, Ruble, who likewise assumed the payment of said mortgage indebtedness. July 12, 1907, defendant in error, Ruble, made application to the Union Central Life Insurance Company of Cincinnati, Ohio, for a loan of \$1,200 on said land, naming the defendant Winne & Winne as his agent for that purpose. A loan of \$1,100 was thereafter made, and the proceeds thereof paid to the order of Winne & Winne by the insurance company. The payee of the \$720 note, Winne & Winne, on August 5, 1903, executed an assignment of the mortgage given to secure the same to the plaintiff in error, W. F. Seibold, but which assignment was not placed of record in Custer county until April 13, 1908. On August 8, 1903, defendant Seibold claims to have purchased said note and mortgage, paying therefor the face of the note. An indorsement in blank was written upon the back of the principal note, assigning without recourse both it and the attached coupons, and, together with the written assignment of the mortgage, were on said last-mentioned day delivered to defendant at his home in Danbury, Iowa. On October 9, 1907, Winne & Winne, claiming to be the owner of said original mortgage, executed a release thereof, which was duly recorded in Custer county on October 14th following. This, according to the record, perfected the title in Ruble, and made his mortgage of July 25, 1907, to the Union Central Life Insurance Company, a first lien on said land.

This action is brought by the plaintiff, Ruble, who claims to have paid to Winne & Winne, the payee of the original note, the amount thereof out of the proceeds of the loan obtained from the Union Central Life Insurance Company, and seeks to cancel the assignment of the mortgage and indebtedness secured thereby, made by defendant Winne & Winne to the codefendant, W. F. Seibold, it being charged that the assignment of said mortgage, appearing of record, constitutes a cloud upon plaintiff's title to the land. De-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fendant Seibold in his answer seeks to recover a judgment on the indebtedness assigned him, and foreclosure of the original mortgage.

It is said by counsel for plaintiff in error in his brief that there is but one question involved in the case, namely, that of agency, and, if it be found that Winne & Winne was Ruble's agent to procure the loan from the insurance company, then that the former's embezzlement or wrongful application of the proceeds would be an act for which the principal, Ruble, must suffer. This is the single issue upon which plaintiff in error seeks a reversal.

[1] The first question necessary to determine is that of the negotiability of the Abernathie note, given Winne & Winne July 28, 1903, for \$720. We do not understand it is seriously urged that the note is negotiable. Under the decisions of this court construing sections 4626 and 4627, Comp. Laws 1909 (which must control and determine its character), on account of the provisions of said note, obviously it is nonnegotiable. *Dickerson v. Higgins et al.*, 15 Okl. 588, 82 Pac. 649; *Clevinger v. Lewis*, 20 Okl. 837, 95 Pac. 230, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56; *Clowers et al. v. Snowden et al.*, 21 Okl. 476, 96 Pac. 596; *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.*, 32 Okl. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177; *Bell v. Riggs*, 34 Okl. 834, 127 Pac. 427, 41 L. R. A. (N. S.) 1111; *Citizens' Savings Bank v. Landis et al.*, 132 Pac. 1101.

[2] Being nonnegotiable, the rights of the transferee would be governed by the rule announced by this court in *Randall Co. v. Glendenning et al.*, 19 Okl. 475, 92 Pac. 158, in a very similar case: "That where a nonnegotiable note is transferred to another, although that party is an innocent purchaser, and the transfer is made before maturity and for a valuable consideration, yet, if made without notice, either actual or constructive, to the makers thereof, it is subject to all the legal defenses which might be interposed against the note in the hands of the original payee."

[3-5] There was no evidence that either Abernathie, Lamb, or Ruble had any knowledge of the assignment of the note by Winne & Winne to Seibold, but, on the other hand, each of these witnesses testified they had no such notice, while the defendant Seibold made no attempt to show that either of the respective owners of the land had any notice whatever of the assignment of the note and mortgage, except that, at the time of delivery to him, Winne & Winne had said that Abernathie would be notified of the assignment. Although, as already seen, the assignment of the mortgage was executed at Wichita, Kan., on August 5, 1903, and delivered to defendant at Danbury, Iowa, on August 8th following, it was not placed of record in the county where the land was situated until April 13, 1908. While the defendant Sei-

bold, in his deposition given in the narrative form (at the taking of which it does not appear the plaintiff was represented), stated that he had had continuous possession of the note and mortgage from the time of his purchase until sent by him to his attorney in the preparation of the defense in the trial court, yet it appears from the uncontradicted evidence of Abernathie that he paid the first coupon to Winne & Winne, and received a notice (presumably from Winne & Winne), the following fall, of the maturity of the second coupon. Lamb testified that he paid two coupon notes to Winne & Winne, from whom he received letters accompanying the canceled coupons. The letter inclosing coupon number two, which matured October 1, 1904, was addressed to James Abernathie; while that inclosing coupon number three, which matured October 1, 1905, was addressed to J. F. Lamb; and both of which letters were signed by Winne & Winne. The evidence is somewhat confusing about coupon number four, which, while offered in evidence by plaintiff, does not appear in the record, but which fact in no wise affects the issues. Clearly it is made to appear that Seibold intrusted Winne & Winne to collect for him the maturing interest coupons, as he admits he intrusted them to notify the maker of the assignment. Neither of the coupons in evidence appear to have been indorsed, and defendant's answer charges the assignment to have been made by an indorsement in writing on the back of the principal note. There was therefore nothing upon these canceled coupons calculated to notify either the original maker, or the subsequent owner of the land; that any one other than Winne & Winne had any interest in them. Not only was Seibold guilty of negligence in not putting his assignment of record for over four and one-half years, and in neglecting to notify the maker of the assignment, but by permitting the original payee to collect the annual interest, and surrender the canceled coupons, thereby justifying the belief that the note and coupons were still owned by and in the possession of the payee. Ruble had no actual notice of the assignment until the receipt of a letter by him from Stewart & Burns, of Wichita, on May 8, 1908, a few weeks after the assignment had been placed of record. The facts in this case are very similar to those in *Randall Co. v. Glendenning et al.*, supra. In each case payment was made of an unmaturing nonnegotiable note to the original payee, prior to the placing of record of the assignment, and without notice thereof to the maker. The same question was before the court, and the same conclusion reached in *Dickerson v. Higgins et al.*, 15 Okl. 588, 82 Pac. 649.

It is urged that upon payment of the proceeds of the Union Central Life Insurance Company loan to Winne & Winne, the original note not having been delivered up to plaintiff, payment was made at the risk of

the payer, and as Winne & Winne was plaintiff's agent in procuring the loan, and was authorized to pay off all liens on the land, and to send the draft to make such payment at Ruble's risk, therefore plaintiff should not recover, and McNabb et al. v. Hunt, 28 Okl. 43, 119 Pac. 210, and Owings v. Howington, 31 Okl. 651, 124 Pac. 1058, are cited as authority supporting this claim. The cases are not in point, as the facts there involved readily disclose.

We must not lose sight of the fact that the note is nonnegotiable. There are many authorities supporting the rule that payment of a nonnegotiable note to the assignor, after the same has been transferred, whether before or after maturity, but before notice of the transfer, will be deemed good. Fowle v. Outcalt, 64 Kan. 352, 67 Pac. 889; Warren v. Gruwell et al., 5 Kan. App. 523, 48 Pac. 205; Chapman v. Steiner et ux., 5 Kan. App. 326, 48 Pac. 607; Lockrow v. Cline, 4 Kan. App. 716, 46 Pac. 720; Wright v. Shim-ek et al., 8 Kan. App. 350, 55 Pac. 464; Killam v. Schoeps, 26 Kan. 310, 40 Am. Rep. 313; Quinn v. Dresback, 75 Cal. 159, 16 Pac. 762, 7 Am. St. Rep. 138; Morgan v. Neal, 7 Idaho, 629, 65 Pac. 66, 97 Am. St. Rep. 264; Pace v. Gilbert School et al., 118 Mo. App. 369, 93 S. W. 1124; Gibson v. Pew, 3 J. J. Marsh. (Ky.) 223; Stevens v. Parker, 5 Allen (Mass.) 333; Allein v. Agricultural Bank, 3 Smedes & M. (Miss.) 48; Weinick v. Bender, 33 Mo. 80; Dunn v. Meserve, 58 N. H. 429; Swan v. Craig, 73 Neb. 182, 102 N. W. 471.

In Vann v. Marbury, 100 Ala. 438, 14 South. 273, 23 L. R. A. 325, 46 Am. St. Rep. 70, in an opinion by Stone, C. J., it appeared that the maker of the note, which under the laws of that state was nonnegotiable, had no knowledge of the transfer by the payee, and it was held that payment made to the payee would be a complete protection, notwithstanding the note was not produced and delivered up at the time of payment. It was there said: "In Hart v. Freeman, 42 Ala. 567, we said: 'The maker of a promissory note, not negotiable, may pay the same to the payee after its maturity, even though the note be not produced and delivered up at the time of payment, provided the maker has had no notice of the indorsement or transfer of the note to a third person. And such payment would be a valid and competent defense against the note, should it afterward appear and suit be brought thereon against the maker by another holder.' It was further held in that case that the burden of proof rests upon the plaintiff in the action, the defendant having proved the payment, to show that the defendant had notice of the transfer or indorsement before the payment was made. We cannot perceive that the fact that payment of the note in controversy was made before maturity takes the case without the influence of the decision in Hart v. Freeman."

In Bliss v. Young, 7 Kan. App. 723, 52 Pac. 577, neither the last coupon nor the principal note were returned to the payer. The notices were sent out by the Western Farm Mortgage Trust Company, the legal successor to the payee, Western Farm Mortgage Company, and it was held that the note being nonnegotiable, and the maker, not having actual or constructive notice of its assignment, was protected in making payment to the payee. See, also, Bensley v. Bartholf, 137 Ill. App. 420; Id., 234 Ill. 336, 84 N. E. 923; Williams v. Pelley et al., 96 Ill. App. 346; McCabe v. Farnsworth, 27 Mich. 52; Pingree on Mortgages, § 1151. The rule is announced in Wade on Notice, § 431, as follows: "One of the incidents of assignment of demands not recognized as negotiable, according to the law merchant, as well as overdue negotiable paper, is that the assignee takes subject to all equities subsisting between the parties at the time. The debtor is entitled to all credits for payment, as well as all set-offs which he may have against the original creditor. Even after the assignment has been made, the debtor, being ignorant of that fact, will be protected in making payment of the debt in whole or in part, or in any set-off to the demand he may have acquired."

While prudence would perhaps require, and the law in many cases exacts, that the payer, upon payment of an unmatured note, require its production, yet, where for a long term of years the assignee of a nonnegotiable note has permitted the assignor to pose as the ostensible owner, and in his behalf collect the annual interest, remit the same, and forward canceled coupons, without any form of notice to the maker, constructive or actual, of the assignment, the delivery of the note will not be required, unless it should appear that it was known to the payer that the note was not at the time in the possession of the one to whom payment was made. The assignee is charged with knowledge of the law that his note is nonnegotiable, and with knowledge of the fact that payment may be made to the payee, and in order that he may be protected, the law enjoins of him notice to the maker, of his claim of title, or at least to refrain from such conduct as will tend to warrant the belief that the payee yet remains the owner.

True, Ruble intrusted the payment of the first mortgage note to Winne & Winne, who at the time occupied a dual position, being not only the agent of Ruble, who had assumed payment of the note, but, as well, the payee of the note. The draft drawn by Ruble and wife on the Union Central Life Insurance Company was payable to the order of Winne & Winne, and was paid to his order by the drawee. The money evidenced by the draft thus passed to Winne & Winne's individual credit, and, as against the plaintiff in error, was, in effect, a payment of the original note, not to Winne & Winne as agent

of Ruble, but to Winne & Winne the ostensible owner. The duality of the relation of Winne & Winne to Ruble marks a distinction between the case under consideration and many of the reported cases involving the question of agency. Here the former owner of the note, and, so far as at the time known to Ruble, the real owner, received payment from one authorized to make payment, the original payee and ostensible owner even going so far as to execute a release of the original mortgage, in which it is recited that payment in full had been made. The note having been paid, the plaintiff was entitled to the relief sought.

The judgment should be affirmed.

PER CURIAM. Adopted in whole.

EL RENO MUT. FIRE INS. CO. v. SUTTON.
(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. JUDGMENT (§ 376*)—VACATION—FRAUD—PERJURY.

The obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud within the meaning of subdivision 4, § 5267, Rev. Laws 1910.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 714; Dec. Dig. § 376.*]

2. JUDGMENT (§ 376*)—VACATION—FRAUD—PERJURY.

While the weight of authority seems to be to the effect that a court of equity will not arrest the execution of a judgment founded upon false testimony which was considered and passed on by the trial court in the case in which the judgment complained of was rendered, yet in this state the rule is that the intentional production of false testimony will, in a proper case, justify the annulment of a judgment rendered on account of such testimony.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 714; Dec. Dig. § 376.*]

3. JUDGMENT (§ 376*)—VACATION—FRAUD—PERJURY.

Where the unsuccessful party has been prevented from exhibiting fully his case by fraud and perjury practiced on him by his opponent, and it is clear that by reason of such fraud and perjury there has never been a real contest in the trial or hearing of the case, a court of equity may set aside the judgment thus rendered, and grant a new trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 714; Dec. Dig. § 376.*]

4. JUDGMENT (§ 343*)—VACATION—GROUNDS.

Before a court of equity will interfere with a judgment rendered on perjured testimony, and order a new trial, it must be made to appear that the injured party has used due diligence in presenting the matter to the court, and that he is clearly entitled to the relief sought; that the question presented has never been litigated in any court on account of the perjury complained of, and that but for the perjury the question raised would have been fully presented and adjudicated at the former trial; that the question of perjury complained of could not have been litigated at the former trial by the use of due diligence; that the relief sought could not have been obtained by motion or other plea in the action where

the judgment was rendered; and that a full and meritorious defense to the action is pleaded, and which, on account of the perjury complained of, could not have been presented in the former trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 672, 677; Dec. Dig. § 343.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Washita County; James R. Tolbert, Judge.

Action by the El Reno Mutual Fire Insurance Company, a corporation, against Mrs. S. E. Sutton to vacate a judgment. Judgment for defendant on demurrer, and plaintiff brings error. Reversed and remanded.

Will H. Chappell, of Guthrie, and Brett & Rice, of Cordell, for plaintiff in error. T. A. Edwards, of Cordell, for defendant in error.

ROBERTSON, C. The defendant, Mrs. S. E. Sutton, on the 12th day of February, 1908, in the district court of Washita county, recovered a judgment against the Oklahoma Farmers' Mutual Indemnity Association, now the El Reno Mutual Fire Insurance Company, plaintiff herein, in the sum of \$825, on a fire insurance policy. On the 8th day of February, 1909, the defendant in that case took an appeal to the Supreme Court, where, in February, 1911, the said judgment was affirmed (27 Okl. 450, 112 Pac. 996) and the mandate of the court duly issued and filed in the office of the district clerk of Washita county.

On February 8, 1911, plaintiff filed its petition in equity against the defendant in the district court of Washita county, and sought thereby to set aside and vacate the judgment above referred to, on the grounds that the same had been obtained by fraud practiced by Mrs. S. E. Sutton, the prevailing party, in obtaining the rendition of said judgment, in that the said Mrs. S. E. Sutton committed willful corrupt perjury in giving of the testimony at the trial of the cause upon a material fact involved in said cause, and that she fraudulently, and for the purpose of deceiving the court and jury prior to the giving of said testimony, had removed all the goods testified to by her as having been destroyed by fire out of the jurisdiction of the court, and out of the state of Oklahoma, and concealed the same, with the fraudulent purpose and intent of deceiving the court and jury, and to wrongfully recover the judgment sought to be set aside. On the same day notice was served on defendant to the effect that on the 14th day of February plaintiff in error would make application for an injunction enjoining defendant in error from enforcing said judgment until trial of said cause. On June 13, 1911, defendant filed her demurrer to plaintiff's petition. On June 15, 1911, plaintiff and defendant stipulated in writing that plaintiff might amend its petition instantaneously by attaching thereto copies of the petition, answer, and reply filed in the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

original cause, wherein the judgment sought to be set aside was rendered, and defendant thereupon replied her demurrer to said petition so amended. The demurrer to said amended petition contains three grounds, the consideration of the first two being rendered unnecessary by the admission on the part of plaintiff that the matters sought to be raised thereby were not such questions as could be reached by demurrer, hence the only ground of demurrer with which we need concern ourselves at this time is the third, which is: "That said petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant." This demurrer coming on to be heard was by the court sustained, and plaintiff, refusing to plead, elected to and did stand upon said demurrer, whereupon the court dismissed its petition, and entered judgment in favor of the defendant for her costs, to which action of the court the plaintiff excepted, and brings this appeal by transcript of the record to reverse the same.

A consideration of this question requires an examination of the petition. Its material allegations, in substance, are as follows: That the judgment sought to be set aside was obtained by the fraud of Mrs. Sutton, the prevailing party; that she swore falsely on February 12, 1908, at the trial of said cause that the goods insured were all destroyed by fire on April 12, 1907, when in truth and fact said goods were not destroyed by fire, but had been removed out of the state of Oklahoma, and were then concealed in various places in the territory of New Mexico; that these facts were all well known to her, and were unknown to plaintiff, and the court, and jury at the time of the trial; that said facts were material, and, had the court and jury known the truth, the verdict and judgment would have been for the defendant in said trial; that none of said goods were destroyed as alleged, and plaintiff was not liable to pay for same; that said judgment thereby was wrongfully and fraudulently recovered against the insurance company by said false testimony; that said company had no means, at the time of the trial, of ascertaining that the said property had not been destroyed by fire, although it made diligent search by and through its adjuster in that behalf; that on or about April 23, 1909, said insurance company discovered that said goods had not been destroyed by fire, but were then in the territory of New Mexico; that immediately upon receipt of such information the said insurance company caused search warrants to be issued and served in New Mexico, and discovered said goods so charged to have been burned, and found the same, and returned them to the state of Oklahoma, and into the jurisdiction of the district court of Washita county, and stored them in the courthouse in said county; that thereafter on the 20th day of June, 1909, the courthouse in said county

was burned, together with all the said goods found by said insurance company, which were the property of Mrs. Sutton; that, by reason of the fact of an appeal to the Supreme Court on the judgment complained of, the insurance company was unable to bring its action to set said judgment aside prior to the time of filing the instant case; that the insurance company has at all times exercised due diligence in defending said suit, in searching for said goods, in prosecuting an appeal from said judgment, and in bringing this action to vacate said judgment; that it has a full and complete defense (setting same out in full); and that it has no adequate remedy at law, etc.

[1, 2] This action is brought under the provisions of subdivision 4 of section 6094, Comp. Laws of 1909 (section 5267, Rev. Laws 1910), which reads as follows: "The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made. * * * Fourth: For fraud, practiced by the successful party, in obtaining the judgment or order."

The foregoing section is literal copy of section 568 of the Kansas Code of Civil Procedure, and was adopted by this jurisdiction in 1893; it has been frequently held (*Glazier v. Heneybuss*, 19 Okl. 316, 91 Pac. 872; *Barnes v. Lynch*, 9 Okl. 156, 59 Pac. 995; *Farmers' State Bank v. Stephenson*, 23 Okl. 695, 102 Pac. 992; *Fort Produce Co. v. S. W. Grain & Prod. Co.*, 26 Okl. 13, 108 Pac. 386) that the construction placed upon an adopted statute by the Supreme Court of the state from which it is taken carries with it that construction as a part of the statute thus adopted, and that therefore the construction placed upon this section of the Code of Civil Procedure by the Supreme Court of Kansas prior to the adoption by the territory of Oklahoma came with and was a part of the statute, and that such construction is binding upon us. This being true, counsel for the insurance company insists that the question in this case must be decided in its favor, and cites, in support of its contention, the case of *Laithe v. McDonald*, 12 Kan. 340, where it is said: "Where direct issues of fact are joined upon proper pleadings, and the defendant uses reasonable diligence to be ready to defend the action, but is absent from the trial, and the plaintiff, who is the only witness who testifies at the trial, obtains a judgment by means of his own willful and corrupt perjury, the defendant may have the judgment vacated, and a new trial granted, under the fourth subdivision of section 568 of the Code, 'for fraud practiced by the successful party in obtaining the judgment.'"

This holding of the court was approved in *Green v. Bulkley*, 23 Kan. 136, in the following language: "By the provisions of section 568 of the Civil Code, if the judgment was

obtained by perjury, and diligence is shown, the defendant can obtain a vacation of it," etc.

The Supreme Court of Oklahoma Territory, in *Provins v. Lovi*, 6 Okl. 94, 50 Pac. 81, while not passing directly on this question, said, in considering the same: "In a proceeding to vacate a judgment against a defendant for fraud practiced by the plaintiff in obtaining it, the petition must set forth the judgment complained of, and must also fully state the facts constituting the defense. Unless the facts stated show an existing, valid, and meritorious defense, the petition is fatally defective." And quoted with approval from *Laithe v. McDonald*, supra, as follows: "In *Laithe v. McDonald*, 12 Kan. 340, the court vacated a judgment for fraud practiced by the prevailing party, because the party who obtained the judgment committed willful and corrupt perjury, thereby recovering a judgment for \$5,836, when in fact he ought to have obtained a judgment for but \$1,800. However, the court did not place its decision upon the ground that it should be vacated because of *excessive damages*, but placed it squarely upon the fact that the prevailing party had committed willful and corrupt perjury in obtaining the judgment [italics ours], and upon the further ground that it clearly appeared that a new trial would relieve against a large portion of this judgment."

In *Publishing House, etc., v. Heyl*, 61 Kan. 635, 60 Pac. 317, it was said: "Judgment fraudulently obtained may be enjoined and vacated in courts of equity; but the assistance of equity may not be invoked to correct errors of law concurring in the course of judicial proceedings."

Section 602 of the Nebraska Code of Civil Procedure provides, "that a district court shall have power to vacate a judgment rendered * * * for fraud practiced by the successful party in obtaining the judgment."

This statute was under consideration in *Munro v. Callahan*, 55 Neb. 75, 75 N. W. 151, 70 Am. St. Rep. 366, wherein the court says: "Certainly the obtaining of a judgment by willful and corrupt perjury is obtaining it by fraud, within the meaning of this section of the Code." And it was there held that a district court has power to vacate a judgment rendered by it after the term at which it was rendered for fraud practiced by the successful party in obtaining the judgment. The court said the cases were not numerous in which a judgment had been vacated, and the defeated party granted a new trial, on the ground that the judgment was obtained by the perjury of the successful party; but this was perhaps because, from the very nature of the case, the existence of the fraud or perjury could not be established otherwise than by trying anew the issue tried and determined in the action in which the new trial was sought, and that neither the equity rule nor the Code authorized the vacation of

the judgment after the term at which it was rendered, and granting a defeated party a new trial for fraud practiced upon him, save where the fraud was practiced in connection with the trial.

While in *Secord v. Powers*, 61 Neb. 615, 85 N. W. 846, 87 Am. St. Rep. 474, it was held that, while the weight of authority doubtless was to the effect that a court of equity would not arrest the execution of a judgment founded upon false testimony *which was considered and passed upon by the court or jury in the case in which the judgment complained of was entered*, yet in Nebraska the rule followed is that the intentional production of false testimony would, in a proper case, justify the annulment of a judgment rendered on account of such false testimony. The court added that it was not the policy of the law, however, to encourage such actions, there must be an end to litigation, and that a party could not be permitted to experiment with his case at the expense of the public, etc.

In *Miller v. Miller*, 69 Neb. 441, 95 N. W. 1010, it is said to be the settled rule in Nebraska under the statute above quoted that a judgment clearly shown to have been obtained by fraud or false testimony, which it would be against conscience to enforce, will, on application of the unsuccessful party and a showing of due diligence, be vacated.

In *Baldwin v. Sheets*, 39 Ohio St. 624, it was held that a petition alleging that defendants entered into a conspiracy to, and did, testify falsely, and thereby obtained the judgment, the evidence to sustain such allegation having been discovered since the trial, was sufficient under a statute identical with the one under consideration.

The cases on the subject are not in accord, and it is difficult to deduce a plain and well-supported rule with reference thereto; but this much may, we think, be said to be fairly established, i. e.: "Wherever an issue exists in any action or proceeding, each of the parties should anticipate that his adversary will offer evidence to support his side of it, and should be prepared to meet such evidence with counterproof. Where he has an opportunity to do this, and does not avail himself of it, or, though availing himself of it, is unable to overcome the effect upon the court or jury of the evidence offered by his adversary, he cannot, in effect, obtain a retrial of the issue before another tribunal by charging that the judgment against him was procured by perjury, and this has been held to continue to be the rule, notwithstanding the existence of a statute authorizing actions to set aside judgments obtained by means of perjury or subornation of perjury." 2 Freeman on Judgments (4th Ed.) § 489.

[3] In *United States v. Throckmorton*, 93 U. S. 61, 25 L. Ed. 93, the rule is stated as follows: "Where the unsuccessful party has been prevented from exhibiting fully his case,

by fraud or deception practiced on him by his opponent, as by keeping him away from court, * * * these and similar cases which show that there has never been a real contest in the trial or hearing of the case are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."

[4] In the case at bar it is clearly shown by the petition, and admitted by the demurrer, that, not only the allegations of Mrs. Sutton's petition, but the testimony in the suit upon the insurance policy were false and untrue, and were known by her to be false and untrue, and were made by her for the sole and express purpose of defrauding the insurance company; that the latter did not know of the falsity of the allegations of said petition nor of the testimony until after the rendition of the judgment, and after the time for the presentation of the same to the trial court by motion for new trial had elapsed. The fraud, in our opinion, was extrinsic and collateral acts not involving the merits of the case as shown by the pleadings, and which was not an issue inquired about in the original case.

The property was not burned, as she alleged in her petition, but, on the contrary, had been, by her, carried out of the jurisdiction of the court for the express purpose of defrauding the insurance company, and she, knowing the same had not been burned, charged in her petition, and testified in support thereof, that the same had been burned. The insurance company was in complete ignorance of the fact that the goods had not been burned; neither did it know that plaintiff had shipped them out of the state, but, relying on the allegations of plaintiff's petition, prepared and presented a defense on a wholly different theory, and sought only to minimize the amount of a legitimate loss. Hence it follows that there has never been a real contest in the trial or hearing of the case, and that the fraud charged by the insurance company as having been perpetrated by Mrs. Sutton was wholly extrinsic and collateral to the matter involved in the original trial, and that but for such fraud she could not have recovered in any event.

We are not unmindful of the general rule that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony, for, if this can be done once, it could be done again and again ad infinitum. *Pico v. Cohn*, 91 Cal. 129, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *Plaster Co. v. Blue Township*, 81 Kan. 730, 106 Pac. 1079, 25 L. R. A. (N. S.) 1237. Nor will relief be granted in equity, unless the fraud complained of is extrinsic to the matter tried in the primary suit. *U. S. v. Throckmorton*, supra; *U. S. v. Gleason* (C. C.) 78 Fed. 396; *Bailey v. Wilkeford*, 69 C. C. A. 226, 136 Fed. 382; *U. S. v. Beebe*, 180 U. S. 343, 21 Sup. Ct. 371, 45

L. Ed. 563; *Graver v. Faurot*, 22 C. C. A. 156, 76 Fed. 257; *Vance v. Burbank*, 101 U. S. 514, 25 L. Ed. 929; *Nelson v. Meehan*, 155 Fed. 1, 83 C. C. A. 597, 12 L. R. A. (N. S.) 374; *Bleakley v. Barclay*, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230. But, as has been pointed out, this case does not come within that rule; but the fraud here complained of is extrinsic to the issue tried in the court below.

There seems to be considerable confusion among the cases as to just how far the courts are justified in going in the granting of the relief prayed for, under the subdivision of the section of the statute relied upon herein; this confusion is due to the fact that no hard and fast rule can be safely enunciated that will fit all cases; each case must, to a marked degree, depend upon its own facts and circumstances, and the granting or refusal to grant relief in such cases is largely a matter of discretion which will seldom be interfered with on appeal.

As one of the general rules governing the subject, however, it may be safely said that no relief should be granted where the matter upon which the claim to relief is founded was litigated in the original action, or where the matter might have been litigated at the former trial by the exercise of due diligence, or where it could have been obtained upon motion in the court which rendered the judgment, unless it appears that the relief sought is in aid of a meritorious claim or defense. In the case under consideration all the foregoing reasons combine in the demand for a new trial.

The plaintiff has used due diligence in presenting this matter to the court, and it is clearly evident that it is entitled to the relief, because, first, the question presented has never been litigated in any court on account of the perjury of the defendant, and but for the perjury the question of the loss of the property would have been fully presented and adjudicated at the former trial; second, the question of the perjury of the defendant in the former trial could not have been litigated at the trial by the use of due diligence; third, the relief sought could not have been obtained (owing to lapse of time) by motion or other plea in the action in which the judgment was rendered; fourth, a full and meritorious defense to the action is pleaded, and which, on account of the perjury complained of, could not have been presented to the court in the former trial.

To refuse the relief prayed for, and to which plaintiff in error is justly entitled, would be a perversion of justice—a reward on perjury and rascality, and against public morals and good conscience. In such a case this court will not hesitate. The demurrer should have been overruled, and, for the error complained of, the judgment should be reversed, and the cause remanded for further proceedings.

PER CURIAM. Adopted in whole.

COMMERCIAL UNION ASSUR. CO., LIMITED, OF LONDON, ENG., v. WOLFE.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDINGS OF FACT.

The questions at issue in the action, being (1) whether or not a proper demand had been made for the production of the books and inventory provided for by the iron safe and inventory clause in the standard form of fire insurance policy, and (2) whether or not the insured's failure to produce his books and inventory was due to his fault or negligence, are questions of fact to be submitted to the jury, under proper instructions, as to the law governing, and the finding of the jury thereon, being supported by sufficient evidence, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. EVIDENCE (§ 157*)—BEST AND SECONDARY.

The best evidence the nature of the cause will permit of shall always be required, if possible to be had; but, if not possible, then the best evidence that can be had shall be allowed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.*]

3. EVIDENCE (§ 178*)—BEST AND SECONDARY.

Where the last inventory and books of the assured have been lost or stolen through no fault of his, it is not error to admit oral proof to establish the value of the property destroyed by the fire.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.*]

Commissioners' Opinion, Division No. 2. Error from Superior Court, Pottawatomie County; Geo. O. Abernathy, Judge.

Action by C. Dale Wolfe, trustee of the estate of D. A. Trotter & Co., against the Commercial Union Assurance Company, Limited, of London, England. Judgment for plaintiff, and defendant brings error. Affirmed.

Burwell, Crockett & Johnson and Scothorn, Caldwell & McRill, all of Oklahoma City, for plaintiff in error. Lydick & Eggerman, of Shawnee, for defendant in error.

GALBRAITH, C. D. A. Trotter & Co., a partnership, were the insured. After the loss upon the policy in suit, the insured were adjudged bankrupts, and the plaintiff, C. Dale Wolfe, was elected and qualified as trustee, and, as such, prosecuted the action on the policy, and recovered a judgment, from which the defendant appealed.

The first and second assignments of error are argued together, and these are that the verdict of the jury is contrary to the law and the evidence. It is contended that the insured breached the "iron safe clause" of the policy, wherein he agreed to keep his books and "last inventory" securely locked in an iron safe at night, and when the store building was not open for business, and al-

so failed to produce the inventory and these books for the inspection of the company after the fire, and for that reason the policy was void and no recovery could be had thereon. The iron safe and inventory clause in this policy were the same as those in the ordinary standard form, and are recognized as reasonable and binding provisions of an insurance contract. *German American Ins. Co. v. Fuller*, 26 Okl. 722, 110 Pac. 763.

The plaintiff, in his petition, specially pleaded a waiver by the defendant of these clauses in the policy, setting out that on the 27th day of September, 1909, which was nine days after the fire, one E. W. Roberts, the agent of the company, duly authorized, visited the scene of the fire and investigated the same, and informed the insured that the company denied liability, and would not pay him anything on the policy, and that thereby the company waived the furnishing of proof of loss and the production of the books and inventory, as provided in the policy. The petition was duly verified, and the defendant's answer denying the same was not made under oath. However, the evidence introduced at the trial showed that the insured made a complete inventory of his stock of merchandise on or about the day the policy in suit was written, May 26, 1909, and kept a complete set of books from that day forward until the fire. That these consisted of a daybook, in which was entered the daily sales, both for cash and credit, and a ledger, in which was entered bills receivable, and another ledger in which was entered the bills payable and the merchandise accounts. That he had no iron safe in his store building, which was located in a small country village, away from the railroad, in Seminole county, but that he kept the inventory and books at night, when the store was not open for business, at his residence, which was separate and apart from the store building, and that the inventory and these books were intact and ready to be produced for the inspection of the company after the fire, and that no demand was made upon him to produce them on the first visit of the agent of the company, 9 days after the fire. That some 30 days later he moved his residence from the place where the store burned to another location in Seminole county, and, in the confusion resulting from the change of location, the ledger containing the bills payable and merchandise accounts, and the blotter containing the cash sales, were either lost or stolen, and that he had made diligent search for them a number of times since moving and was unable to find them, although he had one ledger and a copy of the cash sales account, and produced them for the inspection of the agent of the company on his visit to the scene of the fire more than 60 days after the loss.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The record shows that the jury were properly instructed as to the law governing these questions, and were told that the provisions of the policy providing for keeping a complete set of books and for taking an inventory of the stock insured, and for keeping these books in an iron safe were valid and binding provisions, and that they imposed upon the insured the duty of showing a substantial compliance therewith, or a waiver on the part of the company, and that the law and these provisions did not require the insured to produce his books and inventory unless they were demanded by the company, and further that he was not required to produce them upon demand unless they were in existence, or unless they had been destroyed by his carelessness or negligence, so that the question whether or not a proper demand had been made for the production of the books and inventory by the agent of the company, the question of waiver by the agent, Roberts, and whether or not the insured's failure to produce all of his books was due to his fault or negligence, and whether or not he had substantially complied with these provisions were questions that were properly and fairly submitted to the jury by the trial court, and the finding of the jury thereon being supported by the evidence, as it clearly is, the finding should not be disturbed, and these exceptions should be overruled.

The remaining assignments complain of the rulings of the court in admitting oral testimony over the objection of the insurance company to prove the value of the stock of merchandise destroyed by the fire. Plaintiff was permitted to prove by the insured that the value of the stock of goods at the time the policy was written was \$2,650; that the amount of goods purchased between that time and the date of the fire was \$600; that the amount of his cash sales between the date of the policy and the loss was about \$600. This witness was corroborated as to the value of the stock at the time of the fire by another witness, who was formerly in partnership with the insured, owning a half interest in the business, and who sold out some four months before the policy was written, but was familiar with the stock and its value from that time up to the fire. This, it seems, was the best evidence available for showing the amount of the loss in the absence of the books, which, it had been shown, could not be produced, because they had been lost or stolen, and through no fault or negligence of the insured. This character of testimony was competent. Its weight was for the jury.

[2, 3] Secondary evidence is admissible in the absence of primary evidence, especially where the absence of primary evidence is satisfactorily accounted for.

"And the one general rule that runs

through all the doctrine of trial is this, that the best evidence the nature of the case will admit of shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed." 3 Blackstone, p. 368.

"Where there are no books or inventories, or they have been destroyed, secondary evidence is admissible to show the value of the destroyed property." Cooley's Briefs, Law of Ins., p. 3123.

"Merchants engaged in different lines of business, who saw a stock of insured goods before it was destroyed by fire, may testify as to the value of such stock, although their testimony is not as satisfactory as might be desired." *Graves v. Merchants' & Bankers' Mfg. Co.*, 82 Iowa, 637, 49 N. W. 65, 31 Am. St. Rep. 507.

The effect of this testimony was to show that the loss sustained exceeded \$2,000, the amount of the policy being \$1,500, and was sufficient to sustain the verdict of the jury for the full amount of the policy.

The record shows that the trial court gave every instruction to the jury which the insurance company requested, and that every possible phase of their contention in this suit was fairly presented to the jury in instructions prepared by them, and, there being ample evidence in the record to sustain the verdict of the jury, we see no reason why the judgment appealed from should not be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. R. CO. v. CRINER.
(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. CARRIERS (§ 305*)—INJURIES TO PASSENGERS—PROXIMATE CAUSE.

Though it may be made to appear that a railroad company is guilty of negligence in the carriage of a passenger, yet, before a recovery can be had for injuries subsequently sustained, and charged to have been the result of such acts of negligence, it must be shown by competent evidence that the acts of negligence were the proximate cause of the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1132, 1136-1139, 1245-1246; Dec. Dig. § 305.*]

2. CARRIERS (§ 318*)—INJURIES TO PASSENGERS—NEGLIGENCE—EVIDENCE.

Where a female passenger suffers a miscarriage some two or three days after arrival at her journey's end, and where, during the course of the journey, the carrier may have been guilty of negligence, but where there was no competent evidence that the subsequent miscarriage was caused by or resulted from the negligent acts of the railroad, a verdict based partly on proof of miscarriage and attendant suffering cannot be sustained.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. § 318.*]

3. EVIDENCE (§ 528*)—OPINION EVIDENCE—NECESSITY.

Where the injuries are of such character as to require skilled and professional men to determine the cause and extent thereof, the question is one of science, and must necessarily be determined by the testimony of skilled professional persons.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.*]

4. APPEAL AND ERROR (§ 1140*)—ERRONEOUS INSTRUCTIONS—CURE BY REMITTITUR.

Instructions submitting to the jury an element of damage of which there was no competent proof, duly excepted to, where the verdict is general, with nothing to indicate how the damages were apportioned, cannot be cured by remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.*]

5. TRIAL (§ 252*) — INSTRUCTIONS — APPLICATION TO EVIDENCE.

Evidence examined and *held* insufficient to submit to the jury, as an element of damage, plaintiff's miscarriage.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Carter County; S. H. Russell, Judge.

Action by Etta Criner against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and Fred E. Suits, both of Oklahoma City, for plaintiff in error. H. C. Potterf and E. A. Walker, both of Ardmore, for defendant in error.

SHARP, C. Plaintiff's action was brought to recover damages for injuries inflicted upon her, as well as those resulting from various negligent acts of the defendant, while a passenger on its railroad from Ardmore to Francis via Madill. It was charged that the negligence, carelessness, and cruelty of the defendant caused plaintiff great physical pain, which resulted in a miscarriage, whereby her health had been greatly injured in the sum of \$1,900, and that she had been further damaged in the sum of \$99.50, expended for nurse hire, physician's charges, and extra car fare. The trial resulted in a verdict for plaintiff for \$500.

Plaintiff's testimony tends to show that on the 4th day of March, 1909, she boarded a passenger train at Ardmore to visit sick relatives at Francis, a station on the line of defendant railway north of Ada. That, some miles out of Ardmore, it was discovered a railroad bridge was on fire, and the passengers aboard the train were ordered by the conductor to disembark, and walk across the ravine spanned by the burned bridge to where a train was standing on the opposite side ready to carry them on to the main line junction at Madill. That there was a high embankment where the passenger train was

stopped on reaching the burned bridge, which embankment was some three or three and one-half feet from the lower step of the car. That, at the time, plaintiff was accompanied by her 14 year old son and a child 19 months old. That in alighting from the car the train crew afforded her no aid or assistance, though a fellow passenger came to her relief immediately thereafter. That she started to cross the railroad bridge which was about 25 feet long and 15 or 20 feet high, and while doing so became dizzy, and was aided across by a fellow passenger. She was then told by some of the train crew to get aboard the train standing on the opposite side of the bridge, which she did, also without aid, though this train was standing on a high embankment, and the lower car step was about the same distance from the ground as was the step of the car from which she had just disembarked. That, on account of the negligent acts of the defendant in the particulars mentioned, she became sick and had a severe headache, though after getting on the train she was very comfortable until she reached Ada. Between Ada and Holdenville it appears that other bridges had been burnt out, and the train on which she was a passenger from Madill was detoured from Ada to Shawnee over the Missouri, K. & T. Railway, and from Shawnee to Holdenville over the Chicago, R. I. & P. Railway. In changing cars at Ada for transportation on another train to Francis, she boarded the wrong train and was carried back south, and caused to spend the night at Roff, where she testified she had good accommodations, and, in answer to the question how she got along while there, stated: "Fine." On the morning following she boarded the regular north-bound passenger train. When this train reached Ada she was transferred to an emergency train running between Ada and Sasakwa through Francis. She reached her destination about 4 o'clock in the afternoon of the day following the commencement of her journey. At the time she arrived at Francis, her testimony shows she was feeling very badly, and, though she claims she was not able to sit up, her own testimony shows she walked a distance of four blocks to the home of her parents, where she stayed all night; that on the day following she walked from her father's residence to her sister's, a distance of three blocks, where she stayed until the day following, when she walked two blocks to the home of an uncle, where she remained five or six days; that about 12 hours after reaching her uncle's house, she miscarried, giving birth to a three months old fetus. In the meantime her husband had arrived in Ada and ordered a physician, who arrived about five minutes after the miscarriage. No examination of plaintiff was made by this physician, though he examined the fetus in another room, and afterwards told plaintiff it was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

unnecessary to make any examination of her as she was all right. Thereafter plaintiff was confined to her bed for five or six days, when she departed for her home near Ardmore. She testified that at the time of trial she was 41 years old, and had had two previous miscarriages, and was at the time of trial the mother of nine children, one, a baby two months old. Dr. J. C. McNeese, her family physician, testified to having called to see Mrs. Criner on March 14th, and found her suffering a great deal from what he believed to be an abortion; that, on the day following, he returned and performed an operation on her, and gave her treatment. He further testified that he could not tell from her condition what was the cause of the abortion. Bud Holder testified as a witness for plaintiff, and his evidence is in the main corroborative of plaintiff's as to what occurred at the burnt bridge, though he stated that on mounting the car at the bridge the conductor placed a small platform on the ground underneath the steps, and, aided by the witness, assisted the plaintiff on the car.

We think the court was correct in overruling defendant's demurrer to plaintiff's evidence, as well as in refusing to direct a verdict for the defendant, as there was evidence tending to show negligence on the part of the defendant, and consequent illness and suffering by plaintiff, though perhaps not of a serious nature, apart from the main element of damage relied upon, consisting of the subsequent miscarriage and suffering occasioned thereby.

[1] The really serious question presented is: Was the miscarriage and attendant suffering and illness the result of defendant's negligence? For not only must the negligence of the defendant be proved, but it must be shown that such negligence was the cause of the injury. That plaintiff, while at her uncle's house in Francis, had a miscarriage from which she suffered serious illness was established by the undisputed evidence. There was, however, no competent evidence that her miscarriage and attendant illness were the result of the proven acts of negligence. The physician summoned to wait on her at the time was not present as a witness, or if present, did not testify. Dr. McNeese testified that he could not tell from her condition the cause of the abortion. No hypothetical questions were put to this witness, and no effort was made to prove the cause of the miscarriage, unless it be from such inferences as might arise on account of the nearness in point of time of the injury and the negligence.

The court, in its charge to the jury, gave the following instruction, which was objected to by the defendant: "There were two events occurring on the trip, to wit, the occurrence at the burned bridge where she had to alight from the train she started on and walked across the bridge to a transfer train, and also having to ride in a box car or ca-

boose from Ada to Francis, as testified to by plaintiff, and from which you are expected to determine, when being considered separately, or together, were of sufficient cause to produce the premature birth of her child and consequent injuries and suffering, and so forth. And, on this matter you are instructed that it was plaintiff's duty to exercise such care as an ordinarily prudent person would have when alighting from the coach at the bridge, and, while you are the judges of the weight and value of the evidence, I submit to you if in alighting from the coach in her delicate condition was she prudent in carrying at the time a 19 months old child in her arms, and if not so, and you should believe her injuries were produced as a result thereof, then she cannot recover for such cause, or causes, if any."

[2] Herein we think the court erred, for, without any competent evidence as to the cause of plaintiff's miscarriage, the court submitted to the jury whether or not the occurrence at the burnt bridge, and the fact that plaintiff had to ride in a box car or caboose from Ada to Francis, considered separately or together, furnished sufficient cause to produce premature childbirth and consequent suffering. Before this issue could have been properly submitted, there should have been competent proof introduced, connecting the injury with the negligence. In *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, which case is spoken of by White in his work on *Personal Injuries*, § 23, as a classic in the law of probable and remote cause, Justice Strong announced the rule as follows: "It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

[3] The question presented was first before this court in *Willet v. Johnson*, 13 Okl. 563, 76 Pac. 174, where it was held that the plaintiff, upon whom an assault and battery was alleged to have been committed, which resulted in inflammation of the uterus, Fallopian tubes, bladder and its appendages, should have offered evidence of skilled witnesses to show that her condition was the result of the assault; that it was impossible for persons unskilled in the practice of medicine or surgery to determine the cause of such disease as the plaintiff in that case was suffering from; that those questions, being subjects of science, must necessarily be determined by the testimony of skilled and professional men. The rule thus announced was followed by this court in the recent case of *Atchison, T. & S. F. Ry. Co. v. Melson*, 134 Pac. 388. In the latter case it was shown that the injuries, for which a recovery in damages was sought, consisted of a bruised leg and hip,

injury to the back and kidneys, in and about the lumbar region of the spine, resulting about one month afterwards (it was claimed) in a stroke of paralysis to the left leg, side, and arm. As to the cause of the paralysis, as it was observed by the court, the record was silent, except the mere circumstance that it occurred about a month after plaintiff received her fall. It was said: "The evidence, to justify a court in submitting to the jury the question of whether or not a certain bodily condition complained of is the result of the injury, should show the connection between the two with reasonable certainty, and not leave it to vague speculation and conjecture. * * * Sufficiency of the evidence to prove that a disease from which the injured party is suffering * * * was caused by the injury depends, of course, upon the distinguishing facts of each individual case; the mere fact that a certain diseased condition might consistently arise from the injury is insufficient. The evidence should so exclude other causes, and the circumstances be such, that a reasonable inference arises that the injury caused the disease." In the course of the opinion, it was further said: "No one testified that the injury plaintiff received was at such a place and was of such a character as would likely result in paralysis, and there is absence of evidence from any one that such injury was the cause of the paralysis. There is competent evidence that by the fall plaintiff was bruised upon her leg, upon her hip, and across the back, and that from these bruises she suffered pain. These facts constituted proper elements of damage to be considered by the jury; but the alleged elements of damage, consisting of disease of the kidneys and paralysis, are not supported by any evidence tending to show that such diseases resulted from the injuries received by plaintiff's fall, and they should have been taken from the consideration of the jury by the instruction requested." There proof of the accident, immediate injuries sustained, and the subsequent stroke of paralysis were shown, but it was held by the court there was an entire absence of any evidence to show that the stroke of paralysis was the result of the injuries received by plaintiff in the accident. Nor can we say, nor could the jury, that the miscarriage, sustained by the plaintiff some two or three days after her arrival at Francis, was caused by defendant's negligence. The mere fact that defendant was ill when she reached Francis, even though caused by defendant's negligence, was not proof of what caused her subsequent miscarriage. It will be remembered that the plaintiff had had two previous miscarriages, on one occasion, 13 years before, giving birth to a four months old fetus, and on another occasion, six years before, giving birth to a three months old fetus. Many reasons may have existed, wholly independent of the defendant's act, that would have caused prema-

ture childbirth, and the burden rested upon the plaintiff to show that the alleged acts of negligence effected that result. *St. Louis & S. F. Ry. Co. v. Davis*, 132 Pac. 337. The rule is well established that in an action for personal injuries, although the defendant may be shown to have been negligent in some manner, yet, unless the negligence so shown was the proximate cause of the injury complained of, no recovery can be had on account of such negligence. *Mayne v. Chicago, R. I. & P. R. Co.*, 12 Okl. 10, 69 Pac. 933; *St. Louis & San Francisco Railroad Co. v. Hess*, 34 Okl. 615, 126 Pac. 760; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256.

[4] To what extent the damages were enhanced by the fact of the plaintiff's miscarriage, we are unable to say. The verdict being general, with nothing to indicate how much of the damages were apportioned to plaintiff's misfortune on account of her miscarriage and attendant illness, as distinguished from the sickness suffered by her while a passenger, or thereafter sufficiently proven to have resulted from defendant's negligence, a remittitur cannot be directed, but, instead, the cause must be reversed. *St. Louis, I. M. & S. Ry. Co. v. Hall*, 53 Ark. 7, 13 S. W. 138; *Chicago & E. I. R. Co. v. Donworth*, 203 Ill. 192, 197, 67 N. E. 797; *Bates Machinery Co. v. Crowley*, 115 Ill. App. 540; *Whitman v. Atchison, T. & S. F. Ry. Co.*, 85 Kan. 150, 116 Pac. 234, 34 L. R. A. (N. S.) 1029, Ann. Cas. 1912D, 722; *Stout v. McMasters*, 37 Minn. 185, 3 N. W. 558; *Gulf, C. & S. F. Ry. Co. v. Rossing* (Tex. Civ. App.) 26 S. W. 243; *Scanlan et al. v. Davis* (Tex. Civ. App.) 124 S. W. 126; 3 Cyc. 439.

In view of another trial in this case, we wish to call attention to an instruction given by the trial court defining negligence, and which concluded thuswise: "But to warrant a recovery by the person injured such person must not have contributed to the negligence or causes producing such injuries, and, in this case, among the other questions for you to determine is whether or not the plaintiff was guilty of contributory negligence, that is, whether her acts and conduct were such as aided in bringing about that which she complains of, and seeks damages therefor." In at least two other places in the instructions, the court referred to the question of contributory negligence. The issue of contributory negligence was nowhere injected into the case, save in the court's instructions. The defendant's answer consisted of a general denial, and no claim was made that the plaintiff was guilty of any act of contributory negligence. The instruction was highly prejudicial to the plaintiff, and, while being favorable to defendant, and it may have no right of complaint (a question upon which we express no opinion), at the same time the instruction or allusion to the fact of contributory negligence should not have been permitted.

The judgment of the trial court should be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

WHITCOMB v. OLLER et al.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 166*)—BEST AND SECONDARY—ENTRIES IN BOOKS OF ACCOUNT.

It is competent for one who has personal knowledge of a transaction to testify thereto, although books of account covering the transaction are kept by the creditor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 556, 557; Dec. Dig. § 166.*]

2. PRINCIPAL AND AGENT (§§ 21, 22, 121, 122*)—PROOF OF AGENCY—COMPETENCY.

Agency and the extent of authority may be proved by the testimony, though not by the declarations of the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 39, 40, 413-419; Dec. Dig. §§ 21, 22, 121, 122.*]

3. JUSTICES OF THE PEACE (§§ 90, 174*)—PLEADINGS—SUFFICIENCY—APPEAL.

The same degree of particularity in pleadings is not required in actions before a justice of the peace that is required in courts of record, and a pleading that is sufficient in a justice's court is sufficient in the appellate court, where the cause is tried de novo upon appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 306, 685-693; Dec. Dig. §§ 90, 174.*]

4. PRINCIPAL AND AGENT (§ 171*)—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

One who, with knowledge of a given transaction, accepts the benefits flowing therefrom, done by one assuming, though without authority, to be his agent, ratifies the act, and is liable therefor to the same extent as if authority to act had been previously given.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644-655; Dec. Dig. § 171.*]

5. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Where it appears from the evidence that a verdict is so clearly right that, had it been different, the courts should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Pittsburg County; B. P. Hammond, Judge.

Action by Jacob Oller and another, doing business under the firm name and style of the Oller Heating Company, against James A. Whitcomb. From a judgment for plaintiffs, defendant brings error. Affirmed.

Fuller & Porter, of McAlester, for plaintiff in error. Harry T. Kyle, of McAlester, for defendants in error.

SHARP, C. This case originated in a justice of the peace court, where the plain-

tiffs, Jacob Oller and F. C. Oller, doing business under the firm name and style of the Oller Heating Company, obtained judgment against the defendant, James A. Whitcomb, in the sum of \$51.55. On appeal to the county court, plaintiffs again had judgment. The facts out of which the controversy arose are that defendant, in July, 1906, and subsequent thereto, was the owner of a large residence building in McAlester, which he permitted an employé named Leoffler to occupy and use free of rent. In December, 1909, the furnace in said residence fell to pieces, and Leoffler, acting, as he claims, for Whitcomb, ordered repairs thereon to be made by the plaintiffs, and instructed them to send the bill to Whitcomb. The bill was first sent to Leoffler and afterwards to Whitcomb. The latter paid no attention to repeated notices sent him at intervals of from two to six weeks apart. The evidence of the plaintiffs consisted of the testimony of F. C. Oller as to the doing of the work, its necessity in the house, and the nonpayment therefor by defendant, and that of Leoffler, by deposition, concerning the giving of the order for the repairs, and his agency and authority in acting for defendant in causing the repairs to be made. To his deposition was attached a letter to him from defendant, the first part of which reads: "Dear Sir: Authority is unnecessary to take care of my property in South McAlester. I gave you that when I left you there, and had expected that you would move into that house before this time." This letter was written to Leoffler over three years prior to the transaction involved in the present case, and had reference to other repairs made to the house at that time. Leoffler, in his deposition, testified that Whitcomb was to pay for all necessary repairs, without regard to when contracted.

[1] In the first assignment of error, it is urged that the account upon which plaintiffs' action was founded was not properly proved, and that section 5114, Rev. Laws 1910, controls in making proof of entries in books of account. F. C. Oller, a member of the plaintiff firm, testified that the charges contained in the bill of particulars were correct, and that he did the work. The books of account were not offered in evidence, but instead, the witness testified as to his personal knowledge of the transaction. This evidence was eminently proper and of the highest character. The statute only affords a means by which proof may be made, and does not attempt to furnish the sole manner of making such proof. *Moore v. Joyce*, 23 Miss. 584; *Godbold v. Blair*, 27 Ala. 592; *Crosland Co. v. Pearson*, 86 S. C. 313, 68 S. E. 625.

[2] It is next urged that the agency of Leoffler was not sufficiently proved, and that, as the evidence of his agency was improper, the defendant's demurrer to the evidence

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

should have been sustained. In support of this contention, counsel cite *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 28 Okl. 275, 114 Pac. 333, wherein the court said: "Admissions of an agent, in order to be admissible against the principal, must be made as agent, and while he is acting for the principal within his authority, and it must first be shown by competent evidence that such admissions were made in and as a part of the agent's performance of his duties and within the scope of his authority." The mere reading of this excerpt of the opinion discloses its inapplicability here, for, in the present case, it was not sought to introduce the admissions or declarations of the agent as to the fact of the agency. The agent himself was the witness testifying, and it was competent for him to give testimony whether the relation existed or not, and its extent, if it, in fact, did exist. *Aultman v. Knoll*, 71 Kan. 109, 79 Pac. 1074; 1 *Clark & Skyles on the Law of Agency*, § 66; *Mechem on Agency*, § 102; 31 *Cyc.* 1851.

[3] There was no such variance between the pleadings and proof as to demand a reversal. All of the statements in the bill of particulars were sustained by the evidence of Oller and Leoffler. As acknowledged by plaintiff in error, the same degree of particularity in pleading is not required in actions before a justice of the peace that is required of courts of record, and a pleading that is sufficient in a justice's court is sufficient in an appellate court, where the cause is tried *de novo*. *Garvin v. Harrell*, 27 Okl. 373, 113 Pac. 186, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744; *Holden v. Lynn*, 30 Okl. 663, 120 Pac. 246, 38 L. R. A. (N. S.) 239; *White v. Oliver*, 32 Okl. 479, 122 Pac. 156; *Rice et al. v. Folsom*, 32 Okl. 496, 122 Pac. 236.

The question of agency, involving, as it does, the authority of Leoffler to order repairs to be made, was one to be gathered from all the facts and circumstances in evidence, and a question of fact for the jury. There being competent evidence of agency, namely, Leoffler's testimony that Whitcomb was to pay for all repairs, and the letter from Whitcomb to Leoffler, stating that Leoffler had such authority, there was evidence sufficient to support the jury's verdict.

[4] In addition to the evidence of agency and proof of authority to the agent, the rule may properly be invoked that when a principal, after knowledge that an agent, without authority, has purchased for him certain property, retains possession, and uses the same for a considerable period of time, and obtains the benefit thereof, such acts constitute a ratification of the unauthorized act of the agent, and renders the principal lia-

ble for the payment of the purchase money. *United States Fidelity & Guaranty Co. v. Shirk*, 20 Okl. 576, 95 Pac. 218; *Fant v. Campbell*, 8 Okl. 586, 58 Pac. 741; *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 2, 124 Pac. 875; *Haney School Furniture Co. v. Hightower Baptist Institute*, 113 Ga. 289, 38 S. E. 761; *Henry Voght Mach. Co. v. Lingenfelder*, 62 S. W. 499, 23 Ky. Law Rep. 38; *Anderson v. Johnson*, 74 Minn. 171, 77 N. W. 26; *Hobkirk v. Green*, 26 Misc. Rep. 18, 55 N. Y. Supp. 605; *Bodine v. Berg*, 82 N. J. 662, 82 Atl. 901, 40 L. R. A. (N. S.) 65, Ann. Cas. 1913D, 721; *Russell v. Waterloo Threshing Mach. Co.*, 17 N. D. 248, 116 N. W. 611; *Anderson Coal Mining Co. v. Sloan, Howell & Co.*, 46 Pa. Super. Ct. 320; *D. Sullivan & Co. v. Ramsey* (Tex. Civ. App.) 155 S. W. 580; *Union Bank & Trust Co. v. Long Pole Lbr. Co.*, 70 W. Va. 558, 74 S. E. 674, 41 L. R. A. (N. S.) 663; *Twentieth Century Co. v. Quilling*, 136 Wis. 481, 117 N. W. 1007; 1 *Clark & Skyles on the Law of Agency*, p. 325; *Mechem on Agency*, §§ 148, 150. As already seen, statements of this account were not only sent to Leoffler, defendant's agent, but afterwards to defendant, and at no time did the latter repudiate the act of Leoffler in ordering the repairs to be made, but, on the other hand, by his passive conduct availed himself of the plaintiffs' material and labor in installing the repairs, which, if the furnace was to be longer used, were a necessity.

The objections to the instructions, in view of our conclusions, are not of sufficient magnitude to work a reversal of the case. While it is doubtful if plaintiffs' right to recover is in any way affected by the provisions of sections 3813, 3814, Rev. Laws 1910, yet, there being sufficient proof of Leoffler's agency, apart from the fact of defendant's ratification, to sustain the verdict, the jury obviously reached a proper conclusion, for it is not every error that works a reversal of a judgment. Considering the case from the standpoint that defendant by his continued silence acquiesced in his agent's act, no other verdict could properly have been returned.

[5] Where it appears from the evidence that a verdict is so clearly right that, had it been different, the court should have set it aside, such verdict will not be disturbed merely for the reason that there is error found in the court's instructions. *Shawnee Nat. Bank v. Wooten & Poots*, 24 Okl. 425, 103 Pac. 714; *Mitchell v. Altus State Bank*, 32 Okl. 628, 122 Pac. 666; *Horton v. Early*, 184 Pac. 436.

For the reasons stated, the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

HILDEBRAND v. HILDEBRAND.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

*(Syllabus by the Court.)***1. DIVORCE (§ 27*)—GROUNDS—"EXTREME CRUELTY."**

Any unjustifiable conduct on the part of the husband, which so grievously wounds the mental feelings of the wife, or so utterly destroys her peace of mind, as to seriously impair her bodily health or endanger her life, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty within the meaning of the statute, although no physical or personal violence is inflicted or even threatened.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-63; Dec. Dig. § 27.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2630-2634.]

2. DIVORCE (§ 27*)—GROUNDS—"EXTREME CRUELTY."

False and groundless charges of adultery with divers men, made at intervals during a long course of years, by a husband against the wife, constitute extreme cruelty within the meaning of section 4962, Rev. Laws 1910.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-63; Dec. Dig. § 27.*]

3. DIVORCE (§ 235*)—AMOUNT OF ALIMONY—DISCRETION.

Where a divorce is granted the wife by reason of the fault of the husband, the allowance of permanent alimony rests in the sound judicial discretion of the trial court, and is to be exercised with reference to established principles, and on a view of all the circumstances, such as the husband's estate and ability, at the time the divorce is granted, the wife's condition and means, and the conduct of the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 665; Dec. Dig. § 235.*]

4. DIVORCE (§ 240*)—AMOUNT OF ALIMONY—DISCRETION.

An allowance of alimony to the wife, of property approximating in value \$10,000, where the remainder of the husband's estate, not considering life insurance policies maturing at various times in the future, is worth between \$7,500 and \$8,000, where the major portion in value of the property awarded the wife consists of a homestead acquired by the parties jointly during their marriage, and where the wife is given the care, custody, and control of two of the three minor children (the third and oldest child not being provided for in the decree), will not be disturbed on appeal as an unreasonable allowance.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678, 680; Dec. Dig. § 240.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Kay County; W. M. Bowles, Judge.

Action for divorce and alimony by Clara B. Hildebrand against E. A. Hildebrand. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Moore, of Ponca City, for plaintiff in error. John S. Burger, of Blackwell, for defendant in error.

SHARP, C. The first, second, third, and fourth assignments of error involve either the legal sufficiency of plaintiff's petition, or

the proof submitted in its support, and may therefore be considered together. The petition charged extreme cruelty in that defendant falsely and maliciously, and without grounds, accused plaintiff of having committed adultery with divers men, at divers times and places, during the last 10 years preceding the filing of her petition. Other acts of cruelty, set forth in the petition, unnecessary to be here reiterated, together with the acts of cruelty mentioned, it was charged, caused plaintiff great suffering, mental anguish and pain, worry of mind, and great humiliation, with the result that her health was greatly impaired, and she was rendered almost insane. The facts charged were abundantly proved.

Defendant, a widower 40 years of age, married plaintiff, who was at the time of her marriage 21 years of age, at Matfield Green, Kan., on the 5th day of May, 1892. As a result of their union three children were born, aged at the date suit was brought, respectively, 16, 13, and 11 years. The first step in the family discord was when plaintiff visited her parents about three months after her marriage, and was falsely accused by her husband with having clandestinely met a gentleman acquaintance, though no criminal intimacy was in this instance charged. About two years after their marriage, they moved to Oklahoma, where defendant made homestead entry on a claim in Kay county. Shortly thereafter defendant became jealous of one James Patterson, who had called at their home on some neighborly errand. In 1902 defendant accused plaintiff of being criminally intimate with a hired hand, who was at the time in their employ; that at the time defendant had left plaintiff home sick in bed, with no one to attend her. He threatened to kill plaintiff on this occasion, if he could only be positive of her guilt. On account of defendant's said conduct on this occasion, plaintiff became melancholy, nervous, and physically ill. Plaintiff was also jealous of the local school-teacher, who occasionally called at the Hildebrand home to see the defendant, who was clerk of the school board. Joe Schmidt, a neighbor, was another of whom defendant was jealous. Dr. Elliott, at one time the family physician, was another toward whom he manifested much jealousy, charging plaintiff with having drank whisky with him. On the occasion of a visit by plaintiff to her old home in Kansas, where for several months she was under a physician's care, and upon her return home, she stated that: "Mr. Hildebrand had just worn me out by sexual abuse, just completely worn me out, until I was forced to beg him to let me alone, and he would not do it, and I finally became hysterical and cried, and he called me a strumpet and said that while I had been at my old home I had been intimate with at least a dozen men and had spent that winter around the Old Central

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Hotel, and that he would not live with me again to save my soul from hell."

Wille Wildgrube, a neighbor boy, also came in for a share of his insane jealousies, and with whom he accused plaintiff of being unduly intimate. Kelley Kersey and the Johnson boys were others toward whom defendant formed an aversion on account of his ungrounded suspicions. On one occasion, when two young men came to the home to call on a lady guest visiting them, defendant upon his return flew into a violent rage, broke a panel out of the door, and caused a disturbance. Dr. Conway was another with whom defendant charged plaintiff with having had criminal relations, saying that he would bet that plaintiff had slept with him 50 times. Dr. Gearhardt was still another with whom plaintiff was charged with having been criminally intimate. The evidence shows not the slightest ground whatever for any of these brutal and indefensible charges. They stand uncontradicted, save in the uncorroborated and very unsatisfactory evidence of the defendant himself. Plaintiff, at the time of her marriage, was a school-teacher, and, the evidence unmistakably shows, a woman of some considerable refinement. The effect upon her of these long years of continuous ill treatment is perhaps best told in her own language. The day before the birth of one of her children, some question about what physician would be called arose. She says that defendant assumed to be indignant at Dr. Elliott on some account, and said that he would show him that they did not need to have a doctor, and that "when I was taken sick on the 30th day of December, on a very cold night, we were alone and Mr. Hildebrand—well, I offended his sensibilities with my sickness, his olfactory nerves were so offended and he spoke to me so brutally that my heart was nearly broken, and I was obliged to go out in a cold room and stay there frequently for intervals of a half an hour, and it was so cold in there that water spilled on the floor was frozen, and it made my sickness unnatural, and I suffered a great deal, and when I cried he raised up and says, 'Well, for God's sake, what are you bellering for?' he says, 'if you can't sleep, there isn't any reason why you should keep the whole house awake;' and after that of course I stifled my groans until after daylight." Harry was born the next afternoon, no physician being sent for during her labors.

On another occasion, while plaintiff was confined to her bed with illness, a neighbor boy dropped in to inquire of her condition. The conduct of defendant when he learned of this fact is explained by plaintiff thuswise: "When Mr. Hildebrand found out, he doubled up his fist and shook it in my face, oh well, within a half an inch of my eyes. I thought he was going to strike me, and still he would not have made— Q. State what he said. A. Well, he said that if—the first

time he met that God damned son of a bitch, he was going to walk up to him and strike him between the eyes, he didn't care if he knocked him dead; he wouldn't even listen to my explanation about him not being there—he walked out the door and slammed it after him, and then a short time after that a deputy came from Ponca City to attach some property of ours and sell it for a debt, and Mr. Hildebrand—I was still sick in bed and couldn't get up—Mr. Hildebrand said he was going away, he hitched up and was getting ready to drive away, and he came to the door and he says, 'If that damn deputy comes out there to-day to sell these hogs,' he says, 'don't you let him step his foot on this place.' I said 'Well, papa, how can I help myself.' He says, 'You can go to hell then,' and he went that way."

Referring to the birth of the youngest son, the witness testified: "The next sickness that I remember was when my boy—after my boy Richard came, my youngest son, and I sent for my sister Ruby to help me and it was always the same trouble about the smoke, and he never gave me even a kind word. He would speak about the dirt and things weren't clean enough, and I laid around in the dirt like a shoat; if I looked bad, he said I looked like a cow that had lost her calf; that is the kind of remarks he made to me all the time; and my house was 'just barren of everything. We had been in Oklahoma long enough to begin to get things; we had raised some good crops and had money, but it all had to go to pay old debts. I didn't even have clothes, and I didn't go to town more than twice a year to buy anything. If I did, he didn't give me any money to buy anything."

On five occasions, when plaintiff was ill, caused by miscarriages, defendant would say that he didn't believe there was anything the matter with her, and if there was, "It didn't belong to him."

It was shown that for over 10 years plaintiff had charge of the farm, defendant spending all of his time, except Saturday nights and Sundays, in Ponca City, where he was engaged in the telephone business. Since moving to Oklahoma, plaintiff had done almost all kinds of manual labor, such as painting the house, inside and out, herding the cattle, shoveling wheat, gardening, and cleaning out the stable, and had contributed largely toward their property accumulations. During all of this time plaintiff, on account of defendant's conduct, was ostracized by her neighbors, and had no social companionships, but patiently bore the studied insults and imprecations heaped upon her by her husband, who for 10 years, save from Saturday night until Monday morning, made his home at the leading hotel in Ponca City, and traveled during the latter years in an automobile, while his wife performed her menial labors on the farm. As stated by plaintiff: "So far as my relations with my husband

have been concerned, it has been one long bitter period of just misery for something like 15 or 16 years."

Much more evidence, some of which is even more damning than that mentioned, was produced at the trial. It was shown that defendant repeatedly stated that he cared nothing for his wife or their three children, and that when he married her he needed a home and a housekeeper, and picked plaintiff out from among the other girls of Matfield Green for that purpose.

[1] Does the petition charge, and does the evidence show, extreme cruelty, within the meaning of our divorce statute (section 6172, Comp. Laws 1909; section 4962, Rev. Laws 1910)? The law at one time required proof of physical violence where extreme cruelty was relied upon as a ground for divorce; but the later and better considered cases have repudiated this doctrine, as taking too low and sensual view of the marriage relation, and it is now very generally held that any unjustifiable conduct on the part of either spouse, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other, as to seriously impair the bodily health or endanger the life of the other, or such as utterly destroys the legitimate ends and objects of matrimony, constitutes extreme cruelty under the statute, although no physical or personal violence be inflicted or even threatened. *Beach v. Beach*, 4 Okl. 359, 46 Pac. 514; *Barker v. Barker*, 25 Okl. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909; *Lyon v. Lyon*, 134 Pac. 650; *Gibbs v. Gibbs*, 18 Kan. 419; *Carpenter v. Carpenter*, 30 Kan. 712, 2 Pac. 122, 46 Am. Rep. 108; *Avery v. Avery*, 33 Kan. 1, 5 Pac. 418, 52 Am. Rep. 522; *Masterman v. Masterman*, 58 Kan. 748, 51 Pac. 277; *Rowe v. Rowe*, 84 Kan. 696, 115 Pac. 553.

[2] False charges of adultery, made by the husband of the wife maliciously and without probable cause, constitute legal cruelty. To a pure and virtuous woman, in no way could a husband show his cruelty and inhumanity more completely than by false and unfounded charges of a want of chastity; and, where the charges are repeated and continued for a long term of years, and embrace many alleged facts of adultery, which, if true, would make the wife a being little better than a common prostitute, the offense is aggravated almost beyond the pale of human forgiveness. When a husband descends to such a level, and becomes so vicious and depraved, and so completely forgetful of the sanctity of the marital relation, then indeed, in his case, the institution of matrimony fails. The law does not require that a good woman further continue to cohabit with such a type. Human law requires no such sacrifice, and the fact that defendant did not use a bludgeon will not enable him to defeat the wronged wife, in a suit for legal separation and alimony. Blows often wound less deeply than words, and in this age of Christian

civilization when the wife is not as a beast of the field but instead the queen of the home she is entitled of right to the husband's unfaltering love and respect and where this is denied her, where there is sufficient evidence, to the protection of the courts. We find little patience with the insistence of the once semibarbaric rule that afforded an avenue of escape to the injured wife only where physical violence was inflicted upon her. *Beach v. Beach*, 4 Okl. 359, 46 Pac. 514; *Barker v. Barker*, 25 Okl. 48, 105 Pac. 347, 26 L. R. A. (N. S.) 909; *Mathewson v. Mathewson*, 81 Vt. 173, 69 Atl. 646, 18 L. R. A. (N. S.) 300, and note; *Miller v. Miller*, 89 Neb. 239, 131 N. W. 203, 34 L. R. A. (N. S.) 360, and note; *MacDonald v. MacDonald*, 155 Cal. 665, 102 Pac. 927, 25 L. R. A. (N. S.) 45; 14 Cyc. 606.

The findings of the court are that the allegations in plaintiff's petition are true. These allegations assign extreme cruelty as a ground of divorce, and on appeal we are not concerned with the reason given for reaching the correct conclusion. The petition sufficiently stated a good cause of action, and was supported by the great preponderance of the evidence. The court could not have done otherwise than to find in favor of the plaintiff.

[3,4] Finally, it is urged that the court erred in its decree awarding alimony in property valued at over \$10,000. The statute authorizing an award of alimony (section 4969, Rev. Laws 1910) provides that when a divorce shall be granted by reason of the fault or aggression of the husband, the wife shall be allowed such alimony out of the husband's real and personal property as the court shall think reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time the decree is rendered, and which alimony may be allowed to her either in real or personal property, or both. The plain letter of the statute, therefore, gave to the trial court the right to make such an award as it thought reasonable in the light of the evidence adduced. The rule announced is in full harmony with the very general rule that the allowance of permanent alimony is a matter of sound judicial discretion, to be exercised with reference to established principles, and upon a view of all the circumstances of each particular case; such as the estate and ability of the husband, the condition and means of the wife, and the conduct of the parties. *Adams v. Adams*, 30 Okl. 327, 120 Pac. 566; *Viertel v. Viertel*, 212 Mo. 562, 111 S. W. 579; *McConnell v. McConnell*, 98 Ark. 193, 136 S. W. 931, 33 L. R. A. (N. S.) 1094; *Huffman v. Huffman* (Ind. App.) 101 N. E. 400; *Call v. Call*, 65 Me. 407; *Winkler v. Winkler* (Miss.) 61 South. 1; *Wyrick v. Wyrick*, 88 Neb. 9, 128 N. W. 662; *McCarthy v. McCarthy*, 143 N. Y. 235, 38 N. E. 288; *Blair v. Blair* (Utah)

121 Pac. 19, 38 L. R. A. (N. S.) 269; Harris v. Harris, 31 Grat. (Va.) 13.

The evidence showed that the value of the farm on which plaintiff resided, and had charge of for 10 years, was between \$9,000 and \$10,000. Other property covered by the decree amounted in all not to exceed \$1,000 additional. The defendant was the owner of dividend paying stock in the American Telegraph & Telephone Company of the value of approximately \$5,000, in addition to which he had about \$1,000 on deposit in a bank, and owned real estate in Oklahoma City, Ponca City, and Brame, worth approximately \$1,400, and life insurance policies amounting to \$5,000, one policy for \$1,000 maturing the year following the trial, one one or two years later, and the others having some time to run. He also owned an automobile, and was drawing a salary from the Pioneer Telephone & Telegraph Company of \$75 per month. The decree gave to the plaintiff the care, custody, and control of the two younger children, Harry and Richmond; and, considering this fact and the further fact that plaintiff by her long years of arduous labor had contributed largely to the property accumulations, we think that no abuse of discretion in the matter of fixing the amount of the alimony is made to appear.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

ST. LOUIS & S. F. RY. CO. v. SMITH.
(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. RAILROADS (§ 446*)—ACTION FOR KILLING CATTLE—DUTY TO FENCE—QUESTION FOR JURY.

By statute (section 1389, Comp. Laws 1909, section 1435, Rev. Laws 1910) it is made the duty of railroad companies to fence their roads, except at public highways and station grounds, with a good and lawful fence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

2. RAILROADS (§ 446*)—ACTION FOR KILLING CATTLE—DUTY TO FENCE—QUESTION FOR JURY.

Whether a certain place constitutes a part of the station grounds, or a public highway, where the railroad company is by statute exempt from maintaining a fence, is a question of fact for the jury trying the case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

3. RAILROADS (§ 443*)—KILLING OF ANIMALS—SUFFICIENCY OF EVIDENCE.

The fact that the evidence may show that the cattle were killed at a railroad crossing, relatively near a station platform, is not sufficient proof that the killing occurred either at a public highway or a station grounds.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1608-1620; Dec. Dig. § 443.*]

4. DAMAGES (§ 188*)—KILLING OF CATTLE—EVIDENCE OF VALUE—SUFFICIENCY.

Testimony examined and held sufficient to prove the market value of the animals killed and injured.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 511; Dec. Dig. § 188.*]

(Additional Syllabus by Editorial Staff.)

5. HIGHWAYS (§ 18*)—"PUBLIC HIGHWAY."

A "public highway," as distinguished from a private road, is one which is open to the travel of the public. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 25; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3291-3306; vol. 8, p. 7678.]

Commissioners' Opinion, Division No. 1. Error from McCurtain County Court; T. J. Barnes, Judge.

Action by T. W. Smith against the St. Louis & San Francisco Railway Company. From judgment for plaintiff, defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and E. H. Foster, both of Oklahoma City, for plaintiff in error.

SHARP, C. From a careful examination of the testimony, we fail to find any evidence of negligence on the part of the train crew in charge of the freight train that struck plaintiff's cows. On the other hand, it conclusively appears that, after the discovery of the animals on the track, it was impossible to stop the train in time to avoid the accident. Atchison, T. & S. F. Ry. Co. v. Henderson, 27 Okl. 560, 112 Pac. 986; St. Louis & S. F. Ry. Co. v. Webb, 36 Okl. 235, 128 Pac. 252.

[1, 2] However, in addition to the foregoing allegation of negligence, it was further charged that the railroad company had negligently and knowingly permitted its right of way fence to be down, and not in condition to turn stock, and thereby plaintiff's cows strayed upon the track, with the result that one was killed and another injured. By the statute it is made the duty of every person or corporation owning or operating any railroad in this state to fence its right of way, except in public highways and station grounds, with a good and lawful fence. Comp. Laws 1909, § 1389. Section 1390 defines a lawful fence. Section 1392 provides: "Whenever any railroad corporation or the lessee, person, company or corporation operating any railroad, shall neglect to build and maintain such fence, as provided in this act, such railroad corporation, lessee, person, company or corporation operating the same shall be liable for all animals killed by reason of the failure to construct such fence." The question, therefore, for our determination under this issue is: Was the accident committed at a public highway or a station grounds on defendant's line of road? It occurred at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the little mill town of Duval, a flag station on defendant company's line of road in McCurtain county. At the station there was no depot, but, instead, a platform (presumably for the use of passengers in getting on or alighting from the trains). The crossing near which the accident occurred was a short distance west of the platform. West of this crossing some 20 or 30 yards, the railroad company had put in cattle guards. It appears that the right of way on either side of the crossing had been fenced, but that the fences had not been kept up, and were down at the time of the accident. At the point of crossing there were gates in the fence, which the testimony shows to have been allowed to remain open. After installing the cattle guards, the company had put up the right of way fence at the crossing on several occasions. It appears, from plaintiff's testimony, that this crossing, while the only one in that vicinity, was a private crossing to a nearby sawmill. On both sides of the track, were several piles of railroad ties, between the cattle guards and the dirt road crossing to the east. Whether or not the point of crossing was a public highway within the meaning of the statute, or whether the animals were struck at a place constituting the station grounds of defendant company, is not clear, as we shall presently see.

[5] A public highway, as distinguished from a private road, is one which is open to the travel of the public. It is the right to travel upon it by all the world, and not the exercise of the right, which makes it a public highway. In *re City of New York*, 135 N. Y. 253, 31 N. E. 1043, 31 Am. St. Rep. 825; *Shelby County Commissioners v. Castetter*, 7 Ind. App. 309, 33 N. E. 986, 34 N. E. 687; *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533; *State v. Paine Lbr. Co.*, 84 Wis. 205, 54 N. W. 503; *Southern Kansas Ry. Co. v. Oklahoma City et al.*, 12 Okl. 82, 69 Pac. 1050. It seems that this roadway led through the little town to the south, past plaintiff's residence, but it does not appear from where, or that it was used by the public in general, pursuant to a lawful right, and we are left to infer its character further than as shown by the foregoing testimony.

Whether a certain point constitutes a part of the station grounds or a public highway crossing, where the company is exempt by statute from maintaining a fence, is usually a question of fact to be determined by the jury trying the case. *St. Louis & S. F. Ry. Co. v. Brown*, 32 Okl. 483, 122 Pac. 136; *Elhott on Railroads*, § 1202. The fact that the crossing was the only one in the village did not necessarily make it a public crossing. There was testimony tending to show that it was a private crossing for the convenience of particular individuals, in which event, it would be the duty of the railroad company

to exercise reasonable care to see that its fences were kept up, and its gates closed, as was held in *St. Louis & S. F. Ry. Co. v. Williams*, 31 Okl. 450, 122 Pac. 152. As already noted, the testimony is confusing as to the character of the place where the animals were struck, i. e., whether at a place where defendant was required to erect and maintain a fence, or at either a public crossing or station grounds.

[3] While the accident occurred relatively near the station platform, and between the platform and certain cattle guards to the westward, yet it was outside of the switches, and at a point where the railroad company had maintained a fence inclosing its right of way, and at the crossing had caused gates to be erected in its fence, but which were down at the time of injury. The testimony was sufficient to give rise either to an inference in favor of plaintiff or one favorable to defendant, and is therefore concluded by the verdict of the jury.

[4] It is urged that there is no competent evidence tending to prove the market value of the cattle struck by defendant company's train. We have read the entire testimony with care, and cannot agree with counsel. It was sufficiently shown that the market value of the cow killed, and the damages sustained to the one injured, exceeded the amount of the verdict. Some of the questions and answers were objectionable. The plaintiff was asked, after having first been qualified: "Q. What was she worth? A. She was worth \$75 to me." This answer is particularly objected to, but it does not appear from the record that any objection to said answer was made at the time. The animal killed, as shown by the testimony, was a first-class Jersey milk cow, fresh and in good order; the animal injured was her half-sister. We think the testimony sufficient, within the rule announced in *Midland Valley R. Co. v. Ezell*, 36 Okl. 517, 129 Pac. 734; *Choctaw, O. & G. R. Co. v. Deperade*, 12 Okl. 367, 71 Pac. 629; *Filson v. Territory*, 11 Okl. 351, 67 Pac. 473; *Coyle v. Baum*, 3 Okl. 695, 41 Pac. 389.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

ST. PAUL FIRE & MARINE CO. v. BRAGG.
(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

INSURANCE (§ 640*)—ACTION ON POLICY—PETITION—ELECTION TO CANCEL.

In an action on a fire insurance policy containing the following clause: "This entire policy shall be void at the election of the company, if, without the consent of the secretary or general agent of the company indorsed thereon, any other insurance is now or shall be taken out on any of the property above described,"—where the answer alleges a violation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of this clause by the insured in taking out additional insurance on the same property covered by the policy in suit, without the knowledge or consent of the company, but fails to allege a compliance with the terms of the policy which prescribes that in case the company elects to cancel the policy it shall do so "by returning to the assured the pro rata unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the assured," and does not allege payment or tender to the assured of the pro rata unearned premium, and the giving of written notice to the assured, does not sufficiently plead an election on the part of the company to declare the policy void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. § 640.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by G. W. Bragg against the St. Paul Fire & Marine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Houston & Brooks, of Wichita, Kan., and Chas. Mitschrich, of Lawton, for plaintiff in error. H. C. Stubblefield and Hudson & Whalin, all of Lawton, for defendant in error.

GALBRAITH, C. The defendant in error, on November 30, 1909, instituted this action in the district court of Comanche county, against the defendant in error, on a fire insurance policy that had been delivered to the defendant in error, by the agent of the plaintiff in error, at Lawton, Okla., on the 4th day of February, 1907, insuring his dwelling house and household effects against loss by fire in the sum of \$600, and alleging that the property insured was destroyed by fire on the 24th day of October, 1908, and that proof of loss had been furnished, as required by the terms of the policy, on the 27th day of October, 1908, and the plaintiff had performed all the conditions on his part to be performed, as prescribed by the terms of the policy, and that the defendant had failed to pay the same or any part thereof, and prayed for judgment in the sum of \$600 and costs. The defendant answered the plaintiff's amended petition admitting that it executed and delivered the policy, as charged, but denied each and every other material allegation in the petition contained, and in the second paragraph of the answer set out that the policy issued as aforesaid contained, among other provisions, the following condition: "This entire policy shall be void at the election of the company, if, without the consent of the secretary or general agent of the company indorsed hereon, any other insurance is now or shall be taken out on any of the property above described." And charged that the plaintiff violated the terms of this condition of the contract, inasmuch as, after the issuance and delivery of the policy in suit, the plaintiff took out additional insur-

ance on the property covered by said policy, without the knowledge or consent of the secretary or general agent of the defendant company, indorsed on the policy in writing, as in the above provision stipulated, attaching a copy of the second policy charged to have been issued to the answer, and further alleging "that said insurance was taken out without the knowledge or consent of the secretary or general agent of the defendant, and without any consent of said secretary or general agent being indorsed on said policy as provided by the terms thereof; that the defendant had no knowledge, notice, or information that said other and additional insurance had been taken out until long after the alleged destruction of said property by fire, as charged by the plaintiff in said petition; that, as soon as this defendant learned that said other and additional insurance as aforesaid had been taken out upon said property, it advised the plaintiff that said policy so issued by it to the plaintiff as aforesaid was void." And alleged that on account of the breach of such condition by the plaintiff the policy in suit became null and void, and no recovery could be had thereon. To this second paragraph of the answer the plaintiff interposed a demurrer, which was by the court sustained. The defendant excepted to the ruling of the court in sustaining the demurrer and refused to amend, electing to stand thereon. The cause was submitted to the court for trial upon the issues made by the petition and the first paragraph of the defendant's answer thereto, and judgment was rendered for the plaintiff for the full amount of the policy and interest. A motion for new trial was filed and overruled, and exception saved, and the defendant appealed to this court by petition in error and case-made.

The only assignment of error argued is that challenging the ruling of the trial court in sustaining the demurrer to the second paragraph of the answer, and that is all that is necessary to consider on this appeal. The law is well settled that a provision, such as that set out in the second paragraph of the answer above quoted, is a valid and binding provision in an insurance contract. The Supreme Court of the United States, in *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 183 U. S. 317, 22 Sup. Ct. 136, 46 L. Ed. 213, said: "Overinsurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies, rendering them void in case other insurance had been or should be made upon the property are not consented to in writing by the company, is customary and reasonable. In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in proofs of loss furnished by the insured, and it was found by the jury, that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there was a policy in another company outstanding when the present one was issued. It also was made to appear that no consent to such other insurance was ever indorsed on the policy or added thereto. Accordingly, it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the conditions."

The Supreme Court of Kansas, in regard to the same provision, said that: "Provisions in policies of insurance providing that the policies shall be void if other insurance be taken without the consent of the insurer are valid. 2 May, Ins. 364. And subsequent insurance, taken out without the consent of the insurer, either expressed or implied, avoids the policy. *Allen v. Merchants' Mutual Ins. Co.* [30 La. Ann. 1386] 31 Am. Rep. 243; *Funke v. Insurance Ass'n*, 29 Minn. 347 [13 N. W. 164, 43 Am. Rep. 216]; *Bard, Appellant, v. Penn Mut. Fire Ins. Co.*, 153 Pa. 257 [25 Atl. 1124, 34 Am. St. Rep. 704]." See, also, *Assurance Co. v. Norwood*, 57 Kan. 615, 616, 47 Pac. 531.

Our own court, in at least two well-considered decisions, one by Commissioner Ames and another by Commissioner Brewer, has recognized the validity of this clause in insurance policies. *Western Nat. Ins. Co. v. Marsh*, 34 Okl. 414, 125 Pac. 1094; *Merchants' & Planters' Ins. Co. v. Marsh*, 34 Okl. 453, 125 Pac. 1100. However, we find the following clause in the policy in suit regulating rescission: "This policy may be canceled by either party. If upon request of the company, by returning to the insured the pro rata unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the insured. If by insured, by paying the customary short rate for the time the policy has to run and the expenses of writing the risk." This provision of the policy was not argued by counsel and was overlooked in the preparation of the original opinion, but a member of the court called attention to it with the suggestion that it ought to be considered, and for that reason the original opinion filed in this case was withdrawn and this one substituted.

It will be observed that the provisions of the policy first quoted provide that the taking additional insurance on the property without the written consent of the company avoids the policy at the election of the company, and the provision last above quoted set out how the election of the company to avoid the policy shall be exercised, to wit, "by returning to insured the pro rata unearned premium, if it has been paid, or, if not, by indorsing the amount thereof on any unpaid premium note and giving written notice thereof to the insured."

It will be observed that the second para-

graph of the answer, to which demurrer was interposed and sustained, fails to allege a compliance with these conditions. It fails to allege an offer or tender to the assured of the pro rata unearned premium or an indorsement of the amount thereon on any unpaid premium note, and the giving of notice in writing to the insured, and thereby fails to allege the necessary facts to constitute an election on its part to void the policy on account of taking the additional insurance, and the demurrer was therefore properly sustained on authority of *Taylor v. Insurance Co. of North America*, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906. See, also, *St. Paul Fire & Marine Ins. Co. v. Peck*, 130 Pac. 805, not yet officially reported; *St. Paul Fire & Marine Ins. Co. v. Griffin*, 124 Pac. 300; *Rochester German Ins. Co. of Rochester v. Rodenhouse*, 36 Okl. 378, 128 Pac. 508; *Pacific Mutual Life Ins. Co. v. O'Neil*, 36 Okl. 792, 805, 130 Pac. 270; *Home Ins. Co. v. Dobbins*, 81 Miss. 623, 33 South. 504.

It follows that the assignment of error is not well taken, and that the judgment appealed from should be affirmed.

PER CURIAM. Adopted in whole.

WALTERS NAT. BANK v. BANTOCK.
(Supreme Court of Oklahoma. Dec. 20, 1913.)

(Syllabus by the Court.)

1. BANKS AND BANKING (§ 134*)—DEPOSIT—RIGHT TO APPROPRIATE—TRUST FUND.

A bank generally has the right to appropriate the funds of a depositor to the extent of the indebtedness due from him; but if the deposit, or any part thereof, is a trust fund, and the bank has notice of this fact, it will be liable to the true owner if it appropriates such fund to the discharge of an indebtedness due from the depositor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 353-374; Dec. Dig. § 134.*]

2. ASSIGNMENTS (§ 49*)—CHECK—EFFECT TO ASSIGN DEPOSIT.

Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, pro tanto, of the fund before such check has been accepted or certified.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 85-98; Dec. Dig. § 49.*]

3. ASSIGNMENTS (§ 50*)—CHECK ON PARTICULAR FUND—EFFECT TO ASSIGN DEPOSIT—ESCROWS.

Where the depositor of a trust fund in a bank enters into a contract with another person that such fund shall be deposited and held in escrow to insure the completion of a sale of land, and such parties go to the bank and fully disclose their intentions so to use the fund, and the bank advises both parties that a check for the amount of the fund will be paid, and to satisfy them thereof takes a check already executed for the full amount of the deposit, and writes into the face of the check "in escrow," and the check, in lieu of the money, is then placed with the contract in the hands of the bank's cashier to be held in escrow, pending the completion of the sale of the land, and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which sale is later completed and the check is delivered over according to the escrow agreement, held, that the transaction operated as an equitable assignment of the fund; that there was privity between the bank and the payee of the check, who, upon the bank's refusal to pay the same, had a right to sue and recover the amount of the fund.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.*]

4. TRIAL (§ 343*)—GENERAL FINDING—CONSTRUCTION.

A general finding by a jury in favor of a party includes a finding in his favor on all the material issues in the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 809-812; Dec. Dig. § 343.*]

5. APPEAL AND ERROR (§ 1002*)—VERDICT—CONFLICTING EVIDENCE.

Where the evidence in a case is conflicting, the verdict of a jury thereon will not be disturbed, where the evidence and the inferences legitimately to be drawn therefrom support the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8935-8937; Dec. Dig. § 1002.*]

6. CONTRACTS (§ 137*)—RIGHT TO ENFORCE—ILLEGAL CONTRACT.

A lawful agreement between parties will be enforced, even though it may be incidentally or indirectly connected with a contract that is illegal, where such lawful agreement is supported by an independent consideration, and can be proven without the aid of the illegal contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 701-712; Dec. Dig. § 137.*]

Commissioners' Opinion, Division No. 2. Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by H. Bantock against the Walters National Bank, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

R. J. Ray and Chas. Mitschrich, both of Lawton, for plaintiff in error. H. F. Tripp and I. K. Revelle, both of Walters, and Gray & McVey, of Oklahoma City, for defendant in error.

BREWER, C. The defendant in error, Bantock, as plaintiff below, sued the Walters National Bank for the sum of \$1,000, and upon a trial before a jury was given a verdict for the sum claimed. The defendant bank has appealed on case-made to this court.

Bantock employed the W. E. Wilson Realty Company, a copartnership, composed of W. E. Wilson and W. W. Graves, to sell a farm belonging to his mother-in-law. The realty company found a purchaser who lived in Nebraska, who agreed to take the farm for \$5,450, and sent to the realty company, a draft for the sum of \$1,000 to be applied to the purchase. This draft arrived in Walters, Okl., October 28, 1907, simultaneously with what has been called the bankers' panic of that year. The farm proposed to be sold was a homestead entry, in the name of plaintiff's mother-in-law, and the final proof had not been completed; at least, title could not

at the time be conveyed. As to the handling of the sale and the use of this \$1,000 draft out of which this suit arose, the evidence is conflicting. Plaintiff's evidence shows: That, when this draft was received, Mr. Sultan, the cashier of defendant bank, was shown the same and was told about the land sale and the purpose of the draft, and insisted that, as the bank needed exchange badly, the draft be deposited in the bank, and it could be used in the land trade through a check against it. That it was so deposited on October 28, 1907. That next day, plaintiff and the members of the realty firm went into the bank and showed the cashier a contract that had been entered into providing for the sale of the farm, one of the provisions of which was that each party, Bantock upon the one hand, and the realty firm on the other, should deposit \$1,000 each to insure faithful performance of the contract of sale. To accomplish this the realty company executed its check for \$1,000, and Bantock executed his for a like amount, and these checks and the contract of sale were read and understood by the cashier of the bank. That one of the realty men and also Bantock asked the cashier if that check would be good for the money upon plaintiff's completing the sale, and that the cashier assured them it would, and stated he would fix it so it would be good, and, taking the check which had been already prepared, inserted in its face the words "In escrow." That the cashier then took the papers put them in an envelope, and held them for the parties. About April, 1908, Bantock had the farm conveyed, in everything fulfilling the contract so to do, and the contract and checks were delivered to him by the bank. The check for the \$1,000 was presented, and the bank refused to pay it on the ground of "no funds." The bank explained the disappearance of the fund by saying that the \$1,000 deposited by the W. E. Wilson Realty Company had been appropriated by the bank towards the liquidation of the individual notes of the partners in the realty firm.

The circumstances of the deposit of the \$1,000 are best told by W. E. Wilson of the realty firm, who, after stating that he received the draft from the purchaser of the farm in Nebraska, made payable to W. E. Wilson Realty Company, and told the cashier of the matter, says: "A. Well, I told Mr. Sultan I had a draft there. I had been out to see Mr. Bantock, and he was to come in next day, and I told Mr. Sultan. * * * A. I told Mr. Sultan I had a \$1,000 draft for Bantock, and Mr. Sultan asked me to deposit the draft. I says, 'I don't feel like depositing the draft until he comes in and fixes the deal up,' but he says: 'You go ahead and deposit that draft, I want this draft in exchange.' * * * A. Well, I went and talked to Mr. Graves (his partner), and we

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

deposited the draft in our name, but we had it understood with Mr. Sultan it was Mr. Bantock's money, and he told us we could check on this thousand dollars and close the deal next day," etc. This deposit was the only one ever made by the realty company. The cashier of the bank in a way denies this evidence. The next day after making the deposit, the plaintiff, Bantock, also both Wilson and Graves, of the realty firm, testify that they went into the bank and met the cashier, Sultan, and explained the nature of the contract for the sale of the farm; showed him the contract, which he read; and Mr. Wilson states what was done as follows: "A. When I and Mr. Bantock and Mr. Graves went to see Mr. Sultan about this deal, I says to Mr. Sultan, I says, 'Was our check good for a thousand dollars to Mr. Bantock?' and Mr. Sultan says, 'Most assuredly it is,' and Mr. Bantock asked him then if it is good, and he says, 'Give me the check and I will make it good,' and he takes it and wrote that word in there taking it to the desk, and took his pen and wrote that on the check, and Mr. Bantock accepted the check." The words referred to as having been written in the check by the cashier are "In escroe." That this was written by the cashier to satisfy Bantock that the check would get the money upon the completing of the contract is positively stated by the three witnesses mentioned. Mr. Sultan denied writing the words in the check; in fact, he set up an alibi and disclaimed any knowledge, at the time, of the escrow agreement. For the purpose of comparison of handwriting, the cashier introduced a number of papers he had written in which the word escrow appears. The court and jury evidently had the benefit of a comparison of these writings with the one in dispute; but we have not the same opportunity, as nothing but typewritten copies are before us. Six of these exhibits have the word escrow on them spelled "escroe," as it was on the check in suit.

[4] We do not understand this to be the usual way of spelling the word, and this circumstance that defendant had spelled the word in this peculiar manner in the exhibits may have had weight with the jury. At all events, we take it the jury found against defendant on this point, as well as on the point that the cashier understood the nature and purposes of the draft deposited, who it came from, and how it was to be used, and that it was not the property of the real estate firm, for the reason that a general finding in favor of a party by a jury includes a finding in his favor on all the material issues in the case.

The assignments of error go to: (1) The refusal of the court to direct a verdict for defendant. (2) The admission of incompetent evidence. (3) The refusal to give certain instructions. (4) The giving of certain instructions. The greater part of the brief is devoted to the first of these assignments.

[1] Notwithstanding the vast amount of industry and ingenuity employed by appellant to convince this court otherwise, from a study of the facts of this case, it does not seem to us that many words are required to show that the bank can assert no justification in law or equity for withholding this deposit and appropriating it as has been done. Assuming that plaintiff's evidence is true, as evidently believed by the jury, the bank in receiving this deposit full well knew that it was not the property of the realty company; that in fact it was the property of the Nebraska placed in trust with the realty company, to become the property of plaintiff, upon the completion of the sale of the land. Its trust character was well known, as well as the exact and specific use intended by the parties to be made of the fund. Yet the bank with this knowledge appropriated the fund, which it knew did not belong to the realty firm or either of the partners therein, to the payment of the notes owing by those individual partners. It had no right to do so, and acquired no title to the funds by reason of its attempted appropriation. The principle announced in the cases of *Shawnee Nat. Bank v. Wooten & Potts*, 24 Okl. 425, 103 Pac. 714, and *F. & D. Co. v. Rankin*, 33 Okl. 7, 124 Pac. 71, fully sustain the views above expressed. In the *Rankin Case*, supra, the depositor of the trust fund joined the bank in an effort to appropriate the same to the payment of his individual indebtedness to it by executing his check in his trust capacity. But the court held that the bank could not thus acquire title to the money thus obtained, where it had knowledge of the trust character of the funds and that they were being improperly applied. In the *Rankin Case*, supra, the authorities are collected, and it is not necessary to set them out again. There is nothing in *Forbes v. First Nat. Bank of Enid*, 21 Okl. 206, 95 Pac. 785, in conflict with the views expressed herein. But if it may be doubted that those expressions of our own court are fully applicable, and decisive of this case, we refer to the following authorities: *Judy v. Farmers' & Traders' Bank*, 81 Mo. 404; *Deal et al. v. Mississippi County Bank*, 79 Mo. App. 263; *Paul v. Draper*, 73 Mo. App. 566; *Bessemer Sav. Bank v. Anderson*, 134 Ala. 343, 32 South. 716, 92 Am. St. Rep. 38; *Amer. Ex. Nat. Bank v. Mining Co.*, 165 Ill. 103, 46 N. E. 202, 56 Am. St. Rep. 233; *American Trust & B. Co. v. Boone's Adm'r*, 102 Ga. 202, 29 S. E. 182, 40 L. R. A. 250, 66 Am. St. Rep. 187; *Duckett v. Bank*, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513; *Union Stockyards Bank v. Gillespie*, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724; *Parker v. Hartley*, 91 Pa. 465; *Jeffray v. Towar et al.*, 63 N. J. Eq. 530, 53 Atl. 182; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Jamison v. Howard Lockwood & Co.*, 26 Misc. Rep. 730, 56 N. Y. Supp. 1085; *Union Stockyards Bank v. Moore*, 79 Fed. 705, 25 C. C. A. 150; *Globe*

Savings Bank v. National Bank of Commerce, 64 Neb. 413, 89 N. W. 1030; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906.

It having been determined that the bank's attempt to appropriate the deposit utterly failed, it still remains to be seen whether, under the circumstances, plaintiff has a cause of action for the amount of the deposit against the bank.

[2] Ordinarily the drawing of a check in the usual form by a depositor against his account in a bank does not operate as an equitable assignment, pro tanto, of the fund, before such check has been accepted or certified. *Guthrie Nat. Bank v. Gill*, 6 Okl. 560, 54 Pac. 434; *First Nat. Bank v. School Dist.*, 31 Okl. 139, 120 Pac. 614, 39 L. R. A. (N. S.) 655; section 4239, Rev. Stat. 1910. And it seems the weight of authority is that the holder of such check cannot, ordinarily, maintain a suit thereon against the bank for want of privity of contract (*Bank v. Millard*, 77 U. S. [10 Wall.] 152, 19 L. Ed. 897; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314); but whether our statute would change this general rule against the maintenance of such a suit need not be inquired into nor decided here, for reasons that will appear as we proceed.

A very clear discussion of the rule adverted to, admitting the exceptions which it is believed removes this case from its application, assuming the rule to prevail here, is found in two of the cases last cited (*Bank v. Millard*, supra, and *First Nat. Bank v. Whitman*, supra). In the *Millard* Case, after discussing the rule and collecting the authorities, the court say: "On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes him no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer, in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer, before it was presented, had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor."

In *First National Bank v. Whitman*, supra, Justice Hunt, for the Supreme Court of the United States, after holding: "The payee of a check which has not been accepted by the bank on which it is drawn cannot maintain an action upon it against the bank. Until acceptance there is no privity of contract between the payee and the bank"—proceeds to

explain that privity of contract between the checkholder and the bank may take the case out of the general rule, and authorize a suit by such holder against the bank, and he says: "It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawer and acceptor of a bill of exchange. *Merch. Bk. v. State Bk.*, 10 Wall [77 U. S.] 604, 19 L. Ed. 1008; *Espy v. Bk.*, 18 Wall. [85 U. S.] 604, 21 L. Ed. 947. It may accomplish the same result by writing upon it the word 'good,' or any similar words which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them. *Cooke v. Bk.*, 52 N. Y. 96 [11 Am. Rep. 667]. And such certificate, it is said, discharges the drawer. As to him it amounts to a payment. *Bk. v. Leach*, 52 N. Y. 350 [11 Am. Rep. 708]; *Meads v. Bk.*, 25 N. Y. 143 [82 Am. Dec. 331]; *Mussey v. Bk.*, 9 Metc. [Mass.] 311; *Willets v. Bk.*, 2 Duer [N. Y.] 121. Whether this certificate be obtained by the drawer before the check is delivered, and is thus made an inducement to the payee to receive the same, or whether it is made upon the application of the payee for his security, is of no importance. It is a contract recognized by the law, valid in its character, which essentially changes the position of the parties. The privity of contract with the drawee, which before pertained to the drawer alone, is now imparted to the payee, and the duty which before existed only to the drawer now exists to the payee."

See, also, for full discussion of what circumstances will constitute an equitable assignment of a fund, *Fourth Street Nat. Bank v. Yardley, Receiver*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, and copious note.

[3] When we view what transpired in the bank when the check was drawn on this fund, where all the parties in interest were assembled for the express purpose of providing how this fund should be used, in the light of the knowledge possessed by the cashier, we think a privity of relation and contract sufficient to authorize the maintenance of this suit by plaintiff is fully established. The fund consisted of the one item; the ownership and purposes for which it was intended being known to the bank when deposited. When the parties met the day following the deposit, the contract relative to the sale of the land had been written. It provided that each of the contracting parties deposit \$1,000 in money, with the contract to secure its faithful performance. Instead of taking the cash out of the bank and putting it physically in escrow, it was decided to represent it by the check; this was to the decided advantage of the bank, in those panicky times, regardless of who proposed the plan. The realty firm and the

plaintiff both inquired of the banker if this check would get the money, meaning of course the identical fund in question; the banker assured both parties it would get the money; then, to reassure them, he took the check already executed, and said he would "fix it." He then wrote in the face of the check "In escrow," which could have been for no other purpose than to convince the parties that the fund represented by that check would be set apart and held for the payment of that check upon the completion of the contract.

[8] Some considerable time is used in an argument that it was illegal to contract for the sale of this land before final proof had been completed, and for that reason the suit against the bank for this deposit must fail. We do not think so. This is not an action on an illegal contract, but is to recover a deposit held by the bank in trust, and which it wrongfully appropriated to its own use and refused to turn over as it had under the course of dealings become bound to do. A lawful agreement between parties will be enforced, even though it may be remotely, incidentally, or indirectly connected with a contract that is illegal and therefore unenforceable, where such lawful agreement is supported by an independent consideration, and which can be proven without the aid of the illegal contract. *City Nat. Bank v. Mitchell et al.*, 24 Okl. 488, 103 Pac. 720, 20 Ann. Cas. 371.

It is also asserted that the contract between the plaintiff and the realty company as agent, put in escrow, was illegal because it provided for a forfeiture. We think the real purpose of the contract was to secure a faithful and prompt completion of the sale, and that the \$1,000 deposited by the purchaser was certainly intended to be turned over as a payment of the consideration of the sale. This is what the parties attempted, and the bank has thus far frustrated. We fail to see wherein it is the business of the bank to censor the contracts of its clients, in which it has no concern, and apply to such contracts a construction that would render them invalid, when the parties themselves have acted upon them, thus construing them, in a way that shows the intention not to be illegal.

2. The point that incompetent evidence was admitted is not well taken. The witness was asked how he came to make the deposit of this particular draft. An objection was made and overruled. We think the circumstances and disclosures made to the bank when making this deposit were competent and material. And while the witness in proceeding in narrative form may have stated some things not strictly competent, no further objections were made, and we do not feel called upon to consider the evidence in detail.

3. The instructions to the jury, taken as a whole, are substantially correct. The theory of defendant was presented, if we mistake not, in the language of its own counsel. And in the light of our holding herein as to the law of the case the instructions were as liberal to defendant as it could have possibly expected. No good service would be rendered in prolonging this opinion with a recital of the instructions given and those refused together with an analysis thereof.

The cause should therefore be affirmed.

PER CURIAM. Adopted in whole.

McMURTREY v. BRIDGES.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. ESCROWS (§ 12*)—TIME WHEN DEED TAKES EFFECT—DELIVERY.

A deed of conveyance of real estate placed in escrow when made and duly delivered to the grantee at a subsequent date, when there has been compliance with the conditions of the escrow agreement, will ordinarily take effect at the time of such final delivery, and not before.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 12, 13; Dec. Dig. § 12.*]

2. ESCROWS (§ 12*)—WARRANTY AGAINST TAXES—CONSTRUCTION.

A warranty against taxes "at time of delivery," in deed conveying real estate, refers to and so warrants at time of final and due delivery from escrow, in which deed had been placed when made.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 12, 13; Dec. Dig. § 12.*]

3. ESCROWS (§ 13*)—WARRANTY AGAINST TAXES—ACTION BY GRANTEE—RIGHT OF RECOVERY.

A petition by a grantee, in deed warranting land conveyed against taxes at the time of its delivery, to recover from the grantor the amount of taxes which became due and a lien upon the land between the time the deed was made and placed in escrow and the time it was duly delivered therefrom, the petitioner having paid such taxes after final delivery of the deed to him, is not insufficient merely because such taxes had not become due nor a lien upon the land when said deed was made and placed in escrow.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. § 14; Dec. Dig. § 13.*]

Commissioners' Opinion, Division No. 1. Error from County Court, Alfalfa County; F. M. Gustin, Judge.

Action by Frank McMurtrey against John F. Bridges. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with directions.

Titus & Carpenter, of Cherokee, for plaintiff in error. Talbot & Owen, of Cherokee, for defendant in error.

THACKER, C. The position of the parties, in respect to their descriptive titles, remains the same as in the trial court.

[3] Plaintiff in effect alleged that on Au-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—46

gust 7, 1909, he contracted to purchase a certain tract of land of defendant; that at the same time defendant, in accord with said contract, executed and put in escrow, for final delivery to plaintiff on January 1, 1910, upon condition of performance of certain obligations by plaintiff in respect to the purchase price, a deed of said land, with usual covenants of warranty, and including a warranty against all charges, taxes, assessments, and incumbrances "at time of delivery"; that on January 3, 1910, the first day of the month being a legal holiday and the second being Sunday, plaintiff had fully performed his obligations under said contract and, being entitled thereto, received delivery of said deed from the depositary; but at that time there was a tax charge of \$49.57, which had incumbered said land since October 15, 1909, standing unpaid against it, and which, defendant having failed to pay, plaintiff was compelled to and did pay; and, defendant having failed and refused to reimburse plaintiff after notice to do so, plaintiff seeks to recover this sum of him.

Defendant has failed to file any brief; and, as no other ground is apparent at first blush, we will assume the demurrer was sustained upon the grounds indicated in plaintiff's brief, to wit: (1) That when the deed was finally delivered on January 3, 1910, it related back and operated as a conveyance to plaintiff on and from August 7, 1909, so as to limit said warranty to that date as the "time of delivery"; and (2) that liability is imposed upon the plaintiff by section 18, art. 10, c. 38, Session Laws of 1909, which reads as follows: "That as between grantor and grantee of any land where there is no express agreement as to who shall pay the taxes that may be asserted thereon, taxes on any real estate shall become a lien on such real estate on the 15th day of October of each year, between the 1st day of March and the 15th day of October next following, the grantee [grantor] shall pay the same, but if conveyed between the 15th day of October and the 1st day of March the grantee shall pay the same."

[1] The general rule is that a deed held in escrow takes effect and operates as a conveyance at the time and after it is or should be delivered to the grantee; and, while the doctrine of relation, which gives a deed effect as a conveyance when and after it is put in escrow, will be applied to effect the otherwise apparent intent of the parties, or to prevent injustice, this doctrine cannot be invoked to create or discharge a liability having no other foundation. *Davis v. Clark*, 58 Kan. 100, 48 Pac. 563; 2 *Page on Contracts*, § 587; *Powers v. Rude*, 14 Okl. 381, 79 Pac. 89; *Pomeroy v. Insurance Co.*, 86 Kan. 214, 120 Pac. 344, 38 L. R. A. (N. S.) 142, Ann. Cas. 1913C, 170; *State Bank v.*

Evans, 15 N. J. Law, 155, 28 Am. Dec. 400; *White Star Line Steamship Co. v. Moragne*, 91 Ala. 610, 8 South. 867; *Tiedeman on Real Property*, § 800; 2 *Wait's Actions and Defenses*, 495; *May v. Emerson*, 52 Or. 262, 96 Pac. 454, 1065, 18 Ann. Cas. 1129; 1 *Devlin*, Deeds, § 328; *Prutsmann v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; 4 *Kent's Com.* 454; *Rathmell v. Shirley*, 60 Ohio St. 187, 53 N. E. 1098; *Seibel v. Higham*, 216 Mo. 121, 115 S. W. 987, 129 Am. St. Rep. 502; *Green v. Putman*, 1 Barb. (N. Y.) 500; *Andrews v. Farnham*, 29 Minn. 246, 13 N. W. 161; *Ketterson v. Inscho*, 55 Tex. Civ. App. 150, 118 S. W. 626; *Naylor v. Stene*, 96 Minn. 57, 104 N. W. 685; *Sparrow v. Smith*, 5 Conn. 113; *Lindley v. Groff*, 37 Minn. 338, 34 N. W. 26; *Anderson v. United Realty Co.*, 29 Ohio Cir. Ct. R. 267; *Foxley v. Rich et al.*, 35 Utah, 162, 99 Pac. 666; *Whitfield v. Harris*, 48 Miss. 710; *Bither v. Christensen*, 1 Cal. App. 90, 81 Pac. 670; *Price v. Pittsburg*, Ft. W. & C. R. Co., 34 Ill. 13; *Craddock v. Barnes*, 142 N. O. 89, 54 S. E. 1003; *Whitmer v. Schenk*, 11 Idaho, 702, 83 Pac. 775; *Stephens v. Rinehart*, 72 Pa. 434; *Simpson v. McGlathery*, 52 Miss. 723; *Shirley Lessees v. Ayres*, 14 Ohio, 307, 45 Am. Dec. 546; *Hunter Realty Co. v. Spenser*, 21 Okl. 155, 95 Pac. 757, 17 L. R. A. (N. S.) 622; *Knapp v. Nelson*, 41 Colo. 447, 92 Pac. 912; *Francis v. Francis*, 143 Mich. 300, 106 N. W. 864; *Baker v. Snavelly*, 84 Kan. 179, 114 Pac. 370; *Scott v. Stone*, 72 Kan. 545, 84 Pac. 117; *Batterton v. Smith*, 3 Kan. App. 419, 43 Pac. 275; *Joiner v. Ardmore Loan & Trust Co.*, 33 Okl. 266, 124 Pac. 1073.

[2] By express contract, embodied in the warranty clause mentioned, the defendant was bound to pay this tax charge; and the section of the statute quoted supra is inapplicable.

We are therefore of opinion that this case should be reversed and remanded, with instructions to the trial court to overrule the demurrer and otherwise proceed in accord with the views expressed in this opinion.

PER CURIAM. Adopted in whole.

HAILEY et al. v. BOWMAN.

(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. PLEADING (§§ 192, 354*)—OBJECTION—DEMURRER—MOTION TO STRIKE.

Where objections to a pleading or a portion of a pleading are based, not on any irregularity connected with its filing, nor to any matter pertaining merely to its form, but on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer, and not by motion to strike from the pleading the allegations attacked.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 408-427; Dec. Dig. §§ 192, 354.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. PLEADING (§ 205*)—PETITION—SUFFICIENCY AGAINST GENERAL DEMURRER.

Where the separate paragraphs of a petition sufficiently state a cause of action for debt and mortgage foreclosure, and in addition thereto it is sought to recover attorney's fees as provided for in the mortgage sought to be foreclosed, a general demurrer to each of such paragraphs should be overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491-493, 495, 496, 498-510; Dec. Dig. § 205.*]

3. APPEAL AND ERROR (§§ 248, 301, 544*)—PRESENTATION BELOW—REVIEW.

Errors alleged to have occurred at the trial in the lower court, unless the same are excepted to and thereafter assigned in the motion for a new trial, and made a part of the record by means of case-made or bill of exceptions, will not be considered on review in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435-1439, 1443, 1447-1452, 1454-1459, 1462, 1464-1468, 1743, 1753-1755, 2412-2415, 2417-2420, 2422-2426, 2428, 2478, 2479; Dec. Dig. §§ 248, 301, 544.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by W. W. Bowman against William E. Hailey and others. From judgment for plaintiff, defendants bring error. Affirmed.

J. E. Whitehead, of McAlester, for plaintiffs in error. E. L. Graves, of McAlester, and W. E. Dunaway, of Oswego, Kan. (C. M. Oakes, of Oswego, Kan., and Wm. H. McNeal, of Oklahoma City, of counsel), for defendant in error.

SHARP, C. [1] The first error assigned is based upon the court's action in overruling the defendants' motion to strike from the petition the first, second, and third counts thereof, paragraph 9 of the first count, and that portion of the third paragraph which seeks to recover attorney's fees. This appeal is before us on a transcript of the record only, and without passing upon whether the motion to strike is a part of the record proper, and whether the foregoing questions may be raised upon such proceedings in error, we may say it is obvious that counsel have misconceived the purposes of a motion to strike. Where objections to a pleading are based, not on any irregularity connected with its filing, nor to any matter pertaining merely to its form, but on its alleged insufficiency in matter of substance, the objection ought to be taken by demurrer, and not by motion to strike. First Nat. Bank v. Cochran, 17 Okl. 538, 87 Pac. 855; Finch v. Finch, 10 Ohio St. 501; Savage v. Challiss et al., 4 Kan. 319; Armstead v. Neptune, 56 Kan. 750, 44 Pac. 998.

[2] On the same day that the motion to strike was overruled, defendants filed their demurrer, separately charging that neither the first, second, nor third counts of plain-

tiff's petition stated facts sufficient to constitute a cause of action against any of the defendants. The objection to the sufficiency of the several counts, urged in this court, arises out of the fact that, in addition to a recovery on the several notes, plaintiff sought to recover attorney's fees, provided for by the real estate mortgage given to secure the payment of said notes. The demurrers urged to the separate paragraphs of the petition, however, are general, and do not confine their attack to the allegations concerning attorney's fees, but charge in turn that the several counts failed to state facts sufficient to constitute a cause of action. Where a general demurrer is filed to a petition as a whole, or to any paragraph thereof, if the pleading or the paragraph states a cause of action entitling the pleader to some relief, a general demurrer should be overruled. Hurst v. Sawyer, 2 Okl. 470, 37 Pac. 817; Hanenkratt v. Hamill, 10 Okl. 219, 61 Pac. 1050; Berry v. Geiser Mfg. Co., 15 Okl. 364, 85 Pac. 699; Cockrell v. Schmitt, 20 Okl. 207, 94 Pac. 521, 129 Am. St. Rep. 737; Emmer-son v. Botkin, 26 Okl. 218, 109 Pac. 531, 29 L. R. A. (N. S.) 786, 138 Am. St. Rep. 953; Coody v. Coody et al., 136 Pac. 754.

The exact question was before the court in Savage et al. v. Dinkler, 12 Okl. 463, 72 Pac. 366, where it was held that a petition which stated a good cause of action for debt and foreclosure of a mechanic's lien, and in addition thereto it was sought to recover an attorney's fee, although the plaintiff was not entitled to recover such fee, yet the petition was not subject to a general demurrer.

The several paragraphs of plaintiff's petition state a cause of action, and whether or not plaintiff asked a recovery for a larger amount than he was entitled to could not be reached by a general demurrer charging only that the several paragraphs failed to state a cause of action.

[3] The appeal being prosecuted upon a transcript of the record, and not by case-made, the other assignments of error, consisting of motions passed upon by the trial court, including motion for a new trial, the court's rulings thereon, and exceptions taken, cannot be considered. Errors alleged to have occurred in the trial court, unless the same are excepted to and thereafter assigned in the motion for a new trial, and made a part of the record by means of a case-made or bill of exceptions, will not be considered on review in this court. Muskogee Electric Traction Co. v. Reed, 35 Okl. 334, 130 Pac. 157.

The judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

CITY OF SHAWNEE v. CHEEK.†
(Supreme Court of Oklahoma. Dec. 23, 1913.)

(Syllabus by the Court.)

1. NEGLIGENCE (§ 33*)—LANDOWNER—DUTY TO TRESPASSER.

A landowner owes a trespasser a duty, in respect to safety from dangerous artificial condition of premises, to not injure him intentionally or wantonly.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

2. MUNICIPAL CORPORATIONS (§ 847*)—NEGLIGENCE (§ 33*)—DANGEROUS PREMISES—ACTIONABLE NEGLIGENCE—MATTERS CONSIDERED—"WANTONNESS."

A mere omission, although superficially characterized by mere thoughtlessness or heedlessness, but, in its deeper explanation, involving a reckless disregard for the safety of merely technical and reasonably anticipated trespassers, such as children of tender years, especially if unconscious trespassers, in respect to obviously and seriously dangerous artificial condition of premises, may amount to wantonness in a landowner; but the attractiveness and accessibility of the place or thing involving such danger to and the probability of such trespassers, the gravity of the danger in such condition, the length of time such condition has existed, the smallness of cost and of deprivation of beneficial use involved in eliminating same, and the reasonableness of the inference that the landowner, as a person of ordinary sensibilities and prudence, knew or should have known of, and under all the facts and circumstances in the case should have eliminated such danger, are proper considerations in determining whether there was such reckless disregard for the safety of such trespassers.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1803; Dec. Dig. § 847;* Negligence, Cent. Dig. §§ 45-47; Dec. Dig. § 33.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7386, 7387.]

3. DEATH (§ 23*)—NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—INFANT TRESPASSER.

A child under 7 years of age, or, in the absence of evidence of capacity, between 7 and 14 years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting question of duty of owner in respect to dangerous condition of premises, and the character of the trespass may be a circumstance to be considered by the jury in ascertaining whether there is contributory negligence.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 25, 26; Dec. Dig. § 23;* Negligence, Cent. Dig. §§ 221-223, 229-234; Dec. Dig. § 122.*]

4. DEATH (§ 11*)—RIGHT OF ACTION—NATURE OF RIGHT.

Section 4313, St. 1893 (section 5281, Rev. Laws 1910), does not operate as a continuance of any right of action which the injured person would have had but for his death, but confers upon the beneficiary thereof a property right in the pecuniary value to him of the life of his decedent, and gives him a new or independent cause of action for the pecuniary loss he has sustained by reason of such death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 10, 15; Dec. Dig. § 11.*]

5. DEATH (§ 29*)—RIGHT OF ACTION—SURVIVAL.

A cause of action arising under section 4313, St. 1893 (section 5281, Rev. Laws 1910), has the quality of survivability, is not extin-

guished by the death of the beneficiary therein, and may be revived and prosecuted in the name of his administratrix.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 33; Dec. Dig. § 29.*]

6. MUNICIPAL CORPORATIONS (§ 857*)—DANGEROUS PREMISES—INJURY TO TRESPASSER—PETITION—SUFFICIENCY.

A petition which does not allege facts from which a reckless disregard for the safety of reasonably anticipated technical, if not unconscious, trespassers, amounting to wantonness, appears as a legal conclusion, nor the ultimate fact of reckless disregard for the safety of such trespassers amounting to wantonness, is not sufficient, as against a demurrer, to warrant a recovery of damages for death resulting to such trespasser from dangerous artificial condition of defendant's premises.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1812; Dec. Dig. § 857.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Pottawatomie County; Chas. B. Wilson, Jr., Judge.

Action by Fannie W. Cheek, administratrix, against the City of Shawnee. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

E. E. Hood, City Atty., W. M. Engart, Asst. City Atty., and W. T. Williams, all of Shawnee, for plaintiff in error. Blakeney & Maxey, of Muskogee, for defendant in error.

THACKER, C. The plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

About May 24, 1908, defendant owned and possessed, within its corporate limits, a brick pumphouse, with three rooms, in one of which there was a pump pit about 11 feet deep, and covering practically the entire floor space of the room, except a walk way about 10 feet wide on one side. This pumphouse was on an unbuilt-up and little used portion of a public street within the corporate limits of defendant, and was in a valley about 75 or 100 yards, according to one witness, or 350 or 440 yards, according to other witnesses, south from the south end of the built-up and more traveled portion of this street, which built-up and more traveled portion of the street extends downward, and ends on the south side of a hill north of the valley. About 75 or 80 yards south of the pumphouse was the channel of the North Canadian river, with which the pumphouse pit was connected by a pipe. About 200 yards from the pumphouse was a race track, and within 60 or 70 feet of the pumphouse were the stables connected, in use or purpose, with the race track. The defendant had used the pumphouse in connection with its system of waterworks; but 3 or 4 years before the date mentioned had taken its pump and pumping equipment away from the pit and building, and had abandoned use of the same because of the flooding of the pump pit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied.

through its said pipe connection on the occasion of a rise in the river. The pipe from the river entered the pump pit about 12 or 18 inches above its bottom, which it appears was above the ordinary level of the water in the river; but plaintiff, in her testimony, mentioned three occasions on which the pump pit had been flooded by rises from the river. After defendant abandoned the pumphouse, it was, with the knowledge and consent of a member of defendant's council, occasionally used by parties having animals in the race track stables for storage of hay; but on May 24, 1908, when as a result of a rise in the river commencing about 2 days before, there was about 9 feet of water in the pump pit, there was no hay in the pumphouse except a remnant scattered about over the floor and on the surface of the water, which hay on the water had been raised, by the rising of the water, from the bottom of the pump pit. The defendant had made no other use of the premises for 3 or 4 years. The glass, if not the sash, had disappeared from the windows, the doors had fallen into a dilapidated condition, both doors and windows were open, and such had been the condition during the greater portion of the time of defendant's abandonment of its use of the pumphouse. James Cheek, the original plaintiff, and Fannie W. Cheek, in whose name, as administratrix, the action was revived, on May 24, 1908, resided with their family, outside of defendant's corporate limits, about 150 yards from the pumphouse, and their children, as well as other children in that vicinity, played about the pumphouse during the time of its abandonment. The plaintiff's children also hunted eggs in the hay in the pumphouse; but plaintiff forbade her children playing about the same. The evidence does not show that defendant had actual knowledge of such use of its premises by children, nor actual knowledge of the coat of hay on the surface of the water, nor of the depth or fact of water in the pump pit at the time of the accident. On May 24, 1908, the original plaintiff, with Thompkins Cheek, the 9 year old son of the two successive plaintiffs, and an older son, had occasion to be, and were, near the pumphouse; but the father and older boy went a short distance away in a boat, leaving Thompkins Cheek to watch some hogs near the pumphouse, and, when the father and older boy, soon after, returned, Thompkins Cheek could not be found. In the afternoon of the same day the body of Thompkins Cheek was found drowned on the bottom of the pump pit. At that time the surface of the water in the pit was practically covered with hay that was dry on top, although at places the hay was very thin in its covering, and, by close observation, the water could not only be seen through the hay at places, but there were open spaces from the size of a man's hand to a foot or more square where the same could be seen.

It appears inferentially that Thompkins Cheek, for some unknown purpose, although probably to gratify an instinctive curiosity or desire to re-explore the silent chambers of the deserted building, and possibly lounge upon the hay he thought to find therein, or to search for hens' nests, or to gratify some other boyish impulse, had entered the pumphouse through an open door, had stepped upon the dry hay, apparently, to his view, covering the surface of the water in the pit, without knowledge of there being water in the same, and, the surface of the water being about 2 feet below the top of the pit, had been unable to extricate himself. The evidence shows he had been an industrious boy, and helped his parents, not only by work in the field, but by doing chores about the house, and his father, who died about 10 months later, was 61 years of age when he was drowned.

This action was begun by petition filed August 6, 1908; but no trial was had until November 11, 1911, when a verdict for \$2,000 was returned for plaintiff.

The case presents the vexed question of the liability of a landowner for personal injuries and death resulting from a child trespasser's contact with a dangerous condition of the premises.

In 1841 Lord Denman, C. J., in *Lynch v. Naudain*, 1 Q. B. 29, sustained a verdict for an injury upon a plaintiff, under 7 years of age, who, with several other children, were playing with defendant's horse and cart in a public street, where same had been left unattended for half an hour, when another boy, by leading, caused the horse to move, and plaintiff, falling from the shaft, was run over by a wheel of the cart, and suffered a fractured leg.

That appears to be the first case in which an owner of property, without actual intent to injure, or actually setting in motion a force, or setting a trap, from which injury resulted, had been held liable for personal injuries caused by trespasser's contact with a dangerous condition of his property, not aside from and so near a public highway as to be dangerous to travelers getting off the same, although other cases are there cited as if supporting the conclusions there reached.

It appears that there was no extended discussion of the doctrine announced in that case until after the decision of the turntable case (*Stout v. City & P. R. Co.*, Fed. Cas. No. 13,504, affirmed in 17 Wall. 657, 21 L. Ed. 745) in 1873; but, with the great volume of litigation involving the same that has followed, a war of conflicting ideas has since raged with unabated vigor about this doctrine. The doctrine, apparently without good reason, is known as the "attractive nuisance" doctrine.

The cases sustaining the doctrine, or allowing a recovery, have not only based their conclusions in some instances upon some-

what different grounds, but are not agreed as to the limitations which should be placed upon the doctrine, and this has been urged by some of the critics as evidence of lack of solidity in any ground whatever for the doctrine.

In answer to the argument that the special attractiveness of the thing or place was an implied or constructive invitation to children, it has been said that the condition or use of land by its owner is not intended as such invitation, that the distinction between invitation and temptation is ignored by such argument, that there are but few things or places not attractive to children, and that it is difficult, if not impossible, to find and mark out, so that landowners may be able to see and know, the boundary line between the things or places that are and the things and places that are not so attractive as to constitute such invitation and render them liable for injuries to trespassing children coming in contact with such things or places; but the duty to use ordinary care for the safety for one by invitation upon the premises is indisputable, and most of the cases in which there is any attempt to find the principle upon which recovery is allowed do so on that of such invitation.

In answer to the argument that the landowner may be held liable upon the ground of an implied intent to injure, it has been said that it is absurd to imply such intent where it is clear that it does not in fact exist; but, of course, the duty and the liability for negligence in a breach of the duty to abstain from intentionally injuring even a trespasser, unless in the lawful exercise of the right of defense or expulsion, is indisputable.

In answer to the argument that the maxim of "*sic utere tuo ut alienum non ledas*" (which, literally translated, means, "enjoy your own property in such a manner as to not injure that of another person") requires the landowner to exercise care to make his premises so safe as to avoid injury to trespassing children who may come in contact with a dangerous condition of the same, it has been said that the true legal meaning of this maxim is, "so use your own property as not to injure the rights of another," and that, as a trespasser has no right to be upon the landowner's premises, this maxim is inapplicable, and, although we express no opinion on this point, in *Walker v. Potomac, F. & P. R. Co.* (*Pannill v. Potomac, F. & P. R. Co.*) 105 Va. 226, 53 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871, 8 Ann. Cas. 862, the court said there might be more, but there was one conclusive answer to this argument, in that the maxim referred to only acts of the landowner the effect of which extended beyond the limits of his property.

In the well-considered case of *Bottum's Adm'r v. Hawks*, 84 Vt. 370, 79 Atl. 858, 35 L. R. A. (N. S.) 440, Ann. Cas. 1913A, 1026, decided March 8, 1911, the doctrine is con-

demned, and that court's conception of the status and tendency of judicial opinion, both in England and this country, on the subject, seems worthy of statement here, and appears in the following extract from the opinion: "As said by (now) Mr. Justice Lurton, in *Folton v. Aubrey*, 74 Fed. 350, 43 U. S. App. 278, 20 C. C. A. 436: 'It seems to us that many of the American cases which we have cited fail to draw the proper distinction between the liability of an owner of premises to persons who sustain injuries as a result of the mere condition of the premises and those who come to harm by reason of the subsequent conduct of the licensor inconsistent with the safety of persons permitted to go upon the premises and who he was bound to anticipate might avail themselves of his license. This seems to be sharply emphasized in the case of *Corby v. Hill* (4 C. B. N. S. 556, 93 E. C. L. 556), and is a distinction which should not be overlooked. * * * Some uncertainty, however, seems to have existed in England as to the standing of the case, and much inconsistency appears in the English cases since decided (a review of which is found in *Friedman v. Snare, etc., Co.*, 71 N. J. Law, 605, 61 Atl. 401, 70 L. R. A. 147, 108 Am. St. Rep. 764, 2 Ann. Cas. 497); but all doubt is now set at rest by the recent case of *Cooke v. Midland G. W. R. Co.* [1909] A. C. 229, 5 Ann. Cas. 557, wherein the *Lynch Case* is expressly approved, and its doctrine applied to a turntable case. * * * Notwithstanding the unstable foundation upon which the *Stout Case* stands, it was expressly approved and adhered to in *Union Pac. R. Co. v. McDonald*, 152 U. S. 262, 434, 14 Sup. Ct. 619, 38 L. Ed. 434, and must, doubtless, be accepted as the law of that court. * * * It must be admitted that a majority of the cases adopt the rule of the *Stout Case*. The list includes *Alabama G. S. R. Co. v. Crocker*, 131 Ala. 584, 31 South. 561; *Barrett v. Southern Pac. Co.*, 91 Cal. 296, 27 Pac. 666, 25 Am. St. Rep. 186; *Ferguson v. Columbus, etc., R. Co.*, 77 Ga. 102; *Chicago, etc., R. Co. v. Fox*, 38 Ind. App. 268, 70 N. E. 81; *Edgington v. Burlington, etc., R. Co.*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561; *Kansas Cent. R. Co. v. Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Brown v. Chesapeake, etc., R. Co.*, 135 Ky. 798, 123 S. W. 298, 25 L. R. A. (N. S.) 717; *Keffe v. Milwaukee, etc., R. Co.*, 21 Minn. 207, 18 Am. Rep. 393; *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Chicago, etc., R. Co. v. Krayenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920; *Bridger v. Asheville, etc., R. Co.*, 25 S. C. 24; *Iiwaco, R., etc., Co. v. Headrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. Rep. 169; *Ft. Worth, etc., R. Co. v. Robertson (Tex.)* 16 S. W. 1093, 14 L. R. A. 781. On the other hand, the rule is utterly rejected in *Willmot v. McPadden*, 79 Conn. 367, 65 Atl. 157, 19 L. R. A. (N. S.) 1101; *Daniels v. New York, etc., R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 26 Am. St. Rep.

253; *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 810, 92 Am. St. Rep. 481; *Frost v. Eastern R. Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Delaware, etc., R. Co. v. Reich*, 61 N. J. Law, 635, 40 Atl. 682, 41 L. R. A. 831, 68 Am. St. Rep. 727; *Walsh v. Fitchburgh R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615; *Wheeling, etc., R. Co. v. Harvey*, 77 Ohio St. 235, 83 N. E. 66, 19 L. R. A. (N. S.) 1136, 122 Am. St. Rep. 503, 11 Ann. Cas. 981; *Thompson v. Baltimore, etc., R. Co.*, 218 Pa. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897, 11 Ann. Cas. 894; *Paolino v. McKendall*, 24 R. I. 432, 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736; *Walker v. Potomac, etc., R. Co.*, 105 Va. 226, 58 S. E. 113, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871 [8 Ann. Cas. 862]; *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148. That there is a strong tendency to limit rather than extend the doctrine is admitted on all sides. This tendency is sufficiently shown by the following cases from the states wherein the turntable doctrine is approved: [*Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398] 39 S. E. 82, 54 L. R. A. 314, which was the case of a 5 year old boy drowned in a pool formed in an excavation on the premises of the plaintiff in error; *Stendal v. Boyd*, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, which was the case of a boy, not quite 5 years old, drowned in a quarry hole on the defendant's premises; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543, which was the case of a 9 year old boy drowned in a quarry hole; *Dobbins v. Missouri, etc., R. Co.*, 91 Tex. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, which was the case of a 3 year old child drowned in a pool of water on defendant's right of way; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915, which was the case of a 10 year old boy drowned in a pond allowed to form on the defendant's premises; *Mayfield Water, etc., Co. v. Webb*, 129 Ky. 395, 111 S. W. 712, 18 L. R. A. (N. S.) 179, 130 Am. St. Rep. 469, which was the case of an 11 year old boy killed while playing on a telephone guy wire; *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537, 107 Am. St. Rep. 847, which was the case of a child of tender years injured while playing with a revolving door; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106, which was the case of an 11 year old boy drowned in a pond of surface water which was allowed to stand on defendant's lot. Other cases like *Brown v. Salt Lake City*, 33 Utah, 222, 93 Pac. 570, 14 L. R. A. (N. S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004; *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Indianapolis Water Co. v. Harold* (Ind. App.) 79 N. E. 542; and *Price v. Atchison Water Co.*, 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625—with much more consistency, apply the doctrine to the cases of open con-

duits, ditches, and water holes, and hold the landowner liable."

It appears that Illinois (see *St. Louis, etc., R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269, and *Pekin v. McMahon*, supra) and Tennessee (see *East Tenn., etc., Ry. Co. v. Cargille*, 105 Tenn. 628, 59 S. W. 141, and *Bates v. Nashville, etc., R. R. Co.*, 90 Tenn. 36, 15 S. W. 1069, 25 Am. St. Rep. 665) should also be included in the first foregoing enumeration of states favoring the doctrine.

In *Uthermohlen v. Bogg's Run Co.*, 50 W. Va. 457, 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884, the court said that the doctrine of the turntable cases shifted the duty of watchfulness and care from the shoulders of parents, where the Creator had placed it, to the shoulders of the landowners using their property to make a living, and thus materially detracted from the full ownership of property, sacred under the Constitution; but we only refer to that statement as an extreme view.

In *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644, 55 L. R. A. 810, 92 Am. St. Rep. 481, the doctrine is also condemned, and the court, in criticism, referred to an application thereof in a Kansas case, and said: "Here we have the doctrine of the turntable cases carried to its natural and logical result. We have only to add that every man who leaves a wheelbarrow, or a lawnmower, or a spade upon his lawn, a rake, with its sharp teeth pointing upward, upon the ground, or leaning against the fence, a bed of mortar prepared for use in his new house, a wagon in his barnyard, upon which children may climb, and from which they may fall, or who turns in his lot a kicking horse or cow with calf, does so at the risk of having the question of his negligence left to a sympathetic jury. How far does the rule go? Must his barn door, and the usual apertures through which the accumulations of the stable are thrown, be kept locked and fastened, lest 12 year old boys get in and be hurt by the animals, or by climbing into the haymow, and falling from beams? May a man keep a ladder, or a grindstone, or a scythe, or a plow, or a reaper, without danger of being called upon to reward trespassing children, whose parents owe and may be presumed to perform the duty of restraint? Does the new rule go still further, and make it necessary for a man to fence his gravel pit or quarry? And, if so, will an ordinary fence do, in view of the known propensity and ability of boys to climb fences? Can a man nowadays safely own a small lake or fish pond, and must he guard ravines and precipices upon his land? Such is the evolution of the law less than 30 years after the decision of *Railroad Co. v. Stout*, 17 Wall. 657 [21 L. Ed. 745], when, with due deference, we think some of the courts left the solid ground of the rule that trespassers cannot recover for injuries received, and due merely to negligence of the persons trespassed upon."

In the same case it is further said in the opinion: "That a landowner is under no obligation to use care to protect a trespasser is a broad, and, until recently, undisputed, rule, without exception; liability for injuries sustained by such being limited to cases of intentional or wanton injuries. The rule, with this limitation, is sustained today by the great weight of authority. It is contended by some lawwriters, and has been held in some cases, that an exception exists in favor of children of tender years. The varying reasons given should lead us to doubt the solidity of the foundations upon which these cases rest, especially when none of the reasons are of recognized authority. The law has never before denied the liability of children for trespass because of tender years. On the contrary, it was intimated in *Mangan v. Attorton*, L. R. 1 Exch. 239, that a 4 year old boy was a trespasser, under the circumstances of that case, and there are numerous cases cited in this opinion where liability is denied upon that, and no other, ground. The assertion that the weight of authority supports the plaintiff's contention in this case seems to us incorrect. It may be true that, in cases involving turntables, a majority of the cases, which are necessarily few, have followed the case of *Railroad Co. v. Stout*, 17 Wall. 657 [21 L. Ed. 745], but there should be a legal principle underlying the rule laid down in that case, and that principle has been assiduously sought for by some of the courts, without success, as we have seen."

In the case of *Wheeling L. E. Co. v. Harvey*, supra, decided in 1907, where much of the case law upon the doctrine is very ably reviewed, and the doctrine condemned by the Ohio court, in speaking of the opinion of Judge Hooker in *Ryan v. Towar*, supra, it is said: "Of the case of *Powers v. Harlow*, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154, in which the opinion is by Judge Cooley, and which is quoted from at some length in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, as approving the turntable doctrine he says: 'Clearly this does not adopt the rule of *Sioux City & P. R. Co. v. Stout*.'"

In *Powers v. Harlow*, supra, Judge Cooley said: "A man of ordinary prudence, if told that so dangerous an article was so carelessly stored, might well have deemed the statement incredible"—and, although it is not expressly so stated in the opinion, the act for which a recovery was there allowed appears to have been wanton in its reckless indifference to the safety of others.

In the case of *Ritz v. Wheeling*, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148, the court, in speaking of the original turntable case, said: It, "if carried to the length to which it is sought to be carried, would exact of every property owner the utmost watchfulness, vigilance, and expenditure to guard

against hurt to children, else he would be every moment in danger of ruinous damages. It attacks the right of free use of one's property in lawful business. A railroad liable because it happened to leave a turntable unblocked, as turntables often are, on its own track—a necessary appliance in lawful business! Ought a farmer to be liable for failing to put a picket fence around his pond necessary for his cattle? If he does not, some little boy will climb the fence into the farmer's field, drown in the pond, and the farmer is sued on the same principle. The dam that contains water to turn the mill wheel, having a path around it shaded with willows, is very alluring to the child and the man. Must the miller inclose it? The canal, with its towpath and frogs, is very attractive to the little boy or girl, and dangerous, too. If a child drown in it, is the company liable? How many more instances of things useful in lawful business, and withal very attractive to children, and very dangerous, might be put? And the rule contended for says that, if the thing causing the injury be attractive or seductive, the liability attends it. Now many things are, or may be, so to children? 'A child's will is the wind's will.' Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, the canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him?"

[1] The authorities are, we believe, agreed that a landowner is in duty bound to abstain from intentionally harming a trespasser, unless in the lawful exercise of the right of defense or expulsion, and, in a very able, if not entirely satisfactory, criticism of the doctrine, to which there has been complimentary reference by several courts, Judge Jeremiah Smith, in an article published in 11 *Harvard Law Review*, 349, says: "He is also, by the better view, under a duty to avoid harming the trespasser by negligent acts which result in actively bringing force to bear upon the trespasser. It is a mooted question whether this duty is confined to cases where the presence of the trespasser is known to the landowner. Some authorities hold that the owner may, in special circumstances, be under a duty to use care to ascertain whether trespassers are present before he sets in motion a force which would be likely to endanger any such person if within reach. But the alleged duty, if admitted, is material only when it is sought to make the landowner liable for actively bringing force to bear upon the trespasser."

In the Smith article, *supra*, it is further said: "Upon the crucial inquiry whether the law should impose such a duty upon the landowner, there are considerations of undoubted weight to be urged in favor of either view. A balance must be struck between the benefit to the community of the unfettered freedom of owners to make a beneficial use of their land and the harm which may be done in particular instances by the use of that freedom. The true ground for the decision is policy, i. e., expediency, in the Benthamic sense of 'the greatest good to the greatest number,' and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed.' On the one hand, it is the policy of the law to establish rules tending to preserve life, and to protect human beings from serious bodily harm. And this laudable purpose seems frustrated, pro tanto, by permitting a landowner to pursue with impunity a mode of user which he knows, or ought to know, is likely to occasionally result in the suffering of great harm on the part of some of his neighbor's children. The fact that a defendant neither desired nor intended to bring about a particular result does not necessarily exonerate him. The law not unfrequently holds defendants liable irrespective of their intention to do harm, and in some extreme cases may even hold them liable irrespective of the utmost care on their part, practically making them insurers against all harm resulting from certain classes of acts. 'When a responsible defendant seeks to escape from liability for an act which he had notice was likely to cause temporal damage to another, and which has caused such damage in fact, he must show a justification.' And this doctrine may be assumed to apply, even though he had no notice that his act was likely to cause damage to a specific person at a particular moment, but knew only that it was likely to cause damage to some unspecified person at some indefinite time. To escape liability, he must show that there are considerations equal or paramount to those urged in behalf of the plaintiff which justify his conduct notwithstanding the known risk of damage to others therefrom. He must sustain 'a claim of privilege.' On the other hand, the defendant justifies under his right or privilege to make a beneficial use of his own land in methods which will do no harm to persons remaining outside his boundary. The beneficial use of land is a primal necessity, not only to those individual landowners who happen to be defendants in lawsuits, but to the entire human race. 'The business of life must go forward, and the fruits of industry must be protected.' 'It is impossible to carry on the common affairs of life without doing various things which are more or less likely to cause loss or inconvenience to others, or even which obviously tend that way, and this in such a manner that their tendency cannot be remedied by any means

short of not acting at all. * * * To say that a man shall not seek profit in business at the expense of others is to say that he shall not do business at all, or that the whole constitution of society shall be altered. Like reasons apply to a man's use of his own land in the common way of husbandry, or otherwise for ordinary and lawful purposes.' It is true that the right of user is never literally absolute, and is always restricted to some extent 'by rights residing in others, and by duties incumbent on the owner.' But it is also true that every restriction diminishes pro tanto the beneficial character of the use, and hence the law imposes restrictions as seldom as possible, and never except upon the strongest grounds. If an opposite policy were pursued, it is easily conceivable that the improvement and beneficial occupation of land might become in fact impossible, and property in the soil for nearly all useful purposes might be annihilated. To say, for instance, that B must keep his land in safe condition to be trespassed upon would often result in practically depriving B of certain modes of beneficial enjoyment, unless he takes precautions which are incompatible with profitable user, and might in effect amount to confiscation of his land for the benefit of trespassers. The difficulty of restricting the owner without practically destroying his interest is fully recognized by the law. It has been an important factor in inducing courts to refuse to impose restrictions in various instances where the case in behalf of the landowner is not so strong as in the matter now under consideration. We refer to the class of cases where the use of land, instead of harming only those persons who come upon the land, exerts a damaging influence upon persons and property situated beyond the border of the defendant's land. While there are, of course, many acts thus harmfully operating beyond the limits of his land for which an owner is held liable, there are also various acts of user which confessedly have a damaging effect upon persons and things outside the boundary of the land, and which, nevertheless, the law does not prohibit or punish. * * * The courts do not consider it for the interests of the community that the landowner who does not go beyond certain common and generally beneficial acts of user should be called upon to answer for damage thereby done, even where the thing damaged is outside the limits of his land."

Judge Thompson, in his *Law of Negligence*, vol. 1, § 1031, said: "In respect of the * * * cases * * * of attractive nuisances, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it, and be killed, and which would exempt him from liability for the consequences of leaving exposed and un-

guarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed, or maimed for life. In view of what has preceded, the author regrets that he cannot say, as he said in his first edition, that such is not the law. He limits himself to expressing the opinion that it ought [not] to be the law, and to citing with commendation the few decisions which hold that it is [not] the law. Nevertheless, a few decisions of enlightened and humane courts are found more or less tending to the conclusion that the owner of any machine or other thing which, from its nature, is especially attractive to children, who are likely to attempt to play with it in obedience to their childish instincts, and yet which is especially dangerous to them, is under the duty of exercising reasonable care to the end of keeping it fastened, guarded, or protected so as to prevent them from injuring themselves while playing or coming in contact with it."

In *Shearman & Redfield on the Law of Negligence*, § 98, it is said: "The overwhelming weight of authority, both in number of decisions and in soundness of reasoning, by which is established the right of little children to recover damages for injuries suffered while trespassing should alone be sufficient to settle this question. Innocence and mistake are no excuse for a trespass, and therefore one committed by a child is just as truly a trespass as if committed by an adult. The owner of premises has precisely the same right to eject a child therefrom as he has to eject a full-grown man. He has the same right to recover nominal damages in each case. But, when he is sued for damages caused by his negligence towards a trespasser, he finds that there is a wonderful difference between the probable result of the suit if the plaintiff is a child, and the probable result of a like suit by an adult. Is there any intelligible ground of distinction to account for this difference, except that the child is presumably not guilty of conscious negligence, while the man presumably is? When the man proves that he was ignorant of the fact that he was trespassing, or shows that his trespass was only technical, and such as he might reasonably suppose would not be objected to by the defendant, and did not in fact produce any appreciable injury or annoyance, his right to recover is just as good as that of an infant. All this is well settled. And what inference can possibly be drawn from such decisions, if not that the plaintiff's trespass is only a circumstance tending to prove contributory fault upon his part, and not in and of itself such fault or attended with the usual effects of such fault?"

In *Whittaker's Smith on Negligence*, § 77, it is stated, in the editorial notes, that the rule that a licensee or trespasser ordinarily

enters land at his own risk is subject to an exception where the danger is exposed, and such as might be reasonably apprehended, and, in the text, at page 513, in discussing contributory negligence of children, it is said: "The doctrine of contributory negligence is applied to children, and to those having the control of them. In one case, *Channell, B.*, at nisi prius is reported to have said: 'The doctrine of contributory negligence does not apply to an infant of tender age.' This rule is scarcely satisfactory, because it is difficult to say what is or is not a tender age; but a better rule which would probably excuse the negligence of a child of tender age is that a child is only bound to exercise such a degree of care as children of his particular age may be presumed capable of exercising."

In *Id.* 66, it is said: "If A. digs a hole in his land, and B., who has a right to personal security (but no right to be on the land) falls into it, A.'s right is paramount to B.'s, and no question of negligence arises; but, if A. had permitted B. to come upon his land, the rights would be equal, and questions of negligence would arise, viz.: Whether the pit was negligently left unguarded, and whether B. was using his right of being there with care."

And in *Id.* 70-81, it is said: "But such owner will be liable for anything in the nature of a trap upon the premises, known to him, and as to which he gives no warning to the licensee. He must not do anything to alter the premises, so as to be likely to cause injury, without notice to the licensee. Upon the whole I incline to think, with *Mr. Campbell*, that the owner is bound to take ordinary care with respect to a bare licensee. The question is, as I think, one of great difficulty. It is said that the licensee, being there merely for his own advantage, can only demand that slight care which a gratuitous bailee is bound to display, and so far the proposition is correct; but I am not sure, if a gratuitous bailee were to indicate a place of deposit, whether he would not be undertaking that that particular place was reasonably fit for the deposit, and, if so, a similar agreement would apply to an owner who gives leave to come upon his property, viz.: That he has undertaken that his property is in some degree fit for the licensee to use. If this be so, it seems that he ought to take ordinary care. The courts, however, have distinctly held that the owner is only liable for 'gross' negligence, because he is in the same position as a gratuitous bailee; but I am inclined to think the assumption is not accurate. I think that the question is only further obscured by insisting that the owner must be guilty of an act of commission to render him liable to the licensee. It may be very frequently the case that omissions are slighter neglects than acts of commission; but they may very well be the contrary, and sometimes are so. If the neglect

be of a grave and obvious character, it would matter nothing whether it was an omission or commission. For instance, it would matter nothing whether a signalman omitted by grave and obvious negligence to pull the handle to direct an express upon its proper line, or whether he negligently pulled the wrong handle." "Where there is something done by the owner which is in the nature of a * * * wanton injury, he will be liable to an action for negligence even by a trespasser, as if an owner of premises with great recklessness shot a trespasser, or if the owner set spring guns upon his premises and injure a trespasser. But where a trespasser took shelter from a storm in a ruinous house not fenced off from the road, and a wall fell upon him and injured him, it was held that he could not recover." "Upon this principle it has been held that, where an owner or occupier of lands makes an excavation upon his land so near to a public highway as to be dangerous under ordinary circumstances to persons passing by, it is his duty to take reasonable care to guard such excavation, and he is liable for injuries caused, even if such persons are consciously or unconsciously straying from the way." "Where the excavation is at a considerable distance, no such care need be taken. What is a considerable distance, it is impossible to say, and, in truth, each case depends upon its own facts."

We agree with the view of this author that the landowner is bound to take ordinary care with respect to a bare licensee; but, we do so upon the assumption that he uses the expression "ordinary care" as meaning such care as a person of ordinary prudence would usually exercise under the facts and circumstances in such case, although such care be slight in comparison with the care such person would usually exercise about their own affairs of more than slight importance, and, indeed, sections 2689 and 2691, Stat. 1890 (sections 2917 and 2919, Rev. Laws 1910), make it clear that the degrees of care (section 2688, Stat. 1890, same being section 2916, Rev. Laws 1910) and the degrees of negligence (section 2690, Stat. 1890, same being section 2918, Rev. Laws 1910) refer to the differences in the degrees such persons usually exercise in their own affairs of different degrees of importance, and not to any difference in degrees of care in the same case or under the same state of facts—the rule of three such degrees being thus not inconsistent with the rule that the measure of duty and test of negligence and liability is that one degree of care which a person of ordinary prudence would usually exercise under the facts and circumstances of the particular case.

[2] We also agree with the view of this author that, although not usually so, an omission may constitute a greater neglect of duty than an act of commission, so that the rule holding a landowner liable for acts of commission, and not liable for mere omissions resulting in harm to a bare licensee, is not

sound, and is indefensible, and that, "where there is something done" (and we would add, "or omitted") "by the landowner which is in the nature of * * * a wanton injury, he will be liable to an action for injury even to a trespasser." In our opinion what omission or act of commission, free from intent to injure, will amount to wantonness and render the landowner liable to a trespasser must depend upon the facts and circumstances of each case. The character of the danger and the position of the landowner in respect to his actual knowledge or thoughtlessness of the dangerous condition of his premises, and of its attractiveness and accessibility to merely technical trespassers, especially such as children of tender age, as well as of every other fact and circumstance bearing upon the probability of such trespasses and the probability of injury to trespassers from contact with such dangerous condition, together with the smallness of the expense or effort required to eliminate such danger, bear upon the question of wantonness, and it is not difficult to conceive of a great variety of instances in which a landowner, indifferent and thoughtless of the safety of other persons, might, without intent to injure, be guilty of unquestionable wantonness.

There appears to be no denial of the doctrine of liability to injured trespassers for wanton acts of a landowner; but a great many of the cases, with which we are unable to agree, in effect, limit such liability to acts of commission, thus holding, in effect, that there can be no wantonness in an omission, or, if so, that it creates no liability to a trespasser, even though the trespass be merely technical and even unconscious. It is no doubt true that wantonness should not be inferred from the mere omission to make safe a dangerous place upon one's premises in the absence of sufficient evidence to show a reckless disregard for the life, limb, body, or health of another or others; but, if wantonness be proven, we are of opinion that it is immaterial whether it consists of an act of commission or a mere omission.

A principle that appears to be deductible from much of the case law on the subject allowing recovery is that it is not only the duty of a landowner to a trespasser to not injure him intentionally or wantonly, but that an act or omission involving a reckless indifference to the safety of reasonably anticipated technical trespassers, such as children of tender years, although without intent to injure, may be wanton. It is undoubtedly the general rule that a landowner does not owe a trespasser any further or greater duty than this; but his duty to an invited person upon his premises is quite different, and requires of him reasonable care for the safety of such person.

As used in this opinion, the words "wanton," "wantonly," and "wantonness" mean and are applicable to acts or omissions of a landowner involving reckless disregard for

the safety of such, if any, merely technical trespassers as should in reason have been anticipated by a person of ordinary prudence, and such acts or omissions may be "wanton," "wantonly" done, or the result of "wantonness," although merely thoughtless or heedless in their superficial character, and free from intent to injure.

As stated in Book 1 (Lewis' Ed.) Blackstone's Commentaries, p. 117: "The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health," etc.

[3] In view of the great value and vital importance of this right and the well-known disposition and lack of self-control in children, we see no sufficient reason why a landowner should not, at least, be deemed in duty bound to make reasonably safe any obviously dangerous, artificial, and attractive condition on his premises, which in character is clearly different from common and well-known dangerous natural conditions, especially when he is able to do so at little or no cost, and without appreciable impairment of his beneficial use of the same, in all cases in which his failure to do so involves reckless disregard for the safety of children of tender years, especially children under 7 years of age, or, in the absence of evidence of capacity to be guilty of contributory negligence, under 14 years of age, as a person of ordinary prudence must anticipate will probably be attracted to and may come in contact with and be injured by such dangerous conditions. Is it anything less than wantonness for a landowner, with actual knowledge of such dangerous, artificial, and attractive conditions of his premises, and of facts from which, as a reasonably thoughtful person, he must know that merely technical, if not unconscious, trespassers in the persons of children living or accustomed to congregate or be near by may come in contact with and be seriously injured by such dangerous conditions, to abstain from removing the danger of such conditions, especially if he is able to do so at little or no cost, and without appreciable impairment of his beneficial use of the premises?

It may be that parents, by proper example and correctly enforced precepts, can greatly reduce the number of injuries resulting from the trespassing of children and their contact with the dangerous condition of the premises upon which such trespasses are made, especially if the parents have correct and positive convictions, with which the child may be indoctrinated in many ways; but the senses of sight, taste, hearing, touch, and smell in children of tender years are particularly eager for gratification, and their instinctive desire to examine and explore, to them, strange, mysterious, and wonderful things and places, generally accentuated by much surplus energy, is often stronger than the influence of even the best and highest

degree of parental effort to instruct and restrain.

These are matters of common knowledge, and the moral duty of landowners to supplement the duty of parents in respect to trespassing by children should certainly become a legal one when, under all the facts and circumstances in the case, a failure to do so amounts to wantonness, i. e., a reckless disregard or heedlessness for their safety.

The greater and farther removed from the natural and common in character the danger, and the greater the probability of contact therewith and injury therefrom by persons, especially children of tender years, who are merely technical, if not unconscious, trespassers, and the smaller the expense and inconvenience of eliminating the danger, the clearer appears to be the wantonness.

In the light of the known danger in turntables, high explosives, electric currents, and the like, and the disposition of children, was the act or omission of the landowner in most, if not all, the cases in which recovery for injuries to children has been allowed to stand anything less than wantonness? We think there is, at least, evidence reasonably tending to prove wantonness in, at least, most of them.

The walls and spaces of a deserted building such as this, where children may play hide and seek, and hunt hens' nests, as the evidence shows they did do about this building, and otherwise gratify their childish instincts, are undoubtedly exceptionally attractive places to children, and an intrusion by children of the age of the deceased child should be presumed, in the absence of evidence to the contrary, to be not merely a technical but an unconscious trespass.

In *C. & P. Ry. Co. v. Baroni*, 32 Okl. 340, 122 Pac. 926, it was held proper to submit to the jury the question of contributory negligence, permitting the jury to take into consideration the age, experience, and maturity of the child, and the general rule appears to be that a child under 7 years of age is incapable as a matter of law, and one between the age of 7 and 14 may or may not be capable of contributory negligence, depending upon the age, experience, and capacity to understand, to appreciate, and avoid the danger to which the child is exposed under all circumstances of the case, the care required being the same care that a person of the same age, education, and mental and physical capacity uses under like circumstances, and the contributory negligence of such child is usually held to be a question for the jury. See notes to *Schoonover v. Baltimore, etc., R. Co.*, Ann. Cas. 1913B, 969; 1 Ann. Cas. 895; 17 Ann. Cas. 353, 14 Am. St. Rep. 590; 49 Am. St. Rep. 408.

In deference to the fact that this is the first time the doctrine of the "turntable cases" has been presented for the consideration of this court, we have quoted quite exten-

gely from authorities touching and illustrating some of the variant views upon the same; but, in respect to such quotations, we do not desire to be understood as approving or disapproving further than expressly shown in this opinion.

In brief for defendant it is urged that it was not in duty bound to keep its unused pump station securely locked and barred from the entrance of children, and that the doctrine of the so-called "turnstile" cases is not sound; but the question of wantonness as a ground for recovery is not discussed.

[8] We deem it unnecessary to more specifically point out the logical sequence of the foregoing views touching any question presented by defendant, in view of the necessity of a reversal of this case upon a distinct ground hereinafter shown, except that it appears that the demurrer to the petition should have been sustained, in view of the fact that the allegations do not show a reckless disregard for the safety of such technical trespassers as the deceased boy, and wantonness is not expressly nor by necessary implication alleged.

It is true that the petition alleges facts from which wantonness might be inferred, if the court was at liberty to indulge such inference in favor of the pleader; but, "in the construction of a pleading, challenged by a demurrer before trial, nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case warrant." *Atwood v. Rose*, 32 Okl. 355, 122 Pac. 929.

[4, 5] It is urged by the defendant that the right of action for the death of Thompson Cheek was personal to and expired with the original plaintiff, the father of the decedent; that it was not susceptible of revival for the reason that it did not exist after the death of the original plaintiff.

Section 4312, Stat. 1893 (section 5280, Rev. Laws 1910), reads: "No action pending in any court shall abate by the death of either or both of the parties, thereto. * * *"

But we do not understand this section to impart the quality of survivability to causes of action which do not have that quality under the next preceding section (section 4311, Stat. 1893, same being section 5279, Rev. Laws 1910), which reads: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to the person, or to real or personal estate, or for any deceit or fraud, shall also survive; and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

These sections of our statute were adopted from Kansas, and, in two cases decided by the courts of that state, before such adoption, language is used which gives some color to the contention that an action for

pecuniary loss resulting from death wrongfully caused under section 4313, Stat. 1893 (section 5281, Rev. Laws 1910), is not within any provision of section 4311, *supra*; but due examination of these cases will show that this precise question should be regarded as not settled thereby, and as still open.

In *A., T. & S. F. Ry. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683, the latest of those cases, where a person wrongfully injured commenced action, and, while same was pending, died from another and independent cause, the court held that his entire cause of action for the injury survived and did not abate under sections 4311 and 4312, *supra*; the *arguments* therein as to the nature of the cause of action given by section 4313, *supra*, being inapplicable.

In the *City of Eureka v. Merrifield et al.*, 53 Kan. 794, 87 Pac. 113, the other one of these cases, it is held that section 4311, *supra*, construed with sections 4312 and 4313, *supra*, "only permits actions to survive *for injury to the person* when death does not result from the injury"; but, in that case, the only question was as to the sufficiency of the petition of the parents, as next of kin, suing for their own pecuniary loss sustained by reason of the wrongfully caused death of their child, in the absence of any allegation that the child, at the time of such death, was a nonresident of the state, or that no administrator had been appointed for his estate. The action was for "death" under section 4313, *supra*, and section 4314, Stat. 1893 (section 5282, Rev. Laws 1910), and not for the personal injury for which he might have sued had he lived, the survivability of their cause of action was in no wise involved, the quoted holding of the court was apparently foreign to any question before it, and this language no doubt was merely intended to give expression to the indisputable view that the language "*or for injury to the person*," used in section 4311, *supra*, does not impart the quality of survivability to the cause of action *for death* given by section 4313, *supra*; these two causes of action being separate and distinct.

Section 4311, *supra*, however, apparently stamps with the quality of survivability every cause of action which would survive at common law and every cause of action for injury to "personal estate," and, if the cause of action in this case survived the death of James Cheek, the original plaintiff, it must do so because section 4313, *supra*, does not give a right of action merely for a wrong to a domestic relation or to the person of the beneficiary, but stamps with the character of "estate" or property right the pecuniary interest of the father in the life of the child, at the time of the wrongfully caused death of the latter, which the former is allowed to recover.

Section 4313, *supra*, reads as follows: "When the death of one is caused by the

wrongful act or omission of another the personal representatives of the former, may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages * * * must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Section 4314, *supra*, reads as follows: "In all cases where the residence of the party whose death has been caused as set forth in the preceding section, is at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The death for which this action was brought occurred prior to the amendment of section 6893 (6261) Stat. 1890, by Sess. Laws 1909, p. 548 (Comp. Laws 1909, § 8985), which went into effect June 10, 1909 (see section 8418, Rev. Laws 1910, for history of act), and, under the provisions of section 6893, *supra*, the father was the sole heir, and therefore the only "next of kin" of the deceased child.

Section 4067, Stat. 1890 (section 6586, Rev. Laws 1910), declares all things susceptible of ownership to be property within the meaning of the chapter relating to the nature of property, and section 4068, Stat. 1890 (section 6587, Rev. Laws 1910), includes among its specifications of what may be owned "rights created or granted by statute."

In *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, an action founded upon the Employers' Liability Act of Congress of 1908 (Act April 22, 1908, c. 149, 35 Stat. 85 [U. S. Comp. St. Supp. 1911, p. 1322]), it is said: "The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 and 10 Vict. c. 93, known as Lord Campbell's Act. This act has been, in its distinguishing features, re-enacted in many of the states, and both in the courts of the states and of England has been construed, not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain * * * members of the family for the deprivation, peculiarly, resulting to them from his wrongful death."

In the same case *Patterson, Railway Accident Law*, § 401, is approvingly quoted as stating that the term "pecuniary loss or damage" is judicially employed, in cases arising

under such statutes, as follows: "Not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation."

The measure of damages recoverable under section 4313, *supra*, as held under similar statutes in other jurisdictions, is limited to the pecuniary loss sustained by the beneficiaries therein specified (*M., K. & T. Ry. Co. v. West*, 134 Pac. 655; *St. L. & S. F. Ry. Co. v. Long*, 139 Pac. —, ¹ not yet officially reported; *M., K. & T. Ry. Co. v. Lenahan*, 135 Pac. 383; and *K. P. Ry. Co. v. Outter*, as Administratrix, etc., 19 Kan. [2d Ed.] 83), and this tends to show that a species of estate, a property right, was conferred upon the father, as next of kin, by this statute.

A recent case holding that a right of action for death under the statutes of Illinois, which do not appear materially different from our own in this respect, accrues immediately upon death, becomes an asset of the estate of the beneficiary, and survives the death of the beneficiary, is that of *Union Steam Boat Co. v. Chaffin's Adm'rs et al.*, 204 Fed. 412, 122 C. C. A. 598, and in that case the case of *Pitkin v. N. Y. C. & H. R. R. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906, which is to the same effect, is cited and quoted.

In notes to *Gilkeson v. Missouri Pacific Ry. Co.*, 17 Ann. Cas. 763-776, several cases holding that the action does survive, as well as others holding that the action does not survive, are cited and reviewed, and the following excerpt from that note seems worthy of quotation here: "In other of the foregoing decisions adhering to the view that the action survives, the right of the beneficiary in the action has been considered a property right which is survivable, and passes to the representatives upon his death. In such cases this statute creating the cause of action is construed to create a new cause of action in favor of the beneficiaries for the damages sustained by them, and not as continuing the cause of action which the original deceased might have had if he had survived the injury. *Cooper v. Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633; *Meekin v. Brooklyn Heights R. Co.*, 164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635; *Mundt v. Glokner*, 24 App. Div. 110, 48 N. Y. Supp. 940, appeal dismissed 160 N. Y. 571, 55 N. E. 297; *Pitkin v. N. Y. Cent., etc., R. Co.*, 94 App. Div. 31, 87 N. Y. Supp. 906. In *Meekin v. Brooklyn Heights R. Co.* [164 N. Y. 145, 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635], *supra*, the court said: "Thus it appears, both from the statute and the authorities, that the damages awarded for the negligent act are such as result to the

¹ Rehearing pending.

property rights of the person or persons for whose benefit the cause of action was created. Nothing is allowed for a personal injury to the personal representatives or to the beneficiaries; but the allowance is simply for injuries to the estate of the latter caused by the wrongful act. The statute, as it has been held, is not simply remedial, but creates a new cause of action in favor of the personal representatives of the deceased, which is wholly distinct from and not a revivor of the cause of action, which, if he had survived, he would have had for his bodily injury.' In *Cooper v. Shore Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633, the court said: 'The controlling feature in this legislation is that damages are made recoverable for causing death as compensation for the pecuniary injury the designated beneficiaries have sustained by reason of the death. If there be no widow or next of kin at the time of the death of the deceased, the pecuniary injury contemplated by the statute does not exist, and the action cannot be maintained. It is also clear that the pecuniary injury to be compensated for is that of the widow or persons who are next of kin at the time of the death of the deceased, and that the cause of action created by the statute inures to such persons as a vested right. By this statute a property right is created in the beneficiary of such a nature as would give the action the quality of survivorship, and take it out of the maxim, "*actio personallis moritur cum persona*.'" In *Haggerty v. Pittston*, 17 Pa. Super. Ct. 151, an action by a father for the death of his daughter was continued, upon the father's decease, in the name of his administrator; the court considering the value of the life lost as a species of property which vested in the father. In *Thomas v. Maysville Gas Co.*, 112 Ky. 569, 66 S. W. 398, the survival of an action brought by an administrator for the benefit of a sole beneficiary was sustained; the court holding that the action should be continued by the administrator, and the funds, when collected, held for the estate of the beneficiary. The court said: "The fact that the defendant to the action succeeded in defeating a recovery until one or more of the beneficiaries died had no effect upon its liability to the administrator."

But this Kentucky case cannot be regarded as of great weight as authority here, as the Kentucky statutes are materially different from our own.

The New York death statute does not appear unlike our own in any material respect, and in the *Meekin* Case cited, *supra*, it is further said in the opinion: "In *Quin v. Moore*, 15 N. Y. 432, it was held that the interest of the beneficiary was capable of assignment, which is the test of the right to revive. In deciding the case, the court said: 'The interest of Mrs. Kerns was also assignable. In respect to purely personal torts,

it is true that at common law the right of action ceases with the life of the injured party. But in this case, although the tort was personal to the child who died, the statute comes in and declares that a right of action shall survive to the administrator. The theory of the statute is that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account. * * * But the claim of the administrator, and through him of the next of kin, is altogether different. The statute imputes to them a direct pecuniary loss in being deprived of a life to them of greater or less value. * * * The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the Legislature has chosen to regard as a pecuniary right, a right having the essential attributes of property, so that when it is taken away that compensation is due."

The Pennsylvania and New Jersey statutes likewise appear substantially the same as our own in every respect material to this question, and in the New Jersey case cited, *supra*, it is said in the opinion: "The pecuniary injury of the beneficiary begins immediately on the death of the deceased, and is a continuing injury until compensated for in the condition expressed in the act. Suit must be brought within one year after the death of the deceased; but how long the litigation may be protracted is problematical. If the death of the beneficiary before the end of the litigation discharge the liability of the wrongdoer, the legislative purpose that the wrongdoer should make compensation to the beneficiary for the pecuniary injury sustained by him would be defeated. Such a construction would be contrary to the policy of this legislation, and would thrust into the administration of a statutory proceeding, which our courts have declared should be beneficially construed, a technical rule of the common law of harsh injustice. The death of the beneficiary pending suit will have a controlling influence over the quantum of recovery. The personal injury sustained would be limited in duration and extent to his lifetime. But the death of the beneficiary pending suit cannot be made available to abrogate the liability of the wrongdoer incurred for the pecuniary injury already sustained. The right to compensation vested in the beneficiary immediately upon the death of the deceased. By the death of the beneficiary pending suit there was neither an abatement of the action in the common-law sense, nor was the cause of action to be compensated for, satisfied, or discharged. It is contended, however, that,

inasmuch as the statute does not provide for an executor or administrator for the beneficiary in case of his death before the suit is determined, the action, therefore, abates; but no purpose would be accomplished by introducing such a personal representative into the record. The Legislature selected the personal representative of the original deceased as the party by whom the action should be brought, to whom the control of the suit was committed, to conduct it for the benefit of the next of kin."

It follows from what has been said that defendant's contention that the cause of action by the statutes given James Cheek, the father, as next kin of the deceased child, expired upon the death of the said James Cheek about 10 months after the death of the child cannot be sustained, and this action, originally begun by said James Cheek, was, upon his death, properly revived in the name of the mother, Fannie W. Cheek, as administratrix of the estate of James Cheek, upon a stipulation, duly signed and filed, which reads as follows: "It is hereby stipulated and agreed, and consent of the defendant is hereby given, that the above-entitled action may be revived in the name of Fannie W. Cheek, administratrix of the estate of James Cheek, deceased, and that said action may proceed in favor of the said Fannie W. Cheek, as administratrix of the said estate, and it is further agreed that an order to revive the same as above stated may be made by the court, or the judge thereof, on the 24th day of January, 1910, or at any time within five days thereafter, as it may suit the convenience of the court to hear the same."

It is also urged, and we hold, that the trial court erred in so instructing the jury as to allow recovery for the value of the child's services beyond the time of the death of James Cheek, the sole beneficiary under the statute, and in refusing to give the following requested instruction, to wit: "If you find a verdict for the plaintiff under the evidence and instructions, the amount of your verdict should be the actual pecuniary loss which James Cheek, the father of Thompkins Cheek, sustained during his lifetime on account of the death of his son, not exceeding the amount claimed in the petition, \$10,000."

This follows necessarily from the limitations of the right given by section 4313, supra, to the pecuniary loss or damage suffered by the beneficiary, James Cheek, and there are decided cases to this effect. See *Pitkin v. N. Y. C. R. R. Co.*, supra; *Cooper v. Shore Electric Co.*, supra.

This case should be reversed and remanded for proceedings in accord with the views herein expressed.

PER CURIAM. Adopted in whole.

PRICE v. STATE.

(Criminal Court of Oklahoma. Jan. 10, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 1130*)—BRIEFS—SUFFICIENCY.

It is an abuse of the privilege of filing typewritten briefs for counsel to use paper which is so thin that what is written thereon can only be read with difficulty. Typewritten briefs should be upon paper of standard weight, and the work should be so executed as to be legible. [Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2956, 2965-2970, 3205; Dec. Dig. § 1130.*]

2. EMBEZZLEMENT (§ 2*)—STATUTORY PROVISIONS—ATTORNEYS.

Section 271, Snyder's Compiled Laws 1909, is not, and never was, a part of the Penal Code of Oklahoma, and is applicable only in disbarment proceedings against attorneys.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. CRIMINAL LAW (§ 699*)—TRIAL—CONDUCT OF COUNSEL—DILATORY MATTERS.

The constant presentation and discussion of questions of law which have no application to a case, the making of dilatory pleas, and objecting and excepting to everything done in the trial of a cause, without reference to the substantial merits of a case, is a practice which should not be encouraged or tolerated by the courts.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1655, 1656; Dec. Dig. § 699.*]

4. EMBEZZLEMENT (§ 17*) — PROSECUTION OF ATTORNEY—DEFENSE.

Where a lawyer from another state moves into Oklahoma, and, without securing admission to the bar of this state, holds himself out to the public as a lawyer, and accepts business as such, and embezzles money collected by him as a lawyer, he cannot escape punishment upon the ground that he was never legally admitted to the bar of Oklahoma.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 19; Dec. Dig. § 17.*]

5. EMBEZZLEMENT (§ 44*) — PROSECUTION OF ATTORNEY—SUFFICIENCY OF EVIDENCE.

For testimony which conclusively establishes the guilt of defendant, see opinion.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 87-70; Dec. Dig. § 44.*]

Appeal from District Court, Blaine County; James R. Tolbert, Judge.

J. H. Price was convicted of embezzlement, and appeals. Affirmed.

The information in this case is as follows:

"In the Name and by the Authority of the State of Oklahoma.

"Now comes A. L. Emery, county attorney in and for the state and county aforesaid, and gives the court to know and be informed that one J. H. Price, late of the county of Blaine and state of Oklahoma, on the ——— day of January, in the year of our Lord one thousand nine hundred and ten, at and within the said county and state, was then and there an attorney at law, engaged in the practice of the law, and as such attorney at law, in the course of his professional busi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ness, the Grennell Vehicle Co. intrusted, employed, and delivered to the said J. H. Price the possession of a certain promissory note and claim, which said promissory note and claim the said Grennell Vehicle Co. was then and there the owner, in favor of the said Grennell Vehicle Co. and against one J. F. Winter and one Kate Winter, who were the makers of the said promissory note for the sum of \$123.60, and interest thereon at the rate of ten per cent. from date until paid, amounting in all to the sum of \$130.55, for the purpose of collecting the said sum of \$130.55 from the said J. F. Winter and from the said Kate Winter for the said Grennell Vehicle Co., and he, the said J. H. Price, as such attorney at law, and in furtherance of his employment in the course of his professional business as such attorney at law by the said Grennell Vehicle Co., did, on August 29, 1910, collect from the said J. F. Winter and from the said Kate Winter, as part payment on said promissory note, the sum of \$125.00 for the said Grennell Vehicle Co., and he, the said J. H. Price, on the 25th day of November, in the year of our Lord 1910, did then and there unlawfully, willfully, intentionally, knowingly, wantonly, maliciously, and feloniously, and fraudulently refused to pay over to the Grennell Vehicle Co. the said sum of \$125.00 upon the demand made upon him, the said J. H. Price, by said Grennell Vehicle Co., and he, the said J. H. Price, did then and there unlawfully, willfully, intentionally, knowingly, wantonly, maliciously, and feloniously, and fraudulently appropriate and embezzle the said sum of \$125.00, the property of and owned by the said Grennell Vehicle Co., and intrusted to him, the said J. H. Price, by the said Grennell Vehicle Co., as aforesaid, to his, the said J. H. Price's, own use and benefit, with the unlawful, willful, felonious, and fraudulent intent then and there on the part of him the said J. H. Price to deprive the said Grennell Vehicle Co. thereof as aforesaid, and he, the said J. H. Price, did not then and there, or at any time, claim any fees out of the said sum of \$125.00 contrary to the form of the statute in such case made and provided and against the peace and dignity of the state.

"A. L. Emery, County Attorney.

"Witnesses indorsed: Frank W. Ferguson. August Dobrinski. O. G. Graalman. R. J. Smith. J. F. Winter. Kate Winter. E. J. Warner. A. La Rue."

Filed as follows:

"Filed Aug. 25, 1911. E. J. Warner, Clerk, by Wm. B. Halbig, Deputy.

"Filed Sept. 5, 1911. E. J. Warner, Clerk."

Frank W. Ferguson testified for the state: That he was the collector of the Grennell Vehicle Company, of Grennell, Iowa, and that it was his business to look after past due notes and renewals of the same. That on the 20th day of January, 1910, as such collector, he had in his possession for collection

two notes payable to said company, and signed by J. F. Winter and Kate Winter. That on said date witness was introduced to appellant in Okeene as a lawyer, and as a lawyer appellant agreed to accept the said notes, and have them renewed and secured by a mortgage. In conformity with such employment, said J. F. Winter did execute a note in the sum of \$114, secured by a mortgage on land in Kansas. That witness paid appellant \$10 for his legal services in the matter. Witness received a note of \$114.30, given by Winter, as renewal on the other notes. That afterwards some trouble arose about the land in Kansas, as the records there showed that it was not the property of Winter, and on the 17th day of March, 1910, witness returned the note to Price to have the matter fixed up. That a new note was executed in the sum of \$123.63, a part of which was for the payment of the services of appellant which was advanced and paid by witness. That this new note was delivered to the witness, and that subsequent to that time, in August, 1910, it was returned to Price for collection. That on the 15th day of August, 1910, witness and appellant went out with a team to see Mr. Winter about collecting the note, and saw Winter at his threshing machine. Winter offered to give an order on Mr. Dobrinski for \$140.55 for the amount of the note, and interest, and a fee of \$10 to pay Price for going out there, provided that Dobrinski would accept the order for threshing which was yet to be done by Winter. That appellant and Winter went to see Dobrinski, and came back with an order for \$125 on Dobrinski, signed by J. F. Winter, which was accepted by Dobrinski. Winter paid Price \$2 out of his own pocket, and it was agreed that Price and Winter should adjust the attorney's fee between themselves. Witness then accepted and took possession of the order, and witness and appellant returned to town. After they returned to town, witness delivered the order to Price for collection, and in November, 1910, witness learned for the first time that Price had collected this order; but Price claimed to witness that the money was tied up. That on November 14, 1910, witness went to see Price about this matter, and Price told witness that the money was tied up, and did not say anything about having collected it, but told witness that, if he would wait until the next morning at 9 o'clock, he (Price) would pay him the money.

The following letter written by appellant was offered in evidence: "Okeene, Oklahoma, Sept. 23, 1910. F. W. Ferguson, Clinton, Okla.—Dear Sir: I got you letter yesterday. I kept after those fellows out there till I got Dobrinski's check for \$125.00, and Jake promises to pay the rest in a few days. I want you to let this stand as it is for a few days, so I can use it as a leverage on Jake to make him come through. He is afraid of you, and I don't want to stand loser, if I

can help it. Let me hear from you. Yours truly, J. H. Price."

August Dobrinski testified for the state: That he was a farmer, and was acquainted with J. F. Winter and appellant. That during threshing time in 1910 witness had an agreement with Winter to do his threshing for him. That Winter and appellant came to see witness, and at their request witness accepted an order for \$125. Something was stated at the time about Ferguson. Mr. Winter said to Price, "Suppose Ferguson gets after me?" Price replied, "Do not mind Ferguson; I will keep him off your back." As soon as the threshing was over, witness deposited the money in the bank, and told Price the same day to present his order, and get the money. This was on the 25th day of August, 1910.

O. G. Graalman testified that he was cashier of the Citizens' State Bank at Okeene in 1910; that he was acquainted with appellant, J. F. Winter, and A. Dobrinski. He identified the check of A. Dobrinski given to appellant on the 25th day of August, 1910, in the sum of \$125, which was indorsed by appellant, and the said money was placed to the credit of his personal checking account.

E. J. Warner testified that he was clerk of the court of Blaine county, and said witness introduced in court, as exhibits, pleadings filed in the district court of Blaine county, signed by appellant as attorney.

A. La Rue testified that he was justice of the peace of Blaine county; that he was acquainted with appellant; that beginning in November, 1909, appellant filed a number of suits before witness as an attorney.

The state offered in evidence the record of said justice of the peace, and from it it appears that appellant had filed a number of suits in the justice court of Blaine county as an attorney. The state then rested.

Appellant testified in his own behalf: That he resided in Okeene, Okla. That his business was collecting and practicing law where they would let him; but that he had never been admitted to practice law in Oklahoma. In January, 1910, witness Ferguson spoke to appellant about bringing suit on certain notes against J. F. Winter, and witness told him that he would charge him \$15 to do so. That Ferguson replied that, if appellant was a good lawyer, he would pay it. The witness then testified at length as to the circumstances under which the mortgage was obtained from Winter, and that the mortgage and new note were delivered to Ferguson; that subsequently the mortgage and note were returned to witness, and that witness and Ferguson went out to see Winter about the matter, and that, after they reached Winter's, witness had a private conversation with Winter, and went with Winter to see Dobrinski, and secured from said Dobrinski the order offered in evidence; and that said order was to be applied to the payment of claims which were

held by witness on behalf of other parties. Appellant denied ever having turned the order over to Ferguson; that, after Ferguson and appellant returned to Okeene, Ferguson delivered the mortgage and note, which he held, to witness for collection. Witness denied positively that he had ever collected any money for the Grennell Vehicle Company.

Appellant offered in evidence the deposition of J. F. Winter taken at Harrington, Kan. He testified that during the months of July and August, 1910, he gave appellant an order on A. Dobrinski for the sum of \$125. The said order was for his indebtedness to Smidt & Co., and Ed Hockaday & Co., and said order was not for the benefit of the Grennell Vehicle Company. Witness was asked the question as to whether or not he was acquainted with Mr. Randolph, an attorney of Okeene, and witness denied having stated to said attorney that the \$125 order from Dobrinski was to be paid to the Grennell Vehicle Company.

Defendant rested.

Mrs. Charles Wilson testified for the state in rebuttal that she heard appellant say to her husband that he (appellant) had been arrested, and had been unable to sleep for two weeks; that he was going to Harrington, Kan., where he could buy any kind of evidence that he wanted. He said that he would take the deposition of the witness there. At this time Price was attorney for her husband, and had been paid \$50 to defend him on the charge of rape.

E. S. Randolph testified that he was an attorney residing at Okeene; that he was acquainted with J. F. Winter; that J. F. Winter had told witness that he had been given an order by August Dobrinski to pay the note due the Grennell Vehicle Company.

The state proved by a number of witnesses that the general reputation of J. F. Winter for truth and veracity was bad in the community in which he resided.

Appellant was convicted of embezzlement, and appeals. Affirmed.

William O. Woolman, of Watonga, for appellant. Smith O. Matson, Asst. Atty. Gen., for the State.

FURMAN, J. (after stating the facts as above). [1] First. This court permits typewritten briefs to be filed; but, when this is done, they should be executed in such a manner as to be legible. It is a violation of the rules of this court to file briefs typewritten upon paper which is so thin as to make what is written thereon scarcely legible. In such briefs paper of standard weight should be used, and the work should be so executed as to be legible. In this cause a typewritten brief of 58 pages was filed, which could only be read with great difficulty, and the court was compelled to waste much valuable time and labor in trying to find out what counsel

for appellant was driving at. We have frequently had occasion to condemn the practice of filing such briefs, and trust that we will not find it necessary to do so in the future. If this admonition is not heeded, we will be compelled to strike such briefs from the record.

[2] Second. As we gather from the brief of counsel for appellant, the contention is that the information in this cause should have been based upon section 271, Snyder's Compiled Laws 1909, which is as follows: "An attorney who receives money or property of his client's and in the course of his professional employment or business, and falls for a period of thirty days after receiving the same to notify his client, and on demand to pay over to his client all of said money or property in excess of his agreed fee, if there be an agreed fee, and if not then in excess of a reasonable fee, shall be guilty of embezzlement and shall be disbarred, and may be disbarred without being prosecuted for embezzlement. An attorney who, at or before the time of the passage of this act, shall have collected money for a client and does not report and pay over the same to his client within thirty days after the passage of this act, shall be disbarred. If the property in any event is held for more than thirty days on the written order of the client, or if delivery is prevented by any cause (other than by the use of the property by the attorney) wholly beyond the control of the attorney, then he shall not be guilty of embezzlement nor be disbarred, but the burden shall be on the attorney to prove the cause of the delay."

The trial of the case was conducted, and appellant was convicted, under section 2673, Revised Laws, which is as follows: "If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator or collector, or being otherwise entrusted with or having in his control property for the use of any other person, or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement."

The information could not have been founded upon section 271, as contended for by counsel for appellant, because said section is not, and never was, a part of the Penal Code of Oklahoma, and therefore could not be the basis of a criminal prosecution. It was a part of the civil law of Oklahoma regulating the conduct of attorneys, and applied to disbarment proceedings. This disposes of a great deal that is said by counsel for appellant which it is unnecessary to discuss here. The information in this case was properly based upon section 2673, Revised Laws, and the proceedings were properly conducted according to this section.

[3] Third. When the first witness for the state was placed upon the stand, counsel for appellant interposed the following objections to the introduction of any testimony in the cause:

"Mr. Woolman: Defendant objects to the introduction of any evidence on behalf of the state in this case, for the reason that the information does not state facts sufficient to constitute a crime under the laws of the state of Oklahoma.

"The Court: Overruled.

"Mr. Woolman excepts.

"Mr. Woolman: For the further reason that there was no preliminary examination had in this case prior to the commencement of the action in the district court, as is shown by the record and proceedings had on the motion heretofore had in this cause.

"The Court: Overruled.

"Mr. Woolman excepts.

"Mr. Woolman: For the further reason that this cause was not brought on trial within—at the second term succeeding the time of the filing of the original information in this court, as shown by the proceedings had herein prior to the commencement of the trial.

"The Court: Overruled."

The information follows the language of the statute, and is sufficient as against the objection made. The objection that there had been no preliminary examination prior to the filing of the information in the district court cannot be presented in this manner, and is otherwise insufficient, because the record affirmatively shows that such a preliminary examination did take place. The objection that the case was not tried within the second term of the court after the information was filed, in the absence of a showing that appellant was ready for trial, and demanded a hearing, and objected to the continuance of the cause, cannot be considered. See *Head v. State*, 9 Okl. Cr. 356, 131 Pac. 937; *Parker v. State*, 7 Okl. Cr. 238, 122 Pac. 1116, 124 Pac. 80; *Bowes v. State*, 7 Okl. Cr. 316, 126 Pac. 580.

The record in this case contains nearly 400 pages, and from beginning to end is full of such objections and exceptions as above stated. The constant presentation and discussion of questions of law which have no application to the case, making dilatory pleas, and objecting and excepting to everything done in the trial of the cause, without reference to the substantial merits of the case, cannot do otherwise than weaken the defense. It makes the impression upon the minds both of the jury and of the court that the defendant is guilty, and is relying solely upon the technical skill of his counsel to secure an acquittal. It also unnecessarily consumes a great deal of time which should be devoted to the consideration of the actual merits of the cause, or in the trial of other cases. It delays the administration of justice, incumbers the record, and adds greatly to the cost of criminal trials, and thereby

entails an unjust burden on the state, and no good purpose whatever can be subserved by pursuing such a course, and it should not be encouraged by the courts.

[4] Fourth. At great length counsel for appellant argues that this conviction cannot be sustained, because the record shows that appellant was never legally admitted to the practice of law in the state of Oklahoma. The record does show, however, that appellant was legally admitted to practice law in the state of Illinois, and as a matter of fact he held himself out to the public as a lawyer, and did practice law in Blaine county, Okl.; that he appeared as an attorney in a number of cases; and that he accepted employment and received pay in this case as an attorney. It is true that such conduct was illegal; but the commission of one crime can never be pleaded as an atonement for the commission of another crime. In ancient days under the common law the members of the clergy were not subjected to capital punishment; the presumption being that, on account of their supposed exceeding goodness, there must be some mistake, and they would not have willfully violated the law. Counsel for appellant seeks to reverse this rule, and claims that, on account of his exceeding badness, appellant should not be punished. The very question here presented is identical in principle with the question presented in the case of *Ellington v. State*, 7 Okl. Cr. 252, 123 Pac. 186. It was there held: "Where a guardian is charged with embezzlement of the trust funds of his ward, he cannot be heard to say that such funds were unlawfully acquired by him as such guardian. If he was agent enough to collect the money, he was agent enough to be punished for its embezzlement."

In this case, if Price was attorney enough to accept employment to collect this money, he is attorney enough to be punished for embezzling it.

Bishop, in his work on Criminal Law (3d Ed.) § 367, says: "In reason, whenever a man claims to be a servant while getting into his possession, by force of his claim, the property to be embezzled, he should be held to be such on his trial for the embezzlement. Why should not the rule of estoppel known throughout the entire civil department of our jurisprudence apply in the criminal?"

The lawyers of Oklahoma can rely with confidence upon the support and protection of this court whenever their conduct is professional; but we are not going to stretch the law to screen and protect any lawyer who has been guilty of dishonorable practices. Leniency on the part of the courts and of the members of the bar towards such conduct has done more than any one cause to discredit the profession in the eyes of honest people. The time has come when the members of the bar and courts should act in such matters without fear, favor, or affection, and with a strong hand purge the

profession of all unworthy characters. Practicing law is a necessary and honorable profession, and it should be confined to honest men. Lawyers should be held to the strictest accountability. Their opportunity for wrongdoing is great, and the public and the profession should be protected from the illegal acts of dishonest lawyers.

[5] Fifth. The testimony of the state's witness Ferguson that the Dobrinski order was placed by him in the hands of appellant for collection, to be applied to the debt due the Grennell Vehicle Company, is fully corroborated and sustained by a letter written by appellant on September 23, 1910. This letter is an admission of all the state contends for on this point. Out of the appellant's own mouth he stands condemned. It is true that in Winter's deposition said witness denied that the Dobrinski order was given for this purpose; but the testimony of E. S. Randolph, who, so far as this record goes, appears to be entirely credible, shows that Winter had told said witness that the Dobrinski order was for the purpose of paying the note due the Grennell Vehicle Company. It was also proved by a number of witnesses that the general reputation of Winter for truth and veracity in the community in which he resided was bad. It was also shown that appellant, before taking the testimony of the said Winter, had stated that he was going to purchase his testimony, and that he could buy any kind of evidence he wanted. There is not one line of credible evidence in this record which would indicate good faith on the part of appellant. All of the testimony points to his guilt as conclusively as the spokes of a wheel point to the hub as a common center.

Counsel for appellant has presented 14 specifications of error. We have considered each and every one of them in connection with the record, and find that they are each and all without substantial merit. Not one of them presents even a debatable question. The plain and simple truth is that, according to this record, appellant is guilty, and it would be a miscarriage of justice to set aside this verdict and judgment on the grounds relied upon.

Judgment of the lower court is therefore in all things affirmed.

ARMSTRONG, P. J., and DOYLE, J., concur.

JONES et al. v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 17, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—EVIDENCE.

Where there is a direct contradiction between the testimony of the prosecuting witness and that of the defendant, it is for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury to determine which is worthy of belief, and their determination ordinarily will be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from County Court, Tulsa County; N. J. Gubser, Judge.

L. Jones and another were convicted of violating the prohibition law, and appeal. Affirmed.

George T. Brown and Luther James, both of Tulsa, for plaintiffs in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

DOYLE, J. Plaintiffs in error were tried and convicted upon an information which charged that on the 22d day of December, 1911, Roy Mitchell and L. Jones did unlawfully sell one-half pint of whisky to one I. F. Harmon. In accordance with the verdict of the jury on November 25, 1912, they were sentenced each to pay a fine of \$50 and to be confined in the county jail for 30 days.

The evidence on the part of the state shows that I. F. Harmon, on the date alleged in the information, went into the Owl Drug Store in the city of Tulsa, and went into the back part of the drug store behind some curtains. The defendant Roy Mitchell, a colored boy, was there, and Harmon asked him if he had any whisky. The negro boy poured out a drink, which Harmon drank. He then told the negro boy he wanted to purchase one-half pint, and the negro boy gave him one-half pint of whisky, telling him to pay at the front. Harmon went to the front of the store, and paid the defendant L. Jones 75 cents for the half pint. The negro boy, as Harmon went to the front, told Jones to collect the money for the whisky, and Jones did so. Other evidence on behalf of the state was to the effect that L. Jones and Roy Mitchell, defendants, were at this drug store and were arrested there that day.

L. Jones, as a witness in his behalf, stated that he was a registered pharmacist, that he worked at the Owl Drug Store, but denied that he sold or received any money for whisky from the witness Harmon, and that he did not know that any whisky was being sold in that drug store, and that he was not in the drug store at the time stated by Harmon. Abe Baker testified that L. Jones was not at the drug store at the time the witness Harmon claimed to have bought the whisky there.

Complaint is made that the jury in said case was improperly impaneled, to the prejudice of the defendants, because of certain questions asked a juror on his voir dire by the court and his answers thereto, for which he was excused. The defendants did not object or except to the examination at the time, therefore there is nothing before this

court for review. However, we will say that the complaint is without merit.

It is also contended that the evidence is insufficient to sustain the verdict. The jury had the witnesses before them, and could see their manner of testifying, and they no doubt, in determining the truth, took into consideration all the attending circumstances of the case. Where there is a direct contradiction between the testimony of the prosecuting witnesses and that of the defendant, it is for the jury to determine which is worthy of belief. There appears in the record no error prejudicial to the substantial rights of the defendants.

The judgment of conviction is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

BOGARD v. KENNEDY et al.

(Supreme Court of Oregon. Jan. 6, 1914.)

ACCOUNT (§ 17*)—SCOPE OF RELIEF.

In a contract for an accounting, under a contract for the release of a mortgage of defendant's brother in consideration of the payment to plaintiff of proceeds of sales of lands purchased with funds advanced by defendant after repayment of the advances, where the complaint does not allege that sales were made in fraud of the agreement, or for less than the minimum price named in the agreement, the plaintiff cannot require an accounting for the land at a value greater than the price actually received by defendant.

[Ed. Note.—For other cases, see Account, Cent. Dig. §§ 77-82, 84-88; Dec. Dig. § 17.*]

Department 2. Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Z. T. Bogard against Thomas N. Kennedy and others. From a decree for defendants, plaintiff appeals. Modified.

On September 25, 1907, defendant Thomas N. Kennedy was indebted to the plaintiff in the sum of \$4,777.76, for which amount he executed his promissory note to plaintiff, due three years after date, and secured the payment thereof by a mortgage on 80 acres of timber land in Tillamook county, conceded to be of the value of about \$1,000. The note was not paid at maturity, and on the 6th day of March, 1911, Thomas N. Kennedy being unable to pay plaintiff the amount of said indebtedness, his brother, J. B. Kennedy, by an agreement with Thomas N. Kennedy and the plaintiff, undertook to assist Thomas N. Kennedy to pay the plaintiff, and proposed to plaintiff that 81 acres of land near Woodburn, known as the "Hunt Brothers' Farm," could be purchased, that J. B. Kennedy would advance a sufficient amount of cash to purchase it, and that they would have it surveyed and divided into suitable tracts and placed on the market in the hands of one Ackley, a real estate dealer of Portland, at prices ranging from \$100 to \$225 per acre; the contract

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

being reduced to writing in the following language: "This agreement made and entered into this 6th day of March, 1911, by and between J. B. Kennedy, party of the first part, and Z. T. Bogard, party of the second part, witnesseth: That the party of the first part, for and in consideration of the sum of one dollar to him in hand paid, and the covenants and agreements hereinafter mentioned to be kept and performed by the party of the second part, hereby agrees to have the tract of land known as 'Hunt Brothers' Farm,' in sec. 1, T. 5 & 6 S. R. 2 W., consisting of 81 acres of land more or less, surveyed into convenient tracts to list said property with Ralph Ackley, a real estate agent of Portland, Oregon, to be sold by him in said tracts at a sum not less than \$100.00 per acre and up to \$225.00 per acre. And in consideration of the covenants hereinafter mentioned to be kept and performed by the party of the second part, the party of the first part agrees to divide the proceeds of the sale of the said tract as follows, to wit: 1st. To pay to said Ralph Ackley 10 per cent commission on all sales made. 2nd. To retain out of the said sales the balance arising from said sales until he has received the full sum of \$7,350.00. 3rd. To pay to the party of the second part, said Z. T. Bogard, all sums in excess of the said sums above mentioned until the said Z. T. Bogard has received the full sum of \$6,000.00. 4th. To pay to one T. N. Kennedy all amounts received over and above the sums above mentioned. And the party of the second part agrees to release a certain mortgage for the sum of \$4,600.00 which he now holds against T. N. Kennedy and wife on the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 8, T. 3 N. R. 10 W. of the Will. Mer. in Tillamook county, Oregon, to accept this agreement in full satisfaction of all sums due on said mortgage and the note secured thereby, and to pay over to the said J. B. Kennedy an amount equal to the difference between the principal of the said note with accrued interest to date and the sum of \$6,000.00. And to perform all of the agreements on his part to be performed immediately upon the execution of this agreement by the said party of the first part. In witness whereof, the said parties have hereunto set their hands and seals this 6th day of March, 1911. J. B. Kennedy [Seal.] Z. T. Bogard [Seal.] Done in presence of T. N. Kennedy." The complaint alleges that J. B. Kennedy has sold parts of said tract and collected thereon the sum of \$10,000; and, as trustee refuses to account to plaintiff in any sum whatever, the complaint asks for a reformation of the contract and for an accounting thereon as so reformed. The plaintiff now waives the prayer for a reformation of the contract, and asks that an accounting be had according to the terms of the contract. Prior to the commencement of this suit Thomas N. Kennedy had commenced a suit in Tillamook county to require Bogard,

this plaintiff, to specifically perform the contract herein set out by canceling the mortgage on the Tillamook county land. Upon the trial of this suit the Tillamook county suit was consolidated herewith, and the circuit court decreed that plaintiff's suit be dismissed, and that plaintiff execute to T. N. Kennedy a release of the mortgage on the Tillamook county land. The plaintiff appeals.

H. Overton, of Woodburn, and Frank Holmes, of Salem, for appellant. Thomas Brown, of Salem (Carson & Brown, of Salem, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). The contract seems to assume that the Hunt Brothers' farm had already been purchased and the title taken in the name of J. B. Kennedy. It provides the manner of the division of the proceeds of sales thereof in the following manner, namely: (1) To Ackley, his commissions; (2) to J. B. Kennedy, \$7,530; (3) to Z. T. Bogard, all sums in excess of the above-mentioned amounts up to \$6,000; and (4) the balance if any to T. N. Kennedy. The contract does not specify the amount for which the land is to be sold, naming only the lowest price per acre and the highest. It specifies that Bogard agrees to accept this contract in full satisfaction of the note and mortgage of T. N. Kennedy to him, so that when the contract was signed, the debt of T. N. Kennedy was paid, and the mortgage should have been forthwith canceled. By the contract Bogard was to take the chance of the Hunt land bringing money enough to pay J. B. Kennedy the money he advanced and sufficient over to pay him the \$6,000. He says in his evidence that he thought he would get back part of the debt T. N. Kennedy owed him. The contract is not ambiguous, and needs no construction.

Plaintiff further contends that defendant J. B. Kennedy should account to him for the land at some value greater than what was actually received by him, but there is no charge in the complaint that the sales were made in fraud of the agreement or for less than \$100 per acre—only that defendant had sold and collected thereon to the amount of the \$10,000, and asking for an accounting—so that all plaintiff can claim now is an accounting for the proceeds of sales actually made. Messrs. Carson & Brown wrote to plaintiff on the 20th day of June, 1911, calling attention to the fact that the land could not be sold at the price advertised, as the market had gone down, and asking plaintiff for suggestions, or to furnish a buyer who would pay a better price than was available to defendant. The evidence shows that the tracts could not be sold at the prices placed on them because there was no demand therefor. Plaintiff did not reply to the above-mentioned letter. The condition of the account is as follows: Amount received as the proceeds from sales of the tracts, \$8,862, which in-

cludes deferred payments on sales and contracts made to J. B. Kennedy. From this must be deducted under the contract Ackley's commissions, \$886. The amount due J. B. Kennedy by the contract is \$7,530. In this statement J. B. Kennedy is given credit for the amount of the mortgage upon the Hunt Brothers' land, which he assumed, although about \$1,500 thereof has not yet been paid, being included in the \$7,530 credited to J. B. Kennedy. Thus J. B. Kennedy has on hand, over and above what is due him and Ackley, \$446 and 13 acres of the tract yet unsold.

Therefore the decree of the trial court will be modified, and a decree entered here requiring plaintiff, within 30 days, to cancel and release the mortgage on the land in Tillamook county, executed by J. N. Kennedy and wife to the plaintiff on the 25th day of September, 1907, covering the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 8, township 3 north, range 10 west, Willamette Meridian; and, in case plaintiff neglects so to do within the said 30 days, the decree in this case shall operate as and stand for a release and satisfaction of said mortgage; that plaintiff have judgment against the defendant J. B. Kennedy in the sum of \$446, now due on this accounting, without prejudice to such suit or action as may hereafter be found necessary in this transaction. Neither party shall recover costs.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

HUNTER v. CLARK & HENERY CONST. CO. et al†

(Supreme Court of Oregon. Jan. 6, 1914.)

1. MUNICIPAL CORPORATIONS (§ 696*) — STREETS—REMOVAL OF OBSTRUCTIONS.

A city improving a street has the right to summarily remove as obstructions constituting per se a public nuisance a storehouse located thereon and an oil tank imbedded under its surface.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1496, 1498-1501; Dec. Dig. § 696.*]

2. MUNICIPAL CORPORATIONS (§ 1028*)—INTERVENTION—NATURE OF RIGHT.

Under L. O. L. § 41, authorizing the court to bring in new parties when their presence is necessary to a complete determination of the controversy, where suit is brought against a municipal contractor to enjoin a trespass on plaintiff's land, the city is properly allowed to intervene to assert its right to the land as a street and to defend the acts of the contractor and city officers in removing obstructions therefrom.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 1028;* *Parties*, Cent. Dig. § 47.]

Department 2. Appeal from Circuit Court, Douglas County; J. W. Hamilton, Judge.

Suit by John Hunter against the Clark & Henery Construction Company and others.

From a decree dismissing the suit, plaintiff appeals. Affirmed.

B. L. Eddy, of Roseburg, for appellant. A. N. Orcutt, of Roseburg, for respondents Clark & Henery Const. Co. and others. Carl E. Wimberly, of Roseburg (E. B. Hermann, of Roseburg, on the brief), for respondent City of Roseburg.

McNARY, J. This is a suit to enjoin a trespass upon real property. On the 7th day of August, 1912, plaintiff filed in the circuit court of Douglas county a complaint which, after reciting the incorporation of the Clark & Henery Construction Company, averred: That plaintiff is the owner in fee simple and in possession of a tract of land in Railroad addition to the city of Roseburg; that for many years he had maintained upon the premises a storehouse of the value of \$100, and had embedded in the soil an oil tank of the value of \$500; that defendants, without the consent of plaintiff and against his will, forcibly entered upon the premises, tore down and carried away the storehouse, and threatened to remove the cement oil tank and to plow and remove a large part of the soil from the premises and to occupy the property in such a manner as permanently to exclude plaintiff from the use and enjoyment of the same. The pleading ends by a demand for \$100 damages and a prayer for a decree perpetually restraining defendants from molesting the premises. The Clark & Henery Construction Company appeared by answer, and, after admitting its incorporation and that the defendants Edward Fitzgerald and J. W. House were its employes, denied generally the declarations in the complaint, and set forth as a separate defense each step in the proceedings taken by the common council, with respect to the pavement of Sheridan street and the letting of the contract to the construction company, which, pursuant to the contract, entered upon the street and proceeded to clear it of obstructions and to improve the street agreeably to the provisions of the contract had with the city. Lastly, it is alleged that "the real property described in plaintiff's complaint is included within the limits of said Sheridan street." Plaintiff questioned the sufficiency of the answer by a demurrer which was by the court overruled. Following, the city of Roseburg made application to intervene and tendered therewith an answer in which it alleged that the premises claimed by plaintiff was formerly the property of Aaron Rose, who platted Railroad addition to Roseburg and dedicated Sheridan street, which thoroughfare included the land in controversy. In addition to alleging fully the proceedings taken by the council concerning the paving of the street and the letting of the contract therefor, the answer recites that "on the 5th day of Jan-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied January 27, 1914.

uary, 1911, the marshal of the city of Roseburg for and on behalf of said city duly served written notice upon plaintiff to remove from Sheridan street the storehouse and oil tank described in plaintiff's complaint which were maintained thereon by plaintiff, but that plaintiff refused and neglected so to do." As a concluding statement, it is alleged that, pursuant to the contract and under the direction of the city engineer and street committee of the common council of the city, the construction company and its employes entered upon the street and proceeded to clear all obstructions therefrom and improve the street as provided by the contract. Plaintiff demurred to the application of the city to intervene and to the accompanying answer, which demurrers were overruled, and the city granted permission to intervene. Plaintiff refusing to plead further, the court entered a decree dismissing the suit, whereupon this appeal was taken.

From the perspective of the counsel for plaintiff, the overtowering question is whether a municipal corporation claiming part of a street in the possession of another who claims to own the land in fee simple, can settle the controversy by simply letting a contract to pave the street and thus indirectly authorize forcible entry upon the land, and destruction of buildings, as alleged obstructions to the street.

[1] The position taken by counsel does not accurately represent the situation as revealed by the record, as no thought on this appeal can be given to the claim that plaintiff has a right of property to the land in dispute, for by his demurrer plaintiff admits that the premises are an integral part of Sheridan street; that the buildings thereon and the tank embedded therein are obstructions to the street; that the thoroughfare was being improved conformably to the charter proceedings applicable thereto; that the Clark & Henery Construction Company had the contract for the improvement; and that the marshal of the city pursuant to authoritative direction seasonably notified plaintiff to remove the obstructions from the street; and that plaintiff refused so to do.

Under this state of the record, did the defendants arbitrarily invade any right guaranteed by law to plaintiff? We think not. Having confessed, for the purposes of this appeal, that he is maintaining obstructions in a city street, plaintiff is not in a position to dictate the method by which these obstructions should be removed. As a governmental agency, the municipality has undoubted rights, through its common council, to remove summarily any permanent obstructions that may be placed in the street, as such obstructions constitute per se a public nuisance. *Savage v. City of Salem*, 23 Or. 381, 31 Pac. 832, 24 L. R. A. 787, 37 Am. St. Rep. 688;

Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. Rep. 898; *Robins v. McGehee*, 127 Ga. 431, 56 S. E. 461.

After a careful consideration of the allegations contained in the answers to plaintiff's complaint, we are forced to conclude that the authorities of the city of Roseburg were justified in abating an admitted nuisance in the manner outlined in the pleadings, as it is not only the right, but the duty of the officers of a municipality to remove all unauthorized obstructions from its thoroughfares.

[2] The other question presented involves the right of the defendant the city of Roseburg to intervene. Section 41, L. O. L., reads: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." This case primarily and finally concerned the city of Roseburg, and it was eminently proper for the city of Roseburg to intervene and for the lower court to grant permission therefor. The suit, when instituted, omitted the city as a party defendant, and for that reason a complete determination of the controversy could not be had, as the construction company was acting under the advice of and pursuant to the voice of the city.

There was no error in overruling the demurrer, and the order therefore must be affirmed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

GOODEVE v. THOMPSON.

(Supreme Court of Oregon. Jan. 6, 1914.)

1. APPEAL AND ERROR (§ 832*)—REHEARING—QUESTIONS REVIEWABLE.

Where error is assigned on the denial of a motion for new trial, and was the main reliance of the appellant, and the respondent on the original hearing failed to raise the point that the order denying a new trial could not be reviewed on an appeal from the judgment, the question cannot be raised on petition for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3215-3228; Dec. Dig. § 332.*]

2. APPEAL AND ERROR (§ 978*)—GROUNDS—MISCONDUCT OF OR AFFRONTING JURY.

Where the trial court finds that conduct of plaintiff and a juror in conversing with reference to the case was improper, an order denying a new trial will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

On petition for rehearing.

For former opinion, see 136 Pac. 670. Petition denied.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

EAKIN, J. Two points are strenuously urged for a rehearing or affirmance of the judgment: (1) That the order denying the motion for a new trial cannot be reviewed by the Supreme Court unless such order is appealed from; (2) that the denial of the motion for a new trial was in the discretion of the trial court, and that this court cannot review it except for abuse of discretion. And also that the decision assumes that the verdict for \$50,000 is excessive, and that the court reverses the case for that reason.

[1] As to the first point, the purpose of the amendment of section 548, L. O. L., by the act of 1907 (L. 1907, p. 313), declaring that an order setting aside a verdict and granting a new trial for the purpose of an appeal should be deemed a judgment, was that the validity of the order may be tested before incurring the expense of the new trial. By this amendment, sections 174, 175, L. O. L., relating to a motion for a new trial, were also amended to make the procedure conform to the amendment of section 201, which requires the judgment to be entered the same day the verdict is returned. *Oldland v. Oregon Coal & Nav. Co.*, 55 Or. 343, 99 Pac. 423, 102 Pac. 596. The denial of such motion was not declared by that act to be a final judgment, and therefore is not appealable independently of the judgment sought to be set aside, as held in *Macartney v. Shipherd*, 60 Or. 136, 117 Pac. 814, Ann. Cas. 1913D, 1257. Prior to the amendment of the statute the order denying the motion for a new trial, as well as the one allowing it, was reviewable as an intermediate order on appeal from the judgment, and the amendment certainly was not intended to deprive the movent of the right of review in the appellate court, or to affect the practice on motions for new trials other than to give an appeal from the order granting it before the retrial. It is said by Mr. Justice Moore, in the case of *Colgan v. Farmers' & Mechanics' Bank*, 59 Or. 469, 106 Pac. 1134, 114 Pac. 460, 117 Pac. 807, that if a party is materially prejudiced by any act or conduct occurring at the trial of which he had no knowledge until after verdict, refusal to set aside the judgment and to grant a new trial must now, as before the amendment of the statute, be an abuse of judicial discretion, which is subject to review on appeal. This, we think, is a reasonable application of the amendment of the statute. The right to review the order of the court in denying such a motion as to matters that the movent had no opportunity to present to the court during the trial existed before the amendment, and, although not a final order, it is still reviewable on appeal from the judgment. In that case the order denying the motion for a new trial was specifically included in the notice of appeal, although not mentioned in the opinion; and therefore no doubt influenced the decision. However, that objection was not suggested by plaintiff upon the hearing of the appeal in this case, although error

in the ruling on the motion was assigned as error, and was the main reliance of the defendant in this court upon the questions raised by the motion for a new trial, devoting much of the brief thereto. The plaintiff in his brief and argument met defendant's contentions upon all of the questions so raised, with no suggestion that the question was not here. We considered the case on appeal on all these grounds, and the case went to final decision in this court; and, without determining whether it was necessary for the appellant to specify in his notice of appeal that he desired to review the decision denying the motion for a new trial, it is sufficient to say that it is too late for plaintiff now to present that question for the first time.

[2] We, therefore, take up the second question as to the discretion of the circuit court on motions for a new trial, and as to the statement in the opinion that, "in view of the extravagant amount of damages awarded to the plaintiff, we cannot ignore this circumstance (the misconduct of the juror), nor say that the misconduct was not prejudicial to the defendant's rights," which the motion says is pregnant with error, proceeding to discuss it as though this court had set aside the verdict because the damages were excessive. As stated in the opinion, the unexplained misconduct of the juror alone is sufficient to authorize the court to set aside the verdict. The trial judge was convinced that the conduct of the juror, as well as of plaintiff, was improper, and the size of the verdict tends to show that the misconduct was prejudicial, and that it is only in that sense in which the opinion refers to the amount of the verdict. The judgment was not reversed because of the amount of the verdict, but alone for the misconduct of the juror, and it should not stand under such circumstances. The motion says: "On principle and authority, it is not necessary for the court to say that the misconduct was not prejudicial to the defendant's rights in order to affirm the court's ruling." Standing alone, the record of the misconduct was sufficient to require the setting aside of the verdict. On its face it was prejudicial to the defendant's rights, and the explanation was not sufficient to overcome the legal conclusion from the misconduct. It is said in *Robinson v. Donehoo et al.*, 97 Ga. 702, 25 S. E. 491, that in such a case the legal presumption is that the losing party in the case was by reason thereof injured. The court said in *Tucker v. Flouring Mills Co.*, 13 Or. 28, 7 Pac. 53: "It is highly improper for a party or any person to make remarks concerning a case, when on trial before a jury, in the presence of any of the jurors; and, whenever such practice is indulged in, the judge presiding at the trial should unhesitatingly set aside a verdict in favor of a party who had been guilty of such misconduct. A jury trial would be miserable farce if the jurors were permitted to be tampered with in any manner

whatever. Such trials should be kept entirely free from all suspicion that influences of that character had been exercised to any extent." The court further held that the granting of a new trial in such a case is addressed to the sound discretion of the trial judge, and his decision will only be reviewed on appeal when there has been an abuse of discretion. The circuit court in this case said: "That it was improper I do not hesitate one moment to say"—not that the explanation was satisfactory to him; and, leaving out of the case the evidence of Le Gette, we are of the opinion that, in the light of the showing made at the hearing on the motion, the circuit judge should have set aside the judgment and granted a new trial.

The petition is denied.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

STATE v. WARNER VALLEY STOCK CO. et al.

(Supreme Court of Oregon. Jan. 6, 1914.)

1. MOTIONS (§ 2*)—DEFINITION.

In legal proceedings, a "motion" is an application by a party to an action or a suit for some kind of relief.

[Ed. Note.—For other cases, see *Motions*, Cent. Dig. § 1; Dec. Dig. § 2.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4609, 4610.]

2. EQUITY (§ 262*)—PLEADING—MOTIONS—DECREE ON PLEADINGS.

A motion for "such decree as it may appear to the court the said defendants are entitled to upon the pleadings," without stating what decree is desired or any ground for granting the decree, is properly denied.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 534, 537-540; Dec. Dig. § 262.*]

3. APPEAL AND ERROR (§ 1099*)—REVIEW—SUCCESSIVE APPEALS.

A decision on appeal that limitations did not run against the state in the case in question is the law of the case on a subsequent appeal in the same case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.*]

4. EQUITY (§ 262*)—ANSWER—INSUFFICIENCY—DISMISSAL.

Where the answer contained no material denials and no facts constituting an answer or defense, there was no error in dismissing the answer without a trial or investigation of defendants' claims.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 534, 537-540; Dec. Dig. § 262.*]

5. APPEAL AND ERROR (§ 874*)—REVIEW—SCOPE AND EXTENT—NATURE OF DECISION APPEALED FROM.

On an appeal from an order or decree refusing a decree for defendants on the pleadings, the final decree subsequently entered is not before the Supreme Court for review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530-3540; Dec. Dig. § 874.*]

6. APPEAL AND ERROR (§ 854*)—REVIEW—SCOPE AND EXTENT—REASONS FOR DECISION.

Statements by the court in refusing defendants' motion for a decree on the pleadings are immaterial, where the answer did not state facts constituting an answer or defense; the ruling being correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. § 854.*]

7. PUBLIC LANDS (§ 121*)—CANCELLATION OF PATENT—RELIEF.

The state had no right, in a suit to cancel deeds and other papers executed by the state, to ask that the right of defendants as claimants under the land laws of the United States be adjudicated.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 336-338; Dec. Dig. § 121.*]

Department 1. Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

Suit by the State against the Warner Valley Stock Company and others. From a decree denying their motion for a decree on the pleadings, defendants' W. M. Harvey and others appeal. Affirmed.

See 56 Or. 283, 106 Pac. 780, 108 Pac. 861.

This is a suit in equity brought by the state to obtain a decree for the cancellation and delivery up of certain deeds, certificates of sales, and conveyances made by the state, etc. The court below granted a decree against the state, and it also denied a motion made by certain of the defendants for a decree on the pleadings, etc., and these defendants appeal. The facts are stated in the opinion of the court.

E. B. Watson, of Portland (Watson & Beekman, of Portland, and Thos. S. Farrell, of Lakeview, on the brief), for appellants. A. M. Crawford, Atty. Gen., for the State. Jas. B. Kerr, of Portland (Covert & Stapleton, of Portland, on the brief), for respondent Warner Valley Stock Co.

RAMSEY, J. The original complaint was filed on May 26, 1907, and a decree was rendered in favor of the defendant company, and the state appealed to this court. Said decree was affirmed in part and reversed in part, and the cause was remanded to the court below for further proceedings. The opinion of the court on said appeal may be found in 56 Or. 283, 106 Pac. 780, 108 Pac. 861. On the 18th day of October, 1910, the plaintiff filed in the court below an amended complaint, and on October 19, 1910, all of the defendants, excepting the defendant company and R. F. McConnaughy, filed an answer to the amended complaint expressly admitting every allegation of the amended complaint, excepting those specifically mentioned and denied or explained in said answer, and affirmatively pleading the statute of limitations. Said answer contains a few denials of allegations of the amended complaint, but the denials are not material to any question on this appeal, as we view the case.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Practically everything alleged in the amended complaint is expressly admitted by this answer. The further and separate defense of these defendants pleaded in said answer is as follows: "And for a further and separate defense to this suit, these defendants aver that they and each of them have respectively and severally been in the actual, continuous, open, peaceful, and uninterrupted possession, occupation, and use of the several tracts of land described in paragraphs 22 to 54, under claim and color of title adverse to the plaintiff, and against the world, for over ten years immediately preceding the commencement of this suit, and that the same is barred by the statute of limitations." The foregoing is the whole of the separate defense pleaded in said answer. The plaintiff did not demur to said defense or move to strike it out, nor was any reply thereto filed. On the 16th day of October, 1911, these defendants filed in the court below a motion for a decree on the pleadings, of which the following is a copy: "Now come all of the defendants above named, except Warner Valley Stock Company and R. F. McConaughy, by their attorneys E. B. Watson and Thos. S. Farrell, and move this honorable court to grant to said defendants such decree as it may appear to the court the said defendants are entitled to upon the pleadings on file herein." The foregoing is the whole of said motion, excepting the title of the cause and the signatures of counsel thereto. The court below, after stating certain reasons for doing so, denied said motion; the order denying said motion being stated thus: "It is ordered and adjudged by the court that the said motion be, and the same is hereby, denied, and that said defendants take nothing by their answer."

The order or decree overruling said motion is not the final decree in said suit, and it is not an order or a decree which determined the suit so as to prevent a decree within. See section 548, L. O. L. The writer of this opinion will say, as obiter dictum, that he seriously doubts the right of said defendants to appeal from said order or decree; but, with the view that we take of this case, it is not necessary to decide whether said order or decree was appealable. The final decree was entered after said motion was denied, and it is not appealed from.

[1, 2] 1. The appellants contend that the court below erred in overruling said motion for a decree in favor of said defendants, on the pleadings.

In legal proceedings, a "motion" is an application by a party to an action or a suit for some kind of relief. 14 Ency. Pl. & Pr. 73. A motion should state what relief the mover desires, and the reasons or grounds for asking it. In 14 Ency. of Pl. & Pr. p. 119, the rule is stated thus: "It is the duty of a party who asks relief by motion to point out specifically what he desires. But a mo-

tion praying for certain relief may, sometimes, be treated as a motion for relief substantially embraced therein." The same volume, on page 117, says: "A motion must state the grounds or reasons on which it is based, or it will be overruled." In *Stuht v. Sweesy*, 48 Neb. 770, 87 N. W. 749, the court says: "But the motion (to strike out parts of a pleading) did not specify any particular portion which should be stricken out, but left the court to surmise or determine what portions the pleader meant as referring to the Chapman contract. For this reason, if for no other, there was no error in overruling the motion. A motion to strike out should designate with particularity the averments which are deemed surplusage." In *Walker v. Morse*, 33 Neb. 651, 50 N. W. 1058, the court says: "It will be observed that this motion on behalf of the defendants in error is very general in its terms. The grounds are, 'that it (the bill of exceptions) was not made and signed as required by law.' In what respect there had been a failure to comply with the law we are not informed. * * * It should specifically point out the defect complained of, and where it fails to do so it should be overruled, unless there is a total omission of some essential requirement of the law, such as the failure of the judge to sign the bill." In *Jackson v. Rowles*, 67 Mo. 613, the court says: "The motion to strike out parts of the replication does not sufficiently designate the parts thereof sought to be stricken out, and, for that reason, the action of the court in overruling it cannot be considered." See, also, on this point, *Brown v. Baker*, 39 Or. 71, 65 Pac. 799, 66 Pac. 193; *Hermann v. Hutcheson*, 33 Or. 239, 53 Pac. 489.

It will be noticed that the appellants' motion for a decree on the pleadings fails to specify what decree is desired, and asks the court to grant to the said defendant "such decree as it may appear to the court the said defendants are entitled to upon the pleadings on file herein." The motion does not indicate in any manner to what decree the movers deemed themselves entitled. The motion left it entirely to the court to search the voluminous pleadings and grant them such decree as the court should find them entitled to. The motion does not state any ground or reason for granting them a decree.

[3] The motion should have stated what decree the appellants wished the court to grant and the reasons for asking it. It did neither, and it was insufficient to raise any question, and the court properly overruled it. But assuming that the motion was sufficient to require the court to examine the pleadings and ascertain from them what the appellants' rights were, did the court err in denying said motion?

Counsel for the appellants claims that a decree should have been granted in favor of his clients, because they filed an answer

in which they pleaded the statute of limitations, and no reply was filed denying said plea. When the case was here before on appeal, the question, whether the statute of limitations was pleadable against the state, was raised, discussed, and decided by this court. In *State v. Warner Valley Stock Company*, 56 Or. 299, 106 Pac. 786, Justice Eakin, delivering the opinion of the court, says: "Defendant relies on the statute of limitations as a bar to this suit, in that it was not brought within ten years from the date of the deeds, also on the provision of section 378 of the Civil Code, * * * to the effect that no suit shall be maintained to cancel a patent to lands issued by the United States or by this state unless commenced within ten years from the date of the patent. But that provision, being an amendment of that section (Laws of 1878, p. 25), was by this court held to apply only to controversies arising under section 501 of the Civil Code, * * * viz., where there was a conflict between rival claimants to a donation from the general government of the United States, or of a grant from the state. Therefore it has no application here. *Baker v. Woodward*, 12 Or. 3, 6 Pac. 173. This case is not covered by any of the provisions of the statute of limitations. It is a case of purely equitable cognizance. Its purpose is to procure the cancellation of deeds, valid on their face, issued by the officers of the state, whose duty it was to execute deeds for the state in cases of sales of lands, and were in due form, but issued in a case not authorized by law, and therefore cannot bind the state, but it has no remedy at law. In cases of purely equitable rights the equity court is not bound by the statute of limitations." This court held, in that opinion, in this case, when it was here before, that the statute of limitations did not run. That opinion is the law of this case and binding upon this court. Hence the appellants' plea of the statute of limitations did not state facts sufficient to constitute a defense, and it was not necessary to reply to it. If the appellants' motion for judgment on the pleadings had stated what decree was asked for, and the reasons therefor, it would still have been the duty of the trial court to overrule it. The motion for a decree in favor of said defendants, on the pleadings, was properly overruled. When this case was here before, this court held that it appeared prima facie from the complaint that the state had been guilty of laches, and that the onus was on the plaintiff to allege and prove facts showing an excuse for not commencing this suit earlier. 56 Or. 304, 106 Pac. 780, 108 Pac. 861. This court reversed the decree in part and remanded the case to the court below for further proceedings, and thereafter the state filed an amended complaint, stating, *inter alia*, facts showing good reason for not commencing this suit earlier. The appellants, by their answer to said amended complaint,

admitted the allegations of the amended complaint showing that the state had not been guilty of laches.

[4] 2. The second assignment of error is that the court erred in dismissing the appellants' answer without a trial or investigation of their claims. The appellants' answer contained no material denials, and no facts constituting an answer or a defense, and hence the trial court properly ordered that the said defendants take nothing by their said answer. No trial or investigation was necessary, for there was nothing to try.

[5] 3. The appellants' last assignment of error is that the decree of the court below is contrary to law and the established practice of courts of equity. As the appellants appealed only from the order or decree of the court made when it overruled their motion for a decree on the pleadings, the final decree of the court which was made after that order or decree was granted, is not before us for review. A copy of it is among the papers, but, as the appellants did not appeal from it, they are not entitled to have it examined by this court. Only the decree or order appealed from can be considered.

[6] While the court below made various statements in passing on the appellants' motion for a decree on the pleadings, it is not necessary to consider those statements, because the appellants' answer, as shown *supra*, did not state facts sufficient to constitute an answer or a defense, and it is clear that said motion was properly overruled.

[7] It appears from the amended complaint that the appellants settled upon the lands claimed by them under and by virtue of the laws of the United States relating to homestead, pre-emption, and timber culture claims. They claim title under the United States, and they have no interest in the controversy between the state and the defendant company, and we think that they were neither necessary nor proper parties to this suit for the cancellation of the deeds and documents referred to in the prayer of the amended complaint. The answer of these defendants to the original complaint was stricken out, for the reason that they had no interest in the matters to be adjudicated; but, when the state amended its complaint, it again made them parties. We hold that they were not proper parties, and that any claims that they had as homestead, pre-emption, or timber culture claimants, under the laws of the United States, could not be properly adjudicated in a suit for the cancellation of the deeds and documents referred to in the amended complaint. The state had no right, in a suit for the cancellation of the deeds and other papers executed by the state and referred to in the amended complaint, to ask that the rights of the appellants as claimants, under the laws of the United States, be adjudicated. See *Oregon v. Warner Valley Stock Co.*, 48 Or. 386, 86 Pac. 780, 87 Pac. 534.

We find no error in the decree or order of the court below.

The decree of the court below is affirmed.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

WIEST v. SCHOOL DISTRICT NO. 24, MARION COUNTY.

(Supreme Court of Oregon. Jan. 6, 1914.)

SCHOOLS AND SCHOOL DISTRICTS (§ 89*)—LIABILITY FOR TORTS—ACTS OF OFFICERS.

A school district is not liable for a tort by the directors or clerk in entering on the district records the reason for dismissal of a teacher, nor can any unlawful act of the directors or clerk be imputed to the district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 208; Dec. Dig. § 89.*]

Department 1. Appeal from Circuit Court, Marion County; Percy R. Kelly, Judge.

Action by W. A. Wiest against School District No. 24, Marion County. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for libel. The complaint, after alleging the corporate character of defendant and the fact that plaintiff was a duly employed teacher in one of its public schools, continues as follows: "That in or about the beginning of the month of December, 1912, one Laura De Bord made certain false and malicious charges and accusations against the plaintiff in his capacity as a teacher, and on the 13th day of January, 1913, the board of directors of said school district No. 24 held a meeting for the pretended purpose of investigating the said charges and accusations made against the plaintiff, and an investigation thereof was held on the said date, and the defendant caused to be entered upon its records and journals certain minutes of and concerning the business transacted at said meeting and said investigation as follows: 'Record of Clerk, page 236. School Board Meeting, Salem, Oregon, Jan. 13, 1913. The following witnesses were examined and cross-examined: Laura De Bord, Mrs. Pickering, Mrs. De Bord, Miss Pohle, Mr. Howe (janitor), Mr. Jenks, Mr. Trindle. Following examination of above witnesses, Mr. Corby, on behalf of W. A. Wiest, addressed the board. Upon motion board went into executive session. After due consideration the board found that W. A. Wiest had been guilty of immoral conduct and behavior unbecoming a teacher with one Laura De Bord, and that the charges preferred against him had been sustained. After due consideration the board found that the charges had been sufficiently substantiated to warrant the dismissal of W. A. Wiest. It was moved and duly seconded that W. A. Wiest be dis-

missed as teacher in the public schools of district No. 24, Marion county, Oregon, for immoral conduct and behavior unbecoming a teacher with one Laura De Bord, which motion being placed before the board received the affirmative vote and was by the chair declared carried, and the chair declared said W. A. Wiest duly dismissed as a teacher in the schools of school district No. 24, Marion county, Oregon. Upon motion, clerk was instructed to notify W. A. Wiest of their findings. W. A. Wiest being present before the board, he was in open meeting dismissed as a teacher. Adjournment followed.' That the false and defamatory matter, to wit, that plaintiff was guilty of immoral conduct and behavior unbecoming a teacher, was and is wholly false and untrue, but nevertheless the defendant maliciously published the same of and concerning the plaintiff in his capacity as a teacher, and by means of said publication the plaintiff was injured in his reputation and in his good name and credit as a teacher, and in the practice of his profession as such teacher, to his damage in the sum of \$5,000." A general demurrer being sustained, the plaintiff appeals.

Grant Corby and John A. Carson, both of Salem, for appellant. Geo. G. Bingham, of Salem, for respondent.

McBRIDE, C. J. (after stating the facts as above). The district is not liable for a tort committed by the directors or clerk in entering upon the district records the reason for the dismissal of a teacher, nor can any unlawful act of the directors or clerk be imputed to the district. *Bank v. Brainerd School District*, 49 Minn. 106, 51 N. W. 814; 37 L. R. A. 301, note; *Board of Education v. Volk*, 72 Ohio St. 469, 74 N. E. 646. A different conclusion appears to have been arrived at in *Redfield v. School Dist. No. 3*, 48 Wash. 85, 92 Pac. 770; but, while we have great respect for the learning and ability of that court, we cannot agree with it in this instance. The statutes of Minnesota bearing upon this subject are similar to our own, and we think that the opinion in *Bank v. Brainerd*, etc., supra, correctly states the law. As observed in *Board of Education v. Volk*, supra: "The board is not authorized to commit a tort, to be careless or negligent; and, when it commits a wrong or tort, it does not in that respect represent the district, and, for its negligence or tort in any form, the board cannot make the district liable." We do not believe that it was the intent or is the policy of our law to take the funds intended for the education of the young and apply it to payment for any malicious act of its officers. It is carrying the doctrine of imputed tort too far to hold that, because the directors or clerk of the district have published a libel

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or spread it on the record of the district, the district itself is a malicious libeler.

The judgment is affirmed.

MOORE, BURNETT, and RAMSEY, JJ.,
concur.

STATE ex rel. SHEPHERD v. SIMPSON.
(Supreme Court of Oregon. Jan. 6, 1914.)

1. APPEAL AND ERROR (§ 413*)—PROCEEDINGS
TO TAKE APPEAL.

Under L. O. L. § 550, requiring notice of appeal to be served on such adverse parties as have appeared in the action, service on a defendant who did not appear is unnecessary and when made gives him no additional rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2136-2139; Dec. Dig. § 413.*]

2. APPEAL AND ERROR (§ 796*)—DISMISSAL—
RIGHTS OF PARTY IN DEFAULT.

A defendant who has permitted judgment to be entered against him by default cannot assail an appeal taken by the other party by motion to dismiss.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3146-3148; Dec. Dig. § 796.*]

3. APPEAL AND ERROR (§ 127*)—DECISIONS
REVIEWABLE—DEFAULT JUDGMENT.

L. O. L. § 549, giving a right to appeal from a judgment or decree other than a judgment or decree by confession or for want of answer, gives neither plaintiff nor defendant a right of appeal from a default judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 885-889, 891; Dec. Dig. § 127.*]

Department 2. Appeal from Circuit Court, Multnomah County; W. L. Bradshaw, Judge.

Action by the State, on the relation of George S. Shepherd, against E. M. Simpson. From a judgment for relator, he appeals. Motion to dismiss appeal denied, but appeal dismissed on court's own motion.

Walter H. Evans, Dist. Atty., and Geo. S. Shepherd, both of Portland, for appellant. Claude McCulloch, of Baker, for respondent.

McNARY, J. This is a motion to dismiss an appeal; the movent assigning two reasons therefor: (1) That appellant is in no sense aggrieved by the judgment, inasmuch as the court gave him "everything prayed for"; (2) that "there has ceased to be, if there ever was, any controversy between the parties."

Historically the case presents this situation: The relator, Geo. S. Shepherd, for a period of time prior to December 9, 1911, the date of the contest in question, was captain of the Oregon Naval Militia. The time of the annual election arriving, defendant E. M. Simpson contested with relator his right to a re-election. The canvassing board declared defendant elected to the office of captain of the Oregon Naval Militia, whereupon relator, conformable to the provisions of section 368 et seq., L. O. L., brought this action in

the name of the state against defendant for usurpation of the office. Service of process was made upon defendant, but, no appearance being made, defendant's default was noted and a judgment for want of an answer entered. After trial the lower court adjudged that defendant never qualified for the office to which he had been elected, and, in the absence of any lawfully chosen successor, appellant was the lawful incumbent of the office of captain of the Oregon Naval Militia. Relator, feeling displeased with the judgment of the lower court, brings this appeal and, when perfecting the same, served a notice thereof on defendant, who now appears and urges his motion to dismiss the appeal.

[1] Section 550, L. O. L., indicating the manner in which an appeal shall be taken and perfected, states in substance that, if an appeal is not taken in open court, the party desiring to appeal may cause a notice thereof to be served on "such adverse party or parties as have appeared in the action or suit." Defendant not having appeared in the lower court, it became unnecessary, in view of the statute to have served him with notice of appeal, as the section limits those to be served with notice to such only as have "appeared" in the suit or action. Appellant, in notifying defendant of the appeal, performed an act of supererogation which created no additional rights in defendant. U. S. Investment Corporation v. Portland Hospital, 40 Or. 524, 64 Pac. 644, 67 Pac. 194, 56 L. R. A. 627.

[2] A defendant, in making a default, impliedly invites the court to grant unto plaintiff all the relief to which his pleadings show him entitled, and he cannot be heard to complain if plaintiff labors under the belief that an appeal is necessary in order to establish the rights which he deemed his pleadings warrant. The statute expressly withholds the right of appeal from a defendant who permits a judgment or decree to be entered against him by default and by implication inhibits him from assailing an appeal taken from a judgment which defendant acquiesced in being entered.

[3] Notwithstanding defendant's inability to attack appellant on appeal, has the latter a right of appeal? Section 549, L. O. L., reads: "Any party to a judgment or decree other than a judgment or decree given by confession, or for want of an answer, may appeal therefrom. The party appealing is known as the appellant, and the adverse party as the respondent; but the title of the action is not changed in consequence of the appeal." The language of the statute plainly inhibits both plaintiff and defendant from taking an appeal from a judgment or decree given by confession or for want of an answer, as it reads, "Any party," to a judgment or decree, so that when a sole defendant, as in this case, or all of the defendants when more

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than one, permit a judgment or decree to be entered for want of an answer or by confession, neither plaintiff nor defendant has a right of appeal. While this rule may seem harsh, yet it necessarily follows from a simple reading of the statute.

Believing this court is without jurisdiction in the premises, this appeal is dismissed by the court sua sponte.

Motion to dismiss overruled. Appeal dismissed by court on its own motion.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

FRALEY v. HOBAN et al. (JONES, Garnishee).†

(Supreme Court of Oregon. Jan. 6, 1914.)

1. APPEAL AND ERROR (§ 920*)—REVIEW—PRESUMPTIONS—MATTERS NOT SHOWN BY RECORD.

Where it is disputed on appeal whether allegations and interrogatories were served on a garnishee, in the absence of a showing in the abstract of the record that the service was made in the manner prescribed by L. O. L. §§ 62, 538, 539, it must be determined that they were not served.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3714-3721; Dec. Dig. § 920.*]

2. GARNISHMENT (§ 135*)—PROCEEDINGS TO ENFORCE—INTERROGATORIES—APPEARANCE OF GARNISHEE.

That a garnishee, who had denied liability, appeared at the time judgment was rendered against him did not confer jurisdiction to render judgment against him, in the absence of service of allegations and interrogatories upon him.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 246, 247; Dec. Dig. § 135.*]

3. GARNISHMENT (§ 175*)—PROCEEDINGS TO ENFORCE—JUDGMENT.

A judgment against a garnishee which does not refer to nor perpetuate the lien of the attachment is erroneous, since the attachment is thereby waived.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 315-322; Dec. Dig. § 175.*]

Department 1. Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Edward L. Fraley, as administrator of the estate of J. H. Truby, deceased, against A. J. Hoban and another, defendants, and W. N. Jones, garnishee. From a judgment for plaintiff, the garnishee appeals. Reversed, and garnishment proceeding dismissed.

In an action against the defendants, Hoban and Taggart, the plaintiff caused a writ of attachment to be issued and served with a notice of garnishment upon W. N. Jones, who certified "that I have this day no property in my possession or under my control belonging to the within-named defendants, or either of them. Dated May 7, 1908." Afterwards, on a date not directly disclosed by the abstract, but at least prior to February 17, 1912, the court entered a judgment which,

after the title of the cause, reads thus: "This cause coming on at this time to be heard on motion of attorney for plaintiff herein for a judgment in the above-entitled cause, and the court having heretofore made and entered its findings in accordance therewith, and upon motion of attorney for plaintiff herein, it is ordered and adjudged that the plaintiff recover from off of the defendants, or either of them, the sum of five thousand ninety (\$5,090) dollars, together with interest thereon at the rate of 6 per cent. per annum since the 11th day of July, 1907, and that he have judgment against the said defendants, and each of them, for the said amount, and for his costs and disbursements taxed at \$——, and that execution may issue out of this court to satisfy the same." On April 25, 1912, the sheriff of Multnomah county certified that he had received an execution on February 17th of that year, issued upon this judgment, but that he returned the same, having been unable to find any property belonging to the defendants. It seems that on March 4, 1909, an order of the court was served upon Jones, as garnishee, commanding him to appear on the 6th day of that month before a judge of the circuit court to be examined on oath concerning the property in the possession of the garnishee belonging to the defendants. He appeared at that time, and his testimony was taken; but it does not appear that any order was then made or entered concerning his liability. On December 28, 1912, the following notice signed by the attorneys for the plaintiff was served upon S. B. Huston, as attorney for the garnishee: "To W. N. Jones, the Above-Named Garnishee, and to S. B. Huston, Your Attorney: You, and each of you, are hereby notified that the plaintiff will apply to Judge C. U. Gantenbein, on Monday, December 30, 1912, at 9:30 o'clock a. m., or as soon thereafter as it may be reached, for an order entering judgment against you in the sum recovered by the plaintiff against the defendants in the above-entitled suit. This notice is served upon you pursuant to an order of the Honorable C. U. Gantenbein." On December 30, 1912, the court entered a judgment, reciting the appearance of the plaintiff and the garnishee by their attorneys, and ordering and adjudging that the plaintiff recover from Jones, as garnishee, the sum of \$5,090, together with interest therein named; that being the amount of the original judgment against the principal defendants. From this judgment, the garnishee, Jones, has appealed.

S. B. Huston, of Portland, for appellant. C. M. Idleman, of Portland (Sidney J. Graham, of Portland, on the brief), for respondent. J. B. Ryan, of Portland, for defendant Taggart.

BURNETT, J. (after stating the facts as above). [1] It is contended by the garnishee

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

† Rehearing denied February 10, 1914.

that the judgment is invalid because no allegations and interrogatories were served upon him in any of the proceedings. It is recited in the statement of counsel for the garnishee that no interrogatories or allegations were served. The attorneys for the plaintiff state in their additional abstract that interrogatories were served. It becomes necessary, therefore, as a preliminary, to settle the dispute on this point. It is stated in section 538, L. O. L., that: "Notices shall be in writing, and notices and other papers shall be served on the party or attorney in the manner prescribed in this chapter, where not otherwise provided by this Code." It is also laid down in the following section that: "The proof of service shall be the same as the proof of service of a summons, and shall be returned with the original notice, or other paper of which service is made, at the time and place therein prescribed for the hearing or other proceeding to be had thereon." In section 62, L. O. L., it is laid down that: "Proof of the service of the summons * * * shall be as follows: 1. If the service or deposit in the post office be by the sheriff or his deputy, or by a constable or marshal, the certificate of such officer; or, 2. If by any other person, his affidavit thereof; * * * or, 4. The written admission of the defendant." Although both parties have filed a printed abstract of the record, and in the one filed by the plaintiff certain allegations and interrogatories are quoted, there is nothing in either of them to show that those papers were in fact served upon the garnishee. In the absence, therefore, of the proof required by the statute, it must be determined that they were not served.

[2] It is contended by the plaintiff that, because the garnishee appeared by his attorney at the time the judgment was rendered against him, he thereby conferred jurisdiction upon the court to render the judgment. On this point, however, in *Barr v. Warner*, 38 Or. 109, 62 Pac. 899, Mr. Justice Moore, speaking for the court, said: "A garnishee may waive many irregularities in the notice of garnishment, and by his certificate or answer in response thereto submit himself to the jurisdiction of the court, and thus become in privity with, and in effect a party to, the judgment which has been or may be rendered against his creditor [citing many authorities]; but, while a garnishee may waive jurisdiction of his person, he cannot, by voluntarily appearing, waive the defendant's rights, or substitute the latter's creditor for his own, because that relates to the jurisdiction of the subject-matter, which can be acquired only in the manner prescribed by law." It has been ruled frequently that the service of allegations and interrogatories is essential to confer jurisdiction over the subject-matter in cases where the answer of the garnishee denies liability, and the plaintiff in the writ would take further proceedings against him. Case

v. Noyes, 16 Or. 329, 19 Pac. 104; *Smith v. Conrad*, 23 Or. 206, 211, 31 Pac. 398; *Keene v. Smith*, 44 Or. 525, 75 Pac. 1065. By virtue of the service of the writ of attachment upon a garnishee, the plaintiff acquires a right analogous to subrogation, giving him the privilege of bringing what may be termed an ancillary action against the garnishee to sequester the debt owing from the latter to the principal defendant. It is essential that allegations and interrogatories equivalent to a complaint on the cause of action existing in favor of the principal defendant, and for the time being conferred upon the plaintiff against the garnishee, be served upon the latter in the ancillary proceeding. Otherwise, the court does not obtain any jurisdiction over the subject-matter. It would be like proceeding to judgment where a summons was served, but no complaint was filed.

[3] A further reason why the judgment against the garnishee should be reversed is found in the fact that the plaintiff took judgment without in any way referring to or perpetuating therein the lien of the attachment. This constitutes a waiver of the attachment, putting an end to its efficiency. This question is exhaustively considered by Mr. Justice Ramsey, in *Mertens v. Northern State Bank*, 135 Pac. 885, where the authorities are reviewed, and the rule is laid down in substance that, wherever the lien of an attachment is not perpetuated by the judgment, it is waived, and comes to naught.

For the reasons stated, the judgment against the garnishee has no foundation in law, and is reversed, with directions to dismiss the proceeding.

McBRIDE, C. J., and MOORE and RAMSEY, JJ., concur.

HUME v. SEATTLE DOCK CO. et al.

(Supreme Court of Oregon. Jan. 6, 1914.)

1. MECHANICS' LIENS (§ 103*)—RIGHT TO LIEN—MATERIALMEN.

A materialman or laborer, to be bound by a stipulation in the principal building contract against liens against the building, must have assented thereto, or at least notice of the stipulation must have been brought home to him.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 135; Dec. Dig. § 103.*]

2. MECHANICS' LIENS (§ 52*)—RIGHT TO LIEN—MATERIALS LIENABLE.

Though crude material for the manufacture of an article for the market generally without reference to any particular structure is not lienable against the building in which it is used, yet, where cement and plaster are furnished for the manufacture of blocks and tile for a particular building, they are lienable against such building when so used.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 54-56; Dec. Dig. § 52.*]

3. MECHANICS' LIENS (§ 157*)—NOTICE OF LIEN—EFFECT OF ERROR.

In a notice of mechanic's lien for \$1,871.95, a duplicate charge of \$890 and a failure to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

credit \$215 for sacks returned, both occurring through error of a competent bookkeeper, do not render the lien void.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 268-274; Dec. Dig. § 157.*]

Department 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

Suit by R. A. Hume against the Seattle Dock Company and others. From a decree for plaintiff, defendant Seattle Dock Company appeals. Affirmed.

At the time of the transactions here in controversy the Seattle Dock Company was the owner of the property known as the "Chamber of Commerce Building," in Portland, Or. On August 15, 1910, it contracted in writing with the MacIte Fire-Proofing Company, whereby the latter agreed, for a consideration, to furnish all materials and labor and to install and complete all of the MacIte plaster block and tile partitions and the fire-proofing of all steel trusses in the ninth and tenth floor additions to the Chamber of Commerce building, in accordance with certain drawings and specifications. The said MacIte Fire-Proofing Company was at the time the owner of a plant at Twenty-Second and Reed streets, in Portland, where it manufactured plaster blocks and tile as finished products. The plaintiff, a dealer in cement and plaster, furnished the MacIte Fire-Proofing Company at said place cement and plaster for manufacturing these plaster blocks and tile, and for the amount due him for this material furnished he filed a materialman's lien upon the building in the sum of \$1,871.95. This suit was brought to foreclose the lien. Upon the trial the court rendered a decree foreclosing the lien for the sum of \$1,330.35. The defendant Seattle Dock Company appeals.

Thomas H. Crawford, of La Grande, and J. B. Cleland and R. W. Wilbur, both of Portland (Wilbur, Spencer & Dibble, of Portland, on the brief), for appellant. Roscoe C. Nelson, of Portland (Beach, Simon & Nelson, of Portland, on the brief), for respondent.

EAKIN, J. (after stating the facts as above). Several points are urged on this appeal but may all be covered by three principal grounds of defense: (1) When an owner of a building makes a contract with a builder containing a stipulation that no mechanics' liens shall be filed, such a stipulation by the contractor binds or precludes the laborers, materialmen, or subcontractors from filing a lien for labor or material furnished and used in the construction of the building; (2) that the materials furnished by the plaintiff, namely, sand and cement, from which the cement blocks and tile were constructed, were not lienable; (3) that the error of \$541.60 in the statement of the account in the lien filed rendered the lien void. All other questions dis-

cussed by appellant in his brief are a part of or included in one of these three.

[1] As to the first question there is a great conflict in the cases, accounted for in most instances by the difference in the relative statutes. Where there is a covenant in the contract against liens or an express stipulation that liens shall not be filed, the courts of a great many of the states hold that such stipulation will not bind the laborer, materialman, or subcontractor unless he has assented to it. This is the holding in *Norton v. Clark*, 85 Me. 357, 27 Atl. 252, which is quoted with approval in *Miles v. Coutts*, 20 Mont. 47, 49 Pac. 393, in which it is said: "We think * * * the stipulation under discussion, 'like all other stipulations, binds only those who made it or assented to it,' is the only just and legal conclusion of which the case is susceptible. We are not prepared to hold, notwithstanding the majority of the decisions be that way, that rights conferred upon a person by statute may be contracted away by a contract made with others, to which he has never assented, and of which he has no knowledge. We think such a construction of our statute in relation to mechanics' liens is unauthorized and would result in defeating the end had in view by its enactment by practically depriving the persons sought to be benefited of all protection under its provisions." And many other courts hold to the same rule. This is the holding in *Cost v. Newport Builders' Supply & Hdw. Co.*, 85 Ark. 407, 108 S. W. 509, reported in 14 Ann. Cas. 144, where the cases are collated. To the same effect are the courts of Iowa, Michigan, Missouri, Colorado, Ohio, and Indiana. In *Gimbert v. Heinsath*, *Madden et al.*, 5 O. C. D. 175, 180, the court says: "The statute seems to give importance to the contract only as giving consent of the owner that the improvement be made on his land. The statute gives to laborers and materialmen a direct lien, not through any rights the contractor may have, but direct upon the consent of the owner to the improvement on his land and the performing of labor or the furnishing of materials. This right is by virtue of the statute, and the statute puts this right into * * * every consent he gives for the erection of a structure for him on his land. If, then, the law makes these rights a part of the contract, as much as though written therein, what right have the owner and the contractor to strike them out and write the very opposite in without the assent of the laborer and materialman? This cannot be done without their assent. This being a positive statutory right, it cannot be taken from those who were intended to be benefited by it without their assent being clearly shown. To take from them this right by implication would be construing a remedial statute intended for their benefit most strongly against them. This cannot be done

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—48

without violating an elementary rule of construction."

But, on the other hand, a few states follow the holding in Pennsylvania, as stated in *Schroeder v. Galland et al.*, 134 Pa. 277, 19 Atl. 632, 7 L. R. A. 711, 19 Am. St. Rep. 691, in which the contractor bound himself to erect and deliver over to the party of the first part, free from all liens and incumbrances, or any claims whatever that might arise, a certain building; it being held that a mechanic's lien cannot be filed by a subcontractor for work or material furnished by him toward the erection of the building, and that the only connection between the owner and the subcontractor is through and by means of the contract between the owner and the contractor, so that the subcontractor is chargeable with notice of all its terms and stipulations and is bound thereby. To this effect are the cases in the District of Columbia, Wisconsin, and Indiana. By this rule the laborer is not consulted, and he must accept the work under the conditions of the original contract, in the making of which he had no voice. It was to protect the workman against such conditions that our lien law was enacted. A lien is not given through the contractor by subrogation but is a direct and independent lien to each claimant against the property. In New York and many other states the lien is dependent upon the contractor's claim by subrogation, and the law applicable to such cases is not always pertinent where the lien is direct. See *Baldrige v. Morgan*, 15 N. M. 249, 106 Pac. 342, reported in *Ann. Cas.* 1912C, 337. In *Seeman v. Bie-mann et al.*, 108 Wis. 365, 84 N. W. 490, the limitation of a subcontractor's right to a lien by the terms of the original contract is by virtue of the fact that the subcontractor's authority to bind the owner depends upon the right of his principal to do so under the same circumstances; and this is the theory of the Pennsylvania cases. In Montana it is held that by the statute of that state the subcontractor has a direct lien and that his rights are not limited to those of the contractor. *Kneeland on Mechanics' Liens*, § 136, and *Merrigan v. English*, 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837, seem to recognize this reasoning on the theory that the subcontractor can only claim a lien through the original contract and not by a direct and independent lien. In the former it is said: "It has been held that the express stipulation against liens will affect not only the contractor but all persons acting under him or depending upon the original contract as a basis for their liens, upon the principle that persons agreeing to furnish labor or materials to the original contractor do so with reference to such original contract in subordination to its provisions." In the case of *Geo. B. Swift Co. v. Dolles*, 39 Ind. App. 653, 80 N. E. 678, the whole argument is based on that principle, citing the Pennsylvania cases as author-

ity and also the case of *Bowen v. Aubrey*, 22 Cal. 566, which has been superseded by a later statute. See *Whittier v. Wilbur*, 48 Cal. 177, where it is said that the contractor and owner cannot deprive the materialman of his lien by introducing a stipulation into the building contract to the effect that the contractor agrees to indemnify the owner against any liens by persons furnishing the material. *Jones on Liens*, at sections 1304 and 1304a, states that, where the provisions of a statute give a direct lien to a subcontractor, he is not limited by the amount due the contractor. He must connect himself with the owner through the contractor as the evidence of the owner's consent to the improvement, but the right of lien to the subcontractor and materialmen is by operation of law incorporated into and made a part of the owner's contract as much as if expressly included and written therein. See *Cole Manufacturing Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045. All these authorities recognize that the lien may be waived but that the lienor must waive it for himself. Even Pennsylvania now comes over to this view by the statute of 1891 (page 225), enacted soon after the decision in *Schroeder v. Galland*, *supra*, which provides that a stipulation in the original contract that no lien shall be filed is invalid against subcontractors unless they have conceded in writing that they are bound by the stipulation. See *Jones on Liens*, § 1222. Therefore we conclude that the materialman or laborer, to be bound by stipulation in the original contract against liens, must have assented thereto, or at least notice of that condition must be brought home to him, which was not done in this case.

[2] As to the lienability of the material furnished by plaintiff: First, it may be stated as a fact that the material furnished by plaintiff was intended especially for the manufacture of blocks and tile for the work to be performed by the MacIte Fire-Proofing Company on the Chamber of Commerce Building. This is the testimony of Hume, and it is admitted, at least by recital in the brief of defendant Seattle Dock Company, and not alone on the credit of the MacIte Fire-Proofing Company, that it was understood the material was to be used in the construction of the Chamber of Commerce Building. Then the question is whether material furnished to the MacIte Fire-Proofing Company at its factory for the purpose of manufacturing blocks and tile for use in the construction of the Chamber of Commerce Building was lienable. The appealing defendant contends that raw material used to manufacture a commercial article is not lienable, and also that the identity of the material is lost. We understand the rule to be that the lienability of the material does not depend on its suitability in its crude condition for use in construction of the building or on its identity being maintained,

but whether it was furnished especially for the manufacture of something to be used in such structure. Sand, cement, lime, and other crude materials always enter into the mortar, plaster, and concrete of buildings, and it has never been questioned that in such cases they are lienable; and we know no reason why any crude material furnished especially to be used in some changed form in the erection of a structure upon being so used should not be lienable. The laborer who fells the trees for the manufacture of lumber for a particular structure certainly is as much entitled to a lien therefor as the teamster who hauls it from the mill yard to the building; the only question being: Was the service rendered intended for the particular structure? Of course crude material for the manufacture of an article for the market generally without reference to any particular structure would not be lienable against the building in which it was used. It is said in 20 Am. & Eng. Enc. of Law, 343, that where a person sells material without any reference as to what shall be done with it, if used in constructing a building, no lien will attach; the general rule being that it is necessary that a particular building shall be in the contemplation of the purchaser or employer at the time of the sale of material. In 27 Cyc. 45, it is said that the right to a lien for materials furnished extends to all such materials as ordinarily enter into or are used in the construction, repair, or improvement of the building. Whatever may be the condition of the materials furnished in the construction of the building, whether they are very rough or perfectly adapted to the purpose, and in whatever quantities or from whatever source they may have been originally purchased, or although kept by the contractor as merchandise, his lien is not affected by these considerations, provided only the materials are included in the work contracted for. Therefore we think that the material furnished by the plaintiff in this case was lienable.

[3] The third contention is that there was an error in the statement of the account in the lien notice, namely, a duplicate charge of an item for material furnished in the sum of \$390, the price of a car load of plaster, charged as of date September 30th, and charged again in four items as of the dates October 1st, 3d, 4th, and 5th. Also the said defendant claims that the account was not correctly stated, as required by the statute, in that there had been returned to plaintiff 2,151 cement sacks of the value of \$215.10, which rendered the notice of lien fraudulent and void. Plaintiff filed an amended complaint by which he sets forth the error in the duplicate charge of \$390 and reduces the amount claimed in the notice of lien by that amount, and in his testimony explained how the excessive charge occurred, namely, that

the statement in the lien was made up by him on information furnished by his bookkeeper; that, believing it to be correct, he so swore to it and did not personally examine the books to see whether they were right; that the notice of lien contains the items shown by the ledger; that in preparing for the trial his attorney asked him to look up the proper receipts for the various deliveries, and in so doing he discovered the double charge; and that his bookkeeper was a competent one. At the time he was doing a business of \$6,000 a day. As to the credit of \$215.10 for sacks, the credit was not made on the books at the time the lien notice was made out, and he did not know at that time that any sacks had been returned, nor did he have personal knowledge of these matters, depending upon the books. Thus it is plain that these two errors in the account contained in the lien were mistakes on the part of the plaintiff, and that the statement was made in an honest belief of its correctness. Such an error would not render the lien void. It has been held in this court that where the plaintiff did not knowingly and willfully file an untrue statement of the account nor make it carelessly or negligently, but that the mistake was made in an honest belief of its correctness, the lien will not be held void. *Rowland v. Harman*, 24 Or. 529, 34 Pac. 357; *Lumber Co. v. Washburn*, 29 Or. 170, 44 Pac. 390; *Allen v. Elwert*, 29 Or. 433, 44 Pac. 824, 48 Pac. 54; *Cooper Mfg. Co. v. Delahunt*, 36 Or. 407, 51 Pac. 649, 60 Pac. 1. The decree is affirmed.

McBRIDE, C. J., and BEAN and McNARY, JJ., concur.

WASILJEFF v. HAWLEY PULP & PAPER CO.

(Supreme Court of Oregon. Jan. 6, 1914.)

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Under L. O. L. § 183, providing that a case not sufficient for the jury is one where, if the jury were to find a verdict for plaintiff, the court ought, if required, to set it aside, and Const. art. 7, § 3, as amended (Laws 1911, p. 7), providing that no fact tried by a jury shall be otherwise re-examined in any court unless it can affirmatively say that there is no evidence to support the verdict, evidence, in an action for injuries to a servant, held sufficient to go to the jury on the question of the master's negligence in failing to provide safe appliances to throw off belts from revolving pulleys.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

2. TRIAL (§§ 165, 178*)—RECEPTION OF EVIDENCE—ADMISSION WITHOUT OBJECTION.

In an action for injuries to a servant, testimony that the only way to throw off a belt was with the hands, that there was nothing else there, that one could not use a stick, but that it could be arranged to throw it off with a lever,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or something like that, admitted without objection or motion to strike out, is proper to be considered in passing on motions for nonsuit and instructed verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374, 401-403; Dec. Dig. §§ 165, 178.*]

3. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT.

Employers' Liability Act (Laws 1911, c. 3) § 1, providing that all dangerous machinery shall be securely protected to the fullest extent that the proper operation of the machinery permits, and generally all owners and persons having charge of any work involving danger to the employees or to the public shall use every precaution practicable, limited only by the necessity for preserving the efficiency of the structure, without regard to the additional cost, applies to an action for injuries to a servant in removing a belt from a moving pulley with his hands; no other appliance being provided.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

4. APPEAL AND ERROR (§ 171*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—THEORY OF CAUSE.

In an action for injuries to a servant, where the only question presented on appeal is the sufficiency of the evidence to go to the jury and to justify the refusal of a nonsuit or instructed verdict, the fact that the trial court or counsel for plaintiff stated in the court below that the case was a common-law action does not preclude the Supreme Court from holding that it is within the Employers' Liability Law (Laws 1911, c. 3).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1063, 1066, 1067, 1161-1165; Dec. Dig. § 171.*]

5. MASTER AND SERVANT (§§ 179, 204, 228*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—FELLOW SERVANTS—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant within the Employers' Liability Law, the common-law doctrines of assumption of risk, negligence of fellow servants, and contributory negligence do not apply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 354-358, 544-546, 670, 671; Dec. Dig. §§ 179, 204, 228.*]

6. MASTER AND SERVANT (§ 107*)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY LAW.

Under Employers' Liability Law (Laws 1911, c. 3) § 1, requiring employers to use every practicable precaution for safety, without regard to cost, the fact that there is not sufficient room for belt shifters does not justify their absence; it being the employer's duty to make sufficient room.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. § 107.*]

7. EVIDENCE (§ 597*)—SUFFICIENCY.

To support a verdict, there must be some legal evidence, tending to prove every material issue, on which the person in whose favor the verdict was rendered had the burden of proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2449; Dec. Dig. § 597.*]

Department 1. Appeal from Circuit Court, Clackamas County; J. U. Campbell, Judge.

Action by Victor Wasiljeff against the Hawley Pulp & Paper Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant. A verdict and a judgment in favor of the plaintiff for \$2,065 were rendered in the court below.

F. S. Senn, of Portland (Rauch & Senn, of Portland, on the brief), for appellant. Walter A. Dimick, of Oregon City (Dimick & Dimick, of Oregon City, on the brief), for respondent.

RAMSEY, J. The defendant is a corporation, and engaged in the operation of a paper mill and in the manufacture of pulp and paper in Clackamas county, and its principal office is at Oregon City. The plaintiff is a Russian, and he had been in this country only about two years and three months at the time of the injury.

Prior to January 2, 1912, the plaintiff had worked for the defendant at its said mill about three months. Only about one-half of that time he had been engaged at the place at which he was working when he was injured, as stated below. He had worked a while at a sawmill in the state of Washington, but he had had no experience in working about dangerous machinery until the last six weeks that he worked for the defendant. The plaintiff understands very little English, and he testified through an interpreter.

On January 2, 1912, the plaintiff was in the employ of the defendant and was working for it in that part of the defendant's said mill known as the chipper and barker room, and, in the course of his employment, it was his duty to operate two machines in said chipper and barker room. These machines were known among the employees of the defendant's said mill as a barker, and a cut-off saw. The said barker and chipper room was provided by the defendant with certain barker and chipping machinery, together with a cut-off saw, which was propelled by certain power, conveyed to said machines by belts, attached to said machines, and extending upward to certain revolving pulleys and shafts. Said pulleys and shafts were located about 18 feet above the main floor upon which said barker and chipper machine and saws were located; and, in order to stop the said barker and chipper machines and saw, it was necessary for the employees of the defendant to ascend from said main floor to an upper deck or platform composed of certain boards, a large part of which were loose, and to throw the said belts off from the said pulleys on said main shafts by means of the hands or the use of a stick of wood.

After stating the facts as set out, supra, the complaint alleges: "That it was the duty of said defendant to provide safe appliances for the purpose of adjusting said belts, and for the purpose of throwing off the belts from said revolving pulleys, so that the employees

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of said defendant would not be compelled to throw off the belts from revolving pulleys with their hands or a stick of wood and thereby injure themselves, and that on or about the said 2d day of January, A. D. 1912, while plaintiff was so engaged in his said work in the operation of said barker machine and saw, as hereinbefore described, he was ordered by the foreman of said certain room, who was then in the employ of said defendant, to ascend to said upper floor deck and throw off the belt from said revolving pulleys, which operated said barker machine and saw, and while plaintiff was so performing his said work, at the request and order of said foreman, after he had ascended to the said deck above, and while throwing off the said belt from said revolving pulley, as he was ordered to do, as aforesaid, plaintiff's right arm was caught between said belt and revolving pulley on said shaft, without any fault of the plaintiff herein, and plaintiff's right arm was then and there crushed, bruised, wounded, mutilated, and broken between the elbow and shoulder, and plaintiff was permanently injured thereby. That by reason of the carelessness and negligence of the said defendant in not providing safe and proper appliances for the use of said plaintiff in throwing off said belts from said revolving pulleys, and by reason of the injuries so received by the said plaintiff as hereinbefore alleged, plaintiff has been and now is permanently injured thereby and now is and has been wholly incapacitated from performing any labor since the 2d day of January, A. D. 1912."

The plaintiff was 34 years old when he was so injured and was earning \$2 per day. He claims that he was wholly incapacitated to perform labor, and that in the future he will be obliged to work for much less than he would have been able to earn but for said injury. He claims damages in the sum of \$10,000.

The defendant admitted that it is a corporation and engaged in the manufacture of paper, that plaintiff was employed by it on January 2, 1912, and that the plaintiff operated the two machines as alleged in the complaint, but denied every other allegation of the complaint. The defendant then pleaded that the plaintiff assumed the risk; that, if the plaintiff was injured through the negligence of any one other than himself, he was injured through the negligence of his fellow servants; and that the plaintiff was injured by his own negligence. The plaintiff denied each of the allegations of the answer.

After the plaintiff's evidence in chief was in, the defendant filed a motion for a judgment of nonsuit on the ground that there was not sufficient evidence to be submitted to the jury, etc. This motion was overruled. When all the evidence was in, the defendant moved the court to instruct the jury to return a verdict for the defendant. This motion also was denied.

The defendant contends that the trial court erred in not allowing his motion for a judgment of nonsuit or for an instructed verdict. There are no other assignments of error.

[1] 1. The plaintiff contends that it was the duty of the defendant to furnish him and the other employes with safe appliances with which to work, and that it was its duty to furnish the plaintiff and other employes safe appliances with which to throw off the belts from the revolving pulleys, so that they would not be compelled to throw off said belts from said pulleys with their hands or a stick and thereby injure themselves. The plaintiff contends also that the defendant neglected to furnish him or the other employes with any safe appliances with which to throw off said belts, and that he was compelled to use his hands in throwing them off from said pulley, and, as a consequence thereof, the plaintiff's arm was caught between one of said belts and one of said pulleys and crushed, etc.

We can give only a brief summary of the important portions of the plaintiff's evidence. The plaintiff's evidence in chief was given by the plaintiff, Victor Wasiljeff, Peter Schrotlin, Louie Rich, and Dr. Hugh S. Mount.

The plaintiff testified in substance: That he was working for the defendant at its paper mill on January 2, 1912, and had been working there three months. That he worked about six weeks loading cordwood from cars, and the latter six weeks he worked in the chipper and barker room. That on January 2, 1912, about 5:25 o'clock p. m., the foreman of the room said to the plaintiff and Louie Rich, "You go and take off the belts;" and the plaintiff went and climbed the ladder, about 13 or 14 feet. When he climbed the ladder, there were some boards lying lengthwise (forming the "platform" on which he was when throwing off the belt), and he had to go around under the shaft and pulley, the big wheel, to get the belt. The boards on the platform were loose. He had to watch, so that he would not fall down. The belt caught him by the hand and threw him in, and he did not remember any more. When it caught his hand and broke his arm, he did not remember any more. That Louie Rich called for help and took him down. That the plaintiff had taken off this belt four or five times before he was hurt. That the foreman of the barker and chipper room ordered him to go up the ladder and take off the belt. That Louie Rich was on the platform at the same time taking off another belt. That the defendant did not furnish either him or Rich any instrument or device for taking off the belts. He could not state how fast the pulleys were revolving when he attempted to take off the belts. That the pulleys never stopped, and that they could not take the belts off excepting when the pulleys were revolving. That sometimes the speed was slackened, but the belts had to

be taken off when the pulleys were revolving. That no one ever showed or instructed him how to take these belts off. He had seen others take them off. That he never before worked around machinery. That he was raised in Russia and had been in this country two years and three months; was 34 at the time of the accident. He says his arm still pains him. He cannot sleep when he lies on the sore side. He cannot lift more than 15 pounds with his injured arm. He says his arm was twisted when it was caught between the belt and the pulley. Says he worked at Raymond, Wash., at a sawmill two or three months before he came to Portland. Says he cannot work since the accident.

Peter Schrotlin testified that he was working for the defendant on January 2, 1912, when the plaintiff was injured; knows defendant's mill and the machinery in the chipper and barker room; has worked in that room and with the same machines with which plaintiff worked. In going up to take off the belts, he says the steps are about two feet from the wall, and you have to climb upon the wall, and go underneath the big wheel, and then step over the next plank and come to the shaft again, and throw off the belts there. There are three belts and pulleys there. The barker wheel was about 15 feet from the wall. They generally shut the mill down a little (when the belts are to be thrown off), and you have to take the belt in your hand and throw it off. You cannot throw the belt off when they stop altogether. They cannot shut the mill down but a little. They have to run. When the mill is slowed down to slow these pulleys, it is running other machinery in the mill. There is only one way to throw off the belt, and that is with the hands. You could not use any sticks; "but they could fix it a different way so that a fellow could throw it off without his hands, have a kind of lever or something like that, or a pulley." No sticks were furnished with which to throw off the belts. Witness had thrown the belt off several times, but says the belts cannot be thrown off when the pulleys are just moving. The pulleys are 12-inch pulleys. The belts are 4 inches wide. There is no room up there to stand and throw off the belts. There are planks there with big holes, so you can fall through. There are three or four planks there. The last-named witness was working at the mill at the time of the injury.

Louie Rich, a German, was working in the same room with the plaintiff at the time of the injury and climbed up and threw off a belt at the time the plaintiff was injured. He testified in substance as follows: He and plaintiff went up the ladder (to throw off the belts). We came out on this side (indicating), and then we had to go around the big pulley. There were two planks on that side (indicating) and two planks on this side (indicating),

and we had to go around the side, and one plank crosswise. He took his belt off with his hands. There was nothing there with which to take off the belts. He used his hands. Witness is still working for the defendant. The plaintiff went up the same time that witness did to throw off belts. The foreman told them to go up. The plaintiff fell over, back in the corner. The witness and another person carried the plaintiff down (after he was hurt). That was the time when he got his arm broke. We went up together, and he (plaintiff) went on his side, and witness went on his side of the barker belt. Witness saw the plaintiff fall over back, and the belt went off. Plaintiff got off the belt and fell down back.

Dr. Hugh S. Mount had examined the plaintiff's injured arm several times, and he testified in substance: That the plaintiff was badly injured. His arm and shoulder were the parts injured. His arm had been broken and was shrunken up. Certain muscles of his arm were atrophied. Paralysis had ruined part of his shoulder, and sensation in that part of his arm is gone. If he gets started just right he can lift 15 pounds, and that is all he can lift, and it hurts him to do that. The doctor's evidence tended very strongly to prove that the plaintiff was badly injured, and that the injury was permanent.

It is clearly shown that the plaintiff was ordered by the foreman to climb the ladder and throw off the belt; that he obeyed the order and ascended the ladder, and, in throwing off the belt from a revolving pulley, his right arm was caught between the belt and the revolving pulley on the shaft and crushed and broken between the shoulder and the elbow, and he was permanently injured. It is also shown by the evidence for the plaintiff that the defendant did not furnish any appliance or implement whatever for throwing off the belt, and that the plaintiff had to use his hands for that purpose.

The plaintiff and two other witnesses testify positively that no appliance or implement of any kind was furnished by the defendant for throwing off belts, and that the employees used their hands for that purpose. The evidence for the plaintiff shows also that the belts could not be thrown off excepting when the machinery was running, and that, when the belts were to be thrown off, the speed of the machinery was considerably reduced but not nearly stopped.

The evidence tends strongly to show that the revolving pulleys, the belts, and wheels, and shafts were dangerous machinery. The plaintiff testified that he had no previous experience in working about machinery, and that he had been working at that work about six weeks, and that he had thrown off the belts only four or five times before he was injured. He testified also that no one had instructed him as to the proper manner of

throwing off the belts, but that he had seen others do it.

[2] Peter Schrotlin, who had experience in working at the defendant's mill and in the work in which the plaintiff was engaged when he was hurt, speaking of throwing off the belts, testified: "That (with the hands) is the only way you can throw it off, with the hands. There is nothing else there. You could not use any stick. But they could fix it a different way so a fellow could throw it off without the hands. Have a kind of a lever, or something like that." This evidence was given without objection, and there was no motion to strike it out. On the argument counsel for the appellant suggested that the evidence of Mr. Schrotlin was inadmissible, because he was not shown to be an "expert," but, as no objection was made to his testimony, it is not necessary to decide whether it requires an expert to testify as to how the defendant could have arranged his machinery so that it would have been safe to his employees. It may be that this witness was an expert and fully qualified to testify on that subject. This evidence was relevant, and it was given without objection, and it was entitled to be considered by the jury, and also by the court, in passing on the motions for a judgment of nonsuit and for an instructed verdict.

In volume 9 of the Ency. of Evidence, pp. 111, 112, that work says: "Incompetent evidence which is introduced without objection becomes evidence in the particular case and must be treated as any other competent evidence, not only against the party failing to object, but as against the person introducing it. When evidence has been offered for a particular purpose, and no objection is made thereto, it must be treated as competent evidence for the purpose for which it was offered." The same volume on page 116 says: "Inadmissible conclusions or opinions of witnesses, if not properly and seasonably objected to, become evidence in the case and should be given the weight to which they are entitled."

There was evidence showing that the plaintiff was seriously injured while working for the defendant; that he was practically without experience in working about dangerous machinery. There was evidence also tending to prove that he was not instructed by any one as to the danger attending the throwing off of the belt. There was also evidence tending to prove that the defendant could have arranged his machinery, by putting on a lever or something of that kind, so that the plaintiff and other employees could have thrown off the belts without taking hold of them with their hands and without danger to them; and there was evidence also of three witnesses that the defendant did not furnish any kind of appliances for throwing off belts, and that the employees had to take

hold of the belts with their hands, when they were in more or less rapid motion, etc., etc.

[3] Counsel for the defendant contends that the Employers' Liability Act (Laws of 1911, pp. 16, 17) does not apply to this case; but we are unable to assent to his contention. Section 1 of this act is prolix, and it is not necessary to set it forth at length. After stating inter alia that "all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, floor openings and similar places of danger shall be inclosed," etc., it contains the following provision: "* * * And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

The defendant had charge of the paper mill and was responsible for the work that it was doing when the plaintiff was injured, and, according to the evidence, this work did involve a risk or danger to the defendant's employees, including the plaintiff, and hence this case comes within the words and the intent of that law. This law is a remedial act, and it should be construed with reasonable liberality.

[4] Counsel for the appellant contends also that the Employers' Liability Act should not be held to apply to this case, because, he says, that the counsel for the respondent, when the case was on trial, in the court below, said that this was a common-law action, and the court below regarded it as a case not within said act. The appellant did not except to any ruling of the court below in admitting or excluding evidence or in instructing the jury. He was satisfied with all of the trial court's rulings, excepting its refusal to grant a judgment of nonsuit or an instructed verdict.

The only question for decision here is whether there was sufficient evidence to be submitted to the jury. If there was, the motions for a nonsuit and for an instructed verdict were properly denied. In determining this question, we must base our decision on the law that applies to the case, without reference to what counsel or the court below may have considered to be the law of the case.

In 2 Standard Proc. pp. 414, 415, the rule is stated thus: "Although an appellant in his allegations of error is limited upon appeal to the grounds or reason thus alleged below, an appellate court, however, is not limited in its decision to the grounds or reason given

by the lower court. Thus an order granting a new trial may be sustained upon appeal, although upon an entirely different ground than alleged in the trial court. Likewise, in further example, rulings, excluding evidence and directing a verdict, will be upheld, if sustainable on any ground, regardless of the ground or theory acted upon by the court below."

If counsel for the plaintiff had induced the court below to make an erroneous ruling, and a judgment had been rendered against his client, and his client had appealed and had assigned as error the erroneous ruling of the court which his counsel had induced the court to make, under such circumstances, the plaintiff would be estopped by the acts of his counsel to insist that the case should be reversed for the error so committed.

In this case the counsel for the defendant claimed, in the court below, that the plaintiff's evidence was insufficient to be submitted to the jury, and the counsel for the plaintiff claimed that there was sufficient to go to the jury. The court below agreed with counsel for the plaintiff and denied the defendant's motions. The question for decision here is whether the court below decided correctly in denying said motions, and it is immaterial what the court below or the counsel for the parties said or thought on other questions.

The question here is: What is the law of this case, upon the facts contained in the record? The fact that counsel for the plaintiff or the trial court may have said, in the court below, that this case is a common-law action does not preclude this court's holding that it is within the Employers' Liability Act. The fact that counsel for the plaintiff said, in the court below, that this is a common-law action did not estop him in that court, nor does it in this court, to contend that the decision of the court below, holding that the plaintiff had made out a prima facie case for submission to the jury, was correct.

[6] This case being within the Employers' Liability Act, the common-law doctrines of assumption of risk, negligence of fellow servants, and contributory negligence do not apply. See *Dorn v. Clark-Woodward Drug Co.*, 133 Pac. 351, and sections 5 and 6 of said act. In *Dorn v. Clark-Woodward Drug Co.*, supra, Justice Burnett says: "An absolute duty is imputed to the employer, for the violation of which he is penally, as well as civilly, liable. Under such circumstances, the servant does not assume the risk of injury."

Under the act referred to, supra, it was the duty of the defendant to "use every device, care, and precaution, which it is practicable to use, for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suit-

able material or safety appliance and devices."

The evidence tends to show that the defendant furnished no appliances with which to throw off the belts, and that its employes had to take hold of the belts with their hands, when the belts were moving with considerable rapidity, and that the plaintiff's arm was caught between the belt and a revolving pulley on the shaft and crushed. It is contended that the defendant should have provided a belt shifter for throwing off the belts, and that a failure to furnish some such device was negligence. One witness for the plaintiff testified, as shown, supra, that this could have been done. This evidence on that point, with the other evidence produced by the plaintiff, was sufficient to require the case to be submitted to the jury.

[8] On the argument it was contended by counsel for the appellant that there was not room to place belt shifters on the machinery, but, if there was not room enough for that purpose, the defendant should have made sufficient room. If belt shifters are a good device for preventing danger to employes and can be used without destroying the efficiency of the machinery, it was the defendant's duty to furnish them or some other appliances for the safety of his employes, without regard to the expense.

A case not sufficient to be submitted to the jury is one where it appears that, if the jury were to find a verdict for the plaintiff upon any or all of the issues to be tried, the court ought, if required, to set it aside for want of evidence to support it. Section 183, L. O. L.

Section 3 of article 7 of the Constitution provides inter alia that: "No fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." This provision of the Constitution is a mandate to this court which we must obey.

[7] To support a verdict, there must be some legal evidence, tending to prove every material issue, upon which the person in whose favor the verdict was rendered had the burden of proof. In this case there are no errors of law vitiating the verdict, and it must stand, unless we can say affirmatively that there is no evidence to support it.

In *Perkins v. McCullough*, 36 Or. 147, 59 Pac. 182, the settled rule as to granting of judgments of nonsuit in this state is stated thus: "The rule is well settled in this state that if there be any evidence, however slight, fairly susceptible of an inference or presumption tending to establish a material allegation of the complaint (all the material allegations of the complaint), it is the duty of the court to deny the motion for a judgment of nonsuit and submit the question involved to the jury for determination." It is unnecessary to refer to the numerous cases

decided by this court sustaining the foregoing citation. We are unable to say there is no evidence in this case to support the verdict.

The evidence for the defendant disputed some of the evidence for the plaintiff; but we think that there was sufficient evidence in favor of the plaintiff to require the case to be submitted to the jury, and that there was no error in denying the motion for a judgment of nonsuit or for an instructed verdict.

The judgment of the court below is affirmed.

McBRIDE, C. J., and MOORE and BURNETT, JJ., concur.

WILLIS et al. v. HORTICULTURAL FIRE RELIEF OF OREGON.†

(Supreme Court of Oregon. Jan. 18, 1914.)

1. EXCEPTIONS, BILL OF (§ 18*)—REQUISITES—INCORPORATION OF EVIDENCE.

A purported bill of exceptions, including only a copy of the instructions, with a note of exceptions to four of them, and containing no statement of so much of the evidence or other matter as is necessary to explain it, as provided by L. O. L. § 171, is not a proper bill of exceptions, though accompanied by a transcript of all the evidence, exhibits, and instructions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 19; Dec. Dig. § 18.*]

2. APPEAL AND ERROR (§ 987*) — REVIEW — EVIDENCE.

The Supreme Court will not review the evidence on the appeal of a law case at the suggestion of the appellant to determine what verdict should have been rendered, though it may, when it has determined that there is error, examine the evidence to determine whether it may affirm notwithstanding the error or direct what judgment shall be entered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.*]

3. APPEAL AND ERROR (§ 701*) — RECORD — QUESTIONS PRESENTED FOR REVIEW.

Though a bill of exceptions contains no statement of the evidence or other matters necessary to explain it, yet if instructions objected to appear, in the light of the pleadings, to be erroneous, they may be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2933-2935; Dec. Dig. § 701.*]

4. INSURANCE (§ 553*)—FORFEITURE—FALSE PROOFS OF LOSS.

Under the provision of an insurance policy provided for by L. O. L. § 4666, that the policy shall be void in case of any fraud or false swearing by the insured relating to the insurance, whether before or after a loss, false swearing as to a loss, to avoid the policy, must have been knowingly and willfully false, with the effect of deceiving and misleading.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.*]

5. INSURANCE (§ 553*)—FALSE PROOFS—FRAUD—INTENTION.

In an action on a policy which provides that it shall be void in case of fraud or false swearing by the insured, instructions that the

false statement must have been made with knowledge of its falsity "and with the intention of defrauding the company" are erroneous in adding the quoted qualification.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.*]

Department 2. Appeal from Circuit Court, Lake County; Henry L. Benson, Judge.

Action by Richard Willis and another, partners under the firm name of the Willis Furniture Company, against the Horticultural Fire Relief of Oregon, a corporation. From a judgment for plaintiff for \$6,000, defendant appeals. Reversed and remanded.

This is an action to recover upon two fire insurance policies covering the same stock of goods, one for the sum of \$2,000 and the other for \$4,000, for loss sustained by a fire which occurred on February 5, 1912; plaintiffs alleging total loss of \$7,200. The insurance company as a defense alleges, among other things, that plaintiffs' loss by the fire was only \$3,000; that the proof of loss sustained by plaintiff shows the stock of goods insured in total as of the value of \$9,968.97, when in fact plaintiff Richard Willis, who made affidavit as to the amount of the loss, himself saved from the fire five pieces of furniture of the value of \$70, and stated in his proof that at the time of the fire there were 81 iron and brass bedsteads of the stock destroyed, of the value of \$451, when in fact there were but 32, making other false statements as to the amount or value of the loss. The case was tried before a jury, and judgment rendered in favor of plaintiff for \$6,000, from which judgment defendant appeals.

John Bayne, of Salem (L. F. Conn, of Lakeview, on the brief), for appellant. J. C. Rutenic, of Klamath Falls (W. Lair Thompson, of Lakeview, and J. S. Kent, of Klamath Falls, on the brief), for respondents.

EAKIN, J. (after stating the facts as above). [1] In the record we find what is certified as the bill of exceptions, which includes only a copy of the instructions to the jury given by the court with a note of exceptions to four of them, containing no statement of "so much of the evidence or other matter as is necessary to explain it," as provided by section 171, L. O. L. See Hahn v. Mackay, 63 Or. 100, 126 Pac. 12, 991. Some attorneys seem to have concluded that because by the amendment of the Constitution either party to the appeal may bring up the transcript of all the evidence, exhibits, and instructions, they may rely on that record to supplement the bill of exceptions, or even to take the place of it. In this case there are over 400 typewritten pages of the evidence and instructions, and we cannot recognize that as a bill of exceptions. This question was discussed and decided by Mr. Justice Burnett in the case just cited, where it holds

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 17, 1914.

that the transcript of evidence will not take the place of a bill of exceptions.

[2] This court will not review the evidence on the appeal of a law case at the suggestion of the appellant to determine what verdict should have been rendered. The purpose of that provision of the Constitution was that, if the appellate court finds that the trial court committed error, then it may examine the evidence, and if the verdict was such as should have been rendered, notwithstanding the error, it may affirm it, or if the judgment appealed from should be changed, and it can determine what judgment should be entered, it may direct such judgment to be entered; but, unless the appellate court determines that the trial court committed error, which it will ascertain exclusively from the pleadings and bill of exceptions, except in case of a motion for nonsuit or a directed verdict, it will have no occasion to examine the transcript of evidence, which in this case would be a tedious undertaking.

[3] However, if any of the instructions objected to appear, in the light of the pleadings, to be erroneous, such instruction may be reviewed and the propriety of exceptions 1, 2, and 4 in this case may be examined upon the facts as admitted in the pleadings.

[4] These three involve the same point, that the false swearing charged in the answer to avoid the policy must have been willful, intentional, deliberately false, and fraudulent. The language of the policy involved on this question, as set out in the answer and admitted in the reply, provides: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material facts or circumstances concerning this insurance or the subject thereof; or if the interests of the insured * * * be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." This provision of the policy is provided for by section 4666, L. O. L. The terms "fraud" and "false swearing," being used together, must have the same application, and the false swearing must have been knowingly and willfully false; its effect being to deceive or mislead. *Franklin Insurance Company v. Culver*, 6 Ind. 137; *Claffin v. Commonwealth Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76.

[5] The only controversy here is in regard to the effect of the language repeated several times in the instructions and excepted to, namely, "And with intention of defrauding the company." Similar language is repeated three times in the instructions. The first instruction containing this clause is as follows: "Although the policies of insurance in this case contain a provision that 'in case of any fraud or false swearing by the insured touching any matter relating to the insurance, or the subject thereof, whether before or after

loss,' the policy shall be void, the untrue statement, in order to avoid the policy, must have been knowingly and intentionally made by the insured with knowledge of its falsity and with the intention of defrauding the company." Thus the court impresses the jury with the fact that plaintiff Richard Willis' knowingly and intentionally swearing falsely, with knowledge of such falsity, was not sufficient to avoid the policy, but that the intention to defraud the defendant must also be shown, the burden of which by previous instructions is cast upon the defendant. Although false swearing knowingly and intentionally done is evidence of the fraud and of the intention to injure the defendant, yet the court includes as a necessary additional element of proof the intention to defraud. This, we think, was error. *Ellis v. Insurance Co.*, 7 Pa. Super. Ct. 264; *Marion v. Great Republic Ins. Co. of St. Louis*, 35 Mo. 148. As said in *Dolloff v. Insurance Company*, 82 Me. 266, 19 Atl. 396, 17 Am. St. Rep. 482: "When the actual losses, truly stated in the proof of loss, exceed the whole amount of the insurance, will a knowingly and purposely false statement on oath in the proof of loss, of other pretended losses, destroy plaintiff's claim for his actual losses under such a policy as this? We cannot doubt that it will. The parties stipulated that it should. It is so provided in the contract, and it is a lawful provision."

The object of an insurance policy is only one of indemnity and requires good faith on the part of the assured toward the insurer. Especially is this so in the adjustment of the loss after a fire. Insurers usually require from the assured a detailed statement on oath of the loss as a necessary preliminary to the payment of the indemnity. This is a requisite of our statute also. We think the court was not at liberty to change the language of the policy quoted above and to add thereto a requirement of the additional proof of the intention. The demand of the statute and of the policy for such a statement is addressed to his conscience. When, therefore, he meets the demand with knowingly false statements of losses he did not sustain in addition to those he did, he should lose his standing in a court of justice as to any claim under that policy. This is the substance of what is said in *Dolloff v. Insurance Company*, *supra*, where it is further stated that false swearing by itself is made a cause for forfeiture.

In *Linscott v. Insurance Company*, 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435, it is said: "Where a clause like the one mentioned is contained in the policy, and the insured knowingly and purposely makes a false statement on oath, concerning the subject-matter, it vitiates the policy and bars his right of recovery, whether his purpose was to deceive the company or not, for it is 'so nominated in the bond.'"

This is also directly held in *Claffin et al. v. Commonwealth Insurance Co.*, supra, as stated in the syllabus: "A policy of insurance against loss by fire contained a clause to the effect that in case of loss the assured should submit to an examination under oath by the agent of the insurer, and that fraud or false swearing should forfeit the policy. The insured, after loss, submitted to such examination, and made false answers under oath respecting the purchase and payment of the goods assured. Although it appeared that the statements were not made for the purpose of deceiving the insurer, but for the purpose of covering up some false statements previously made to other parties, held, the motive which prompted them was immaterial, since the question related to the ownership and value of the goods, and were material, and that the attempted fraud was a breach of the condition of the policy and a bar to recovery."

We leave out of account any consideration of false swearing in ignorance of the facts or by mistake which would not avoid the policy, being guarded by the instruction given expressly cautioning the jury, namely: "The untrue statement in order to avoid the policy must have been knowingly and intentionally made by the insured with knowledge of its falsity." Such an oath in such a case would be moral fraud and not merely legal fraud. This is the effect of all the decisions cited above. This error, being sufficiently disclosed by the instructions as applied to the facts admitted in the pleadings, is sufficient to reverse the case.

The cause is reversed and remanded.

BEAN and McNARY, JJ., concur.

FISHER v. PORTLAND RY., LIGHT & POWER CO. et al.

(Supreme Court of Oregon. Jan. 13, 1914.)

1. APPEAL AND ERROR (§ 419*)—NOTICE OF APPEAL—DESCRIPTION OF JUDGMENT.

The notice of appeal required by L. O. L. § 550, in order to give the Supreme Court jurisdiction, must describe the judgment or decree appealed from with reasonable certainty.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2145, 2146; Dec. Dig. § 419.*]

2. APPEAL AND ERROR (§ 440*)—EFFECT OF TRANSFER OF CAUSE — JURISDICTION OF TRIAL COURT—AMENDMENT NUNC PRO TUNC.

Though the trial court is without jurisdiction to annul a judgment after the term at which it was rendered, it may make an entry after the term, and after an appeal has been taken from the judgment, as of the date of the original judgment, eliminating one of the defendants against whom no verdict was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2198-2201; Dec. Dig. § 440.*]

3. APPEAL AND ERROR (§ 781*)—DISMISSAL—GROUNDS—AMENDMENT OF JUDGMENT.

Where, after an appeal from a judgment, the trial court makes a nunc pro tunc entry in terms annulling the judgment and entering a new one but in effect only eliminating one of the defendants against whom no verdict was rendered, the appeal will not be dismissed on the ground that the judgment appealed from has been annulled; the nunc pro tunc entry showing the real determination of the cause as of the date of the original judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, 3122; Dec. Dig. § 781.*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by Roy Fisher, a minor, by Andrew J. Crafton, his guardian ad litem, against the Portland Railway, Light & Power Company and another. From a judgment for plaintiff, defendants appeal. On motion to dismiss appeal. Denied.

Griffith, Leiter & Allen, of Portland (F. J. Lonergan, of Portland, on the brief), for appellants. Kimball & Ringo, of Portland (Seitz & Clark, of Portland, on the brief), for respondent.

McNARY, J. This is a motion to dismiss an appeal upon the premise that the judgment from which the appeal is taken was annulled by the trial court and a different judgment entered in lieu thereof. On April 17, 1913, a judgment for \$5,000 was docketed in the circuit court of Multnomah county in favor of plaintiff and against defendants. The Portland Railway, Light & Power Company on July 3, 1913, filed its notice of appeal and subsequently took steps necessary to perfect its record in this court. On August 29, 1913, the circuit court, in the presence of the legal representatives of the parties litigant, entered the following judgment: "It appearing to the court that on the 17th day of April, 1913, a verdict was returned by the jury in the sum of \$5,000 against the defendant Portland Railway, Light & Power Company in the above-entitled cause, and not against the Portland Water Power & Electric Transmission Company. It appearing to the court that, through inadvertence and mistake, a judgment was rendered and entered against both defendants above named in said cause on said verdict for the sum of \$5,000 and \$63.60 costs and disbursements, and it further appearing to the court that said judgment so rendered and entered on said verdict against the defendant corporation above named should be vacated and held for naught, and that a judgment should be entered to conform with said verdict, to wit, a judgment in the sum of \$5,000 and costs and disbursements taxed at \$63.60 against the Portland Railway, Light & Power Company, one of the defendants above named: Now, therefore, it is considered, ordered, and adjudged that said judgment rendered and

entered on the 17th day of April, 1913, be and the same is hereby annulled and held for naught; and it is further considered, ordered, and adjudged that the plaintiff above named do have and recover of and from the defendant Portland Railway, Light & Power Company the sum of \$5,000 and his costs and disbursements in this action taxed at \$83.60, and that execution issue therefor, and that this order be entered nunc pro tunc as and of the 17th day of April, 1913." From this judgment no notice of appeal was given.

[1] The record before us is supported solely by the original judgment under date of April 17, 1913. By the exactment of section 550, L. O. L., the serving and filing of a notice of appeal is an act prerequisite to this court acquiring jurisdiction. Not only must notice be given as required by the statute, but the contents thereof must describe with reasonable certainty the judgment or decree from which the appeal is taken.

[2, 3] In a consideration of this motion it must be borne in mind that the judgment enrolled August 29, 1913, was after the expiration of the term wherein the original judgment was entered, and as a consequence thereof the trial court was without jurisdiction to annul the judgment entered April 17, 1913. While the court used the expression that the original judgment was "annulled and held for naught," subsequent language shows that the order was only nunc pro tunc in character. All the court professed to do by the last order was to eliminate one of the defendants and thereby relieve it from the burden of the first judgment. This the court had a right to do by the entry of the judgment of August 29, 1913, as and of April 17, 1913, so that the latter order would reflect the truth of the record which by inadvertence was omitted from the primal judgment. *Grover v. Hawthorne*, 62 Or. 65, 116 Pac. 100, 121 Pac. 804; *Frederick & Nelson v. Bard*, 134 Pac. 318. Therefore, on principle, the only judgment which speaks the final determination of the rights of the parties as adjudged by the lower court is the one from which this appeal is taken under date of April 17, 1913.

Wherefore the motion to dismiss is overruled.

MCBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

WEST OREGON LUMBER CO. v. BRADY et al†

(Supreme Court of Oregon. Jan. 13, 1914.)

JUSTICES OF THE PEACE (§ 187*)—APPEAL — CORRECTION OF RECORD.

On appeal from a justice of the peace, when it was found that the amended complaint on which the case was tried was not in the record, the circuit court could not authorize a copy to be substituted therefor, the proper proceeding

being by application to the justice, and, in the absence of such application, the circuit court properly dismissed the case.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 647-651, 654; Dec. Dig. § 187.*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by the West Oregon Lumber Company against Fred J. Brady and others. From a judgment of dismissal on appeal of the plaintiff from a judgment of a justice of the peace for defendant Martin Denny, plaintiff appeals. Affirmed.

The plaintiff brought an action in the justice's court for Portland district to recover for lumber alleged to have been sold and furnished to defendants at their special instance and request. The defendant Martin Denny answered by a general denial, putting the case at issue. After the cause was thus at issue, the plaintiff served on Denny's counsel an amended complaint, substantially changing the cause of action as to Denny, but either failed to file it, or it was lost from the files. The defendant Denny demurred to the amended complaint, and his demurrer being sustained, plaintiff appealed to the circuit court. Upon the transcript being filed, it was discovered that the amended complaint was not in the record, and thereupon defendant Denny moved to dismiss the appeal, which motion was overruled, and the plaintiff was permitted to substitute a copy for the original amended complaint and defendant Denny to file an answer thereto. Thereafter, a copy of the amended complaint having been filed, the defendant Denny answered by a general denial, and the plaintiff objected to the filing of the answer on the ground that the answer changed the issue tried in the court below from one of law to an issue of fact, which, being a substantial change of the issues tried in the court below, was inimical to section 2464, L. O. L. Thereafter the court reversed its ruling upon the demurrer to the amended complaint, and sustained the same; and, plaintiff refusing to plead further, the defendant Denny had judgment of dismissal, from which plaintiff appeals.

R. W. Wilbur, of Portland (Wilbur & Spencer and J. C. Simmons, all of Portland, on the brief), for appellant. M. O. Wilkins, of Portland, for respondent.

MCBRIDE, C. J. (after stating the facts as above). The circuit court had no jurisdiction to allow a substitution of the copy of the amended complaint. It was the duty of the appellant to bring into the circuit court a perfect record. If portions of the record had been lost, it was the duty of the appellant to have applied to the justice's court for leave to substitute copies before bringing up his transcript. Failing to do this, the circuit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

† Rehearing denied January 27, 1914.

court was without jurisdiction to hear the cause. Corbitt & Macleay et al. v. Bauer et al., 10 Or. 340.

Plaintiff was in the appellate court without a complaint, and the action was properly dismissed:

The judgment is affirmed.

BEAN, EAKIN, and McNARY, JJ., concur.

JOHNSON v. MIAMI LUMBER CO.

(Supreme Court of Oregon. Jan. 13, 1914.)

1. ATTORNEY AND CLIENT (§ 167*) — ACTION FOR COMPENSATION—INSTRUCTIONS.

In an action by an attorney for compensation, evidence that, after plaintiff had tendered defendant his resignation of an employment on a monthly retainer of \$30 unless defendant should discharge an objectionable employé, defendant willfully kept from plaintiff knowledge that the objectionable employé had been retained, and plaintiff's resignation accepted, till plaintiff had rendered services in important litigation then pending, and had accepted the usual monthly retainer, justified an instruction as to fraudulent conduct of the defendant in failing to notify plaintiff of the acceptance of his resignation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373-375; Dec. Dig. § 167.*]

2. APPEAL AND ERROR (§ 260*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—NECESSITY FOR EXCEPTIONS.

A ruling excluding evidence cannot be considered on appeal, when not excepted to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.*]

Department 2. Appeal from Circuit Court, Tillamook County; Percy R. Kelly, Judge.

Action by S. S. Johnson against the Miami Lumber Company. From a judgment for plaintiff for \$455, defendant appeals. Affirmed.

This is an action to recover for the reasonable value of legal services rendered defendant. The complaint, in substance, alleges that between October 5 and December 25, 1911, plaintiff, at the instance and request of defendant, rendered certain legal services for defendant in the trial of a certain case in the United States District Court; that the reasonable value of such services and of plaintiff's expenses in connection therewith was the sum of \$500; that defendant has paid plaintiff's expenses and the further sum of \$45, leaving due the sum of \$455. Defendant answered, admitting that plaintiff rendered the services alleged, but denying the value thereof, and set up as an affirmative defense that at all the times from April 1, 1909, to January 1, 1912, plaintiff and C. W. Talmage were the retained attorneys of defendant under and by virtue of a contract with them, whereby they agreed to attend to all defendant's business in the courts of the state of Oregon for the sum of \$30 per month, and their necessary expenses, and that the

litigation for which plaintiff seeks to recover in this action was litigation arising and conducted under the terms and conditions of said contract, alleging payment under the terms of that agreement. The plaintiff's reply admitted the making of the agreement, but alleged that on the 23d day of November, 1911, there was a disagreement between plaintiff and certain agents of defendant in Tillamook county; that on said date plaintiff wrote defendant that unless one of its agents was discharged from its employ defendant must accept the resignation of plaintiff, to take effect on the 30th day of September, 1911; that said letter was received by defendant prior to the date last mentioned; that upon receipt of said letter of resignation, the defendant, unknown to plaintiff, did not discharge said employé, and failed to inform plaintiff whether or not his resignation was accepted, but did immediately notify its agent in Tillamook and C. W. Talmage, its attorney, that plaintiff had resigned and was no longer in its employ; that the said agents of defendant did not notify plaintiff that his resignation was accepted; but that defendant and its attorney Talmage, in order to obtain the legal services of plaintiff at only trifling costs in a very important law action, fraudulently represented and led plaintiff to believe by acts and words that he was still retained as attorney, and did not notify him that his resignation had been accepted until after his services in the law action had been rendered, thereafter informing him that his resignation had been accepted as of September 30, 1911.

R. K. Page and H. D. Roberts, both of Salem (C. W. Talmage, of Tillamook, on the brief), for appellant. R. R. Dunlway, of Portland (T. B. Handley and Webster Holmes, both of Tillamook, on the brief), for respondent.

McBRIDE, C. J. (after stating the facts as above). The pleadings are voluminous, and the foregoing is only a summary, but it is deemed sufficient to present the issue tried in the court below. It appears from plaintiff's testimony that plaintiff and C. W. Talmage were partners in the practice of law when the agreement with defendant for the rendition of legal services was entered into, and that while this agreement was in force a case entitled "Wheeler v. Miami Lumber Company" was instituted against defendant. The firm of Johnson & Talmage had been dissolved, but it was agreed between them that they would jointly conduct the business of the defendant, and share in the retainer of \$30 a month. On September 23, 1911, the plaintiff wrote the defendant the following letter: "Miami Lumber Company. I have written you heretofore concerning the man in your employ by name of Hiram Eadus. * * * You have paid no attention to this,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

at least you have not answered my letter. * * * Mr. Talmage and I have dissolved partnership a few months ago, but have been carrying on your business together. * * * As you have ignored the recommendation heretofore made by me with respect to this man Eadus I wish to say that on and after the 30th day of September, which ends a quarter of our employment as your attorney, that unless you immediately discharge Eadus you may consider myself no longer as your attorney. * * * This man Eadus is a disreputable trouble maker. * * * Now kindly understand that if you do not immediately discharge from your employ Hiram Eadus you may consider my resignation as your attorney, tendered to take effect on the 30th day of September. S. S. Johnson." Defendant replied thereto as follows: "October 5, 1911. Mr. Sidney S. Johnson. Replying to your letter of September 23d, regarding Mr. Eadus, will say we have written Mr. Bent about the matter and will communicate with you further. Miami Lumber Company, by Isham." Defendant sent the following letter to its agent in Tillamook: "October 24, 1911. Mr. A. S. Bent. We have yours of October 18th with letter of explanation from Mr. Eadus. We accept the explanation and let the matter drop. Mr. Talmage is going to act as our attorney as Mr. Johnson has resigned. Miami Lumber Company, by Isham." Bent did not notify plaintiff or Talmage of the receipt of this letter until after plaintiff had completed his services and won for defendant the case of *Wheeler v. Miami Lumber Company*, which was an important case involving a claim against it of several thousand dollars. After plaintiff had won this case and taken his share of the retainer from Talmage, supposing that his request had been complied with and the objectionable agent discharged, he was informed for the first time that his resignation had been accepted in October, and that he was no longer an attorney for the company. Without repeating it in detail, we think there was sufficient evidence tending to show that defendant's agent in Oregon had willfully kept from plaintiff the knowledge that the objectionable employé had not been discharged, and that his resignation had been accepted to justify the submission of the case to the jury. It is clear that if plaintiff had known that his employment by defendant had been terminated and that he would no longer receive his share of the retainer theretofore paid to Talmage & Johnson, he would not have rendered the very valuable services given by him for the pittance paid him by Talmage. The defendant and its agent knew that he was rendering the services, and allowed him so to do after it had accepted his resignation; and its failure to notify Talmage or plaintiff that it had retained the objectionable employé, but had accept-

ed Johnson's resignation, might well satisfy a jury that it was seeking to obtain the benefit of his previous knowledge of the case, and his ability to conduct it to a successful issue, without giving an equivalent.

[1] It is also urged that the court erred in instructing the jury in relation to the fraudulent conduct of the defendant in failing to notify plaintiff of the acceptance of his resignation before he had rendered the services above alluded to; but, for the reasons above given, we think the instruction was justified by the evidence.

[2] It is true that in the course of the trial the court ruled that there had been no evidence of fraud and bad faith on the part of the defendant, and excluded testimony offered to show that Talmage had no knowledge of the acceptance of plaintiff's resignation until after the trial of the case of *Wheeler v. Miami Lumber Company*; but this ruling was not excepted to, and cannot be considered here. In fact there was no evidence that Talmage knew any more about the matter than did plaintiff. But there is evidence that defendant and its agent in Tillamook knew that Johnson was no longer under retainer by the company and was no longer a partner of Talmage, and, with this knowledge in its possession, continued to correspond with Johnson and to accept his services and their valuable results, without informing him that when they were terminated he would no longer be in receipt of a retainer from it.

The verdict was just, and the judgment is affirmed.

BEAN, EAKIN, and McNARY, JJ., concur.

EAGLE CLIFF FISHING CO. v. McGOWAN et al.

(Supreme Court of Oregon. Jan. 6, 1914.)

1. COURTS (§ 493*) — FEDERAL AND STATE COURTS—CONCURRENT JURISDICTION.

When either a state or federal court first secures concurrent jurisdiction of a cause, the other cannot interfere with or control the process of the first, and any attempt to do so before a final decision is reached is void.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1346-1352; Dec. Dig. § 493.*]

2. JUDGMENT (§ 829*) — CONCLUSIVENESS — IDENTITY OF SUBJECT-MATTER.

A decree of the Circuit Court of the United States for the Western District of Washington determining that defendants, under a license from the fish commissioner of Washington, had the exclusive right to maintain at places specified set nets for salmon until March 31, 1912, does not bar a suit in Oregon, after the date named, to enjoin obstructions of fishing rights at the same places under the laws of Oregon; the proper court having meantime decided that the boundary was so located as to include the places in question in Oregon, instead of Washington.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1510-1515; Dec. Dig. § 829.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. COURTS (§ 39*)—JUDGMENT (§ 498*)—JURISDICTION—DETERMINATION—ALLEGATIONS IN PLEADINGS.

The authority of a court to hear and determine a cause depends upon the allegations of the initiatory pleading, and not upon the facts, and an error in determining the jurisdiction does not usually render the judgment void, but voidable only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 152-161; Dec. Dig. § 39;* Judgment, Cent. Dig. § 939; Dec. Dig. § 498.*]

4. NAVIGABLE WATERS (§ 39*) — RIPARIAN RIGHTS—ACCESS TO WATER.

As an incident to the lawful occupation of lands, one border of which is the low-water line of the Columbia river, the occupant has the private right of access at the sites occupied to and from the stream.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239-244; Dec. Dig. § 39.*]

5. NAVIGABLE WATERS (§§ 36, 37*)—OWNERSHIP OF BED—EXTENT.

The margin of Oregon's ownership of the bed of a navigable stream is the line of ordinary high water, and the state may convey the part between ordinary high and low water to the exclusion of the riparian rights of the upland owner.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180-226, 285; Dec. Dig. §§ 36, 37.*]

6. FISH (§ 5*)—EXCLUSIVE RIGHTS—OWNERS OF TIDELANDS.

A tideland owner on a navigable stream has the exclusive right to draw a seine on his own land; but he cannot exercise any prerogative in the manner of catching the fish differing from that which may be legally asserted by every other citizen of the state.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 11-15; Dec. Dig. § 5.*]

7. MONOPOLIES (§ 4*)—EXCLUSIVE RIGHTS — INJUNCTION.

Under L. O. L. §§ 5272, 5283, 5294, 5298, 5303, 5304, providing for licenses for fishing salmon, the fees for licenses to be placed in a hatchery fund, and the place of operation under a license to be designated by the number of the license placed on the bank of the river, or on a buoy, the maintenance in a river, under a license, of rocks to which buoys are attached, a cable to which a boat may be fastened for fishing operations, and other appliances, tend to create an exclusive right of fishing, and are properly enjoined.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 3; Dec. Dig. § 4.*]

8. MONOPOLIES (§ 4*)—EXCLUSIVE RIGHT OF FISHERY.

An exclusive right of fishing in a navigable stream cannot be granted to any person under a Constitution forbidding the creation of a monopoly in the pursuit of a lawful undertaking.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 3; Dec. Dig. § 4.*]

In Banc. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Suit by the Eagle Cliff Fishing Company against H. S. McGowan and others. From a decree for plaintiff, defendants appeal. Affirmed.

This is a suit to enjoin interference with the right of access to a navigable stream from a part of the tidelands fronting upon Sand Island in the Columbia river near its mouth. The facts are that by proclamation

of the President of the United States this Island was on August 29, 1863, withdrawn from sale, and reserved for military purposes. All of the tidelands abutting upon the island were granted to the United States by an act of the Legislature of this state, approved October 24, 1864. Special Laws, Or. 1864, p. 72. These lands were surveyed, and, from a plat thereof received in evidence, it appears that the general outline of the southerly and easterly shores of Sand Island form nearly a right angle, except that the corner is circular. The measurement, as far as material, divided the lands into tracts called sites numbered 1, 2, and 3. No. 1 embraces the corner; the length of the low-water line being about 4,500 feet. Sites 2 and 3 join No. 1 on the east in the order named; the length of each being 3,500 feet. Pursuant to a act of Congress approved July 28, 1892, c. 316, 27 Stat. 321 (U. S. Comp. St. 1901, p. 2529) the Secretary of War, on May 1, 1908, caused to be leased to the Columbia River Packers' Association, an Oregon corporation, sites numbered 2 and 3 for a term of three years. The defendant H. S. McGowan, having secured from the fish commissioner of the state of Washington licenses to catch salmon by operating until March 31, 1912, set nets in the Columbia river in front of Sand Island, located the lines intended to be occupied in placing such nets by securely anchoring buoys for that purpose. Such lessee thereupon commenced a suit in July, 1908, in the Circuit Court of the United States for the Western District of the State of Washington, Western Division, against the defendants herein, H. S. McGowan, Eric Lindstrom, and J. P. Coyle, residents of that state, to enjoin the placing in the river of any obstruction in front of the demised premises, alleging in the bill that Sand Island was situated within the borders of that state. Such suit having been at issue was tried, and on February 5, 1912, an interlocutory decree was given that, until March 31st of that year, the expiration of the then fishing license issued to McGowan, he and the other defendants were entitled to the exclusive right to maintain at the places specified set nets for the purpose of catching salmon, and the plaintiff in the suit was enjoined, until the expiration of the time so limited, from interfering with the exercise of that right. At the time such suit was begun the boundary between Washington and Oregon had long been in dispute, it being asserted by some persons that the line extended south of Sand Island; but on November 11, 1908, the Supreme Court of the United States, in an original suit instituted to ascertain the dividing line, determined that it ran north of that island, thereby including it within Oregon. *Washington v. Oregon*, 211 U. S. 127, 29 Sup. Ct. 47, 53 L. Ed. 118; *s. c.*, 214 U. S. 205, 29 Sup. Ct. 631, 53 L. Ed. 969.

The plaintiff in such suit, on March 28,

1911, in consideration of the annual payment of \$12,500, secured from the Secretary of War a lease of sites numbered 1, 2, and 3 for a term of three years. The defendants herein, on April 1, 1912, obtained from the master fish warden of Oregon licenses to catch salmon by operating in front of such sites 11 set nets and 2 seines. The plaintiff herein was incorporated under the laws of the state of Washington, May 15, 1912, and on the 11th of the next month was duly permitted to engage in business in the state of Oregon. The plaintiff in the suit in the federal court on June 5, 1912, in consideration of the payment of the annual rent of these sites, as hereinbefore stated, and the sale to it of all merchantable fish that might be caught, sublet to the plaintiff herein the several sites named for the remainder of the term. The defendants herein, as copartners, undertaking to operate under the licenses last mentioned, anchored to heavy rocks, put into the river in front of these sites, and at right angles with the current, wooden buoys, about 4 feet long, and 6x6 inches wide, indicating the lines intended to be occupied by nets 150 to 300 feet in length to be set from 550 to 950 feet apart, and also placed in that stream, about 40 feet below the line of low water, and on front of these sites, a steel cable about 1,200 feet in length, which wire rope was fastened at each end and in the middle to heavy iron rails that were sunk by a hydraulic pump into the sand to the depth of about a foot. To this cable were attached buoys; the defendants intending to moor thereto vessels having machinery with which seines could be operated and the salmon that might be thus encircled removed without dragging the net to the shore. The plaintiff herein, on June 12, 1912, also secured from the master fish warden of Oregon licenses to catch salmon by operating at Sand Island two seines, each not to exceed, 1,800 feet in length. Employees of the plaintiff removed from the river buoys, rocks, cable, and iron rails so placed therein by the defendants, commenced operating seines in front of the specified sites to and upon which the nets were hauled, and thereupon instituted this suit.

The complaint states many of the facts hereinbefore set forth, and avers, *inter alia*, that the obstructions so placed in the river by the defendants interfere with an exercise of the plaintiff's right of access to the Columbia river from such tidelands. The answer denies the material averments of the complaint, sets up affirmative matters as separate defenses and by way of cross-bill, and as an estoppel to the maintenance of the suit, details the pleadings filed in and the decree rendered by the federal court in the suit referred to, alleging that the plaintiff herein is the successor in interest of the plaintiff in that suit and in privity in estate with it. The reply put in issue the allegations of new

matter thus set forth, and the cause being tried resulted in a decree as prayed for in the complaint, and the defendants appeal.

Leslie Craven and Harrison Allen, both of Portland (Griffith, Leiter & Allen, of Portland, on the brief), for appellants. G. O. Fulton, of Astoria, for respondent.

MOORE, J. (after stating the facts as above). [1] The questions to be considered are: (1) Is the determination of the federal court, in the case referred to, a bar to the prosecution of this suit? (2) If that decree does not constitute an estoppel herein, has the plaintiff, by reason of its possession of the tidelands fronting upon a part of Sand Island, the right to enjoin the placing in the Columbia river, in front of its premises the obstructions mentioned, when the defendants were undertaking to exercise at such place privileges alleged to have been obtained from the master fish warden of Oregon pursuant to prior licenses, issued to them for that purpose? These inquiries will be treated in the order stated. Although the state and the federal courts constitute a uniform judicial system, they are so essentially distinct that neither, when concurrent jurisdiction has first been secured by one, can interfere with or control the process of the other, and any attempt to do so before a final decision has been reached is void. *Tenth Nat. Bank v. Sanger*, 42 How. Prac. (N. Y.) 179; *Ex parte Robinson*, 6 McLean, 355, Fed. Cas. No. 11,935; *Ex parte Jenkins*, 2 Wall. Jr. 521, Fed. Cas. No. 7,259; *Riggs v. Johnson County*, 6 Wall. 166, 18 L. Ed. 768; *United States ex rel. v. Council of Keokuk*, 6 Wall. 514, 18 L. Ed. 933.

[2, 3] It will be remembered that, after the suit referred to was commenced in the federal court of the state of Washington, Sand Island was determined by the proper tribunal to be within the limits of the state of Oregon. Invoking a maxim that equity acts in personam, it has been held by a few courts of last resort that a chancery tribunal having jurisdiction of the parties may enjoin a trespass on or an interference with land in another state; the decree operating directly on the person, and indirectly on the real property. *Great Falls Mfg. Co. v. Worcester*, 23 N. H. 462; *Alexander v. Tolleston Club*, 110 Ill. 65; *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522, 59 L. R. A. 907, 93 Am. St. Rep. 782; *Kirklin v. Atlas Savings & Loan Ass'n* (Tenn. Ch. App.) 60 S. W. 149. The weight of authority and apparently the better reason support the rule that a suit to enjoin a threatened trespass upon lands is local, and must be brought in the state where the property is situated. *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340; *Columbia National Sand Dredging Co. v. Morton*, 28 App. D. C. 288, 7 L. R. A. (N. S.) 114, 8 Ann. Cas. 511. But, however this may be, the authority of

a court to hear and determine a cause depends upon the allegations of the initiatory pleading, and not upon the facts, and an error committed in determining the jurisdiction does not usually render the judgment void; but such misconception of the question is generally regarded as voidable only. *Van Fleet*, Col. At. § 60. As the bill filed in the federal court of the state of Washington averred that Sand Island was within that state, and as that tribunal has general jurisdiction of the subject-matter thus involved, it will be assumed, without deciding the question, that the relief there awarded was not void.

It will be kept in mind that the decree passed by the federal court did not purport to be anything more than temporary, and was to be in force only until March 31, 1912, the end of the then current fishing year. The rule is well-nigh universal that the doctrine of *res judicata* applies only to final determinations, and not to interlocutory decrees. 24 Am. & Eng. Ency. Law (2d Ed.) 793; 2 Black, Judg. (2d Ed.) § 509; 23 Cyc. 1126; 1 *Van Fleet*, Former Adjn. § 27. The decree invoked as an estoppel, to be available for that purpose, must be in force at the time of the alleged *res judicata*. *Bigelow*, Estop. (6th Ed.) 65. This author, in a note supporting the legal principle thus asserted, observes: "Periodically securing grants of licenses, resting in the discretion of magistrates, creates no estoppel, and same objection may be made of recurring hearings, and be sustained at one time and denied at another, without regard to the state of the record in the given case."

As opposed to this postulate, defendants' counsel call attention to the following cases, a summary of which decisions may be found in a part of the syllabus of the first, to wit: "A right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pacific Railroad v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; *Baldwin v. Maryland*, 179 U. S. 220, 21 Sup. Ct. 105, 45 L. Ed. 160; *Keokuk & H. Bridge Co. v. People*, 185 Ill. 276, 56 N. E. 1049; *Markley v. People ex rel.*, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; *Peru Plow & Wheel Co. v. Ward*, 6 Kan. App. 289, 51 Pac. 805; *Freeman v. Barnum*, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355.

An examination of these decisions will show that the two actions referred to in each case embraced parts of the same sub-

ject-matter, and the question determined by the prior adjudication was identical with another part of the same subject-matter included in the new action. Though the interference complained of herein is averred to have been committed at the same place as in the former suit, and the parties hereto are identical except as to alleged privy in estate of one, the right determined by the federal court was predicated upon licenses issued to the defendants pursuant to the laws of the state of Washington; while in the case at bar the licenses involved were granted to the defendants by authority of the state of Oregon. Since the decree given by the federal court was not in force when this suit was begun, and as the right involved in the prior suit was not identical with that embraced therein the former adjudication is not a bar to the maintenance of this suit.

Before considering the remaining question, it is deemed proper to state more in detail the facts believed to be material to a correct understanding of the cause. The water in front of sites 1, 2, and 3 of Sand Island, for some distance from the shore, is quite shallow, and, the bed of the stream at that place being free from snags, the shoal affords an excellent place for taking salmon with seines. Those operated by the plaintiff are about 1,800 feet long, 12 feet deep at the shore end, and 50 at the other. Beginning at the deep end of a seine, one of them is coiled on the stern of a large flat bottom boat built for the purpose of carrying such weight. From the narrow end of the seine when thus loaded, a line extending to the shore is drawn along the beach by horses. When ready to make a sweep, this boat is towed by a launch at a right angle with the current, the horses holding the shore end of the seine, and keeping it in line with the outward movement of the propeller. As the boat is thus taken towards the middle of the stream, its burden is gradually discharged, and when unloaded a headline fastened to the deep end of the seine, and kept afloat by corks, is carried to the shore, where it is hitched to other horses, which drag the outer end of the net towards and along the beach, thereby forming a loop, and retaining the salmon within the compass. To a rope on the upper edge of the seine are attached at regular spaces corks, which sustain such rope on the surface of the water, and to a line on the lower edge are fastened leads, whereby that cord is sunk to the bed of the river over which it is dragged. The meshes of a seine are too small for a salmon's head to extend through the interstice sufficiently to entangle its gills. When the bight of the seine is finally brought to the shore, any fish encompassed and retained by the sweep of the net are placed upon wagons, and hauled to a landing station to be shipped to a cannery. Obstructions in the bed of the river that can be reached by the lead line are apt to

rend the seine, and through the gap thus made any salmon then within the scope of the net might escape. While a seine might possibly have been hauled along or across the wire rope referred to, without injury, the large rocks placed in the river as anchors, and the buoys attached thereto and to the steel cable, constituted such impediments that the operation of plaintiff's seines would necessarily have been difficult, and the injury thereto apparently inevitable.

H. S. McGowan, as a witness for the defendants, testified that it was his intention to use set nets when other appliances were not being operated, saying, in effect, that their seines could not be used when the set nets were in position. It will thus be seen that, if the defendants are permitted to use set nets, and to operate seines in conformity with the licenses first issued to them by the master fish warden of Oregon, an exercise of such permission will necessarily deprive the plaintiff of all opportunity to take salmon by any means in the shallow water in front of the sites mentioned. When this suit was commenced, and thereafter, the plaintiff had legal possession of the tidelands fronting upon that part of Sand Island that is particularly valuable for seining purposes.

[4] As an incident to the lawful occupation of lands, one border of which is the low-water line of the Columbia river, the plaintiff had the private right of access at such sites to and from that stream. *Micelli v. Andrus*, 61 Or. 78, 120 Pac. 737; *Van Dusen Inv. Co. v. Western Fishing Co.*, 63 Or. 7, 124 Pac. 677, 126 Pac. 604. In *Yates v. Milwaukee*, 10 Wall. 497, 504 (19 L. Ed. 984), Mr. Justice Miller, discussing the question of access to the navigable part of a river, says: "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation." In that case the right of access was recognized as pertaining to the upland owner. *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, 21 L. Ed. 798. The right is here referred to, however, in order to show its acknowledged importance to the person lawfully entitled thereto.

[5] Upon the admission of Oregon to the Union February 14, 1859, the state took the title to all that part of the bed of the Columbia river, near its mouth, that is situate south of the middle of the north ship channel of that stream. 11 Stat. 383, c. 33. The margin of Oregon's ownership of the bed of a navigable stream is the mark made on its bank by the line of ordinary high water. *Micelli v. Andrus*, 61 Or. 78, 84, 120 Pac. 737, and cases cited. Subject to the paramount right of navigation, the state, pursuant to

legislative enactments, has been authorized to sell and convey any part of its lands lying between ordinary high water and low water, and the grantee of such tidelands is the riparian proprietor to the exclusion of the upland owner. *Bowly v. Shively*, 22 Or. 410, 30 Pac. 154.

[6] Though the right of fishing in a navigable stream in Oregon is free and common to all the citizens of the state, the tideland owner on such a stream has the exclusive right to draw a seine on his own land. *Hume v. Rogue River Packing Co.*, 51 Or. 237, 244, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732. While in the case at bar the sole privilege thus adverted to is held by the plaintiff in consequence of its possession of the demised premises, which right is undoubtedly of great advantage in landing salmon entrapped by a seine, such lawful occupant of the sites mentioned is not entitled to, and cannot exercise at such place, any prerogative in the manner of catching such fish differing from that which can be legally asserted by every other citizen of the state. *Hume v. Rogue River Packing Co.*, *supra*.

The buoys placed in the river to indicate the location of the lines intended to be occupied by the set nets, and the large rocks by means of which such floats were anchored, and the buoys fastened to the cable, if allowed to remain in the stream, would necessarily have prevented the plaintiff from hauling its seines to the shore. Notwithstanding such obstructions, it is contended by the defendants' counsel that the state, being the owner of the bed of the river, had, as an exercise of its police power, authority to grant an exclusive right of fishing in front of the sites described; that, their clients having obtained the prior licenses to catch salmon in the manner described, their privilege in this respect is superior to all others; that the spaces of 550 to 900 feet within the lines selected for the set nets afforded the plaintiff reasonable access from the tidelands to navigable water; and that the cable which lay on the bed of the stream did not constitute any obstruction to such right of passage. Based on these assertions, it is insisted that an error was committed in granting the relief prayed for in the complaint, and that an affirmance of the decree would be tantamount to giving plaintiff the exclusive right of fishing in front of Sand Island.

[7] The provisions of the statute regulating the catching of salmon may be summarized as follows: The Governor, the Secretary of State, and state treasurer constitute the board of fish commissioners, whose duty it is to appoint a master fish warden. L. O. L. § 5272. The fish warden is required to collect all license fees, and pay the same to the state treasurer, to be placed in the hatchery fund to be used for hatchery purposes. Id. § 5283. It is unlawful for

any person to operate in any waters of the state a set net or a seine without first having obtained from the fish warden a license therefor. Id. § 5294. It is unlawful for any person to fish for salmon in any waters of this state, unless he is a citizen of the United States, or has declared his intention to become such, and, for a period of six months, has been a bona fide resident of the state of Oregon or of another state bordering upon the Columbia river. Id. § 5298. Certain sums of money are annually collected from persons operating set nets, gill nets, seines, etc., and from cannerymen of, and from dealers in, salmon for licenses granted for that purpose. Every license so issued is required to be numbered and dated, and shall terminate on the 31st of March following its issuance. Id. § 5303. Any person having obtained a license to operate a set net shall cause to be placed and maintained on the bank of the river, or upon a buoy securely anchored in the stream on the location claimed, the number of such license, and for a seine he shall also cause to be placed and maintained on the seining ground the number so designated by the master fish warden. Id. § 5304.

[8] Evidently the purpose of the statute in thus licensing persons engaged in catching salmon in nets and by seines was to protect such individuals from intrusion by nonresident fishermen who came to this state during the open season to pursue their occupation, and not particularly to designate, with respect to such means of taking fish, the places where the business might be conducted. The sums of money obtained by issuing such licenses were undoubtedly designed to create a fund to be used in propagating such species of fish, in order that the supply might not be wholly exhausted. Although the statute specifies the location, claimed by the licensee of a set net, must be evidenced as indicated, the enactment does not expressly provide that the privilege so bestowed shall be exclusive as to such place. An exclusive right of fishing in a navigable stream cannot be granted to any person by a state, under a Constitution like ours, forbidding the creation of monopolies in the pursuit of a lawful undertaking. *Hume v. Rogue River Packing Co.*, 51 Or. 237, 259, 83 Pac. 391, 92 Pac. 1065, 96 Pac. 865, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

It is believed that the obstructions placed by the defendants in the Columbia river were not authorized by statute, and that they tended to create an exclusive right of fishing, the continuance of which was properly enjoined. Nor is it thought that plaintiff, by reason of its sole right to draw a seine upon its own ground, will be granted an exclusive right to catch salmon at the place indicated, for the testimony shows that fishermen operating gill nets made drifts in

front of and behind such seines when they were being operated.

The defendants had intended to remove any salmon that they might catch in a seine to a boat moored to the cable. Their right to tow a seine over the same ground is admitted; but they must remove the salmon thus caught upon a steamer or other craft adapted to that purpose.

Believing that the decree is a correct adjudication of the rights of the parties, it is affirmed.

STATE ex rel. EVANS, Dist. Atty., v. HOLMAN et al.

(Supreme Court of Oregon. Jan. 13, 1914.)

JURY (§ 62*)—SELECTION OF JURY LIST—JURISDICTION.

Under Laws 1913, p. 768, § 3, conferring on the board of county commissioners of Multnomah county all the powers previously exercised by the county court sitting for the transaction of county business, and page 769, § 4, conferring on the circuit court of the Fourth judicial district all the judicial jurisdiction previously exercised by the county judge and county court of Multnomah county, the duty of making a jury list devolves upon the board of county commissioners, being within L. O. L. § 937, subd. 9, giving the county court power to transact county business, and to have the general care and management of county property, funds, and business.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 273-275; Dec. Dig. § 62.*]

In Banc. Original application by the State, on the relation of Walter H. Evans, district attorney for the Fourth judicial district, for mandamus to Rufus C. Holman and others as chairman and members of the board of county commissioners of Multnomah county. Peremptory writ granted.

Walter H. Evans, of Portland, for plaintiff. Conrad P. Olson, of Portland, for defendants.

BURNETT, J. Invoking the original jurisdiction of this court in mandamus proceedings, a writ was issued against the defendants who are county commissioners of Multnomah county commanding them to make a jury list for that county, for the current year, or show cause why they have not done so. They have returned the writ certifying that they have not formed a list for the reason, as they contend, that the two acts of March 4, 1913, of the legislative assembly have imposed that duty upon the circuit court. The cause has been heard as upon a demurrer to the return. The acts referred to are found on pages 767-770, inclusive, of the Laws of 1913. The legislation mentioned provides for the abolition of the office of county judge for Multnomah county, and for the promotion of the then incumbent of that office to be a circuit judge of the Fourth judicial district, comprising that county, to sit in department No. 6 of the circuit court, which department was created by the act.

The following sections appear in the two statutes.

Section 3: "Upon taking effect of this act, and thereafter, the county commissioners of Multnomah county shall be known as the board of county commissioners of Multnomah county. Said board shall have power to appoint a chairman from among their own number and remove him at pleasure, and shall have and possess, exercise and enjoy all the powers and jurisdiction now possessed, exercised and enjoyed by the county court of Multnomah county, sitting for the transaction of county business." Laws 1913, p. 768.

Section 4: "Upon the taking effect of this act all judicial jurisdiction, power and authority of the county judge and of the county court of said Multnomah county, as distinguished from such power and jurisdiction as is exercised in the transaction of county business, shall then, and thereafter, be vested in and exercised by the circuit court of said Fourth judicial district, and all said matters, causes and proceedings pending in said county court shall be considered as transferred, continued, heard and disposed of in the said circuit court." Laws 1913, p. 769.

The issue to be determined is whether the work of forming a jury list for that county shall be performed by the board of county commissioners or by the circuit court. Under the original Constitution it was provided by section 12 of article 7 that "the county court shall have the jurisdiction pertaining to probate courts, and boards of county commissioners, and such other powers and duties, and such civil jurisdiction not exceeding the amount of value of five hundred dollars, and such criminal jurisdiction not extending to death or imprisonment in the penitentiary, as may be prescribed by law. But the legislative assembly may provide for the election of two commissioners to sit with the county judge whilst transacting county business in any or all of the counties, or may provide a separate board for transacting such business." By section 9 of the same article: "All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other court, shall belong to the circuit courts; and they shall have appellate jurisdiction and supervisory control over the county courts, and all other inferior courts, officers, and tribunals." Although article 7 was so amended by the plebiscite of November, 1910, as to almost destroy its identity, yet section 2 of the amendment states that "the courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted, until otherwise provided by law." L. O. L. p. xxiv. It is plain that by the legislation in question a step has been taken in the disintegration of the former system. Confessedly,

under the original régime, only the county court could make up a jury list. That duty was not referable in the jurisdiction pertaining to probate courts, nor to civil jurisdiction over controversies between parties, nor yet to authority in criminal matters. It is evidently to be classed in that portion of the jurisdiction of the county courts pertaining to boards of county commissioners, named in the original section 12 of article 7. Under the authority of that section, the Legislature had provided for the election of two commissioners to sit with the county judge in the transaction of county business. Long usage has construed this section to impose that duty of making up jury lists upon the county court as composed of a judge and commissioners. It is properly within the terms of subdivision 9 of section 937, L. O. L., whereby it is declared that "the county court has the authority and powers pertaining to county commissioners to transact county business; that is * * * 9. To have the general care and management of the county property, funds, and business, where the law does not otherwise expressly provide."

If it had been the intention either of the Constitution or of the legislation in pursuance thereof to vest the compilation of the jury list in the county court otherwise than as a board of county commissioners, the law would have expressly provided that the duty should be a judicial function to be performed by the county court considered solely as a judicial tribunal. Whatever else may be said, the formation of a jury list from which circuit court jurors are to be drawn never has been a function of that court, and as we believe and so hold, the legislative assembly did not intend to confer that prerogative upon circuit courts by the two acts of March 4, 1913.

Conceiving that duty to be in its true spirit and meaning one incumbent upon the defendants charged with the transaction of county business, it is ordered that a peremptory writ be issued to them commanding them to make up at once a jury list containing at least 2,000 of the most competent and permanent citizens of the county of Multnomah to be chosen from the entire assessment roll of that county for the year 1913. All the Justices concur, except RAMSEY, J., not sitting.

HANAN v. SANFORD et al.†

(Supreme Court of Oregon. Jan. 13, 1914.)

ACCOUNT STATED (§ 6*)—REQUISITES.

Itemized statements mailed regularly by a bank to a depositor unobjected to, constituted accounts stated, notwithstanding the depositor's claim that he did not understand book-keeping and did not know what they meant.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 30-39; Dec. Dig. § 6.*

For other definitions, see Words and Phrases, vol. 1, pp. 93-98; vol. 8, p. 7561.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

†Rehearing denied February 10, 1914.

Department 2. Appeal from Circuit Court, Douglas County; L. T. Harris, Judge.

Suit by E. B. Hanan against S. A. Sanford and another. From a decree for defendants, plaintiff appeals. Affirmed.

This is a suit in equity, to enjoin the prosecution of an action at law. The defendant herein, S. A. Sanford, commenced an action against the plaintiff herein, E. A. Hanan, to recover \$6,360, with interest at 8 per cent. per annum from March 2, 1911, and attorney's fees, as evidenced by a promissory note, alleged to have been executed by Hanan to the defendant herein, the First National Bank of Roseburg, Or., a corporation, and assigned by it for value to Sanford; the complaint being in the usual form. Hanan filed an answer in that action, admitting that he executed the note but denied that it was given or assigned for value, and alleged that he was entitled to relief arising out of facts requiring the interposition of equity and material to his defense. Thereupon as plaintiff he commenced this suit, in the nature of a cross-bill against Sanford and the bank, alleging in effect that since the latter part of the year of 1898, and about October, 1905, he, at first as E. R. Hanan & Co. and thereafter in his own name, deposited with such bank large sums of money; that because of his confidence in that banking house and in T. R. Sheridan, its then president and manager, such deposits were made without taking any written evidence thereof; that the bank failed to account for a large part of the money so left with it and wrongfully appropriated the same to its own use, the exact amount thereof being unknown to the plaintiff; that the bank and its president have from time to time misrepresented to plaintiff the true state of his account, though he requested of them a true report thereof; that they represented to him in March, 1909, and about four years after he had ceased to do business with the bank, that from its books his account appeared to have been overdrawn to the extent of \$6,000, in consequence of which the bank examiner was complaining, and that it would be necessary for the plaintiff forthwith to execute to the bank his promissory note for that sum in order to prevent serious trouble which was threatened by such examiner; that desiring to effect a friendly settlement of his account, and by reason of his personal friendship and intimate business relations with Sheridan, the plaintiff believed and relied upon such representations and upon Sheridan's promise that, if such note were given, a full examination and settlement of his account would be made, and that he would never be pressed for the payment of the note; that plaintiff, believing that, if a full settlement of his account were made, the bank would have been indebted to him in a greater sum than \$6,000, and that he would never be obliged to pay the note, and that because the bank was a powerful financial in-

stitution and its president reputed to be wealthy and possessing great influence, and the plaintiff being unable to cope therewith, was induced to and did sign such note; that on March 2, 1911, Sheridan further represented to plaintiff that the bank examiner was again complaining because no interest had been paid on such note, though no payment thereof had been demanded, and the plaintiff, still relying upon the promise of such president to make a full statement of the account and desiring to avoid friction and enmity of the bank and of such officer, executed a new note which is sued upon; that the plaintiff is not a debtor of the bank but a creditor thereof; that he never received any consideration for executing such note; that an accounting is necessary; and that he has no plain, speedy, or adequate remedy at law.

The defendants, answering the cross-bill, denied the material averments thereof and alleged in substance that for all deposits of money so made the plaintiff was given proper credit; that, during all the time he was dealing with the bank, statements showing the true condition of his account were regularly made and delivered to him, except in a few instances when he was absent from his home at Roseburg, Or.; that the statements that were not so handed over were kept for his use and would have been delivered to him at any time upon a request therefor; that, in addition to the amount of money deposited in the bank by plaintiff, he was on June 4, 1903, indebted to it in the sum of \$17,000 evidenced by a promissory note upon which payments were made, giving a statement thereof, until only \$6,000 remained due, for which a new note was given and thereafter renewed, including interest, and eventuated in the note which forms the basis of the action at law; that there was also due from plaintiff to the bank the further sum of \$1,459.39, which on January 2, 1906, was charged to profit and loss and duly assigned to Sanford prior to the commencement of such action. Exhibits are attached to the answer, purporting to be statements showing the condition of plaintiff's account with the bank from December 18, 1897, to January 2, 1906.

The reply denied most of the averments of new matter in the answer and set forth a detailed statement of items of the alleged account, amounting to \$17,096.72, for which sum it is asserted that no credit was given. Based on these issues, which in the pleadings are stated with great particularity, the cause was tried, resulting in a decree dismissing the cross-bill, and the plaintiff appeals.

Geo. M. Brown, of Roseburg (B. L. Eddy, of Roseburg, on the brief), for appellant. O. P. Coshow, of Roseburg, for respondents.

MOORE, J. (after stating the facts as above). The testimony shows that, for sev-

eral years prior to the time the promissory note described in the action was executed, the plaintiff was engaged in buying for the market cattle, sheep, and hogs, which business compelled him to borrow from the First National Bank of Roseburg, Or., large sums of money. When a sale of such stock was consummated, the consideration therefor was usually evidenced by a check or a draft which the plaintiff assigned to the bank either in payment of his notes which were held by that banking house or as a fund against which to draw checks. In referring to such method of preserving a record of his business transactions, the plaintiff testified: "That is the only way I had of ever keeping any accounts straight was through the bank." In explaining why he adopted such a course of keeping a chronicle of his affairs, he further stated upon oath: "Mr. Sheridan told me, 'Now, I will see that it is all kept straight;' and I left the whole thing with him to see that it was kept straight. I did not understand keeping books."

One of the controverted items is a memorandum check in Sheridan's handwriting whereby the bank on October 1, 1901, transferred to its then president \$3,000 from Hanan's account. This item appears in the statements of the account as exhibits to the answer herein. The plaintiff, as a witness, admitted that he received from the bank a copy of a part of the account, containing the entry of that sum. Referring to the memorandum check, he stated upon oath that it had been in his possession but that he had no knowledge of ever having received any benefit or value by reason thereof. He admitted that he received a partial statement of the account, but never noticed the \$3,000 item until this suit was instituted, saying: "I am no bookkeeper myself and I did not understand anything about it. I never got the first part of them accounts so I could get any other bookkeeper to go over that business for me. I was right in the center of it. I did not have either end of it." He further testified that he never requested the cashier or a bookkeeper of the bank to furnish him a statement of his account, and that such parts thereof as he received were mailed to him.

The evidence shows that, before the action at law was commenced, Hanan offered to pay Sanford \$1,000 down and thereafter to give him \$1,000 yearly until the debt was paid, but that the proposition was rejected. Hanan engaged an expert accountant who was given every advantage carefully to examine the books of the bank, and, while they do not in some instances agree with what he claims to be a correct statement of the account, the defendant's witnesses, who were the bookkeepers and the officers of the bank, explain such discrepancies by attempting to identify deposits made at different times or in variant sums of money.

Sheridan was in an adjoining county when this suit was tried and did not appear as a witness, nor was his deposition taken. Each party reasonably supposed he would be present and testify and neither should be blamed for his failure in that respect.

No attempt will be made to reconcile or explain the differences that may appear in the accounts of the plaintiff and the defendants. It is believed that the itemized statements mailed by the bank from time to time to Hanan, and to which he made no objection until this suit was instituted, constitute accounts stated and are binding upon him. *Nordine v. First National Bank*, 41 Or. 388, 68 Pac. 1109. He did not receive all the statements of his account that were prepared by the bank, but from those that were mailed to him when he was at home, accompanied by canceled vouchers, Hanan must have known the general course pursued by the bank in dealing with its customers, in view of which it was incumbent upon him to call for these statements when he returned to Roseburg or to write the bank to mail them to him. Because he was not a bookkeeper and could not understand the statements of account which he received did not relieve him of the consequences or absolve him from the legal effect of such accounts stated.

It was his duty to take them to some person who could explain them, but, failing in this respect, the decree should be affirmed, and it is so ordered.

BEAN, EAKIN, and McNARY, JJ., concur.
McBRIDE, C. J., not sitting.

In re STANDARD CAFETERIA CO.
O'CONNER v. STANDARD CAFETERIA CO.
(Supreme Court of Oregon. Jan. 13, 1914.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS
(§ 300*)—PRESENTATION OF CLAIMS—TIME
FOR PRESENTATION.

Under L. O. L. § 7544, requiring an assignee for creditors to give notice by publication for at least six weeks and by mailing to each known creditor, requesting him to present his claim under oath within three months, though such a notice properly required claims to be presented within three months from its date in order to participate in the first distribution of proceeds, the claimant has at least three months from the first publication, unless the claimant has sooner received notice by mailing, within which to present his claim.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 882-884; Dec. Dig. § 300.*]

2. TIME (§ 5*)—PRESENTATION OF CLAIMS—
"MONTH."

Under L. O. L. § 7544, requiring presentation of claims to an assignee for creditors within three months from notice, and section 531, providing that the time within which an act is to be performed is computed by excluding the first day and including the last, unless the last is a nonjudicial day, in which case it is also excluded, where the first publication of the assignee's notice was on October 12, 1910,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a claim presented on January 12, 1911, was in time; a "month" meaning a calendar month (citing Words & Phrases, vol. 5, p. 4574. See, also, volume 8, p. 7724.)

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 5-8; Dec. Dig. § 5.*]

3. APPEAL AND ERROR (§ 1022*)—REFERENCE (§ 106*)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

Where the findings of a referee on a claim against an insolvent are properly set aside for error therein, and the testimony of the claimant tends to support the amended findings made thereupon by the court, such findings are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.* Reference, Cent. Dig. § 206; Dec. Dig. § 106.*]

Department No. 2. Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

In the matter of the assignment of the Standard Cafeteria Company, insolvent debtor. Petition by H. M. O'Conner on claim against the insolvent. From a judgment for the petitioner, the insolvent appeals. Affirmed.

Sidney Telser, of Portland, for appellant.
P. J. Bannon, of Portland, for respondent.

MOORE, J. This is an appeal by an insolvent from a judgment establishing a claim against it. The facts are that the Standard Cafeteria Company, a corporation doing business at Portland, Or., made an assignment October 7, 1910, for the benefit of all its creditors in proportion to the amount of their respective claims. Benjamin E. Hayman, who was selected as assignee, gave to such creditors notice of his appointment, requesting them to present to him their claims under oath within three months from the date thereof, to wit, October 10, 1910. The first publication of the notice appeared in the Morning Oregonian, a newspaper of Multnomah county, in the issue of October 12, 1910. A writing was prepared and dated as follows:

State of Oregon, County of Multnomah—ss.

I, M. H. O'Conner, being first duly sworn depose and say that I am claimant of Portland, Oregon, and have personal knowledge concerning the said claims, which is for work and material (sheet-iron work) by myself and helpers to the Standard Cafeteria Co., a corporation, of the reasonable value and agreed price of \$426.75; that no part of said amount has been paid, and that there are no offsets or counterclaims to same; that the annexed itemized bills and statements, showing items of said account are in every respect correct and accurate.

x M. H. O'Conner.

Subscribed and sworn to before me this 12 day of January, 1911.

Benjamin E. Hayman,
[Notarial Seal] Notary Public for Oregon.

Written exceptions to such demand were filed with the clerk of that county by M. C. Tebbetts, another claimant, on the ground that the sum so asserted to be due was excessive to the extent of about \$300. Notice

thereof having been given to O'Conner, he filed, in the circuit court for that county, a petition, in the nature of a complaint, setting forth a statement of his claim, and demanding judgment for the sum alleged to be due him. In order to ascertain such sum the cause, was, by consent of the parties, referred to R. E. Hitch to take and report the testimony with his findings of fact and of law thereon. After the parties had submitted their evidence and rested, the referee, upon application of counsel for the insolvent, permitted an answer to be filed, denying most of the averments of the petition, and that O'Conner's claim had been filed within the time allowed. For a separate defense it was alleged that O'Conner had been paid on account of his claim the sum of \$388. The averments of new matter in the answer were treated as denied. Upon this issue further testimony was taken, and, based thereon, the referee made findings to the effect that O'Conner's claim was not filed within the time limited therefor, after the publication of the notice of assignment; that between June 1, 1910, and October 1st of that year he had sold and delivered to the insolvent goods, wares, and merchandise, and performed for it work and labor of the value of \$527.30, and that he had received on account thereof \$388, thus leaving due \$139.30. As conclusions of law the referee further found that O'Conner was entitled to a judgment against the Standard Cafeteria Company for the sum of \$139.30, to be paid after the claims presented within three months from the date of the publication of the notice of assignment had been discharged, and that the assignee was entitled to a judgment against O'Conner for the costs and disbursements of the proceedings. Exceptions to such findings having been made by counsel for O'Conner, the court from the testimony that had been so taken modified the referee's findings of fact, and found that the claim had been filed within the time required after the publication of the notice to creditors. The referee's conclusions of law were also modified so that the sum of \$139.30 found to be due O'Conner should be paid in the same proportion as those who had filed their claims within the prescribed time, and that O'Conner was entitled to recover his costs and disbursements. A judgment having been rendered in accordance with the amended findings, the corporation brings up for review the determination thus reached.

[1] A transcript of the entire testimony given before the referee has been filed in this court; and, as the cause was tried without the intervention of a jury, the question to be considered is whether or not there is any evidence supporting the findings of fact made by the trial court. A preliminary inquiry, however, is whether O'Conner's

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

claim was presented to the assignee within the time prescribed by law. The person to whom a general assignment is made is required to give notice thereof, by publication in some newspaper of the county, for at least six weeks, and by mailing a notice to each known creditor of the insolvent estate, requesting him to present his claim under oath to such assignee within three months thereafter. L. O. L. § 7544. It is the due publication in the specified newspaper of a notice to creditors of the insolvent that starts the running of the special statute of limitations against them. The notice is in the nature of process, and its publication in a newspaper is equivalent to a service thereof. Whether the period of time so limited by law for presenting claims begins to run from the first publication of the notice or the last, it is not important in the case at bar, for in any event the limitation could not, as we view the enactment, be put into operation except by at least one publication of the notice, or by the assignee's verified statement that notice by mail had been sent to O'Conner at his place of residence, giving the date of such mailing. No proof of the latter method of obtaining jurisdiction was offered in evidence. The date affixed to the notice as published properly called the attention of the creditors to the fact that, in order to participate in the first ratable distribution of the proceeds of the insolvent's property, their claims should be presented to the assignee within the time specified, which period antedated the expiration of the limitation prescribed by law. The date thus indicated in the notice is otherwise unimportant, for the statute of limitations did not begin, in any event, to run until October 12, 1910, the day of the first publication of the notice. From that day at least creditors were allowed three months within which to present their claims. L. O. L. § 7544.

[2] The word "month" is not defined by our statute, and in such case the word is uniformly held to mean a calender month, unless a contrary intent is indicated. 5 Words & Phrases, 4574.

The time within which an act is to be performed is computed by excluding the first day and including the last, unless the last day is a nonjudicial day, in which case it is also excluded. L. O. L. § 531. The first publication of the notice having been made October 12, 1910, and O'Conner's claim having been sworn to before the assignee January 12, 1911, the affidavit was made within the three months limited by the statute. Id., § 7544. An examination of the section thus referred to will show that a creditor is under no legal obligation to see that his claim is filed. His duty is fully discharged when he presents to the assignee a claim under oath.

[3] It is insisted, however, that such sworn written declaration, a copy of which is hereinbefore set forth, did not have annexed thereto "itemized bills and statements show-

ing items of said account," as expressed therein, and, this being so, O'Conner's claim was not presented at the time the affidavit was made. Referring to such writing voluntarily made under oath by O'Conner, he testified as follows: "This is the claim I presented to Mr. Hayman. I brought him a statement of my account with the Standard Cafeteria and Material Company, and he gave me a copy, and he told me my claim was safe in his hands; this is a copy of the claim."

Benjamin E. Hayman, the assignee, disputing such sworn declarations, testified as follows: "On the 12th day of January, 1911, Mr. O'Conner told me he had a claim against the Standard Cafeteria Company amounting to \$426.75; that he didn't have a statement of the account with him at the time, but he wanted to know what he should do in order to file a claim. I filled out this form [indicating the affidavit], a number of which I had in my desk to be filled out for claims against the Standard Cafeteria. He signed it, and I swore him on the 12th day of January, the day on which he appeared before me, attached my card to the place which is perforated by two holes, and told him to mail this proof of claim with his statement of account; and the card was given him for the purpose of knowing where to mail it. I never received anything from him, either this proof of claim, or his statement of account. He never filed anything with me; and my record filed in the circuit court on the 10th of January, 1911, shows his claim was not in this record as having been filed. The 10th of January, 1911, was the last day on which claims could be filed within the three-month period. This was sworn to two days subsequent, so he would not have come in with the first claimants anyway, but the fact is he never filed this claim, not any claim, with me, nor left any statement of account with me."

The affidavit produced by O'Conner and received in evidence has been included as an original exhibit in the case, and brought up with the transcript. Such sworn statement appears to have been subscribed by the claimant and by Hayman as notary public, whose seal is impressed in the paper on which the affidavit is set forth in typewriting. A mark "x," made with a pen, precedes O'Conner's name, thus seeming to indicate that the paper was to be sent out to claimants, whose signatures should appear on the line thus designated, and then to be returned to the assignee. The writing itself seems to bear intrinsic evidence that it was intended to be an original affidavit and not a copy, and for that reason to corroborate Hayman's testimony. But however this may be, as the referee erred in his findings to the effect that the affidavit was not made within the time limited, the court properly set aside such conclusion of fact, and made its own findings; and, as O'Conner's testimony tended to sup-

port the amended findings, they are conclusive upon the question of fact involved, when it is remembered that the cause was ultimately tried without a jury.

It follows that the judgment should be affirmed; and it is so ordered.

BEAN, EAKIN, and McNARY, JJ., concur.
McBRIDE, C. J., not sitting.

BROWNING v. SMILEY-LAMPERT LUMBER CO.

(Supreme Court of Oregon. Jan. 6, 1914.)

1. MASTER AND SERVANT (§ 173*)—INJURIES TO SERVANT—FELLOW SERVANTS—COMPETENCY.

If a master is aware that a servant is unfit for the service in which he is employed, so as to endanger other servants, it is the master's duty to discharge the unfit servant, and, if he fails to do so, another servant injured by negligence of the unfit servant may hold the master liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 343-346; Dec. Dig. § 173.*]

2. MASTER AND SERVANT (§ 173*) — INJURIES TO SERVANT—FELLOW SERVANTS — COMPETENCY.

A master is charged with knowledge of the common reputation in the community of a servant who has been in his employ for a long time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 343-346; Dec. Dig. § 173.*]

3. MASTER AND SERVANT (§ 287*) — INJURIES TO SERVANT—FELLOW SERVANTS — COMPETENCY.

It is error to take from the jury a case for injuries to a servant, where there is evidence of negligence in the selection or retention of the co-servant whose act caused the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. § 287.*]

4. MASTER AND SERVANT (§ 170*)—INJURIES TO SERVANT—FELLOW SERVANTS — COMPETENCY.

The measure of care demanded of a master in the selection and retention of servants is commensurate with the danger reasonably to be apprehended from the instrumentalities employed in the required labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*]

5. MASTER AND SERVANT (§ 182*) — INJURIES TO SERVANT—FELLOW SERVANTS — EMPLOYERS' LIABILITY ACT.

An action for injuries to a servant from negligence of a head sawyer under whom plaintiff was working in failing to observe a signal from plaintiff and causing a log to roll against plaintiff's hand falls within the Employers' Liability Act (Laws 1911, p. 16) § 1, requiring all owners, contractors, etc., to use every precaution practicable, and section 5, providing that the negligence of a fellow servant is not a defense where the injury is caused by the incompetence or negligence of any person in charge of the machinery or of particular work at the time of the injury; the head sawyer in such a case being a vice principal and not a fellow servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

6. MASTER AND SERVANT (§ 182*)—INJURIES TO SERVANT—"FOREMAN."

A "foreman" is a laborer with power to superintend those working under him, and a head sawyer is a foreman over one operating a carriage in a sawmill who is directed to obey his instructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372; Dec. Dig. § 182.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2891, 2892.]

Department No. 2. Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action by Randal Browning against the Smiley-Lampert Lumber Company. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

This is an action for damages for a personal injury. The cause was tried before a jury. At the close of plaintiff's evidence, the court entered a judgment of nonsuit, from which plaintiff appeals.

The plaintiff claims that the injury was inflicted through the negligence of the defendant, acting by Henry Lee, the head sawyer, in the former's sawmill where plaintiff was hurt; that the head sawyer had the full direction and control of the machinery for loading logs upon the carriage. Plaintiff alleges, in effect, that, in carrying out the objects of the corporation, the defendant owned, operated, and controlled a certain sawmill, and that Henry Lee was the head sawyer therein; that, at the time of the happening of the injuries hereinafter stated, the plaintiff was a servant of and working for the defendant, and was subject to the orders, dominion, and control of Henry Lee; that the plaintiff was employed by the defendant about June 11, 1912, as a dogger; that his duties required him to adjust dogs or instruments by which logs are held in place upon the carriage while being sawed under the immediate supervision of Henry Lee; and that, among other duties, he was to see that no sticks or chunks of wood, or other substances, were on the carriage between the blocks and the log; that the defendant adopted a system of signals between the head sawyer and the plaintiff; that under this system the head sawyer was required not to throw the logs against the ratchet until after he was notified to do so by the plaintiff when adjusting the dogs and moving the sticks and other particles from the carriage; that a certain stick inadvertently and without the plaintiff's fault got on the carriage between the block and the log then being adjusted; that Henry Lee failed, refused, and neglected to follow any signal from plaintiff; that while plaintiff was engaged in attempting to remove the stick, defendant, acting through Henry Lee, without notice or warning to the plaintiff, and in disregard of plaintiff's safety, by means of certain instrumentalities known as "niggers," threw a log with great force and violence against the head block and crushed plaintiff's hand, in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

juring the same; that at said time plaintiff and Henry Lee were pursuing their work under the direction and the command of the latter while he was the foreman and in charge of the particular instrumentality, to wit, the log carriage whereby plaintiff was injured. It is also alleged that by reason of his violent temper Henry Lee was incompetent and unfit to have control of the plaintiff or to handle the instrumentalities intrusted to him; that he acted quickly and impulsively and without regard to the safety of the plaintiff; that prior to the injury defendant had notice and knowledge and means of knowledge of such incompetency and unfitness; that plaintiff was unaware of the same. The defendant answered, admitting its corporate capacity and its operation of a sawmill, but denying the allegations of liability, and further pleaded: (1) The assumption of risk; (2) the negligence of a fellow servant; and (3) that the alleged injuries were due to the carelessness and negligence of plaintiff, and could not have been prevented by the defendant by the exercise of ordinary care. Plaintiff replied, putting in issue the new matter of the answer. At the trial the plaintiff testified in his own behalf upon the points in issue upon this appeal substantially as follows: After detailing the character and extent of the injuries, plaintiff stated that it was his duty as a dogger to ride upon the carriage and throw the instruments known as dogs into the log, after Mr. Henry Lee, the sawyer, had placed the log upon the carriage; that, also, if he happened to see any portion of material that might have been inadvertently flopped over on the carriage lying on the same by the logs, it then became his duty and he was instructed to hold up his hand as a signal indicating that there was some obstruction in the way, and for Lee not to touch the nigger nor push the log on the rollway; that at the time of the accident he observed certain material in the way of placing the log upon the carriage, and that he gave the signal to the sawyer; that Lee got his eye and glanced at him a few seconds; that he accepted his glance as a signal and stooped to pick up the stick of wood; that Lee, without any notice or warning, pulled the lever and threw the log upon the carriage and against plaintiff's hand; that when he went to work in the mill he was employed by Mr. Smiley, who told him to receive his instructions from Mr. Lee; that he had worked as a dogger before, at one time for 2½ or 3 months; that a short time after the accident Mr. Smiley, who apparently had charge of the mill, said to plaintiff "that Henry Lee, the sawyer, was a man very quick-tempered, careless, and would act in a sudden;" that, while in a restaurant in Astoria, Mr. Smiley said "that Henry Lee was all right as a sawyer, but that he hadn't quite caught on to the manner in which to manipulate the nigger, but he hoped to do so in the very near future;" that the log they were preparing to saw was 4½ feet in di-

ameter. On cross-examination plaintiff testified that the lifting up of his right hand indicated to Mr. Lee that there was some obstruction in the way which should be removed, and for him not to touch the nigger. To the question, "So now you swear positively that you looked Mr. Henry Lee right in the eye, and he looked you in the eye, and you gave him the sign not to remove the nigger, or not to push that log on the rollway, that he understood it, and yet he bumped that log up against you?" He answered, "I did." To the question, "That is your contention?" he answered, "It is."

I. N. Smith, of Portland (A. W. Norblad, of Astoria, on the brief), for appellant. F. S. Senn, of Portland (G. C. Fulton, of Astoria, and Rauch & Senn, of Portland, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It is contended by plaintiff that under the Employers' Liability Act, adopted by the people November 8, 1910 (Laws 1911, p. 16), the defendant is responsible, and that the trial court erred in granting a judgment of nonsuit. The contention of defendant is that there was no testimony to show that Henry Lee, the head sawyer, was careless, negligent, or incompetent; that if there was any negligence it was the negligence of a fellow servant in a matter of the mere operation of machinery; that the case does not come within the provisions of the Employers' Liability Act; that it is governed by the rule announced prior to the passage of this law in the case of *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580, and other like cases, viz., that the liability of the master depends upon the character of the act in the performance of which the injury arises, and not the grade or rank of the negligent employé. The trial court held that the case at bar did not come within the provisions of the Employers' Liability Act; that the alleged negligence was that of a fellow servant.

[1] Before referring to the statute in question, it will be helpful to note the old rule as to the general nature and obligation of an employer to employ competent and fit fellow servants, stated in 4 Thompson on Neg. § 4048, as follows: "While, as hereafter seen, the master is not in general liable for an injury happening to one of his servants through the negligence of another of them engaged in the same general employment, yet this rule does not exonerate the master from exercising reasonable or ordinary care in the selection of competent, careful, sober, and fit servants, to the end that other servants shall not be exposed to unnecessary peril by reason of their incompetency, carelessness, drunkenness, or other unfitness, and of maintaining such a reasonable supervision over their conduct as will apprise him of the fact of their falling into the habit of drunken-

ness, carelessness, negligence, etc., while in his service, and of discharging them therefrom on the discovery of such facts. This obligation is analogous to the obligation of the master to furnish safe machinery, appliances, and places of work." If the master becomes aware that the servant has become, for any reason, unfit for the service in which he has employed him, so as to endanger the safety of other servants, it will become his duty to discharge the unfit servant; and if, failing in this duty, one of his other servants is injured by the negligence of the unfit servant, the master will be liable.

[2] The master is charged with a knowledge of the common reputation in the community of such servant who has been in the employ a long time. 4 *Thomp. on Neg.* § 4050.

[3] It is error to take the case from the jury where there is evidence that there was negligence in the selection or retention of the coservant whose act caused the injury. 3 *Labatt's Master & Servant*, § 1080.

[4] The measure of care demanded of the master in such cases is commensurate with the degree of danger reasonably to be apprehended from the instrumentalities employed in performing the labor required. *Labatt's Master & Servant*, § 186. In *Staats v. Twohy Bros. Co.*, 61 Or. 602, at page 608, 123 Pac. 909, at page 911, Mr. Justice Moore, after referring to the last-mentioned authority, said: "As a legitimate deduction from the precept last stated, it necessarily follows that, in selecting an employé whose duty it is to direct and control fellow servants in their performance of work which is essentially dangerous, a master must exercise due or ordinary care in choosing for that purpose a person who is reasonably safe and competent to execute the service required"—citing *Smith v. St. Louis & San Francisco R. Co.*, 151 Mo. 391, 408, 52 S. W. 378, 48 L. R. A. 368, 387.

[5] Turning now to the Employers' Liability Act (Laws 1911, p. 16), we note that the title of the act, which is very suggestive, is erroneously printed. The full text as found in the Oregon Electors' Pamphlet for 1910, p. 82, is as follows: "To propose by initiative petition a law providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks, and other structures, or engaged in any work upon or about electrical wires, or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence or for injury or death of their employés, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employés

against employers, and prescribing a penalty for a violation of the law." The provisions of the act, so far as deemed material in the case at bar, are as follows: "Section 1. All owners * * * engaged in * * * the erection or operation of any machinery, * * * or use of any dangerous appliance, * * * shall see that all metal, * * * or other material whatever, shall be carefully selected * * * and tested so as to detect any defects, and all scaffolding, staging, * * * shall be constructed to bear four times the maximum weight to be sustained by said structure, and such structure shall not at any time be overloaded or overcrowded; * * * and all dangerous machinery shall be securely covered and protected to the fullest extent that the proper operation of the machinery permits, and all shafts, wells, * * * shall be enclosed, and all machinery other than that operated by hand power shall, whenever necessary for the safety of persons employed in or about the same, or for the safety of the general public, be provided with a system of communication by means of signals, so that at all times there may be prompt and efficient communication between the employés or other persons and the operator of the motive power. * * * Here follows a regulation for the transmission and use of electricity. Then comes the following provision: "And generally, all owners, contractors, or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employés, or the public, shall use every device, care and precaution, which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices." Section 2 is as follows: "The manager, superintendent, foreman, or other person in charge or control of the construction or works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employé." Section 3 provides for a compliance with the act and for a penalty for a noncompliance. Section 4 provides that, in case of loss of life by reason of the neglects or failures or violations of the provisions of the act, the heirs of the deceased shall have a right to bring the action without any limit as to the amount of damages. Section 5 provides that: "In all actions brought to recover from an employer for injuries suffered by an employé the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: (1) Any defect in the structure, materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary

care; (2) the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; (3) the incompetence or negligence of any person in charge of, or directing the particular work in which the employé was engaged at the time of the injury or death; (4) the incompetence or negligence of any person to whose orders the employé was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; (5) the act of any fellow servant done in obedience to the rules, instruction, or orders given by the employer or any other person who has authority to direct the doing of said act." Section 6 reads thus: "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

It will be noticed that the general provisions contained in section 1 refer to persons having charge of or responsible for any work involving a risk or danger to employes or the public, or what is usually termed "hazardous occupations." The Employers' Liability Law does not define all acts of negligence. As suggested in the title, it defines and extends the liability of employers in certain cases. It makes them responsible for an injury caused or contributed to by the negligence of the superintendent, foreman, or person in charge of the machinery, or by the incompetence or negligence of the person in charge of the particular work in which the employé was engaged at the time of the injury; that is, where the injury was caused by one in authority over the injured servant, and on account of such superiority the employé could not have been expected to exert such an influence over his foreman in the matter of care and caution, as over a coservant who stood upon an equal footing with him.

It is contended that the case at bar falls within the third provision of section 5; that is, it is claimed that the injury was caused by the incompetency and negligence of Henry Lee, and head sawyer, who was the person in charge of and directing the particular work in which the plaintiff was engaged at the time of the injury. The act in question is broader in its scope than any other Employers' Liability Law that has been called to our attention. The language employed in the general clause in the latter part of section 1 of the act is somewhat confused. It, however, provides that all owners, contractors, etc., shall use every care and precaution which it is practicable to use for the protection and safety of life and limb; hence the negligence, if any, of Henry Lee, the head sawyer, whose instructions the plaintiff was told to obey by Mr. Smiley, the secretary and manager of the company by whom plaintiff was employed, would bring the case within the statute, unless the plaintiff assumed the risk incident thereto. By the plain pro-

visions of section 5, the negligence of a fellow servant is not a defense, where the injury is caused or contributed to by "the incompetence or negligence of any person in charge of, or directing the particular work in which the employé was engaged at the time of the injury or death." *Dorn v. Clarke-Woodward Drug Co.*, 133 Pac. 351; *Dunn v. Orchard L. & T. Co.*, 136 Pac. 872, filed December 9, 1913.

It is alleged in the complaint, that the evidence tended to show that at the time of the injury complained of, the plaintiff was under the direction and control of Henry Lee and engaged in assisting to operate machinery used in sawing logs; that in the operation of the machinery for that purpose a system of signals had been adopted to be used by the assistant and the operator of the saw and other appliances; that the plaintiff gave the required signal not to start the machinery nor roll the log upon the carriage; that Lee was looking at him and saw the signal, but disregarded the same and proceeded to work the "niggers" and throw the log upon the carriage and against plaintiff's hand; that at the same time, the plaintiff, relying upon Lee's observation and obedience to the signal, stooped to remove a piece of board from the saw carriage as he had been instructed to do whenever he discovered anything of the kind on the carriage. From the nature of the machinery and the appliances then being operated, it would seem reasonably necessary that a system of communication be provided, in accordance with the statute, for the safety of employes, and that such rule be enforced and the system employed. From the evidence the jury might have fairly concluded that Lee was careless and negligent in failing to obey the signal given by plaintiff, and in rolling the log against his hand in the manner indicated by the testimony. As we understand the testimony Henry Lee was the person in charge of the saw, machinery, and "niggers," and was the foreman in charge of plaintiff, thus bringing him within the definition of those whose neglect or incompetence shall not be a defense, as contained in clauses 2 and 3 of section 5 above quoted and numbered. Section 2 of the act enacts that the manager, superintendent, foreman or other person in control of the construction, or works, or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for injury suffered by an employé.

[6] According to the purport of the evidence, at the time of the accident, Henry Lee was in charge and control of the operation of the "niggers" used in rolling the logs, and had charge of that part of the work in which plaintiff was engaged; that is, he was in authority over plaintiff. Lee was therefore a vice principal and not a fellow servant within the meaning of the act. A "foreman" is a laborer with power to superintend those working under him. *Peterson v. Coal*

& Mining Co., 50 Iowa, 673, 32 Am. Rep. 143. The complaint and evidence describe Lee as a foreman, though that exact word is not used. The evidence tended to show that the injury complained of was the direct result of the carelessness of Henry Lee, the foreman, in failing or refusing to heed the signal given by plaintiff; that such signal had been regularly adopted and was seen and understood by Lee; that the foreman was known to Mr. Smiley, the secretary and manager of the company, to be quick-tempered and careless; and that he had not "caught on" to handling the "nigger" which was alleged to have been carelessly operated. We think under the statute that the evidence should have been submitted to the jury.

In *Lucey v. Stack-Gibbs Lbr. Co.*, 23 Idaho, 628, 131 Pac. 897, 900, without applying a statute like ours, it was held that it is a general rule of law that, when a master is engaged in a complex and hazardous business, he must promulgate such rules and regulations for the conduct of his business and the government of his servants in the discharge of their duties as will afford reasonable protection to them, and that it is the duty of the master to use reasonable care to see that such rules are complied with, and that, if he fails to do so, he will be responsible for injuries resulting from failure of compliance. Much to the same effect, see *Potlatch Lumber Co. v. Anderson*, 118 C. C. A. 180, 199 Fed. 742; *Seewald v. Harding Lumber Co.*, 49 Wash. 655, 96 Pac. 221; *Harding v. Ostrander Ry. & Timber Co.*, 64 Wash. 224, 116 Pac. 635; *Blenduck v. Crookston Lumber Co.*, 121 Minn. 53, 140 N. W. 125; *Cole v. Gerrick*, 62 Wash. 226, 113 Pac. 565. In *Schulte v. Pac. Paper Co.*, 135 Pac. 527, in considering the Employers' Liability Act, Mr. Justice Eakin said: "It also eliminates the defense that the injury was the result of the negligence of a fellow servant in certain cases, and no doubt by section 2 it is intended to change the rule that the character of the act in the performance of which the injury arises, and not the rank or class of the negligent employé, is the test whether a negligent employé is a vice principal or a fellow servant, as announced in *Mast v. Kern*, 34 Or. 247, 54 Pac. 950, 75 Am. St. Rep. 580." In *Evans v. Portland Ry., L. & P. Co.*, 135 Pac. 206, a case coming within the provisions of the Employers' Liability Act, an instruction to the effect that the legal principle of assumption of risk had been abrogated by the statute was upheld by this court. In *Chicago, I. & L. R. Co. v. Hackett*, 228 U. S. 559, 33 Sup. Ct. 581, 57 L. Ed. 968, the United States Supreme Court upheld a ruling of the Illinois court to the effect that a yard foreman controlling the movements of a train and its engine in the yard, for the purpose of distributing the cars, is in charge of the train within the meaning of Indiana Acts 1893, p. 294, abolishing the fellow-servant rule in actions by railway employés "when such injury

was caused by the negligence of any person in the service of such corporation (the railway company) who has charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive, engine, or train upon a railway."

Viewed in the light of the general rule first referred to, and prevailing for years in many of the states, it will be observed that the statute adopts no untried or unreasonable rule. The language employed in section 5 of the act presents no ambiguity and admits of no doubt or secondary meaning; therefore it is simply to be obeyed, without more. No room is left for construction. Endlich on Interpretation of Statutes, § 72; Black on Interpretation of Laws, § 35. It is urged by defendant's counsel that Lee, the sawyer, did not have charge of the machinery in the true sense of the word. It appears, however, that he was in authority and had charge and control of the plaintiff who was working with and under him, and we think the evidence tends to show that he had charge of the machinery and appliances within the import of the act. It is suggested by counsel for defendant that the courts of Pennsylvania have construed a law of that state, in substance the same as section 5 of our statute, adopting the character of the act rule as announced by this court in *Mast v. Kern*, supra. From a careful examination of the cases cited from that state it does not appear to us that such is the settled construction. *Remmert v. Pennsylvania Ry. Co.*, 18 Pa. Dist. R. 372, is a case where the plaintiff's husband was killed while acting as an engineer on a locomotive, through the negligence and carelessness of another engineer who had disobeyed a regulation of the company. The negligent engineer had no control or authority over the injured employé, thus differing from the facts in the case at bar. The plaintiff invoked the statute with reference to fellow servants. The district court held that the statute did not apply. The next case under the Pennsylvania act was that of *Feeney v. Abelson*, 49 Pa. Super. Ct. 163, in which the employer was sought to be held liable because one of his teamsters who was a foreman a portion of the time, but not at the time of the injury, had injured another servant through his negligence. The superior court reviewed the enactment and held that the statute did not apply. In the other cases cited, the Employers' Liability Act was not commented upon. It has been held that, where a statute copied from the statute books of another state has received a known and settled construction by the courts of that state, that construction at the time of such enactment is to be deemed as forming an integral part of the same. Endlich, § 371. It is there said: "But, as applied to transcribed statutes, this rule is undoubtedly subject to important qualifications. Whilst admitting that the construction put upon such statutes by the courts of the state from

which they are borrowed is entitled to respectful consideration, and that only strong reasons will warrant a departure from it, its binding force has been wholly denied, and it has been asserted that a statute of the kind in question stands upon the same footing, and is subject to the same rules of interpretation, as any other legislative enactment."

It follows that the judgment of the lower court must be reversed, and the cause remanded, for such further proceedings as may be deemed proper, not inconsistent with this opinion.

McBRIDE, C. J., and EAKIN and McNA-
RY, JJ., concur.

COOK et al. v. GORDON.

(Supreme Court of Oregon. Jan. 13, 1914.)

1. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS BY COURT.

Where a cause is tried by the court without a jury, the findings of fact have the same force as a verdict, and will not be disturbed unless the evidence was not sufficient, as a matter of law, to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.*]

2. BROKERS (§ 84*)—ACTIONS FOR COMPENSATION—BURDEN OF PROOF.

In an action for commissions under a contract giving brokers, in addition to a fixed sum, all sums received over \$125 per acre, where the answer denied a sale for \$150 an acre alleged by the complaint, the burden was on plaintiffs to show that the sale was for more than \$125 an acre.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 104, 105; Dec. Dig. § 84.*]

3. BROKERS (§ 69*)—COMPENSATION—AMOUNT.

In estimating the commission on an exchange of real estate, the actual and not the trade value of the property should be taken as the basis.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 55; Dec. Dig. § 69.*]

4. BROKERS (§ 48*)—RIGHT TO COMPENSATION—EXCHANGE OF PROPERTY.

In determining whether a real estate agent is entitled to compensation, there is no difference between a sale and an exchange.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.*]

Department 2. Appeal from Circuit Court, Multnomah County; W. L. Bradshaw, Judge.

Action by W. J. Cook and another, a partnership under the firm name of Cook & Clark, against J. D. Gordon. From a judgment for plaintiffs, defendant appeals. Modified.

This is an action to recover a broker's commission. The cause was tried before the court without the intervention of a jury. The court found for plaintiffs and rendered judgment against the defendant for \$9,300, from which the latter appeals.

The complaint alleges, in substance, that on September 26, 1911, the defendant employed plaintiffs, as brokers, to sell certain real property in Yamhill county, Or., owned

by him, and agreed to pay the plaintiffs, as commission, \$1,075, and all sums received over and above \$125 per acre, the selling price for 329 acres of land; that plaintiffs sold the land on December 14, 1911, for \$150 per acre, making a commission, pursuant to the agreement, of \$9,300, which is unpaid. In the defendant's answer the contract of employment was admitted, and the averment made that the plaintiffs were unable to procure a purchaser, and that the agreement had been annulled by mutual consent. It denied that the sale was made for \$150 per acre, or that anything was due the plaintiffs; and further pleaded that in November, 1911, plaintiffs endeavored to negotiate a sale of the land to one S. W. Childers and wife, and proposed that defendant accept in part payment certain real property for \$17,400, which plaintiffs agreed to purchase at that price in payment of their commission, and to secure the balance by a mortgage of \$8,100 on the real property; that on such conditions defendant accepted the proposition and exchanged the properties; and that plaintiffs now refuse to comply with their agreement to purchase the Childers property. The plaintiffs' reply denied the new matter of the answer, and averred that subsequent to September 26, 1911, and prior to the sale, the plaintiffs proposed in writing to take either of the Childers properties mentioned in the answer, but that the defendant failed to accept the proposition.

Earl C. Bronaugh and J. M. Gearin, both of Portland, for appellant. G. G. Schmitt and C. M. Idleman, both of Portland, for respondents.

BEAN, J. (after stating the facts as above).

[1] The law is plain that, where a cause is tried by the court without a jury, the findings of fact have the same force and effect as the verdict of a jury, and will not be disturbed unless it appears that the evidence upon which they were made was not sufficient, as a matter of law, to support them. *Good v. Smith*, 44 Or. 578, 76 Pac. 354; *Astoria R. Co. v. Kern*, 44 Or. 538, 76 Pac. 14; *Smith v. Gevurtz*, 135 Pac. 190; *Peaslee v. Gordon Falls Elec. & Mfg. Co.*, 135 Pac. 521.

[2] The court found that the original contract had not been annulled. An exchange of defendant's land was made with S. W. Childers about December 14, 1911. It is denied by the answer that the sale was made for \$150 per acre. In order to collect the extra commission, the burden of proof is upon the plaintiffs to show that the real property of the defendant was sold for more than \$125 per acre, or \$41,125.

[3] The controversy arises on account of an exchange of the real estate in question for a house and lot in St. Johns estimated at \$7,000, and 105 acres of land known as Estacada land. The defendant claims that \$6,000

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was the price asked by S. W. Childers for the latter property. It is in regard to this that the contention arises. The plaintiffs' claim is based upon a value of \$100 per acre, or \$10,500. The defendant asserts that this is a mere fictitious or "padded" value, and that the property at no time was worth more than \$6,000. We will consider the testimony of the plaintiffs upon this question. After the plaintiffs had endeavored to make a sale of Gordon's property to Mr. Childers and his associates for cash, and were unable to do so, on November 21, 1911, Messrs. Cook & Clark wrote a letter to the defendant Gordon stating that they would take the Estacada land "that is valued at \$6,000" in full for their commission. On December 7, 1911, the plaintiffs wrote defendant Gordon a letter as follows: "Mr. J. D. Gordon, Newberg, Oregon—Dear Sir: Mr. Childers was in to-day and made me the following proposition on your 329 acres: He wants to turn over his 105 acres at Estacada for \$100 an acre making \$10,500, and a nine-room house on the quarter block at St. Johns for \$7,000. He says he will assume the \$13,000 mortgage, and give you a mortgage for the balance, which would be \$18,850, and put up as security a \$12,000 mortgage that he has, providing that you would agree to protect him on the \$13,000 for five years from date. * * * As far as Clark and my commission or interest is concerned that can be arranged for us to either take the house at St. Johns or the farm at Estacada. * * *"

E. L. Clark, one of the plaintiffs, testified to the effect that they wrote Gordon the terms proposed; that Gordon came and looked at the land and said that he would accept the proposition and trade; that the property was sold for \$150 per acre; and that Gordon took all the Childers properties and a mortgage back, amounting in the aggregate to \$49,350. On cross-examination, he testified: That the first proposition made by Mr. Childers was that, if he could get plenty of time on it, he would take the land. That Mr. Gordon informed them that he would give Childers all the time he wanted. That the latter then came back with the proposition to turn in the Estacada property for which at that time he wanted \$6,000. That afterwards Childers said: "My property is worth as much as the hill land (Gordon's). I am going to raise my price on my property. I won't take less than \$10,500, \$100 an acre." That Mr. Gordon came in to see them, and that they told him they would take the Estacada land for their commission. Mr. W. J. Cook, also one of the plaintiffs, testified, in regard to the negotiations, that, when the proposition made by Mr. Childers was submitted to Gordon, the latter came in and said that he would trade.

Nowhere in the evidence of the plaintiffs does it appear that the defendant ever agreed to accept the Estacada property at \$100 per acre, but only that he would exchange. The

testimony of the plaintiffs fails to show that Gordon ever agreed to take any less than \$125 an acre for his land. After the trade was consummated and the deeds were executed, in order to give the purchaser Mr. Childers ten days' time in which to obtain the \$12,000 collateral security, Gordon and wife and Childers and wife executed a memorandum agreeing to place the deeds and mortgages in escrow with W. J. Cook to be held during that time. In this agreement the consideration for the Estacada and St. Johns properties was mentioned at \$17,500. The trial court based its findings upon the trade value recited in the memorandum. This, we think, was an error.

In estimating the commission upon an exchange of real estate, the actual and not the trade value of the property should be taken as the basis. 19 Cyc. 237; *Boyd v. Watson*, 101 Iowa, 214, 70 N. W. 120; *Porter v. Hellingsworth*, 30 Misc. Rep. 628, 62 N. Y. Supp. 796. See, also, *Calland v. Trapet*, 70 Ill. App. 228. We think this is a reasonable rule. It is plain from plaintiffs' evidence, as well as from the whole record, that the increase in price of the Estacada land was made solely for the purpose of partly offsetting the increase in the price of the Gordon land from \$125 to \$150 made by the plaintiffs. See *Porter v. Hellingsworth*, supra. According to plaintiffs' claim, the result of this would be simply to swell the commission of plaintiffs and reduce defendant's price below \$125 per acre. In the exchange, according to the plaintiffs' evidence, defendant received the following sums for his land:

Old mortgage on the property.....	\$13,000
New mortgage.....	18,850
St. Johns house and lot.....	7,000
Estacada property.....	6,000
Total	44,850
Am't. of Gordon's price at \$125 an acre	41,125
Difference	3,725
Plus the fixed commission.....	1,075
Total	\$ 4,800

This is the amount of plaintiffs' commission as shown by their evidence. There is no substantial legal evidence in the record to support the findings for any greater amount. There is evidence to support the other findings, and they should not be disturbed.

Counsel for plaintiffs suggest that the defendant does not allege in his answer that the Estacada land is not worth \$10,400, nor that the St. Johns property is not worth \$7,000; but the allegation of the complaint is to the effect that the property of defendant was sold for \$150 per acre, and this is denied.

[4] Counsel for defendant contend that the transaction was an exchange and not a sale. In so far as the notes and mortgages were concerned, it partook of the character of a sale. There is no substantial difference between a sale and an exchange. *Kennerly v. Somerville*, 68 Mo. App. 222, 227.

Under the provisions of section 3, art. 7, of the Constitution, the judgment of the lower court should be changed and reduced to \$4,800, and it is so ordered.

MCBRIDE, C. J., and EAKIN and McNARY, JJ., concur.

BORTHWICK v. JOHNSON et al.

(Supreme Court of Oregon. Jan. 13, 1914.)

1. TAXATION (§ 788*)—TAX DEEDS—VALIDITY—PRESUMPTIONS AND BURDEN OF PROOF.

Unlike a sheriff's deed on sale of land for delinquent taxes, his deed on sale of land bid in by the county is not prima facie evidence of regularity of the proceeding, and one claiming thereunder must show that every step necessary to vest complete title in the county has been complied with.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559-1569; Dec. Dig. § 788.*]

2. TAXATION (§ 810*)—TAX TITLES—SUITS—EVIDENCE.

In a suit to quiet title to land, a party claiming title under a sheriff's deed to land bid in by the county for taxes is not entitled to a decree in his favor, in the absence of evidence that any warrant was ever issued by the county court for the sale for taxes, or of any notice of sale, or of the certificates of sale which the law requires to be given the purchaser at a tax sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.*]

In banc. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Suit by William L. Borthwick against J. E. Johnson and others. From a decree for defendant Johnson, plaintiff appeals. Reversed and rendered.

This is a suit to quiet title to lots 28 and 29, in block 23, Willamette addition to East Portland, now included within the corporate limits of the city of Portland. The complaint is in the usual form. All the defendants made default except Johnson, who answered, disclaiming any interest in lot 29, but setting up title in fee to lot 28. It was stipulated that the original title was in Andrew Roberts, who died in August, 1898, that Sarah E. Malcolm was his daughter and sole heir, and that on April 11, 1911, Sarah E. Malcolm and her husband Phillip S. Malcolm quitclaimed all their right, title, and interest in lot 28 to plaintiff. Defendant Johnson claimed title under a deed made to William Mast by the sheriff of Multnomah county, bearing date of October 5, 1904, upon a sale of property theretofore purchased by the county for delinquent taxes, upon which the time for redemption had expired. The land was unoccupied and uninclosed until a few months before the commencement of this suit, when plaintiff inclosed it with a wire fence, which defendant tore down. Upon the trial the plaintiff offered in evidence the assess-

ment rolls for Multnomah county for the years 1898, 1899, showing the property to have been assessed to Andrew Roberts.

H. H. Riddell, of Portland, for appellant. I. E. Richardson and Geo. D. Young, both of Portland, for respondent.

MCBRIDE, C. J. (after stating the facts as above). [1] Unlike deeds made by the sheriff on sales of land for delinquent taxes, deeds made by that officer upon sales of land bid in by the county are not prima facie evidence of the regularity of the proceedings; and it is incumbent upon the party claiming under such a conveyance to show that every step necessary to vest a complete title in the county has been complied with. *Ayers v. Lund*, 49 Or. 303, 89 Pac. 806, 124 Am. St. Rep. 1046; *Dufur v. Healy*, 58 Or. 49, 107 Pac. 692; *Rafferty v. Davis*, 54 Or. 77, 102 Pac. 305.

[2] The defendant failed in this act at the very threshold. There is no evidence of any warrant ever having been issued by the county court for the sale of property for delinquent taxes, nor of any notice of sale having been given; neither are the certificates which the law requires to be given to a purchaser on such sales produced. In short, there is an entire lack of any evidence tending to show that the lot in question was ever legally sold to or bid in by the county for delinquent taxes. Defendant Johnson seems to have relied wholly upon the sheriff's deed made when the land was sold by the county, and upon the assessment rolls and the entries by the clerk upon the record of delinquent tax sales; but evidence of the facts which give life and validity to a sale, namely, the return of the sheriff upon the tax roll, the warrant for collection of delinquent taxes, and proof of due notice of sale are all wanting. In the absence of these there is nothing to show that the county had any title to the property when it conveyed it to defendant.

The decree will therefore be reversed, and a decree entered here declaring plaintiff to be the owner in fee of the lot described, and quieting his title thereto.

VAUGHAN v. CANBY CANAL CO.

(Supreme Court of Oregon. Jan. 13, 1914.)

JUDGMENT (§ 890*)—CANCELLATION—SATISFACTION BY EXECUTION.

Under L. O. L. § 241, subd. 3, providing that on the return of an execution, the sheriff shall pay the proceeds to the clerk, who shall apply them in satisfaction of the judgment, where the judgment creditor at execution sale has bid a sum equal to the judgment, with the accrued interest, costs, and disbursements, the debtor is entitled on motion, in the absence of a showing that the creditor is entitled to be relieved from his bid, to have the judgment canceled.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1689-1701; Dec. Dig. § 890.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department No. 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by R. M. Vaughan against the Canby Canal Company. From an order overruling a motion to cancel a judgment against it, defendant appeals. Reversed and rendered.

A. E. Clark, of Portland (M. H. Clark, of Portland, on the brief), for appellant. James L. Hope, of Astoria (E. B. Seabrook and Stott & Collier, all of Portland, on the brief), for respondent.

McNARY, J. The purpose of this proceeding is to procure an order for the cancellation of a judgment. In December, 1910, plaintiff obtained a judgment in the circuit court of Multnomah county against defendant for \$644.80 and costs and disbursements. On March 14, 1911, a transcript of the judgment was docketed in the office of the county clerk of Clackamas county. Concurrently in time plaintiff caused an execution to be issued upon the judgment, and a levy to be made upon a tract of land owned by defendant in Clackamas county containing about 27½ acres. As required by statute, the property was advertised for sale, and sold under the execution on May 13, 1911. At the sale of the premises, plaintiff was the successful bidder, having offered a sum equal to the amount of his judgment, costs, and disbursements. The sheriff issued to plaintiff a certificate of sale, which was by plaintiff recorded in the records of Clackamas county. The return of the sheriff recites the history of the transaction, which was conducted in accordance with the statute. No motion for or objection to a confirmation of the sale has ever been filed, and the judgment remains unsatisfied. On March 14, 1913, the defendant filed a motion for an order canceling the judgment, supporting the application by an affidavit containing a recital of the proceedings that had been taken. Plaintiff, so far as the record discloses, made no more than oral objection to the motion. On the 31st of the month the motion was by the court overruled.

Counsel for the defendant assumes the position that the purchase of the property at the execution sale ipso facto operated to extinguish the judgment and for that reason defendant is entitled to have an order of cancellation. Subdivision 3, of section 241, L. O. L., in part provides: "Upon the return of the execution, the sheriff shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, in satisfaction of the judgment." By the mandate of this statutory provision, the clerk is required to apply the proceeds of the sale to the satisfaction of the judgment. If, however, the successful bidder is the judgment creditor, still the clerk must apply the amount of the bid to the satisfaction of the judgment. Should the

purchaser at the execution sale be the judgment creditor, who bid a sum of money equal to the judgment, costs, and disbursements, as in this case, the sum so bid must be applied to the satisfaction of the judgment. A reasonable interpretation of the statute warrants the decision that a judgment becomes extinguished upon the return of the execution showing a bid equal to the judgment, plus accrued interest, costs, and disbursements. If the bid of a judgment creditor is less than the amount due, the sum offered and accepted must be applied pro tanto in payment of the judgment. Under certain conditions a judgment creditor or other successful bidder at an execution sale may be relieved from a bid, but nothing appears in this case to suggest such a contingency. The record is nude of any matter that would inspire the court to release plaintiff of the purchase of the property at the execution sale, and therefore it would be working a positive wrong upon defendant to permit plaintiff to sit up supinely and hold his judgment over defendant without a showing that would quicken the court to action. The proceedings sanctioned by statute with reference to the confirmation of the sale relate to the title of the property and cannot be confounded with those agencies that work an extinguishment of the judgment. Defendant shall have an order directing the clerk of Multnomah county to satisfy the judgment. Reversed.

McBRIDE, C. J., and BEAN and EAKIN, JJ., concur.

AVERY et al. v. HOWELL et al.

(Supreme Court of Kansas. Jan. 10, 1914.)
BROKERS (§ 54*)—COMPENSATION—RIGHT TO.

When a real estate agent produces a purchaser able, ready, and willing to take the land at the agreed price, he is entitled to his commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

Appeal from District Court, Gray County. Action by G. W. Avery and another against George Howell and another. From an order granting plaintiffs a new trial after an adverse judgment, defendants appeal. Affirmed.

J. M. Kirkpatrick, of Dodge City, for appellants. C. A. Baker, of Kinsley, for appellees.

PER CURIAM. The appeal in this case is taken from an order of the court granting a new trial in an action brought by the appellees against appellants to recover \$1,000 and interest, which they claimed as a commission for producing a purchaser or one who would make a satisfactory trade with appellants for a tract of 800 acres of land belonging to appellants. The verdict and

judgment denied the appellees' right of recovery.

The facts in this case bring it fairly within the rule laid down in recent decisions of this court, as follows:

In *Green v. Flist*, 89 Kan. 536, 132 Pac. 179, it is said: "Following *Betz v. Land Co.*, 46 Kan. 45, 26 Pac. 456, it is held that, when an agent for the sale or exchange of real estate finds a purchaser able and willing to take the land at the agreed terms, or to enter into a contract which is satisfactory to the principal, he has earned his commission."

In *Hutton v. Stewart*, 90 Kan. 602, 135 Pac. 681, it is said: "Ordinarily a real estate broker has earned his commission when he has produced a customer with whom his principal enters into an enforceable contract for the sale of the land, although the title does not actually pass. After the principal has entered into such a contract, not being induced thereto by any deceit on the part of the broker, he cannot avoid liability for a commission by showing the inability of the buyer to carry out his agreement."

It follows that the motion to set aside the judgment and grant a new trial was properly sustained.

The order is affirmed.

MATEER v. GREAT WESTERN LAND CO. et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

LIMITATION OF ACTIONS (§ 100*)—COMPUTATION OF TIME—DISCOVERY OF FRAUD.

In an action for damages for false and willfully fraudulent representation, on which plaintiff relied in making a written contract to purchase land, and in making a part payment therefor, commenced September 16, 1910, it appeared that plaintiff about August, 1908, was told by one claiming to have been in the vicinity that the land could not be irrigated as represented, and that soon afterwards he sent his son about 700 miles to investigate, who, on his return, reported, between September 26th and the early part of October, 1908, that the land could not be irrigated. *Held*, that such facts showed ordinary diligence to discover the fraud, which could not be said to have been discovered until he obtained knowledge of the facts, so that the action was not barred, because not brought within two years from the time the fraud was discovered.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

Appeal from District Court, Finney County.

Action by James Mateer against the Great Western Land Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Hoskinson & Hoskinson, of Garden City, for appellants. C. L. Marmon, of Garden City, and L. T. Shangle, of Oskaloosa, Iowa, for appellee.

PER CURIAM. The appellee commenced this action September 16, 1910, to recover

damages for the alleged false and willfully fraudulent representations and guaranty by H. C. Wiley, upon which the appellee alleges he relied, and was induced thereby to enter into a written contract to purchase two quarter sections of H. C. Wiley, doing business in the name of the Great Western Land Company, and to pay \$2,500 in part payment therefor. The jury returned a verdict for actual damages in the sum of \$2,500, with interest thereon from the time of payment, and for \$875 exemplary damages.

The principal contention of the appellants is that the action was not brought within two years from the time the fraud, if any, was discovered. The representations and warranty alleged were that the land was located under and irrigable from the Amazon ditch, and that on or just prior to August 5, 1910, one Bolton, claiming to have been in the vicinity of the land, told the appellee that he did not believe it could be irrigated from the Amazon ditch. The appellee testified that, from Bolton's report, he did not believe that Bolton had seen the land. The jury also, in answer to a special question in regard thereto, returned the answer: "According to the evidence, [L. C. Bolton] did not see the land in controversy." The evidence, also, is that, soon after the report of Bolton was made to appellee, the appellee sent his son from the place of their residence, in Mahaska county, Iowa, to Kearny county, Kan., a distance of about 700 miles, to learn the truth in regard to the matter. The son returned, and, as is variously stated, from the 26th day of September to the fore part of October, 1908, reported to his father that he had consulted the engineer of the Amazon ditch, and had learned that the land in question was higher in elevation than the Amazon ditch, and could not be irrigated therefrom.

Considering the distance from the residence of the appellee to the land, we think there was a showing of ordinary diligence, at least, to discover the fraud; also, that it cannot be said that one has discovered a fraud until he has obtained knowledge of the facts.

We think the evidence was sufficient to justify the verdict and the judgment of the court, and the judgment is affirmed.

BOWERS v. JETT et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

PARTITION (§ 109*)—JUDICIAL SALE—EFFECT TO BAR SECOND MORTGAGE.

The owner of real property upon which he had given two mortgages died intestate. The first mortgage was foreclosed; the holder of the second being a party. In a partition suit brought to divide the property among the heirs of the mortgagor, a decree was rendered for its sale, the proceeds to be applied, first, to the payment of the judgment on the first mortgage. Before the sale was made in the parti-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion action the property was sold under the foreclosure. The bidder at the partition sale held the certificate of purchase issued in pursuance of the foreclosure sale, and in effect applied it upon the bid at the second sale. The court in the partition action directed the sheriff to redeem from the foreclosure sale out of the proceeds of the partition sale. A sheriff's deed was issued to the purchaser at the latter sale. Held, that it conveyed a good title, and the second mortgage is not enforceable.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 375-397; Dec. Dig. § 109.*]

Appeal from District Court, Wyandotte County.

Action by W. H. Bowers against Lizzie T. Jett and others. From judgment for plaintiff, defendants appeal. Reversed and remanded, with directions.

Lesley Lyons, of Kansas City, Mo., John A. Hale, of Kansas City, Kan., and H. L. Burgess, of Olathe, for appellants. Sutton & Sutton, of Kansas City, Kan., and Thomas Irish, of Kansas City, Mo., for appellee.

MASON, J. W. H. Bowers brought an action to foreclose a mortgage, which was resisted by Lizzie T. Jett, who asserted ownership of the land freed from the plaintiff's lien. The case was sent to a referee, who reported the facts in detail, and concluded that the defendant should recover. The trial court, however, gave judgment for the plaintiff, from which an appeal was taken.

The facts found by the referee were practically adopted by the court throughout. Some of the findings were modified, but in each instance the difference of opinion between the referee and the court was not really as to what had taken place, but as to the legal consequences that followed. Therefore we have only to determine the rights of the parties under the established facts, which for present purposes may be thus stated:

In 1898 Allen G. Woodcock owned the land in controversy. On June 14th of that year he gave a first mortgage upon it for \$1,500. The next day he made a second mortgage to his son Chester O. Woodcock for the expressed consideration of \$2,500. He died intestate March 20, 1899, his only heirs, besides his wife and his son Chester, being another son. The first mortgage was foreclosed in an action brought in the district court of Wyandotte county July 17, 1902; Chester O. Woodcock being a party. Judgment was rendered March 17, 1903, for \$1,927.50, bearing 8 per cent. interest. November 16, 1900, a partition suit was begun in the court of common pleas, for the purpose of dividing the real estate among the heirs of Allen G. Woodcock. A division in kind was found impracticable, and a sale was ordered. A decree in the partition suit was rendered June 6, 1904, providing that if no party took the property at its appraised value (\$3,600), it should be sold by the sheriff at not less than two-thirds of the ap-

praisement, the proceeds, after payment of costs and taxes, to be applied to the judgment in the foreclosure action, the residue to be distributed among the heirs. June 27, 1904, a sale under the mortgage foreclosure was had, which was confirmed July 2, 1904. A sale under the decree in the partition suit followed, July 11, 1904. Mrs. Jett was the buyer at the second sale. She also bought the certificate of purchase which had been issued in pursuance of the foreclosure sale, upon which 18 months' redemption was allowed. The sale in the partition action was confirmed September 19, 1904, and the decree of confirmation directed the sheriff to apply the proceeds of the redemption of the property from the foreclosure sale, and return the canceled certificate. A sheriff's deed in pursuance of the sale in the partition suit was executed to Mrs. Jett October 13, 1904.

December 16, 1904, W. H. Bowers, who had acquired whatever rights Chester O. Woodcock had under the second mortgage, brought the present action, for its foreclosure. He contends that the interest acquired by Mrs. Jett through her purchase of the certificate of purchase which was issued in the first mortgage foreclosure merged with the title she obtained by purchase at the sale under the decree in the partition suit, and that the original second mortgage thereby became a first lien. We cannot assent to this view. The doctrine of merger is equitable in its nature, and we see no sufficient reason for its application to this situation. In the partition case it might perhaps have been simpler for the court to have directed a sale of the mere equity in the property—of the property subject to the rights arising under the first mortgage. But substantially the same result was accomplished by the sale of the property as a whole, with a direction to apply the proceeds, so far as necessary, to the first lien. Between the judgment in the partition proceedings and the sale thereon the property was sold under the foreclosure decree, and the form of the first mortgage lien was thereby changed from a judgment to a certificate of purchase, but it was essentially the same demand, and was still a first charge. The confirmation of the partition sale implies that it was regularly and fairly conducted. As the proceeds of this second sale, after the payment of the costs and taxes, were directed to be applied to the lien of the first mortgage, and as these items practically exhausted the amount for which the property was sold, nothing was left for either the heirs or the second mortgagee. Their failure to realize anything for their respective interests was the necessary consequence of the property not having brought a larger amount.

A formal redemption of the property from the sale on foreclosure does not appear to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have been made, although the transaction as a whole doubtless amounted substantially to the same thing. Mrs. Jett was the bidder at the partition sale, and she held the certificate of purchase to the redemption of which the amount of her bid was to be applied. The precise manner in which her preferred claim was applied to the amount of her bid is not important. The certificate of purchase was treated as a credit upon her bid. If there was a valid redemption, her title is good in virtue of her purchase at the partition sale; the redemption was made in her behalf as the purchaser—the owner of the equity of redemption—and the property is no longer liable to the second mortgage. Gen. Stat. 1909, §§ 6072, 6092 (Code Civ. Proc. §§ 477, 497). If the proceedings are regarded as not amounting to a redemption, then her title is good in virtue of the sale under the mortgage foreclosure. It may be suggested that in that view of the case she has not paid the amount of her bid at the partition sale. The property was in effect bid off to her at the partition sale for substantially the claim she held against it. What method was adopted in setting the one amount against the other is not very important. We hold that in buying at this sale, under a decree which appropriated the amount of the bid to the payment of her own claim, she did not take the property charged with the lien of the second mortgage, and that ruling is decisive of the controversy.

A contention has been made in behalf of Mrs. Jett that the second mortgage was barred by the judgment in the action brought to foreclose the first mortgage, and also by the judgment in the partition action. In view of what has already been said, it is not necessary to determine those questions.

The judgment is reversed, and the cause remanded, with directions to render a judgment quieting the title of Mrs. Jett. All the Justices concurring.

McCLINTICK v. PYLE.†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—REFUSAL OF INSTRUCTIONS ALREADY GIVEN.

Where the jury are told that, in order to be entitled to a commission, a real estate agent must have been the "procuring" cause of a sale, it is not material error to refuse to instruct that he must have been the "efficient" and "proximate" cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

(Additional Syllabus by Editorial Staff.)

2. APPEAL AND ERROR (§ 1068*)—CURE OF ERROR—INSTRUCTIONS.

Error, if any, in instructing in a broker's action for commission that he could recover either upon an express or an implied agreement,

was cured, where the jury found specifically that there was an express agreement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

3. TRIAL (§ 350*)—SPECIAL INTERROGATORIES—REFUSAL TO SUBMIT.

In a broker's action for commission, it was not an abuse of discretion to refuse a special interrogatory inquiring, "What, if anything, did plaintiff do as agent to sell said farm to E. W. B.," evidence, rather than the ultimate fact, being apparently called for thereby.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

4. TRIAL (§ 352*)—SPECIAL INTERROGATORIES—REFUSAL.

In a broker's action for commission, a special interrogatory, inquiring, "Is it not a fact that E. W. B. only talked to plaintiff as a friend," being negative and leading in form, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.*]

Appeal from District Court, Coffey County.

Action by Bert McClintick against Morris Pyle. Judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Pleasant, of Burlington, and John C. Nipp, of Kansas City, Mo., for appellant. Henry E. Ganse, of Emporia, for appellee.

MASON, J. Bert McClintick sued Morris Pyle for a real estate commission and recovered a judgment, from which an appeal is taken.

[1] Complaint is made of the refusal of several instructions. Two were to the effect that the plaintiff had the burden of proving that his acts were the "efficient and procuring," "procuring or inducing" cause of the sale; that it was not enough to show them to have been a part of the chain of causes. The court instructed that there could be no recovery unless the plaintiff was the procuring cause of the sale. This sufficiently covered the point involved.

[2] An instruction was given that a recovery could be had either upon an express or upon an implied agreement. The appellant urged that the evidence did not warrant the latter. The jury found specifically that there was an express agreement, and therefore the error, if any, was cured.

[3, 4] Complaint is also made of the refusal to submit three special interrogatories asked by the defendant, as follows: "What, if anything, did plaintiff do as such agent to sell said farm to E. W. Barker? Was plaintiff the efficient, proximate, and procuring cause of the sale of the farm in question to E. W. Barker? Is it not a fact that E. W. Barker only talked to plaintiff as a friend?" The first of these perhaps called for evidence rather than the ultimate fact, and the court was within its discretionary right in refusing it. *S. K. Ry. Co. v. Walsh*, 45 Kan. 653, 26 Pac. 45. The second was covered by a finding that the plaintiff was the "procuring" cause of the sale. The third was ob-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

jectionable because of its negative and leading form. *A., T. & S. F. R. Co. v. Butler*, 56 Kan. 433, 43 Pac. 767.

Several questions asked upon cross-examination were ruled out, but the discretion of the court in this regard was not abused. The plaintiff's wife was allowed to testify that her husband wrote a letter which he told her was to the defendant, but the evidence does not appear to have been prejudicial.

The judgment is affirmed. All the Justices concurring.

WHEELER v. BALLARD et al.†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. QUIETING TITLE (§ 52*) — DECREE — CONSTRUCTION AND EFFECT.

The life tenant in possession of certain land sued the remainderman and another to quiet title, alleging in herself the legal title and peaceable possession, and averring that the defendants set up a claim of estate and interest adverse to that of the plaintiff, and praying that such claim be shown null and void as against the plaintiff. The summons by publication notified the defendants that, in default of answer or demurrer, the petition would be taken as true, and judgment rendered quieting plaintiff's title in and to the land in question as against the title of the defendants, and the title of the defendants, if any, would be determined to be null and void as against the title of the plaintiff. The journal entry recited proper service, default, a finding that the averments of the petition were true, and concluded: "It is further considered by the court that the plaintiff * * * is the owner of the following lands, * * * and that the defendants, * * * and each of them, be excluded and forever precluded of any interest in or to the above-described lands and tenements. * * *"*Held*, that such decree extinguished the defendants' title, and left the plaintiff as to them the full and complete owner of the land.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 99, 102, 103; Dec. Dig. § 52.*]

(Additional Syllabus by Editorial Staff.)

2. WORDS AND PHRASES—"TITLE."

Legal "title" usually means a full and absolute title (citing *Words and Phrases*, vol. 8, p. 6980; see, also, vol. 8, p. 7816).

3. QUIETING TITLE (§ 52*) — NATURE AND SCOPE—EFFECT—"SUIT TO QUIET TITLE."

The ordinary purpose of a suit to quiet title is to make the plaintiff's ownership complete as against any claim asserted by the defendant, and the usual effect of the decree is to bar the latter and those claiming against the plaintiff or his successors of any title or interest in the property affected.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 99, 102, 103; Dec. Dig. § 52.*]

Appeal from District Court, Franklin County.

Action by Adaline Wheeler against James W. Ballard and others. From decree for defendants, plaintiff appeals. Reversed.

W. B. Pleasant, of Ottawa, for appellant. John O. Quin and F. A. Waddle, both of Ottawa, for appellees.

WEST, J. [1] In 1886 Benjamin Yancy willed the land in controversy to an adopted niece, Adaline Anderson, "after the death of my beloved wife Eliza and myself." He died shortly thereafter, and the widow elected to take under the will; she being an unlearned colored woman then about 75 years of age. She continued to reside on the land until about 1907, and had the use thereof until her death, March 1, 1912. This action was begun by Adaline Wheeler as heir of the widow against the heirs of the devisee of the fee in remainder, and, having been defeated, she appeals.

It appears that in 1895 the widow sued her daughter Mary Payne and the devisee of the fee in remainder, Adaline Anderson, to quiet title, and it is argued by the present plaintiff that this resulted in fixing the complete title in the widow; while the defendants contend that it did not add to her life estate. The latter was the view taken by the trial court, and its correctness is the principal question for determination.

In her petition to quiet title, the widow alleged that "she, the plaintiff, has the legal title to and is in peaceable possession of" the land, and "that the said Mary Payne and Adaline Anderson set up a claim of estate and interest in and to the said premises as heretofore described adverse to the estate and interest of the said plaintiff so as aforesaid averred. Said plaintiff therefore prays that the said Mary Payne and Adaline Anderson may be compelled to show their said title, and that it may be shown null and void as against the said plaintiff." In the affidavit for publication sworn to by her attorney, it was stated that the plaintiff had caused to be filed a petition praying that certain described lands "in which the said defendants, Mary Payne and Adaline Anderson, claim to have some interest in and to the said premises, adverse to the estate and interest of the said plaintiff, and praying in said petition that the defendants be compelled to show their said title, and that it be determined to be null and void as against the said plaintiff, and that the defendants be barred and precluded from all right, title, and interest in and to said premises, and each and every part thereof," and that Mary Payne resided in Arkansas, and Adaline Anderson in Kansas City, Mo. The summons by publication notified the defendants that, unless they should answer or demur to the petition, it would be taken as true, and judgment rendered in favor of the plaintiff, "quieting her title in and to the following described lands and tenements, to wit, * * * as against the title of said defendants, and the title of said defendants (if any they have) will be de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

terminated to be null and void as against the title of the said plaintiff." The journal entry recites proper service, and the default of both defendants, and a finding that the averments of the petition were true, and concludes as follows: "It is further considered by the court that the plaintiff Eliza Yancy is the owner of the following lands and tenements situated in said county and state, and described as follows, to wit, * * * and that the defendants, Mary Payne and Adaline Anderson, and each of them, be excluded and forever precluded of any interest or title in and to the above-described lands and tenements, and that the plaintiff pay the costs of this action."

In the conclusion of law that so much of the former judgment as purports to exclude and forever preclude Adaline Anderson from any interest in or title to the land is outside and beyond the issue raised by the petition and the notice of publication therein, and therefore void, reference is made to *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609. In the conclusion that the proceedings in the former cause did not add to the title formerly held by Eliza Yancy, *Lockwood v. Meade*, 71 Kan. 739, 81 Pac. 496, is cited.

In *Gille v. Emmons* the defendant's wife was adjudged liable on two promissory notes involved in foreclosure proceeding against her husband and herself, although she had never signed the notes, and the only prayer as to her was that her equity of redemption in the mortgaged premises be foreclosed. This was held void, upon the ground that her indebtedness was not an issue in the case, and was never submitted to the court for its determination. *Reynolds v. Stocton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464, holding that a judgment must be responsive to the matters controverted, and other decisions similar in effect were referred to and followed. It was said, however, that, if there had been an attempt to set up a liability against the defendant's wife, "and the cause of action had been imperfectly or defectively stated, a judgment rendered thereon, although erroneous, would be deemed to be valid until reversed on error, or set aside by some direct proceeding for that purpose."

In *Woodman v. Davison*, 85 Kan. 713, 716, 118 Pac. 1066, 1068, property was left by will to be used for 20 years by the executors, then to go to a son of the testator. The executors continued the business unsuccessfully, and creditors began an action to subject its assets to the payment of their demands. The son was made a party, and the petition alleged that all the property in the executors' hands belonged to the plaintiffs, and any interest the son had in the trust estate was inferior to the equitable lien of the creditors. Judgment was rendered for the sale of the property belonging to the trust estate, all parties to be barred after such sale. At the expiration of the 20-year period, the son

brought ejectment; but it was held that his claim was barred by the former proceedings. In the opinion it was said: "The fact that in the prior action the question of his reversionary interest does not appear to have been distinctly presented or considered does not affect the conclusive character of the judgment. The issue was necessarily involved in the decree barring him of all interest in the bank building, and he cannot avail himself of his own failure to present it in more definite form. * * * The decree of the court barring Woodman from all interest in the property sold by the receiver necessarily involved a decision that he had no title thereto as against the purchaser. That question, therefore, was one of those 'actually decided,' and became *res judicata* between the parties, regardless of the form of the litigation in which the attempt might be made to raise it." It was further said that, had it been clear that all parties had in fact conceded Woodman's ownership, and there had been no purpose to reach or affect it, and the judgment barring him had resulted from inadvertence, it might be possible, in furtherance of justice, to regard it as within the rule in *Gille v. Emmons*, but that the express allegation that all the property in the possession of the administrators belonged to and was a part of the trust estate was an invitation to Woodman to make the claim which, he having failed to make then, he could not make afterwards.

In *Lockwood v. Meade* it was held that an ordinary decree quieting a plaintiff's title does not have the effect of transferring to him "as against a stranger to the suit" the title theretofore held by the defendant. Here the holders of a tax deed procured a decree quieting their title against the holder of an earlier one, and then transferred their title to the defendant. In the suit by the fee owner both tax deeds were held voidable, and he was awarded possession, but required to reimburse the defendant for the amount the earlier tax deed holder had expended in procuring her deed. This was held to be erroneous, and, concerning an ordinary decree quieting title, it was said: "It effects no affirmative increase in the plaintiff's rights. It strengthens his title only in that it cuts off a source of attack. It brings to him no new and independent right which he may assert against a stranger to the suit. It adjudges that the defendant has no claim to the property—not that a claim which he has must be deemed to be transferred to the plaintiff." 71 Kan. 741, 81 Pac. 497. The effect of the decision was that a mere decree quieting title against a former tax deed holder, while precluding such holder or any one under him from asserting title to the real property affected, did not transfer to the plaintiff the tax lien which such holder might have asserted upon being dispossessed by the original owner.

[2] We do not think that these two deci-

sions justify the conclusions of law reached by the trial court. The former action must be regarded the same as if the defendants had both appeared and contested the allegations of the petition which alleged that the plaintiff had the legal title to the land, and that they set up a claim of estate and interest in and to the same adverse to the plaintiff's estate and interest as averred. The publication summons advised them that upon their default judgment would be rendered in favor of the plaintiff quieting her title to the land as against their title, and that the latter, if any, would be determined to be null and void as against that of the plaintiff, who alleged that she had the legal title, and was in peaceable possession of the property. The language of the petition should be given its natural and ordinary meaning, and usually "legal title" means a full and absolute title. 8 Words and Phrases, Jud. Def. 6980. We see no escape from the conclusion that, based upon such allegations and service, the decree upon the default of the defendants properly excluded them from any title or interest in or to the land in controversy. In *Entreken v. Howard, Adm'r*, 16 Kan. 551, 554, an action like the one now under consideration was brought under the Code, and the petition alleged in general terms ownership and possession of the land, and that the defendant set up and claimed an estate and interest adverse to the estate and interest of the plaintiff, and prayed that he be compelled to show his title, and that it be adjudged null and void as against the plaintiff. It was held that this was sufficient to sustain the decree against a collateral attack, and it was said: "Nor do we in this case mean to intimate that the objections to this petition would be sufficient for a reversal, even in a direct proceeding therefor." To the same effect is *Cartwright v. McFadden*, 24 Kan. 662. In *Commissioners of Marion County v. Welch*, 40 Kan. 767, 20 Pac. 483, a general finding of title in plaintiff, and consequently of no title in the defendants, was held to be conclusive and binding, and forever estopped them from asserting a claim of title which existed at the time of finding a judgment. In *Manley v. Park*, 62 Kan. 553, 564, 64 Pac. 28, 32, the rule frequently announced was again quoted with approval: "If the petition sets forth facts sufficient to challenge the attention of the court with regard to its merits, or authorize the court to deliberate with respect thereto, then the judgment subsequently rendered upon it is not void, but at most is only voidable, and it cannot even then be held to be voidable except when it is attacked directly and in a direct proceeding." See interesting decision and discussion, *Clevenger v. Figley*, 68 Kan.

690, 75 Pac. 1001. In *Finn v. Howard*, 77 Kan. 421, 94 Pac. 801, 127 Am. St. Rep. 420, an affidavit for publication in a suit to quiet title recited that the plaintiff had filed his petition against the defendants, naming them, praying judgment quieting title to certain described lands, and that the defendants be barred and foreclosed of any right, title, and interest in and to the same, was held to be not so defective as to render a judgment based thereon absolutely void. It was said that the phrase "quieting title in plaintiff" is one which would not be misunderstood by any person familiar with legal terms. In *Hillyard v. Bancher*, 85 Kan. 516, 118 Pac. 67, a judgment against a mortgagee and others to quiet title, reciting that the defendants had no estate or interest in or to the premises, and that they be perpetually barred and enjoined from asserting any claim thereto adverse to that of plaintiff, was held to bar the lien of the mortgage. See, also, *Shafer v. Covey*, 90 Kan. 588, 135 Pac. 676.

[3] The ordinary purpose of bringing a suit to quiet title is to make the plaintiff's ownership complete as against any claim asserted by the defendant, and the usual effect of the decree is to bar the latter and those claiming under him from asserting against the plaintiff or his successors any title or interest in the property affected. 32 Cyc. 1384. A decree destroying the defendant's title for the benefit of the plaintiff when other parties are not involved (as they were in *Lockwood v. Meade* and in *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 11 L. R. A. [N. S.] 803, 118 Am. St. Rep. 612, 11 Ann. Cas. 348, relied on by the defendant) is so similar in effect to one which transfers the title from the one to the other that a discussion of their distinguishing features could not add to the "gladsome light of jurisprudence."

The pleadings in the former case were left in the condition of the plaintiff's asserting a complete title as against the defendants and their failure to disprove the assertion, and, while it may have been a wrong for the life tenant thus to proceed against the remainderman, it devolved upon the latter at that time, and in that suit, to contest her right so to do, and to permit successors in interest, after the lapse of many years, to do so collaterally in another suit would be to impair the integrity and verity which, by the settled and ancient rules of law, attach to a judicial decree.

This view, which we feel compelled to take, renders it unnecessary to consider the question of adverse possession presented and argued at length in the briefs and upon the hearing.

The holding is reversed, with directions to enter a decree in favor of the plaintiff. All the Justices concurring.

RONIGER v. MCINTOSH.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. COMPROMISE AND SETTLEMENT (§§ 15, 22*)—PAYMENT—"SETTLEMENT"—PLEADING AND PROOF.

Settlement of a debt is the same as payment, and, where it is relied upon as a defense, it must be properly pleaded. Proof of settlement is not admissible under a general denial (citing Words and Phrases, vol. 8, p. 7799; vol. 6, pp. 5247-5253; vol. 8, p. 7749).

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 51-53, 90; Dec. Dig. §§ 15, 22*.]

(Additional Syllabus by Editorial Staff.)

2. LIBEL AND SLANDER (§ 33*) — DAMAGES RECOVERABLE—PROOF.

Where a letter contains statements which are libelous per se, damages may be recovered without proof of actual damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 112, 277; Dec. Dig. § 33.*]

Appeal from District Court, Chase County.

Action by Fred Roniger against William McIntosh. From judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Madden & Richardson, of Emporia, for appellant. W. J. Gresham and Dudley Doolittle, both of Cottonwood Falls, for appellee.

PORTER, J. In an action for libel, the plaintiff was awarded damages in the sum of \$1,230.33. From the judgment defendant appeals.

The action was based upon a letter written by defendant which referred to plaintiff as follows: "Elmdale, Kansas, April 5, 1912. Mr. Randolph—Dear Sir: As I have never met you, you may think I am impolite in writing to you; but, as you know, Fred Roniger lived in my house, and raised life stock; came here and represented himself to be a farmer and all 'round stock man, but I found him no good for anything, only torturing stock. He could not do anything like a farmer. Could not plow a row of corn, if he got ten dollars for it. But I found he could steal a good lick. I wrote him yesterday, but I am of the opinion that he will not answer. If so, I will send for him. I am in awful poor health, and not in shape to be annoyed by thieves. * * * William McIntosh."

The defendant filed a plea of justification alleging that the matters stated in the letter were true. In a cross-petition he set up a claim of damages arising out of the alleged failure of the plaintiff to cultivate the land in a good farmer-like manner in compliance with the terms of the lease, and a further claim for the value of corn and other personal property belonging to him, which he alleged the plaintiff had carried away from the farm at the expiration of the lease. The

reply to the answer and cross-petition was a general denial.

[2] The person to whom the letter was addressed was a stranger to the writer and seems to have been a friend and acquaintance of the plaintiff. There were so many obviously extravagant statements in the letter that, taken as a whole, it carried its own antidote for the poison in the libelous statements concerning the plaintiff. Mr. Randolph testified that he knew the plaintiff enjoyed a reputation as an honest man, and that after studying the letter over he considered the source from which it came; and it is clear from his testimony that his confidence in the honesty and integrity of the plaintiff was not affected by the letter. There was no attempt to prove any actual damages sustained by the plaintiff. This was not necessary, because the letter contained statements that were libelous per se, and the court rightly instructed the jury that the amount of the plaintiff's recovery should be left to their good sense and fair judgment. *Miles v. Harrington*, 8 Kan. 425; *Walker v. Wickens*, 49 Kan. 42, 80 Pac. 181. We are not prepared to say that the amount is so excessive as to warrant the inference that it resulted from prejudice or passion of the jury. But it is sufficient of itself to justify a quite careful scrutiny of defendant's claims of error in the course of the trial.

[1] It appears that, when the case was called for trial, plaintiff's attorney asked leave to amend the reply to show a settlement of the matters pleaded by way of set-off as evidenced by a check, given by the plaintiff to the defendant, bearing upon its face the words "final settlement." The defendant objected to the amendment unless the case was continued over the term for the reason that he was not prepared at that time to try the issue of settlement. The court thereupon refused to allow the amendment to be made, and the case proceeded to trial.

The defendant admitted writing the letter, and the court held that he had the burden of proof. Upon cross-examination of defendant, plaintiff's attorney asked him whether he had made a final settlement with the plaintiff. An objection was sustained to the question because it was not within the issues. When the plaintiff came to offer his testimony in rebuttal, he was asked by his counsel if he had ever talked with defendant about a settlement of their matters. The defendant objected. The court at this time appears to have changed its ruling upon the admissibility of evidence showing a settlement and overruled the objection. Plaintiff was permitted, over the defendant's objections, to testify to a settlement with defendant and to introduce in evidence a bank check for \$4.50, drawn by himself to the order of the defendant, marked "final settlement." The check was dated February 29, 1912, which was the expiration of his lease,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and it was indorsed by the defendant and stamped as paid. There is some contention by the plaintiff that the check was not offered for the purpose of showing a settlement but merely for the purpose of showing that some of the items in the defendant's counterclaim or offset were not in existence. The court, however, instructed the jury as follows: "A check has been introduced in evidence upon which appear the words 'final settlement'; as to this, the jury is instructed that, if they believe from the evidence that said check was given by the plaintiff and accepted by the defendant as a final settlement of all the matters between them at the time said check was given, then the defendant cannot recover for any items that were in existence at the time of such settlement; the question of whether there was or was not a settlement between the plaintiff and defendant at said time is entirely a question of fact, to be determined by the jury from all the evidence in the case. The burden of proof is on the plaintiff to prove that said check was a final settlement between the parties when it was given."

We think the court was right in its first ruling that a settlement of the matters could only be shown provided it was properly pleaded. Bouvier defines "settlement" as the same thing as "payment." See, also, Words and Phrases Judicially Defined. It is the general rule that proof of payment can only be made when the issue is presented by proper pleadings, and that it is never admissible under a general denial. *Stevens v. Thompson*, 5 Kan. 305; *Clark v. Spencer*, 14 Kan. 398, 408, 19 Am. Rep. 96; *St. L. Ft. S. & W. Rld. Co. v. Grove*, 39 Kan. 731, 735, 18 Pac. 958; 16 Ency. Pl. & Pr. 180.

When his objections were overruled, counsel for defendant stated that he was not prepared to meet the issue of payment; that he was taken by surprise at the change in the ruling and requested a postponement, with a statement that, if the case were continued, he could produce evidence to disprove a settlement. The request was denied. Manifestly it was error to admit evidence of a settlement and to submit to the jury a material issue not presented by the pleadings.

It follows that the judgment must be reversed, and a new trial ordered. All the Justices concurring.

FILLEY v. ILLINOIS LIFE INS. CO. et al.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

INSURANCE (§ 585*)—WIFE AS BENEFICIARY—EFFECT OF DIVORCE.

The benefit accruing from a policy of life insurance, upon the life of a married man, payable upon his death to his wife, naming her, is payable to the surviving beneficiary, named, although she may have years thereafter secured a divorce from her husband and he was there-

after again married to one who sustained the relation of wife to him at the time of his death. [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1461-1468; Dec. Dig. § 585.*]

Appeal from District Court, Shawnee County.

Action by Mrs. Clarence E. Filley against the Illinois Life Insurance Company and others. From judgment for defendants, plaintiff appeals. Affirmed.

E. S. Quinton and Waters & Waters, all of Topeka, for appellant. T. M. Lillard, of Topeka, and Stavely & Stavely, of Lyndon, for appellees.

SMITH, J. This case was tried upon an agreed statement of facts, in addition to the facts admitted in the pleadings, signed by the attorneys for each party. It reads: "It is admitted by the plaintiff, through and by her attorneys, and the defendant Fannie E. Filley, by and through her attorneys, that this cause may be submitted to the court upon the following agreed statement of facts, and the copy of the policy attached to plaintiff's petition, and upon the pleadings: That at the time of the issuance of the policy herein sued on, to wit, on or about the 7th day of June, 1883, the said Clarence E. Filley, upon whose life said policy was issued, was then and at that time lawfully married to Fannie E. Filley, the defendant herein, and the said Fannie E. Filley, defendant herein, was at that time the lawful wife of the said Clarence E. Filley. It is further admitted that on or about the 12th day of June, 1900, the said Fannie E. Filley, defendant herein, sought and obtained a divorce from her husband, Clarence E. Filley, the insured named in said policy, sued on in this action, the said policy being a part of this agreed statement of facts; and that in said decree certain property was prayed for, and set apart and decreed to Fannie E. Filley, the defendant; and that said Fannie E. Filley, defendant herein, is not claiming any right, title, or interest in said policy by virtue of said decree. That on or about the 20th day of March, 1901, the said Clarence E. Filley was married to the plaintiff herein, Mary Filley. And the said Mary Filley, plaintiff herein, was the wife of said Clarence E. Filley at the time of the death of Clarence E. Filley, the insured in said policy. The annual premiums upon said policy were paid annually by the said Clarence E. Filley, up until the time of his death on the 24th day of August, 1910."

The determining question of law involved is whether, under these facts, Fannie E. Filley, who as the wife of the insured was made the beneficiary, is entitled to recover from the insurance company, she having been divorced before the death of the insured; or whether Mary Filley, whom the insured married after the divorce from Fannie, and who

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was the wife of the insured at the time of his death, is entitled to recover. Mary Filley, in the name of Mrs. Clarence E. Filley, brought this action, and Fannie E. Filley answered setting up her claims. The insurance company, defendant, having assumed the obligation of the Kansas Mutual Life Association, which issued the policy sued on, admitted its liability and paid the amount of the claim into court and, upon the order of the court, it was dismissed from the action. The court rendered judgment in favor of Fannie E. Filley, and Mary Filley appeals and assigns as error: First, that the court erred in rendering judgment for the appellee; second, in overruling the motion for new trial; third, in not rendering judgment for the appellant.

The death benefit in the policy recited, in substance, that upon the receipt of satisfactory proof of the death of Clarence E. Filley, the insured, "he having conformed to all the conditions hereof, this association will pay to his wife Fannie E. Filley, or to her legal representatives, the net proceeds of one full assessment * * * to an amount not to exceed three thousand dollars." Also, "that should said Clarence E. Filley live to the age of sixty-four years, and then choose to surrender this policy, this association will pay to said Clarence E. Filley the amount he has paid into the treasury on account of death and expectation indemnity assessments (less the ten cents, cost of collection) with four per cent. interest upon such payments. * * *

Epitomizing the agreed facts, the appellee Fannie E. Filley was the wife of the insured over seven years from the time of the issuance of the policy when she secured a divorce and in the way of alimony was apportioned a part of his property; that, about nine months after the divorce, the insured married the appellant, who remained his wife until the time of his death, over nine years thereafter. No claim is made by appellee by reason of any provision for her in the decree of divorce.

The appellant contends that the benefit was payable to the status, the person who sustained the relation of wife to Clarence E. Filley at the time of his death. The first ground for this contention is the language of the certificate or policy. It is said that, where two nouns indicate one person, the second serves to identify the first rather than the first to identify the second. We see no force in this contention.

On the other hand, the appellee Fannie E. Filley contends, and we think in accordance with the authorities, that the circumstances and relations of the parties at the time of the contract for insurance was made should determine, if the terms of the contract are indefinite or uncertain, the purpose and intent of the insured. He had the right to designate any person or persons he chose as

beneficiaries within the restrictions of the rules of the company and, where the writing does not clearly indicate the purpose of the insured, the motives which actuate people generally will be presumed to have actuated him. It may be said, without hesitation, that a man, with or without children, does not ordinarily prefer his wife's relatives in preference to his own in the descent or appropriation of his estate or of any interest in property which he controls. It is said in appellee's briefs that the insured and Fannie E. Filley had children, but there is no evidence of this in the agreed statement of facts. Whichever of the contending claimants was designated in the policy as the primary beneficiary, "her legal representatives" were clearly the alternative or secondary beneficiaries. If the motives which usually actuate men lead to the presumption that the secondary beneficiaries contemplated were related to him more nearly than his other relatives, the heirs of the primary beneficiary were probably his heirs.

So far as shown, the insured was at the time of the issuance of the policy living amicably with his then wife, and under such circumstances, in purchasing such a contract, a man ordinarily makes provision for the relations then existing, for the support and benefit of his then wife and their children, if any they have or are reasonably to be expected. It will not be presumed that the insured contemplated a divorce from his then wife and in purchasing a policy of insurance was intending to make provision for another wife.

Yet it seems clear, if the policy be construed as designating the appellant as the beneficiary, that the words "or her legal representatives" must also mean the legal representatives of the appellant. It also seems improbable that the insured could have contemplated a benefit to one succeeding his then wife, at the time of securing the contract of insurance; much less than he contemplated a possible benefit to the second wife's heirs or legal representatives.

In 17 A. & E. Encyc. Law, 21, it is said: "In interpreting a writing, the court, in order to determine its meaning, will consider all the facts and circumstances attending its execution. Among the circumstances so considered, all the relations of the parties, the nature and situation of the subject-matter, and the apparent purpose of making the instrument or contract in question. * * * It is but another statement of the same rule to say, as is frequently done, that the court will, if necessary, put itself in the place of the parties and read the instrument in the light of the circumstances surrounding them at the time it was made and of the objects which they evidently had in view."

This is a well-recognized rule. Viewing the situation as of the time the policy was

written, we conclude that the object of the insured was to protect his then wife, if she should survive him, and his children by her, if any they had or might have. There is nothing to indicate that he contemplated a divorce from his then wife, which occurred seven years thereafter, or that he was contemplating any protection to any one who might thereafter become his wife and maintain that relation at the uncertain time of his death.

The appellant cites the case of *Life Ins. Co. v. Sturges*, 18 Kan. 93, 26 Am. Rep. 761. In that case Sturges was the assignee of a policy of insurance on the life of a man in the continuance of which he had no interest whatever, and a benefit to him was not at all contemplated by the insured or the company at the time of the issuance of the policy.

The case of *Hatch v. Hatch*, 35 Tex. Civ. App. 373, 80 S. W. 411, is more closely analogous to this case; but in that case the wife was not named in the policy when it was procured. The intention of the insured to benefit her thereby seems to be negatived, inasmuch as some other person was made the beneficiary, and the wife procured the policy by assignment, and she thereafter obtained a divorce from her husband, the insured.

The citation from 3 American & English Encyclopedia of Law, 943, relates only to mutual benefit certificates. The instrument in this case is designated as a policy and not as a certificate and has more resemblance to an old-line policy of insurance than to a mutual benefit certificate. At any rate, under the authorities, the question of appellee's right to receive the benefit depends largely on whether her rights vested at the time of the issuance of the policy or could only vest upon the death of the insured. In support of the contention of the appellant, several fraternal insurance cases are cited, among which are *Order of Railway Conductors of America v. Ella Koster*, 55 Mo. App. 186, and *Tyler v. Odd Fellows Mutual Relief Association*, 145 Mass. 134, 13 N. E. 360. In this class of cases it seems to be the general rule that no interest vests in the beneficiary until the death of the insured; while in the old-line insurance cases the interest of the beneficiary is said to vest at the time of the execution of the policy.

The provisions of this policy are more like the provisions of old-line life insurance policies than fraternal certificates. In this class of insurance policies we believe it is generally held that, when a married woman is named as a beneficiary in a policy of insurance on the life of her husband, she is entitled to the proceeds of the policy notwithstanding a divorce has been obtained by her before his death. *Overhiser v. Overhiser*, 14 Colo. App. 1, 59 Pac. 75; *Prudential Ins. Co. v. Morris* (N. J. Ch.) 70 Atl. 924; *Overhiser v. Mutual Life Ins. Co.*, 63 Ohio St. 77, 57 N. E. 965, 50 L. R. A. 552, 81 Am. St. Rep.

612; *Overbeck v. Overbeck*, 155 Pa. 5, 25 Atl. 646; *White v. Brotherhood of Am. Yeomen*, 124 Iowa, 293, 99 N. W. 1071, 66 L. R. A. 164, 104 Am. St. Rep. 823, 2 Ann. Cas. 350; *Brown v. Grand Lodge*, 208 Pa. 101, 57 Atl. 176; *Courtols v. Grand Lodge*, 135 Cal. 552, 67 Pac. 970, 87 Am. St. Rep. 137; *Wallace v. Mutual Ben. Life Ins. Co.*, 97 Minn. 27, 106 N. W. 84, 3 L. R. A. (N. S.) 478.

The judgment is affirmed. All the Justices concurring.

STORY v. LANG et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

JUDGMENT (§ 891*)—PAYMENT OF SUBSEQUENT JUDGMENT—JOINT TORT-FEASOR.

In order for a joint judgment debtor to be entitled to a release or satisfaction on the ground that a subsequent judgment recovered in another action for the same tort has been paid by the defendant therein, it is incumbent upon him to show that the latter judgment was recovered against his joint tort-feasor for the same wrong litigated in the former action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1702, 1703; Dec. Dig. § 891.*]

Appeal from District Court, Trego County.

Action by Adaline E. Story against Ignetz Lang and another. From refusal to cancel a judgment for defendants, plaintiff appeals. Affirmed.

Herman Long, of Wakeeney, for appellant. David Ritchie, of Salina, for appellees.

WEST, J. The plaintiff contracted to sell a tract of land for a certain quantity of wheat to be grown thereon during a term of years. The grantee transferred his interest to another, who rented the land to Lang, who permitted Augustine to farm a part of it. The plaintiff sued to recover back the land for default of payment and also sued to recover the wheat raised by the tenants last named. It was decided that she was entitled to only a portion of the crop, and the two tenants, Lang and Augustine, recovered a judgment against her for \$192.52 for wheat which she had by her agent Nelson threshed and sold. Afterwards Lang sued Nelson in justice court for conversion of certain kaffir corn, hay, and straw, and recovered a judgment among other things for \$2.25 for straw taken August 27, 1910, by Nelson at the time he was threshing the wheat for the plaintiff herein. Nelson paid the judgment, and thereafter the plaintiff in this action moved the district court to order the \$192.52 judgment canceled, which was refused, and the plaintiff appeals.

Her theory is that, as the straw for which the judgment for \$2.25 was recovered and paid was taken by Nelson while acting as her agent, the principal and agent were joint tort-feasors, and that, Nelson having settled for his part of the joint tort, no further

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

liability exists against his former principal. Upon refusing the motion to cancel the judgment against the plaintiff herein, the court made findings of fact, and in No. 5 expressly found that in the former suit against Lang and Augustine no recovery was sought nor finding made as to straw, and that in the subsequent case in the justice court against Nelson no recovery was had or finding made concerning wheat; that in the former case no finding was made of the exact nature of the rights of either Lang or Augustine in the straw converted by the plaintiff, as to whether they were joint owners or owners severally or how much of the wheat belonged to either. The court also found that Nelson testified that three or four days before the threshing and conversion of the wheat he bought the land on which it was grown, and that the taking of the wheat and straw was one transaction; and an attempt was made upon the hearing of the motion to show the respective interests of Lang and Augustine in the wheat converted by Nelson's former principal, which so far as it went indicated that of the straw in question Lang owned about four-fifths and Augustine about one-fifth less the rental due the landowner. Suffice it to say that the straw involved in the case in justice court was not a subject of litigation of the former case in district court. The parties were different, the subject-matter was different, and, if Nelson was in fact the owner of the land before he disposed of the wheat, he could not well have been acting as the agent of the plaintiff. On the other hand, if he was acting for her in converting certain wheat, it does not necessarily follow that she had anything to do with straw converted by him, and the apparent finding of the justice that the straw was taken at the time of the threshing of wheat for the plaintiff is not conclusive that it was for her benefit or by her connivance any more than that the kafir corn for which the justice awarded a judgment of \$9 is chargeable to the plaintiff. The judgment against the plaintiff is a joint judgment in favor of Lang and Augustine, and neither claimed or recovered anything in the former action against Nelson. Indeed, he was not a party thereto.

Assuming, without deciding, that the plaintiff's theory that only one possible satisfaction for a joint tort is correct, before she can justly demand a cancellation of her judgment she must show that it was in fact recovered for a joint tort so that its payment is necessarily a finality.

The following decisions shed some light on the question at issue: Wardell v. McConnell, 25 Neb. 558, 41 N. W. 548; Westbrook v. Mize, 35 Kan. 299, 10 Pac. 881; W. & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502; Edens v. Fletcher, 79 Kan. 139, 98 Pac. 784, 19 L. R. A. (N. S.) 618; Brush v. Rich, 83 Kan. 531, 112 Pac. 158; Routh v. Finney

County, 84 Kan. 25, 113 Pac. 397; Clifton v. Meuser, 88 Kan. 408, 129 Pac. 159, 43 L. R. A. (N. S.) 124.

From the record including the findings, we find no error in the refusal to cancel the judgment, and such ruling is affirmed. All the Justices concurring.

JONES v. JOPLIN & P. RY. CO.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. TRIAL (§ 253*)—DEATH OF PEDESTRIAN—REFUSAL OF INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

In an action to recover for negligence in causing the death of a person, where the defendant offers proof tending to show that the person for whose death the action was brought was guilty of contributory negligence and that he put himself in a place of danger with suicidal intent, it is error for the court to refuse to instruct the jury as to contributory negligence and its effect, if satisfactorily proven.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 417; Dec. Dig. § 253.*]

2. NEGLIGENCE (§§ 122, 136*)—PERSONAL INJURIES—PRESUMPTION—SELF-PRESERVATION.

The inference that a person in the presence of danger will be impelled by the love of life and the instinct of self-preservation to exercise care for his safety is a rule of law which places upon the opposite party the burden of offering proof against the fact presumed, but when substantial evidence upon the subject is produced, the question then becomes one of fact for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234, 277-353; Dec. Dig. §§ 122, 136.*]

3. DEATH (§ 104*)—INSTRUCTION—INSTINCT OF SELF-PRESERVATION—PRESUMPTIONS.

An instruction that, because of the instinct of self-preservation, a presumption must be indulged that the deceased was using due care and diligence at the time he was killed and did not intend to commit suicide without any reference to the testimony produced on the subject and without telling the jury when the presumption would cease to operate is substantial error.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142-148; Dec. Dig. § 104.*]

Appeal from District Court, Crawford County.

Action by Maggie Jones against the Joplin & Pittsburg Railway Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Ed C. Wright, of Kansas City, Mo., and John P. Curran, of Pittsburg, for appellant. Wheeler & Denison, of Pittsburg, and Keene & Gates, of Ft. Scott, for appellee.

JOHNSTON, C. J. In this action the appellee, Maggie Jones, recovered a judgment against the Joplin & Pittsburg Railway Company for negligently causing the death of her husband, David Jones, who was a resident of Frontenac and by occupation a coal miner. He and the appellee were married in 1890, and he died intestate on October 24, 1909, at the age of 49 years, leaving surviv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing his widow and two daughters. It appears that he worked steadily during his married life and had an earning capacity of from \$50 to \$75 a month. These earnings he contributed to the support of his family until about eight months before his death when he was taken sick and forced to give up his work. For a time before his death Jones was in the habit of taking early morning walks, and on the morning of October 24, 1909, he left the house before breakfast and started south along the street on which appellant's railway was constructed. The appellant operates a line of railway along the streets of Frontenac, and one of its tracks passes the home of appellee. There is a descending grade from the north toward the south at this point, and on the morning in question the rails of appellant's railroad were more or less covered with frost. Shortly after Jones had started on his walk a car of appellant's, going in the same direction, struck and killed him at a point about four blocks from his home. In her petition appellee alleged that persons frequently walked upon and over the railway track; that those in charge of the car saw or should have seen the position of danger of Jones on the morning in question and could have stopped the car before striking him; that the car was run at a reckless rate of speed; that no signal or warning of its approach was given; and that Jones was killed through the gross and wanton negligence of those in charge of the car. In its answer appellant alleged that Jones' death resulted from his negligence; that in fact he had intentionally and deliberately walked over from the street and placed himself upon the track in front of the car and was killed without any negligence of the appellant. The motorman testified that as he went south he saw Jones walking on that part of the street used by wagons, which was parallel to and about 15 feet east of the railway track; that as the car approached he tapped the gong, when Jones turned and looked toward the car and then walked quickly across from the wagon road to the railroad track and threw himself across the rail. The motorman testified further that he applied the brake but on account of the grade and the frost on the tracks he was unable to stop the car until it had passed over Jones' body and about 70 feet beyond it. Witnesses testified that the motorman made statements at variance with his testimony shortly after the accident. No witnesses testified that they saw Jones walking on the track, but two did testify that they saw him walking on the wagonway, 12 to 15 feet east of the railroad and separated from it by a ditch. It was shown that Jones' body was found on the east side of the east rail of the track, and that his head and hat were on the west side of the east rail, and apparently the wheels had passed over his neck and hands.

[1] Although appellant pleaded contributory negligence and offered proof that Jones

came to his death through his own act and without fault of appellant, the court declined to instruct the jury as to that defense. Contributory negligence is not mentioned in the instructions except to say that such negligence is no defense if appellant was grossly negligent. The court stated at length the grounds on which the jury might find in favor of appellee but did not instruct at all as to the defenses pleaded by appellant nor state any grounds upon which a verdict in its favor might be based. An instruction as to contributory negligence was specifically requested and refused. The failure to give that or some similar instruction on the principal defense of the appellant was material error.

[2, 3] The court instructed that: "The said David Jones, from the love of life and instinct of self-preservation, is presumed to have used ordinary care and diligence on his part in going upon or near the track of the said defendant at and prior to the time he met his death; and, as a matter of law, it is presumed that the said David Jones, at and prior to the time he met his death, did not intend to commit suicide." This instruction was given without the usual preliminary qualifications that such an inference may be drawn in the absence of evidence on the question and without a statement that the presumption was to be considered in connection with the facts and circumstances of the case, and also without any statement as to the effect of evidence upon the subject. As given the jury might have treated the presumption as conclusive evidence of due care and also of the absence of any suicidal purpose on the part of Jones. The presumption, as it is called, is a rule of law which places upon the opposite party the burden of offering proof against the fact presumed; but, when proof upon the subject is produced, then the question becomes one of fact for the determination of the jury. The presumption is available in the absence of evidence on the fact in question, but it ceases to operate when credible evidence of the actual facts are produced. In *Railroad Co. v. Hill*, 57 Kan. 139, page 142, 45 Pac. 581, page 582, it was held that: "A jury may infer ordinary care and diligence on the part of an injured person from the love of life or the instinct of self-preservation and the known disposition of men to avoid injury. But this presumption is overthrown when there is direct proof to the contrary." Other cases on the subject are: *Dewald v. K. C., Ft. S. & G. Rld. Co.*, 44 Kan. 586, 24 Pac. 1101; *C., R. I. & P. Rly. Co. v. Groves*, 56 Kan. 601, 44 Pac. 628; *C., R. I. & P. Rly. Co. v. Hinds*, 56 Kan. 758, 44 Pac. 993; *Railroad Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469, 64 L. R. A. 344; *Railway Co. v. Baumgartner*, 74 Kan. 148, 85 Pac. 822, 10 Ann. Cas. 1094; *Fike v. Railway Co.*, 90 Kan. 409, 133 Pac. 871.

The theory of the appellant is that Jones was suffering from a fatal disease, was dependent, and threw himself upon the rail-

way track with the purpose of ending his life. To sustain that theory the appellant offered the evidence of the only eyewitness of the tragedy to the effect that Jones turned aside from the road in which he was walking, crossed over to the track, seized the rail with his hands, and placed his neck across the rail when it was too late to stop the car. It is contended, too, that the fact that the head was found on one side of the track and the body on the other, together with the further fact that the hands were crushed and the body was not even bruised, are strong circumstances in support of its contention. If there was no suicidal purpose and Jones was walking along the middle of the track, it can hardly be said that he was exercising due care for his own safety. Assuming that this was the case, it would appear that the instinct of self-preservation did not lead him to be careful. We all know that there are many who are inattentive, careless, and reckless, as well as those who are prudent and careful, and we know equally well that the instinct for self-preservation does not keep some from doing careless acts or getting into dangerous places. If Jones took the risk of walking on the track, reckless of the great danger incurred, it was a clear case of want of care, and such negligence necessarily preceded the instinct to save himself which we may infer actuated him when he was finally aroused to his danger. In either event the question of contributory negligence was in the case, and the court should have charged the jury on that defense and as to the scope of the presumption. The arbitrary and unqualified instruction that the jury might presume, from the instinct of self-preservation, that due care and diligence had been exercised by Jones and that he did not have a suicidal intent, notwithstanding the testimony tending to show that his death resulted from his own act, is error. *Wigmore on Evidence*, § 2487; 29 Cyc. 590; note, 33 L. R. A. (N. S.) 1110.

There is also reason to complain of instruction 8 which made the appellant liable if Jones was upon the track "or in close proximity thereto" and the motorman could have seen him but negligently ran over him. What is meant by the clause "in close proximity" should have been definitely stated.

For the errors mentioned the judgment will be reversed, and the cause remanded for a new trial. All the Justices concurring.

WINFREY v. CLAPP et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1203*)—RENDITION OF JUDGMENT AFTER REMAND—JURISDICTION.

Upon a trial in the district court, a finding of indebtedness was regularly made and entered upon the journal, and a decree was rendered embracing other matters, but no formal

judgment was entered for the amount so found due. An appeal from the judgment generally was taken to this court, resulting in its affirmance. Thereupon a motion for judgment on the finding for the amount so found due was made and sustained, no payment having been made. It is held that the court had not lost jurisdiction, and a judgment upon the motion for the amount of the debt is affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4686, 4684-4691, 4693; Dec. Dig. § 1203.*]

Appeal from District Court, Linn County.

Action by Caleb Winfrey against Charles Clapp and others. From a judgment for plaintiff, defendants appeal. Affirmed.

S. L. Mathews, of Kansas City, Mo., for appellants. I. Tavenner, of Kansas City, Mo., and J. W. Jenkins, of Kansas City, Kan., for appellee.

BENSON, J. The question to be decided relates to the power of a district court to render judgment upon findings of fact made at a previous term, an appeal having been taken meanwhile. This is a second appeal. *Winfrey v. Clapp*, 86 Kan. 887, 122 Pac. 1055.

The plaintiff commenced an action to foreclose a mortgage given by the defendant Clapp to Mathews, and by Mathews assigned to the plaintiff. The defendant Smith purchased the premises, and made a new mortgage to the defendant Mathews, intended to be a renewal of the Clapp mortgage, the assignment of which had not been recorded. The court found that there was an amount due from Mathews to the plaintiff, and subrogated him to the rights of Mathews under the new mortgage, which was not due, and therefore could not be foreclosed. The facts are more fully stated in the report of the case upon the first appeal.

The appeal having been taken, nothing further was done in the district court until the mandate was received affirming the judgment. After that was filed, the plaintiff, upon due notice, moved for a judgment on the finding against the defendant Mathews. This motion was sustained, and a judgment was rendered accordingly for the sum so found due with interest and costs. The defendant Mathews appeals from this judgment.

In the appellant's brief questions are discussed that were disposed of on the first appeal and cannot be reconsidered now. It is also argued that judgment ought not to have been entered "upon a reason given by the trial court in rendering a judgment" now fully complied with. The judgment, however, was rendered upon an express finding. This finding is referred to in the report of this case upon the first appeal as follows: "That Mathews was indebted to Winfrey, by reason of the fact that the balance owing on the Smith mortgage was not so large as the amount due on the Clapp mortgage." *Winfrey v. Clapp*, 86 Kan. 887, 889, 122 Pac. 1055.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

No formal entry of judgment for the amount, however, was entered at that time, and the first appeal followed. The amount of the difference between the two mortgages is not disputed; therefore the only question presented upon this second appeal is whether the judgment, which the finding warranted, could properly be entered after the appeal was decided. This question must be answered in the affirmative. That the original judgment included other provisions, which have been complied with, does not preclude a recovery of indebtedness stated in the findings, but not carried into the judgment at that time. The district court had not lost jurisdiction to complete its judgment, either by the appeal or by lapse of time, and no reason for disturbing it is perceived.

The judgment is affirmed. All the Justices concurring.

ANDERSON v. BOARD OF COM'RS OF SHAWNEE COUNTY.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. WITNESSES (§ 26*)—FEES—POLICE OFFICERS. Under section 3674 of the General Statutes of 1909, a salaried police officer of a city is not entitled to fees as a witness for the state in an action to which the state is a party. [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 51, 52; Dec. Dig. § 28.*]

(Additional Syllabus by Editorial Staff.)

2. MUNICIPAL CORPORATIONS (§ 180*)—POLICE OFFICERS—NATURE OF OFFICE. Although police officers are chosen by local municipal authority, they are not mere agents of the city, but are essentially state functionaries and act for the benefit of the public at large. [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 449-457, 468, 482; Dec. Dig. § 180.*]

Appeal from District Court, Shawnee County.

Action by J. W. Anderson against the Board of Commissioners of Shawnee County. From judgment for defendant, plaintiff appeals. Affirmed.

A. J. Bolinger, of Topeka, for appellant. E. R. Simon and W. E. Atchison, both of Topeka, for appellee.

BURCH, J. [1] The plaintiff, a salaried police officer of the city of Topeka, sued for fees as a witness in a criminal case prosecuted by the state. He was defeated, and appeals.

Section 1, c. 183, of the Laws of 1907, reads as follows: "No person holding any office or appointment under any county, city or other municipality shall be paid any witness fees in any case whatsoever when such person is a witness for the state of Kansas,

county, city or other municipality when such state, county, city or other municipality is a party to said suit; nor shall any sheriff or his under-sheriff or deputies or any constable, while attending court as an officer, claim or be paid any witness fees in such cases; provided, that this act shall not apply where such witness is required to attend court at a place other than where he resides or is employed." Gen. St. 1909, § 3674. The contention is that the statute is unconstitutional and that a city official is denied witness fees in those cases only to which the city is a party.

The constitutionality of the statute was affirmed in the case of *Clafin v. Wyandotte County*, 81 Kan. 57, 105 Pac. 19, 19 Ann. Cas. 168. In the same case it was held that the statute is one affecting the compensation of public officers and not one relating to witness fees; the legislative purpose being to cut off pay for attending court when recompense for the time consumed is made by way of official salary or fees. The statute governs in all cases to which the reason for its enactment extends. It is peculiarly applicable to police officers who may be called as witnesses in state cases.

[2] Although such officers are chosen by local municipal authority, the performance of their duties is not a matter of local concern only. They are not mere servants and agents of the city, but are appointed and act for the benefit of the public at large. They are essentially state functionaries. *State ex rel. v. Hunter*, 38 Kan. 578, 588, 17 Pac. 177; *Peters v. City of Lindsay*, 40 Kan. 654, 656, 20 Pac. 490; 1 Dillon, *Municipal Corporations* (5th Ed.) § 103.

The plaintiff's salary as a police officer fully compensated him for that portion of his time occupied in attending court as a witness for the state.

The judgment of the district court is affirmed. All the Justices concurring.

DENT v. NATIONAL FIRE INS. CO.

(Supreme Court of Kansas. Jan. 10, 1914.)

APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE.

The weight and credibility of conflicting evidence is for the jury, and not for the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Appeal from District Court, Johnson County.

Action by J. H. Dent against the National Fire Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

Fyke & Snider, of Kansas City, Mo., for appellant. C. L. Randall, of Olathe, for appellee.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

PER CURIAM. The single question presented is whether or not the verdict is supported by the evidence. The inventory and account books are sufficient for that purpose. The oral testimony was conflicting. Its weight and credibility were matters for the jury to determine, and the conclusion that the documentary evidence was not overthrown cannot be disturbed.

Judgment affirmed.

MINNEAPOLIS THRESHING MACH. CO. v. SCHALANSKY.†

(Supreme Court of Kansas. Jan. 10, 1914.)

Appeal from District Court, Smith County. Action by the Minneapolis Threshing Machine Company against Henry Schalansky. From a judgment for defendant, plaintiff appeals. Affirmed.

A. W. Relihan, of Smith Center, for appellant. Mahin, Mahin & Mahin, of Smith Center, for appellee.

PER CURIAM. The claimed verbal warranty was not submitted to the jury as a basis for recovery. Consideration of this so-called warranty was permitted only as furnishing the occasion for the claimed rescission. If the contract were rescinded, as the defendant claimed, then the plaintiff could not recover. The question of rescission was properly submitted to the jury as the sole defense to the action. This question was one of fact, and the verdict, which included a finding that the contract was rescinded, is abundantly sustained by the evidence.

There is nothing else in the case, and the judgment of the district court is affirmed.

HERRIFF v. FINLEY et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

Appeal from District Court, Neosho County. Action by J. H. Herriff against J. W. Finley and others. From judgment for defendants, plaintiff appeals. Affirmed.

J. H. Herriff, of Erie, for appellant. Oline & Stratton, of Erie, for appellees.

PER CURIAM. In this appeal from a judgment sustaining a demurrer to a petition, the plaintiff asks the court to review proceedings in other actions; but they are not set out or abstracted, and therefore they cannot be examined.

Various documents are referred to in the abstract as exhibits, designated by letters A to H, but we have no information of the contents of the papers referred to. This is also true of a decree, motion, notice, and various journal entries, to which reference is made without stating their purport. In like manner a stenographer's report of a trial is mentioned; but no such report, or abstract of its contents, is given, nor is it stated how it was material to the hearing upon a demurrer to the petition.

It seems from the argument that the plaintiff sought in this action to recover damages for alleged misconduct of a district judge, attorneys, and others in other actions and proceedings; but the ruling of the learned judge pro tem. upon the demurrer must be presumed to be correct, in the absence of the petition or

† Rehearing denied February 13, 1914.

its substance and the grounds upon which it was challenged.

No error being shown, the judgment is affirmed.

FARRELL v. SHEPARD et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

Appeal from District Court, Jackson County. Action by William Farrell against Charles Shepard and others. From judgment for defendants, plaintiff appeals. Affirmed.

James A. Troutman, of Topeka, for appellant. Crane & Woodburn Bros., of Holton, for appellees.

PER CURIAM. Action to recover possession of horses taken under a chattel mortgage executed by the husband and agent of the mortgagor. She subsequently gave the horses to her son. There is testimony that her husband was her agent, that she knew of the existence of the note and mortgage shortly after they were executed, and that she did not repudiate them nor the act of her agent. There was a claim that the note was invalid, because it was given for an amount in excess of the price of the horses and for an illegal purpose; but the jury have found that there was no collusion or intention to defraud any one, and while two or three of the findings are somewhat argumentative, it cannot be held that they betray passion or prejudice. They were sufficiently definite and appear to have support in the testimony. As to obtaining possession of the horses, the jury have, in effect, found that the appellant first refused the demand of the appellee, but finally yielded possession. No material error is found in the instruction given by the court.

Judgment affirmed.

CHEESMAN v. FELT et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

Appeal from District Court, Sumner County. Action by H. T. Cheesman against John A. Felt and another. From judgment for plaintiff, defendants appeal. Affirmed.

H. W. Herrick, C. E. Elliott, and W. T. McBride, all of Wellington, for appellants. W. W. Schwinn, of Wellington, for appellee.

PER CURIAM. Several assignments of error are made in this case. We have examined them all, and find the only substantial question is whether the evidence is sufficient to sustain the verdict. That the appellants were both interested in the hogs and delivered to the appellee hogs infected with the disease known as "hog cholera" seems clearly established by the evidence, if, as appears from their answers to the numerous special questions and from their general verdict, the jury believed the evidence produced by appellee on the most closely contested facts.

On the question whether appellants knew that the hogs delivered to appellee were at the time infected with hog cholera, different minds might come to different conclusions; but the weight as well as the credibility of the evidence was for the determination of the jury, and, as before said, we think the evidence was sufficient to sustain the verdict.

No evidence was offered to support the allegations of fact raised by the motion for a new trial, and the questions of law therein presented are not well taken.

The judgment is affirmed.

NOLAND et ux. v. ARNOLD et al.

(Supreme Court of Washington. Jan. 8, 1914.)

1. TAXATION (§ 696*)—FORECLOSURE PROCEEDINGS—SUMMONS—PUBLICATION—FORM—STATUTES—APPLICATION.

Act March 20, 1901 (Laws 1901, c. 178), amending Revenue Law 1897 (Laws 1897, c. 71) § 96, by changing the form of summons in tax foreclosure proceedings, where service is had by publication, not having become effectual until 25 days after the last publication of summons in proceedings to foreclose a tax lien, was not applicable to such proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1393; Dec. Dig. § 696.*]

2. TAXATION (§ 708*)—LIENS—FORECLOSURE—PROCESS—SUMMONS—PUBLICATION.

Though Revenue Law 1897 (Laws 1897, c. 71) § 96, providing the form of summons in tax foreclosure proceedings where service is made by publication, does not expressly require that the summons shall state the dates of publication, it was nevertheless necessary under such section, prior to its amendment by Act March 20, 1901 (Laws 1901, c. 178), that it should contain information that would enable the defendant named therein to determine with accuracy the limit of time within which he must appear and defend.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.*]

3. TAXATION (§ 708*)—DELINQUENT TAXES—FORECLOSURE OF LIEN—PUBLISHED SUMMONS—DATE OF PUBLICATION.

Where a published summons in tax foreclosure proceedings contained the words "first publication Jan. 12, 1901, last Feb. 23, 1901," following the signature of plaintiff and his attorney, such recital had the same effect as if contained in the body of the summons and was sufficient to inform defendants of the time when they were required to appear and defend.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.*]

4. TAXATION (§ 708*)—DELINQUENT TAXES—FORECLOSURE OF LIEN—SUMMONS—FORM AND SERVICE—STATUTES.

Revenue Law 1897 (Laws 1897, c. 71) § 96, provided prior to its amendment in 1901 that notice served on defendant should contain a direction to the owner summoning him to appear within 60 days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due; section 97 provided for service of the summons in tax foreclosure proceedings in the manner prescribed by the general law for the service of summons in civil actions in the superior court; and Rem. & Bal. Code, § 233, provided for service by publication, declaring that the summons should require the defendant to appear and answer the complaint within 60 days from the date of the first publication of the summons, and that publication should be made in a newspaper, published in the county where the action was brought, once a week for six consecutive weeks. *Held*, that the contents of the summons in tax foreclosure proceedings, whether served personally or by publication, was controlled by the revenue law, and that the general provision of the Code only regulated the manner of service.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1291-1297, 1406, 1635-1642; Dec. Dig. § 708.*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Actions by George Noland and wife against Frederick J. Arnold and wife, John F. Chamberlin and wife, and H. G. Larsen and wife to quiet title. Judgment for defendants in each case, and plaintiffs appeal. *Affirmed*.

McClure & McClure, of Seattle, for appellants. Corwin S. Shank and Horatio C. Belt, both of Seattle, for respondents.

PARKER, J. This controversy first came into the superior court for King county in the form of three separate actions instituted by the plaintiffs seeking to quiet their title to different tracts of land claimed by the defendants Arnolds, Chamberlins, and Larsens separately, under certain tax foreclosure proceedings, which they claimed divested the plaintiffs of title to the land. It appearing that the respective rights of the parties to these actions rested upon controlling facts in substance the same, the actions were, by order of the superior court, consolidated. Thereafter new pleadings were filed, presenting the question of the superiority of the claim of title made by the plaintiffs as against the defendants, in substance as in the original actions. A trial upon the merits in the superior court resulted in judgment denying the relief prayed for and a dismissal of the action. From this disposition of the cause the plaintiffs have appealed to this court.

While the contentions of counsel have to do with the question of the validity of the judgments rendered in the tax foreclosure proceedings under which respondents claim title, and also the question of appellants' laches following those proceedings, we conclude that the record before us calls for affirmance of the judgment upon the ground that the judgments rendered in the tax foreclosure proceedings were valid and divested appellants of their title to the land. The facts controlling the disposition of this question are not in dispute.

In January, 1901, and for some years prior thereto, appellants were the owners of all the land here involved, consisting of five lots in the city of Seattle. Appellants having failed to pay the taxes thereon, and J. F. Bleakley having purchased and become the owner of tax certificates of delinquency against the lots, in January, 1901, he commenced five separate tax foreclosure proceedings against appellants upon his certificates of delinquency in the superior court for King county. Appellants being residents of the state of Oregon, and it not being possible to serve them with summons in the tax foreclosure proceedings within this state, service was had upon them in each of those proceedings by publication in a newspaper published in King county, which publications were made once a week for six consecutive weeks, the first publication being on January 12, 1901, and the last being on February 23, 1901; all of the summonses being exactly alike

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—51

as to form and contents, apart from the lot descriptions therein. Each of the summonses, as so published, in so far as we need here notice their contents, reads as follows: " * * * You are hereby directed and summoned to appear within sixty (60) days after the service of this notice and summons upon you exclusive of the day of service, in the above named court, and defend the action, or pay the amount due. * * * J. F. Bleakley, Plaintiff, by H. H. Eaton, Attorney for Plaintiff. Office and Postoffice Address: Stevens Hotel, Seattle, King County, Washington. First publication Jan. 12, 1901; last Feb. 23, 1901."

In so far as the language of the summonses in the body thereof directed appearance by the defendants, these appellants, they complied with the provisions of section 96, p. 182, Laws of 1897, being a portion of the Revenue Law of the state then in force, reading as follows: "Such notice shall contain: * * * A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due." Section 97 of that law, which was also then in force, provided for the service of summonses in tax foreclosure proceedings by reference to the general law relating to service of summonses in civil actions, as follows: "Summons shall be served in the same manner as summons in a civil action is served in the superior court."

Section 96 of the Revenue Law was, in some respects, amended by section 13, p. 296, Laws of 1899, but remained unchanged so far as the above-quoted provisions are concerned. The general law relating to the manner of service of summonses by publication in civil actions, which has been in force since long prior to the commencement of these tax foreclosure proceedings, is found in section 233, Rem. & Bal. Code, and reads as follows, in so far as we are here concerned with its provisions: "The publication shall be made in a newspaper printed and published in the county where the action is brought * * * once a week for six consecutive weeks: Provided, that publication of summons shall not be had until after the filing of the complaint, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication as aforesaid. The summons must be subscribed by the plaintiff or his attorney or attorneys. The summons shall contain the date of the first publication, and shall require the defendant or defendants upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of such summons. * * * " This section, it will be noticed, relates not only to the manner of service in civil actions but also to the contents of the summonses in such actions. Whether section 97 of the Revenue Law, above quoted, makes, by reference, the provisions of section 233, Rem. & Bal.

Code, relating to the contents of the summons, controlling in tax foreclosure proceedings, in view of its specifically prescribed contents in section 96 of the Revenue Law, is a question we will notice later.

[1] The summonses in these tax foreclosure proceedings, we have noticed, were published the last time on February 23, 1901, so that on that day their service was complete and effectual, if they were sufficient in form and statement of their contents. On that day and prior thereto there was no other law in force in the state of Washington relating to the contents and the service of summonses by publication in tax foreclosure proceedings than that above quoted, which need be here noticed. Thereafter, on March 20, 1901, there became effectual by virtue of the Governor's approval thereof, and by virtue of an emergency clause contained therein, an act of the Legislature passed at the session of 1901, amending section 96 of the Revenue Law of 1897 so as to make the subdivision thereof above quoted to read as follows: "Such notice shall contain: * * * A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due, and when service is made by publication a direction to the owner, summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action or pay the amount due." Not until the passage of this amendment of 1901 did the Revenue Law make any specific provision as to the contents of a summons which was to be served by publication in a tax foreclosure proceeding. Thereafter, on April 30 and May 21, 1901, more than 60 days having elapsed since the last publication of the summonses in the tax foreclosure proceedings, the defendants therein, these appellants, being in default for want of appearance and defense therein, the court rendered judgments foreclosing the delinquent tax certificates held by J. E. Bleakley, the plaintiff therein. At the sale of the lots held in pursuance of those foreclosures, Bleakley became the purchaser of the lots, receiving deeds therefor in due course from the county treasurer. It was through these foreclosures and mesne conveyances that appellants Arnolds, Chamberlins, and Larsens became the present owners of separate portions of the land here involved. It is important that we keep in mind, as we proceed, the chronology of the events we have narrated, especially in the application of the decisions relied upon by counsel for appellants.

In view of the passage of the amendment of 1901, which became effective, as we have noticed, some 25 days after the date of the last publication of the tax foreclosure summonses, let us first inquire what, if any, influence that amendment will properly have in our consideration of the question of the

validity of these summonses and their service. A bare statement of the facts, already noticed, would seem to necessarily leave that amendment entirely out of the proper consideration of the question of the validity of those summonses and the service thereof. We are not, however, without expressions from this court indicating that such is the law. In *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536, the tax foreclosure proceedings there drawn in question were sought to be instituted by a published summons, the last publication of which was had a few days prior to the amendment of 1901 becoming effective. That summons commanded the defendant "to appear within sixty days after the date of the first publication." It seems to have been prepared with a view to conforming to the general law providing for publication of summons in civil actions (section 233, Rem. & Bal. Code) as to contents in this regard, instead of complying with section 96 of the Revenue Law of 1897, above quoted, which was then in force, requiring the summons to direct the defendant "to appear within sixty days after the service of the summons." The main question there discussed was: By which law should its validity be tested? The court held that such test must be made by the law in existence at and prior to the date of its last publication, and that therefore the summons was void as not complying with the law then existing; the amendment of 1901 not having yet become effective. Justice Hadley, speaking for the court at page 502 of 32 Wash., at page 537 of 73 Pac., observed: "It will be observed from the statement hereinbefore made that the first publication of the summons was made February 8, 1901. Under the law as it then existed, the summons in a tax case required the defendants to appear within 60 days after service of the summons, exclusive of the day of service. Laws of 1897, p. 182, § 96, subd. 3. There was no specific provision in the revenue law for serving a defendant by publication summons. Section 97 of the above act, however, provided that 'summons shall be served in the same manner as summons in a civil action is served in the superior court.' The above provision undoubtedly authorized a service by publication in the same manner as in other civil actions. The general statute upon that subject is found in section 4878, Bal. Code (section 233, Rem. & Bal. Code). The statute provides for publication of the summons in a newspaper once a week for six consecutive weeks, and that the service shall not be deemed complete until the expiration of the time prescribed for publication. Therefore a defendant cannot be said to be served with publication summons until the full time of the six weeks' publication has expired; and inasmuch as the Revenue Law of 1897, *supra*, provided that a defendant in a tax foreclosure proceeding should not be required to appear until 60 days after the service of the summons, it follows that under

that law, when he was served by publication, he was not required to appear until 60 days after the period prescribed for publication has ended, for at the expiration of that period only was he actually served. The summons in the case at bar was issued and published when the above rule was in force as to tax cases, but it required an appearance within 60 days from the date of the first publication. There was no authority in law for such a summons in a tax foreclosure case at that time." Following some further discussion, the opinion concludes at page 505 of 32 Wash., at page 538 of 73 Pac., upon this question as follows: "It follows that the summons in this case, issued and published as it was under the late law, must be governed by that law. If under the former law the summons did not confer jurisdiction to enter the judgment, the later law did not vitalize it so as to give it jurisdictional force. The judgment was therefore void, and the court did not err in vacating it."

The decision in *Silverstone v. Totten*, 50 Wash. 447, 97 Pac. 491, is in harmony with these views. In that case, however, the last publication of the summons involved occurred after the taking effect of the amendment of 1901, and therefore the sufficiency of its service could not be tested by the prior law. We conclude that, since the last publication of these summonses occurred before the amendment of 1901 became effective, their sufficiency, both as to contents and service, must be tested by the law existing at and prior to the date of their last publication, and that the amendment of 1901 is therefore of no consequence in this inquiry.

Let us next inquire: Were the words and figures "first publication Jan. 12, 1901, last, Feb. 23, 1901," following the signature of the plaintiff and his attorney upon each of these summonses, a portion thereof, with the same force and effect as if these words and figures had been inserted in the body of the summonses?

[2] This inquiry is proper to be made here since we have held that, even though under the law before the amendment of 1901 there was no specific provision in the revenue law itself for stating in the summons the dates of its publication, the summons must nevertheless, under the law then existing, contain information that will enable the defendant named therein to determine with accuracy the limit of time within which he must appear and defend. In *Williams v. Pittock*, 35 Wash. 271, 279, 77 Pac. 385, 387, the question was as to the sufficiency of the summons under the amendment of 1901, above quoted, requiring a direction to the defendant in a published summons "to appear within sixty days after the date of the first publication of the summons."

[3] The summons in that case stated the date of the publication only by words and figures following the attorney's signature. Disposing of the question of the sufficiency of

this as a statement of the date of the first publication, Justice Hadley, speaking for the court said: "Immediately following the attorney's signature to the summons is the following: 'Date of first publication, October 9, 1902.' Appellants contend that the above words, not being in the body of the summons, are not contained therein, within the meaning of the statute. They also argue that, since the words follow the signature of counsel, it does not appear that they were authorized by the plaintiff in the case; that they may have been placed there by the printer, or by some one else not representing the plaintiff, and by whose acts the plaintiff was not bound. The words were, however, in a conspicuous place, and where they must have been seen, if the summons was read. It was the duty of the defendants in the action to presume that the correct date was stated, and to act accordingly. If it afterwards developed that the date was incorrect, the diligence of the defendants would have saved them from any prejudicial consequences. The fact that the words followed the signature of counsel we think is immaterial. They conveyed as much information as if they had preceded the signature, and their location is analogous to that of the post office address of counsel, which usually follows the signature upon the summons. In *Wagnitz v. Ritter*, 31 Wash. 343, 71 Pac. 1035, it was held that section 4870, Bal. Code, which contemplates that the post office address of the attorney shall be contained in the summons, was sufficiently complied with when such address followed the signature." We conclude that these words, following the signature of the plaintiff and his attorney, showing the dates of the first and last publication of the summons, had the same effect as if contained in the body of the summons.

[4] Now, since then we have seen that the amendment of 1901, which was not the law at the date of the last publication of the summonses here involved, does not control the question of their validity as to form and contents, nor the question of the validity of their service, and since we have seen that they contain a statement of the dates of their first and last publications, we are brought to our principal inquiry, to wit: Did these summonses conform to the law as it existed at and prior to the date of such last publication, so as to confer jurisdiction upon the court in the tax foreclosure proceedings, or should they, as counsel for appellants now contend, have directed the defendants in the tax proceedings "to appear within sixty days after the date of the first publication," as required by the amendment of 1901 thereafter becoming effective, and as required in a summons by publication in an ordinary civil action, under section 233, Rem. & Bal. Code, above quoted? The observation above quoted from the decision in *Woodham v. Anderson*, 32 Wash. 500, 503, 73 Pac. 536, it seems to us, answers this question against the contentions

here made in behalf of appellants. We have noticed that section 96 of the Revenue Law of 1897, prior to the amendment of 1901, specifically provided that the summons shall direct the defendant "to appear within sixty days after the service of the summons." This manifestly, as pointed out in *Woodham v. Anderson*, requires the defendant to appear within 60 days from the date of the completed service, whatever the manner of the service should be. The reference in section 97 of the Revenue Law of 1897, above quoted, to the general law for the manner of service of summons by publication, we think, did not control the specific provision of section 96, Revenue Law of 1897, requiring the summons to direct appearance within 60 days after its service, though the general law (section 233, Rem. & Bal. Code), relating to publication of summons in civil actions, requires a different direction as to time of appearance. Counsel's contentions are apparently rested upon this provision of the general law; and their argument seems to overlook the fact that a requirement as to manner of service of summons, and a requirement as to contents of the summons, are two different matters, and that the requirements of one do not necessarily control the other. The commingling of these requirements in section 233 of the general law is apt to lead to confusion unless careful discrimination be exercised. Section 97 of the Revenue Law then in force made specific provision as to what the summons should state as to the time within which the defendant was required to appear. This provision, we think, was then applicable to all summonses in tax foreclosures, whether served personally or by publication, and was not in any wise controlled by the provisions of section 233 of the general law, though that law was to be looked to to determine the manner of service by publication, which, however, was another matter. This apparently was the view entertained by the court in *Woodham v. Anderson*, 32 Wash. 500, 503, 73 Pac. 536, as evidenced by the observations above quoted therefrom. We are of the opinion that as the law existed at and prior to the date of the last publication of these summonses, when their service was completed, they contained directions for the defendants' appearance, strictly conforming to the law then in existence, and that, by virtue of the statements therein of the dates of their first and last publication, they informed the defendants with absolute certainty as to the time within which they were required to appear and defend. Sixty days after the service of those summonses clearly meant, as shown upon their face, that the defendants had 60 days after the date of their last publication, which, as we have seen, was the date of their completed service.

It is strenuously argued by counsel for appellants that a number of our decisions are in conflict with the views we have here expressed. We do not think so. A critical

reading of the decisions of this court touching the sufficiency of summonses in a tax foreclosure proceeding, as to contents and service, will, we think, render it quite plain that no summons like those here involved has ever been the subject of consideration by this court. At the risk of being somewhat tedious and of making this opinion unduly lengthy, we will now notice in order all of the decisions of this court which could possibly have any bearing upon the question here involved, from the viewpoint of counsel for appellant.

In *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, there was drawn in question the sufficiency of a summons attempted to be served by publication, the last publication of which occurred March 30, 1901, some ten days after the amendment of 1901 became effective. That summons was, in form, as provided by the Revenue Law of 1897 and directed the defendant "to appear within sixty days after the service of this summons upon you." While the first publication was before the amendment of 1901 became effective, the last occurred thereafter. Of course, as we have seen, its sufficiency could not be controlled by the prior law, since its service had not become complete before the expiration of the force of that law, and, not complying with the amendment of 1901, it was held void. In that opinion the court inadvertently discussed the question before it as though the summons had been issued and published after the amendment of 1901 became effective, as was later pointed out in *Smith v. White*, 32 Wash. 414, 417, 73 Pac. 480, which was the next decision rendered by this court upon the subject of the sufficiency of a summons in a tax foreclosure proceeding and the sufficiency of service thereof. In that decision the summons involved was also issued in form as provided by the former law, and its publication was not completed until after the amendment of 1901 became effective, and the summons was held void for substantially the same reason.

In *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536, from which we have already quoted, while the summons involved was issued and first published before the amendment of 1901 became effective, it was, in form, as provided by that amendment, and by the general law (section 233, Rem. & Bal. Code), ignoring the provisions of section 98 of the Revenue Law, in force at the time of its issuance and last publication, requiring the appearance of the defendant "within sixty days after service of the summons." The summons was held invalid because it did not conform to the law in existence at the time of and prior to its last publication.

In *Williams v. Pittock*, 35 Wash. 271, 77 Pac. 385, already noticed and quoted from, the summons involved was issued and published after the amendment of 1901 became effective. This decision furnishes no aid here further than already noticed.

In *Dolan v. Jones*, 37 Wash. 176, 79 Pac. 640, the summons involved failed to become effective because it did not state the date of its last publication. It was issued and published before the amendment of 1901 became effective, and hence failed to inform defendant of the date of its completed service so as to enable him to determine the time within which he was required to appear.

In *Young v. Droz*, 38 Wash. 648, 80 Pac. 810, there was involved a summons issued and published after the amendment of 1901 became effective. It was, in form, so far as its direction to the defendant to appear is concerned, as provided by the Revenue Law before the amendment of 1901 became effective, and for that reason was held void.

In *Owen v. Owen*, 41 Wash. 642, 84 Pac. 606, there was involved a summons apparently issued and published under the law of 1901, which did not conform to that law in its direction to the defendant to appear.

In *McLean v. Lester*, 48 Wash. 218, 93 Pac. 208, the summons involved was issued and published under the law of 1901. It was held void because of the omission of the year in stating the month and day of its first publication.

In *Bauer v. Widholm*, 49 Wash. 310, 95 Pac. 277, there was involved a summons issued and published prior to the going into effect of the amendment in 1901. It was held void because it contained no statement of the date of its last publication, so of course the defendant was not informed of the period within which he was required to appear and defend.

In *Silverstone v. Totten*, 50 Wash. 447, 97 Pac. 491, which we have already noticed, there was involved a summons issued before the amendment of 1901 became effective, but the last publication of which was thereafter. It was held ineffective to confer jurisdiction upon the court in that it did not comply with the amendment of 1901, which was in force at the date of its last publication.

In *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886, the summons involved was held, or rather assumed, to be void. The decision does not inform us upon what ground, evidently because it was a matter which did not call for serious discussion in that case.

In *Gould v. White*, 54 Wash. 394, 103 Pac. 460, there was involved a summons which was held void without discussion; the principal contentions apparently being upon other questions. The court seems to have had in mind the act of 1901, while the form of the summons was as provided by the prior law.

In *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837, there was involved a summons which was apparently issued and first published before the amendment of 1901 became effective, the last publication of which was thereafter. Apparently the summons did not conform to

the amendment of 1901, though the reasons for holding it invalid are not clear, evidently because that was not a question of serious controversy in the case.

In *Flueck v. Pedigo*, 55 Wash. 646, 104 Pac. 1119, there was involved a summons which seems to have been assumed, rather than directly held, to be void. Here also the question does not appear to have been seriously in controversy.

In *Thompson v. Schoner*, 58 Wash. 642, 109 Pac. 116, there was involved a summons which required the defendant to appear, using the language of the law in existence prior to the amendment of 1901. It was held void for reasons which are not clear, from the language of opinion, unless we assume that it failed to state the dates of its publication. The language of the opinion, however, indicates that it was conceded to be insufficient to confer jurisdiction.

No other decision of this court has come to our notice touching the questions here involved, and we think there is none in conflict with the view we here express, that the summonses in these tax foreclosures, conforming as they strictly do, in their direction to the defendants to appear, to the revenue law existing at and prior to the time of their last publication, and stating the dates of their first and last publication, were sufficient, upon the completion of their service thus made, to confer upon the court jurisdiction to render the judgments in the tax foreclosure proceedings. We note that some of the syllabi to the decisions we have reviewed refer to the Revenue Law of 1897 without qualification, when in some instances at least they evidently mean the Revenue Law of 1897 as amended by the act of 1901.

The judgment is affirmed.

CROW, C. J., and MORRIS and MOUNT, JJ., concur.

HUMPHREY et al. v. KRUTZ et al.
(Supreme Court of Washington. Dec. 31, 1913.)

1. DEDICATION (§ 18*)—PAROL DEDICATION OF ALLEY—WHAT CONSTITUTES.

Where a property owner so fences his property as to leave a passageway connecting two public streets, which strip is continuously used by people having business with the abutting owners, for more than 10 years, and subsequently sells all the abutting property, retaining legal title to the strip, such strip becomes a public alley by parol dedication to the public, where the use is with the legal owner's consent.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

2. MUNICIPAL CORPORATIONS (§ 648*)—ALLEYS—ESTABLISHMENT—PRESCRIPTION.

Where a property owner so fences his property as to leave a passageway connecting two public streets, which strip, by reason thereof, is continuously used by people having business with the owners of property abutting thereon, for more than 10 years, and subse-

quently sells all the abutting property, retaining legal title to the strip, such strip becomes a public alley by prescription, where the use is without the legal owner's consent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1421, 1422; Dec. Dig. § 648.*]

3. DEDICATION (§§ 15, 43*)—PAROL DEDICATION OF ALLEY—PROOF.

The fact of the dedication of a strip of land for a public alley is a question of intention; and, where the dedication rests in parol, it is provable by parol testimony.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. §§ 13, 83, 84; Dec. Dig. §§ 15, 43.*]

4. MUNICIPAL CORPORATIONS (§ 697*)—OBSTRUCTION OF PUBLIC ALLEY—INJUNCTION.

Where, in an action to enjoin obstruction of a public alley, defendants answered that they proposed to exclude plaintiffs from using the alley, it was error to dismiss the action on the ground that there was no threatened obstruction, though one defendant testified that he had never forbidden any one to use the alley, and intended to do nothing illegal.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1502-1505; Dec. Dig. § 697.*]

5. MUNICIPAL CORPORATIONS (§ 671*)—OBSTRUCTION OF ALLEY—ABUTTING OWNERS—RIGHT TO ENJOIN.

An action to enjoin a threatened obstruction of a public alley may be maintained by the abutting owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.*]

6. DEDICATION (§ 39*)—PUBLIC ALLEY—ESTOPPEL—PAYMENT OF TAXES AND ASSESSMENTS.

That the owners of the legal title to a strip of land dedicated for use as a public alley paid certain taxes and assessments thereon did not estop either the city or the abutting owners from asserting its public character.

[Ed. Note.—For other cases, see *Dedication*, Cent. Dig. § 77; Dec. Dig. § 39.*]

7. QUIETING TITLE (§ 2*)—PARTIES—ABUTTING OWNERS—PUBLIC ALLEY.

Abutting owners may sue to quiet title to an easement in an alley, and to the fee which they hold subject thereto.

[Ed. Note.—For other cases, see *Quieting Title*, Dec. Dig. § 2.*]

8. "EASEMENTS" (§ 1*)—NATURE.

An "easement," although an incorporeal right, is an interest in land.

[Ed. Note.—For other cases, see *Easements*, Cent. Dig. §§ 1, 2, 5-7; Dec. Dig. § 1.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2305-2311; vol. 8, pp. 7646, 7647.]

Department 1. Appeal from Superior Court, King County; Guy C. Alston, Judge.

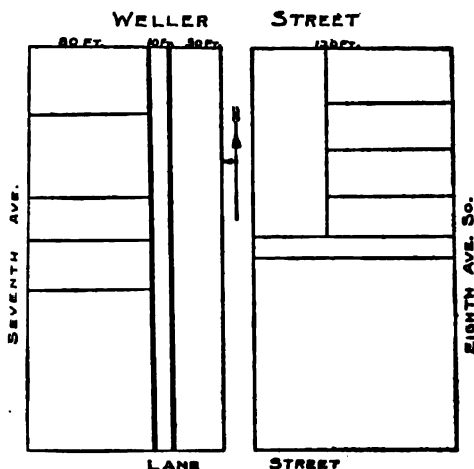
Action by J. J. Humphrey and others against Harry Krutz and others. From a judgment of dismissal, plaintiffs appeal. Reversed, with directions.

Peterson & Macbride and John S. Jurey, all of Seattle, for appellants. Jay C. Allen, of Seattle, for respondents.

GOSE, J. This action is prosecuted by abutting owners, to enjoin a threatened obstruction of an alleged alley in the city of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Seattle, and for general relief. The strip of land in controversy is 10 feet wide, and extends from Weller street south, a distance of 240 feet, to Lane street. Its west line is 80 feet east of the east line of Seventh avenue. The strip lies within the heavy black lines shown upon the annexed map. A strip of land 30 feet in width lies between the alleged alley and an alley regularly dedicated, which extends through the center of the block.



The complaint alleges that the defendants Krutz claim a fee simple title to the strip of land, and that they "propose to appropriate said 10-foot strip for their own private use and benefit, and to exclude plaintiffs wholly therefrom." The defendants Krutz in their answer "admit that they own and claim to own said 10-foot strip, and that they claim and do assert title thereof in fee simple, and that they propose and will exclude the plaintiffs wholly therefrom." The defendant city in its answer alleges that it claims the land "to be a public alley," and prays that the action be dismissed. At the close of all the evidence a judgment was entered dismissing the action.

The appeal presents two questions: (1) Does the evidence show that the strip of land in controversy is an alley either (a) by parol dedication, or (b) by prescription; and (2) Can the appellants, as abutting owners upon the facts shown, maintain the action?

[1, 2] In respect to the first question the trial judge in passing upon the case said that, if he were passing upon the merits he would find that the strip in controversy is a public highway "by virtue of the fact that it was fenced off by Turner, the original owner thereof, leaving a passageway connecting two public streets, and by reason of the fact that it was used continuously, by people having business with the owners of property abutting thereon, for more than 10 years, this ownership being open and exclusive under an apparent right." We are in hearty accord with these views. The evidence shows

that in 1888 one Turner and wife, who then owned the entire block, fenced all of the west side of the block up to the west side of the alley in controversy, in one tract, and the 30-foot strip east of it in another tract, leaving the land in controversy uninclosed. They then sold all the property abutting upon both sides of the strip in controversy by metes and bounds, retaining the legal title to the 10-foot strip. After the death of Turner, and in October, 1905, the widow conveyed the legal title to the 10-foot strip to respondent Harry Krutz by a quitclaim deed. From 1888 until the regrade of connecting streets in 1909, the strip was used continuously as a public highway, and the end adjoining Weller street is still so used. The connection at Lane street makes the use of that end of the alley at present impracticable. Whether the strip of land was used with the consent of the Turners, the legal owners, or in hostility to the title of the legal owners, the result is the same. If used with their consent and approval, there was a parol dedication to the public. If used without their consent, a prescriptive right is clearly established.

[3] An owner of real property may dedicate it, or an easement in or over it, to a public use. The fact of dedication is a question of intention, and, where the dedication rests in parol, it is provable by parol testimony. *Seattle v. Hill*, 23 Wash. 92, 62 Pac. 446; *Lueders v. Tenino*, 49 Wash. 521, 95 Pac. 1069; *Roundtree v. Hutchinson*, 57 Wash. 414, 107 Pac. 345, 27 L. R. A. (N. S.) 875.

An offer of dedication may be accepted by a public user. 13 Cyc. 465.

If there was no intention to dedicate the land to a public use, there was an open, notorious, continuous, and adverse user by the public for a period of 20 years or more.

[4, 5] The trial court dismissed the action because there had been no actual and, in his opinion, no threatened obstruction of the alley. Entertaining this view, he expressed the opinion that abutting owners could not maintain the action. In this we think he was in error. The complaint alleges, as we have seen, that the respondents Krutz "propose * * * to exclude" the appellants from using the alley. They answered that "they propose and will exclude" the appellants from using it. This is obviously a threatened interference with the rights of the appellants. The fee of streets and alleys is in the abutting owners, except in rare instances not present in this case. *Rowe v. James*, 71 Wash. 267, 123 Pac. 539; *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988; *Norton v. Gross*, 52 Wash. 341, 100 Pac. 734.

An abutting owner has two distinct kinds of rights in a street, the public one, which he enjoys in common with all citizens, and private rights, which arise from his ownership of contiguous property. 28 Cyc. 856.

"Ordinarily an injunction will be granted when the act or thing threatened or apprehended is a nuisance per se, or will necessarily become a nuisance, or will be denied when it may or may not become a nuisance, according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual, merely." *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710.

A remote danger will not suffice. It must be threatened and probable. 28 Cyc. 902, 908.

We have uniformly held that an abutting owner may maintain an action to enjoin an actual or threatened obstruction of the highway. *Brazell v. Seattle*, 55 Wash. 180, 104 Pac. 155; *Smith v. Centralia*, 55 Wash. 575, 104 Pac. 797; *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843.

In *Brazell v. Seattle* it was held that abutting owners had such a special interest in a street that they could enjoin the city from carrying out a void ordinance directing its vacation. In *Smith v. Centralia* abutting owners were permitted to prosecute a suit to set aside a purported vacation of a street, based upon an illegal ordinance.

The respondent Harry Krutz testified that he claimed title to the alley, that he had never forbidden its use as a public way, and that "I had no idea of doing anything except what my rights are legally." It is upon this testimony that the respondents contend that the closing of the alley is contingent and remote, and hence that the cause of action fails. This testimony was given at the close of the trial. An issue had been joined in which the respondents asserted an intention to exclude the appellants from using the alley. The evidence had then conclusively established the status of the strip of land as a public alley. The respondents could not then change the issues and deprive the appellants of their right to have the issue determined upon the testimony. The respondents could have frankly disclaimed title to the alley, but this they failed to do.

[6] The fact that the respondents Krutz paid certain taxes and assessments upon the strip of land, while showing their good faith, does not estop either the city or the appellants from asserting its public character. *Seattle v. Hinckley*, 67 Wash. 273, 121 Pac. 444.

[7] There is another phase of the question upon which the appellants must prevail. As abutting owners, they may prosecute a suit to quiet title to an easement in the alley, and to the fee which they hold subject to the easement. *Davidson v. Nicholson*, 59 Ind. 411; *Standart v. Round Valley Water Co.*, 77 Cal. 399, 19 Pac. 689; *Oates v. Town of Headland*, 154 Ala. 503, 45 South. 910; 32 Cyc. 1308; 37 Cyc. 206, 208; *Rem. & Bal. Code*, § 809; *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639; *Cushing v. Spokane*, 45 Wash.

193, 87 Pac. 1121, 122 Am. St. Rep. 890; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264.

In *Davidson v. Nicholson*, it was held that the plaintiff could quiet his right to an easement of a right of way across the defendant's land. In *Standart v. Round Valley Water Co.*, it was held that the plaintiff could quiet his title in water and in the pipe line through which it was conveyed to his quartz mill.

"The jurisdiction in actions to quiet title or remove cloud does not rest on arbitrary rules; much depends on the facts of the particular case, and in the exercise of the jurisdiction the court is clothed with a large discretion." 32 Cyc. 1308D.

In *Povah v. Lee*, *supra*, in considering the statutes of the state pertaining to actions to quiet title, this court said: "These statutes were intended to, and do, we think, provide a remedy for every claimant of real property, no matter what may be the nature of the relief required."

[8] An easement, although an incorporeal right, is an interest in land. *Oates v. Town of Headland*, 154 Ala. 503, 45 South. 910; *Pacific Yacht Club v. Sausalito, etc., Co.*, 98 Cal. 487, 33 Pac. 322; 14 Cyc. 1139.

The judgment is reversed, with directions to enter a decree in harmony with the prayer of the bill.

CROW, O. J., and ELLIS, CHADWICK, and MAIN, JJ., concur.

JOHNS v. COFFEE et al.

(Supreme Court of Washington. Jan. 17, 1914.)

En Banc. On motion for rehearing. Affirmed.

For former opinion, see 74 Wash. 189, 133 Pac. 4.

PER CURIAM. Upon a rehearing of this case by the court en banc, the majority still adhere to the original opinion as found in 74 Wash. 189, 133 Pac. 4, and for the reasons there given are of the opinion that the judgment should be affirmed.

WALTER C. SIVYER & SONS CO. v. CITY OF SPOKANE.

(Supreme Court of Washington. Jan. 6, 1914.)

MUNICIPAL CORPORATIONS (§ 450*)—STREET IMPROVEMENTS—ASSESSMENT DISTRICTS—STATUTORY PROVISIONS—"BLOCK"—"PLATTED PROPERTY"—"UNPLATTED PROPERTY."

In Laws 1911, c. 98, § 13, providing that the assessment district for a street improvement shall include all the property between the termini of the improvement abutting on or proximate to the street improved to a distance back from the marginal lines thereof to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the center line of the blocks abutting on the street, provided that in any case the distance back shall be at least 90 feet, or in case of unplatted property the distance back shall be the same as that included in the assessment of platted lands immediately adjacent thereto, the word "block" means the square included by four streets as located by the system of streets prevailing generally in the plat in which an assessment district may be located, the words "platted property" mean land included by regularly placed intersecting streets, and the term "unplatted property" means lands not so included, and fractional blocks and produced by interference with the general street scheme must be treated as platted property, while land so situated as to be capable of subdivision into ordinary blocks and fractions by the extension through it of streets, so as to preserve the general street scheme, must, until subdivided, be regarded as unplatted land, and, where land is readily susceptible of subdivision into blocks of ordinary size by a mere extension of streets which have never been laid out, the land is unplatted, and the line of an assessment district must not extend back on it further than on the platted property adjacent thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1073, 1074; Dec. Dig. § 450.*

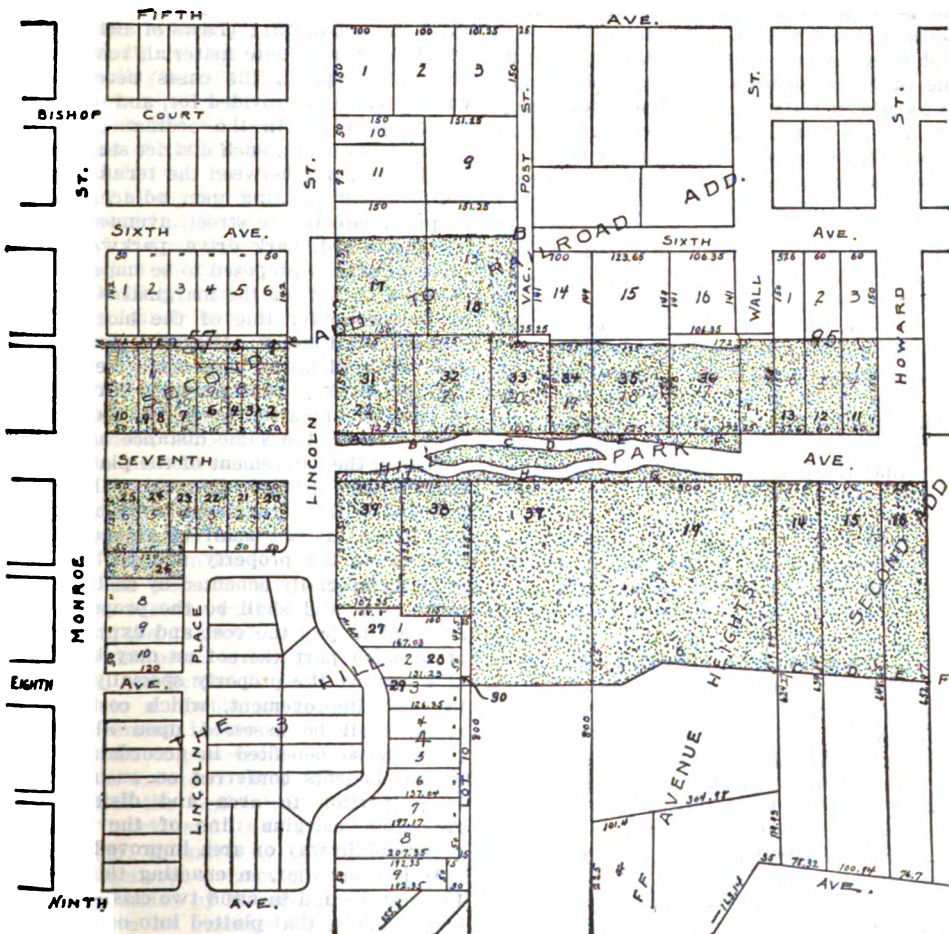
For other definitions, see Words and Phrases, vol. 1, p. 809.]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Proceeding by the City of Spokane for the confirmation of the assessment roll for the paving of a street, in which the Walter C. Sivyer & Sons Company appeared and objected. From so much of the order of confirmation as affected the property of the objector, the City appeals. Affirmed.

H. M. Stephens, Wm. E. Richardson, Ernest E. Sargeant, and Dale D. Drain, all of Spokane, for appellant. Hamblen & Gilbert, of Spokane, for respondent.

ELLIS, J. This action arose upon an appeal to the superior court from so much of an order of the city council of Spokane confirming an assessment roll for the paving of Seventh avenue from Howard street to Monroe street as affected the property of the objector, Walter C. Sivyer & Sons Company. We reproduce from appellant's brief a plat of the improvement district which, though not introduced in evidence, was, in argument, admitted to be correct.



*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The shaded portions represent the property included in the district. The objector's property is in that part of the district north of Seventh avenue, and comprises the two tracts numbered 12 and 13 in small figures. Seventh avenue runs east and west; Howard and Monroe streets north and south. Between these two streets, Seventh avenue is intersected only by Lincoln street, also running north and south, parallel with, and about 300 feet east of, Monroe street. About the width of an ordinary city block, or 300 feet to the east of, and parallel with, Lincoln street is a narrow street called Post street, which does not extend through to Seventh avenue, but terminates in a cul de sac about 150 feet north of Seventh avenue. About 300 feet east of Post street, and about 150 feet to the west of Howard street, is Wall street, also running north and south to within about 150 feet north of Seventh avenue, where, like Post street it terminates in a cul de sac. The first continuous east and west street north of Seventh avenue is Fifth avenue, and is over 600 feet, or a little more than two ordinary city blocks, distant from Seventh avenue. Sixth avenue, about 300 feet north of Seventh avenue, is not a continuous street. It runs from Howard street west to an intersection with Post street, where it terminates on the east side of the objector's property, and, beginning again on the west side of objector's property, it runs from Lincoln street west to Monroe street. Sixth avenue has never been dedicated or opened as a public street across the objector's property between Post and Lincoln streets, a distance of about 300 feet. All of the territory included in the assessment district and the environing property was, in 1883, platted as Second addition to Railroad addition to Spokane Falls, now Spokane. The property lying north of Seventh avenue, and between Lincoln street on the west, Wall street and Wall street, extended on the east, and Fifth avenue on the north was never divided into lots and blocks, save that the part included by a line drawn parallel to, and about 150 feet north of, Seventh avenue and by Wall street, Fifth avenue, and Lincoln street, was designated on the above-mentioned plat as block B. The strip, 150 feet wide, lying between this tract and Seventh avenue has never been platted into blocks and lots. Seventh avenue south of this tract has been platted as Hill Park. A half block at the easterly end of the assessment district immediately north of Seventh avenue, between Howard street and Wall street, designated on the plat as block 95, and the whole block at the extreme west end of the district, between Monroe street and Lincoln street, designated as block 57, have been subdivided into lots. The assessment district to the north of Seventh avenue was made to include the south half of blocks 57 and 95, and a strip of about equal width to the south half of these blocks, extending

from the south end of Wall street to the south end of Post street. Thence the district extends north along the west line of Post street to a point about halfway between Seventh avenue and Fifth avenue; thence east along what would be the north line of Sixth avenue, were it extended across objector's property to the east line of Lincoln street; thence south to a point opposite the east and west middle line of block 57, thus including in the district property of the objector lying between Post street and Lincoln street, not abutting upon, but more than half an ordinary city block distant from the improvement. None of the property between Lincoln street and Wall street north of Seventh avenue to Fifth avenue has ever been platted or subdivided into lots except by a plat prepared and long used in the county assessor's office for convenience in assessments for taxes. The trial court, on an inspection of the assessment roll, sustained the objections to the roll on the ground that the objector's property could not be included legally within the assessment district. The city appeals.

The sole question presented is: Can the respondent's property be legally included in the district, under the provisions of section 13 of the act of 1911 (Laws of 1911, p. 446), which, so far as here material, reads as follows: "Except in the cases herein otherwise specifically provided for, and unless otherwise provided in the ordinance ordering such improvement, such district shall include all the property between the termini of said improvement abutting upon, adjacent, vicinal or proximate to the street, avenue, lane, alley, boulevard, park drive, parkway, public place or square proposed to be improved to a distance back from the marginal lines thereof to the center line of the blocks facing or abutting thereon: Provided, that in any case such distance back shall be at least ninety (90) feet: And provided further, that in case of unplatted property, the distance back shall be the same distance as that included in the assessment of the platted lands immediately adjacent thereto. All property included within said limits of such local improvement district shall be considered and held to be the property and to be all the property specially benefited by such local improvement, and shall be the property to be assessed to pay the cost and expense thereof or such part thereof as may be chargeable against the property specially benefited by such improvement, which cost and expense shall be assessed upon all of said property so benefited in accordance to the special benefits conferred on such property in proportion to area and distance back from the marginal line of the street, or other public way or area improved."

It is clear that, in enacting this law, the Legislature had in mind two classes of property, namely, that platted into ordinary city blocks, and usually regarded as platted

property, and that not so platted. We find it unnecessary to enter into the extended discussion of decisions from other jurisdictions invited by the briefs as to the abstract definition of the word "block," since the act itself, by an unmistakable inference, leaves that question to be solved by a reference to the particular plat in which the assessment district is located. This is made clear by the proviso as to the inclusion in the district of unplatted property, "that the distance back shall be the same as that included in the assessment of platted lands immediately adjacent thereto." Obviously, the Legislature never intended to use the word "block" in the broad sense of a square included by four streets, how far soever apart and how large soever the resulting square, but did intend the square included by four streets as located by the system or scheme of streets prevailing generally in the environing city plat in which the given assessment district may be located. By "platted property" is evidently intended lands so included by the regularly placed intersecting streets, and by "unplatted property" is intended lands not so included. Fractional blocks and irregular blocks produced by interference with the general street scheme, by the topography of the ground, by joining up with other additions, or by diagonal streets, would, of course, be treated as platted property. *Felt v. Ballard*, 38 Wash. 300, 80 Pac. 532. But land so situated and of such topography as to be capable of subdivision into ordinary blocks and fractions of blocks by the extension through it of the abutting streets, so as to preserve the general vicinal street scheme, and make the land when so platted fairly conform to the surrounding regularly platted lands, must, until subdivided, be regarded as unplatted land, within the meaning of the act. Any other construction would leave the assessing officers without any guiding rule for even approximate uniformity, and would, in most instances, subject the owner of such property to an assessment on his property lying at a greater distance from the proposed improvement than that of other owners of adjacent platted lands in the same district, and would, in many cases, subject the owner to an assessment on property not abutting on nor any part of it within a distance from the improvement equal to one-half the width of an ordinary city block. It would also subject such property, in most instances, to a double assessment, one for the improvement in the given district, the other for the improvement of the parallel street when extended through the property. To hold that the Legislature, by the use of the word "block" and its reference to unplatted property, intended no other distinction than that between a tract of land, however large, surrounded by streets, and land ordinarily known as acreage, as contended by

the appellant, would inevitably lead to the inequitable results above pointed out.

If the respondent's property were so situated by reason of the character of the ground or of other physical obstacles, or so improved as to raise a presumption that Sixth avenue would never be extended through it, the case would be different, since in such a case the respondent's property would forever escape assessment for the improvement of cross streets, unless the land so rendered incapable of subdivision were treated as a permanent, though irregular, block, and subjected to assessment as such to half its depth. The justness of this distinction is plain. *Cooper v. Nevin*, 90 Ky. 85, 13 S. W. 841; *Specht v. Barber Asphalt Paving Co. (Ky.)* 80 S. W. 1106. Here no such case is presented. On the contrary, it is not even suggested that there is anything to prevent the extension of Sixth avenue through the tract in question.

We do not hold that the mere fact that a block is materially larger than other blocks is alone sufficient to withdraw the land therein from the operation of the statute as applied to platted lands; but we do hold that land readily susceptible of subdivision into blocks of ordinary size by a mere extension of abutting streets, which has never been so subdivided, is unplatted land.

We are of the opinion that the tract extending from Seventh avenue to Fifth avenue, and between Lincoln street and Post street extended, is unplatted land within the meaning of the statute, and that the line of the assessment district should have been extended back upon it no further than upon the platted property on the one side and on the unplatted property on the other. This, as we understand the record, would exclude the respondent's property.

We find no error in the court's decision.

It is affirmed.

CROW, C. J., and GOSE, CHADWICK, and MAIN, JJ., concur.

NEWELL et al. v. LOEB et al.

(Supreme Court of Washington. Dec. 31, 1913.)

1. EMINENT DOMAIN (§ 216*)—PROCEEDINGS—PEREMPTORY CHALLENGES.

Even if the general statute relating to peremptory challenges of jurors applies to a proceeding under Laws 1911, c. 11, for improving a river channel, all of the defendants must join in the challenge, since the statute contemplates but one jury trial to determine all the questions involved, and does not itself provide for peremptory challenges.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 554; Dec. Dig. § 216.*]

2. NAVIGABLE WATERS (§ 36*)—OWNERSHIP OF BED.

Under Const. art. 17, § 1, declaring the ownership to the beds and shores of navigable waters to be in the state up to the high water

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

line, riparian owners on a navigable river have no rights in the bed of the stream or its waters as against the state.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

3. EMINENT DOMAIN (§ 219*)—ASSESSMENT OF COMPENSATION—DETERMINATION OF BENEFITS.

In view of the whole act, the provision of Laws 1911, c. 11, § 14, requiring the jury to find the maximum amount of benefits in proceedings for improving a waterway merely contemplates that the maximum amount fixed shall be the basis upon which the assessments shall be made, and limits its extent.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 556, 557; Dec. Dig. § 219.*]

4. EVIDENCE (§ 474*)—OPINION EVIDENCE—LAND VALUES—QUALIFICATION OF WITNESSES.

Witnesses who testified on direct examination that they were acquainted with lands claimed to be damaged by the improvement of a river, and with their value, and with the benefits accruing by reason of the improvement, were qualified to testify as to such value; any lack of such knowledge by them, shown on cross-examination, going only to the weight of their evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

5. EMINENT DOMAIN (§ 222*)—PROCEEDINGS—INSTRUCTIONS—EFFECT OF VIEW.

The court instructed, in a proceeding to condemn land for river improvements, that one of the objects of the view had by the jury of the premises was that they might acquire such information as to the physical conditions and characteristics as would come to one through the sense of seeing, since "what the jury sees they know," and further instructed that if, in their judgment, the evidence was conflicting as to the benefits, they should resort to the knowledge gained by their view as bearing upon the weight given the conflicting estimates. *Held*, that the instruction was not erroneous.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

6. EMINENT DOMAIN (§ 47*)—PROPERTY CONDEMNED—PROPERTY ALREADY TAKEN.

Laws 1911, c. 11, § 7, subd. "a," gives waterway districts the right of eminent domain, with power to condemn private property, including that of private corporations, for the use of the organization. Subdivision "d" empowers the commissioners to acquire by purchase or condemnation "all necessary" rights of way in the improving of waterways. *Held*, that the commission has implied power to condemn property already devoted to a public use, if necessary, in improving a river.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

7. EMINENT DOMAIN (§ 47*)—PROPERTY TAKEN—PROPERTY DEVOTED TO PUBLIC USE.

Property devoted to a public use cannot be condemned for another public use without express or implied legislative grant.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 107-120; Dec. Dig. § 47.*]

8. NAVIGABLE WATERS (§ 37*)—LANDS UNDER WATER—PLATS—CONVEYANCES.

Under plats describing certain additions as running "to the right bank of the Duwamish river," a navigable river, "thence up stream with the meanders of said right bank," and also describing the boundaries as extending "to the meanders of Duwamish river," the title of purchasers of land according to the plats ex-

tended only to the bank of the river, whether the meanders were in the bed or upon the bank.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

9. NAVIGABLE WATERS (§ 36*)—RIGHTS OF RIPARIAN OWNERS.

Riparian owners have no rights in meanders in the bed of a navigable river which they can enforce as against the state or its agency, a waterway improvement district.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.*]

10. EMINENT DOMAIN (§ 222*)—PROCEEDINGS—CONDUCT OF JURY.

In proceedings to condemn some 10,000 different tracts of land for waterway improvements, there was no prejudicial error in permitting the jury to take with them to the jury room the estimates of the witnesses as to the benefits to the various tracts.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 562-567; Dec. Dig. § 222.*]

11. EMINENT DOMAIN (§ 219*)—PROCEEDINGS—ASSESSMENT OF BENEFITS—SEPARATE HEARING.

Since the Waterways Statute (Laws 1911, c. 11) in effect requires that the benefits from an improvement shall be determined by the jury in one proceeding, there should not be separate hearings upon the assessment of maximum benefits resulting to each tract.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 556, 557; Dec. Dig. § 219.*]

12. NAVIGABLE WATERS (§ 8½, New, vol. 13 Key-No. Series)—ASSESSMENT FOR BENEFITS.

The fact that a railroad right of way, assessed for benefits from river improvements, is used for railway purposes will not prevent its assessment for benefits from the waterway improvements.

13. EMINENT DOMAIN (§ 145*)—COMPENSATION—ASSESSMENT FOR BENEFITS.

Since, under the Waterways Statute (Laws 1911, c. 11, § 14), requiring the jury to find a maximum amount of benefits per acre or per lot or tract to be derived by each owner, the jury should determine the maximum benefits accruing to the property as it was at the time, whether it might be platted in the future or not, an objection that the assessments upon unplatted property were greater than upon platted property because no deductions were made for streets was untenable.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 378-389; Dec. Dig. § 145.*]

14. APPEAL AND ERROR (§ 1004*)—FINDINGS—CONCLUSIVENESS.

The Supreme Court cannot disturb jury findings on conflicting evidence as to the amount of damages in proceedings to improve a waterway.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.*]

Department 2. Appeal from Superior Court, King County; Kenneth Macintosh, Judge.

Condemnation proceedings by Fred W. Newell and others against Samuel S. Loeb and others. From judgments of condemnation and assessing damages, some of the defendants appeal. *Affirmed*.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Richard Saxe Jones, of Seattle, for appellants Loeb and another. James B. Howe and Hugh A. Tait, both of Seattle, for appellants Puget Sound Traction, Light & Power Co. and others. Hughes, McMicken, Dovell & Ramsey, of Seattle, for appellant Puget Mill Co. Ira Bronson, of Seattle, for appellants Macaulay's Estate and others. Farrell, Kane & Stratton, of Seattle, for appellant Columbia & P. S. R. Co. Turner & Hartge, Carkeek, McDonald & Kapp, Preston & Thorgrimson, and Jay C. Allen, all of Seattle, for appellants Riner and others. Shorett, McLaren & Shorett, of Seattle, for respondents.

MOUNT, J. This is an eminent domain and special assessment proceeding prosecuted by the commissioners of waterway district No. 1 of King county, Wash., under the provisions of chapter 11, Laws of 1911, p. 11, for the purpose of acquiring the right of way for the straightening and deepening of the channel of the Duwamish river, in King county. Thirteen thousand parties are named as defendants. Against some of these defendants it is sought to take certain of their property for the right of way. Against others it is sought to determine the maximum special benefits to the property within the district. The action was tried to a jury selected under the provisions of the act above referred to. Verdicts were returned in favor of the defendants whose property was taken and damaged. A verdict was also returned finding the maximum benefits to all other property within the district. Certain of these defendants have appealed from portions of the judgment affecting them. There are a number of appellants, presenting six different appeals, all presenting certain questions in common, and some presenting questions applicable only to themselves. We shall notice the errors assigned in their order. The facts upon which assignments of error are based will be hereafter stated sufficiently to raise the questions presented. The object of the improvement sought to be made by the commissioners is to straighten the channel of the Duwamish river between the termini of the district. The Duwamish river as it runs through this district makes certain bends. The length of the river between the termini of the district in its natural condition is nearly ten miles. Nearly half of this distance is obviated by the proposed improvement. In straightening the river it is the purpose of the commissioners to obviate the bends in the natural channel by cutting a new channel from one bend in the river to the next nearest bend. One of these bends, known as the "Ox Bow Bend," is in the shape of a letter U. The appellants Loeb and Moyes own property upon the shore of the river as it flows in its natural state, which will be left by the improvement one-half mile away from the new channel of the

river. The river flows in a northwesterly direction. It is proposed to put a dam across the natural channel at its southerly end near the artificial channel, and thus prevent fresh water from flowing down the natural channel by the property of Loeb and Moyes. The same is also true of other bends. The object of the action is to determine, first, the damages or compensation for the property taken, together with the estimated cost of the whole improvement, and second, to determine the maximum amount of benefits which will be derived from the improvement and which will inure to the property within the district.

The act upon which the proceeding is prosecuted provides at section 26 that "in case the damages or amount of compensation for such property, together with the estimated costs of the improvement, amount to more than the maximum amount of benefits which will be derived from said improvement, or, if said improvement is not practicable, or will not be conducive to the public health, sanitation, welfare and convenience, or will not increase the public revenue, the court shall dismiss such proceedings." The act also provides at section 14 that if the court shall be satisfied by competent proof that the improvement is practicable and conducive to the public health, etc., and that the contemplated use is really a public use, and that the lands sought to be appropriated are necessary for the establishment of the improvement, the court shall call a jury of 12 persons to be impaneled to fix the compensation and to assess the damages and benefits; that the jurors at such trial shall make in each case a separate assessment of the damages which shall result to any person, corporation, or company, or to the state, by reason of the appropriation and use of the lands for said improvement, and shall ascertain the amount of damages to be paid to said owners respectively; and that the jury shall further find the maximum amount of benefits per acre or per lot or tract to be derived by each land owner.

After an adjudication by the court to the effect that the improvement was practicable, etc., and that the contemplated use for which the property sought to be taken was really a public use, a writ of certiorari was prosecuted to this court, and certain constitutional objections were therein raised. See *State ex rel. Puget Mill Co. v. Superior Court*, 68 Wash. 425, 123 Pac. 791.

Prior to that time a writ was prosecuted to this court from the order of the county commissioners authorizing the organization of the district. See *State ex rel. Bussell v. Abraham*, 64 Wash. 621, 117 Pac. 501. In these cases we reviewed most of the constitutional questions which are now sought to be relitigated upon this appeal. We shall therefore not notice those questions at this time.

This case is like the case of *Commissioners'*

Commercial Waterway District No. 2 of King County v. Seattle Factory Sites Co., 135 Pac. 1042. In that case a proceeding was prosecuted in the same manner and for the same purposes that this proceeding is prosecuted. We there set out the principal features of the act of 1911 under which this proceeding was prosecuted, and we refer to that decision without again restating the provisions of the act, except as the same may be necessary to a clear understanding of the questions decided herein. All of the appellants in this proceeding objected to the manner of calling and impaneling the jury, and base error thereon. It appears that, when the case was called for trial upon the questions hereinbefore stated, the court selected one jury to try the question of damages to the property taken, and also to assess the maximum benefits to the lands within the district. The appellants insisted that they were each entitled to separate juries and that they were not required to join in the peremptory challenge. By referring to the act it will be seen that it provides for one jury to try these questions. It also provides that each person whose property is taken or damaged, and each person whose property is liable to assessment within the district shall be made a party defendant. In other words, the statute provides for a special proceeding in these cases. The jury was required and did in this case try out separately each case where property was taken or damaged. But as to the property specially benefited, all were tried together. The statute makes the case one case and provides for one jury to try the questions to be determined. There is no provision in the act with reference to peremptory challenge.

[1] Assuming, however, that the general statute governs in this case by reason of the fact that no special provision is made for such challenges, it is plain that it was not error when the court required the defendants to join in the challenge, because the statute makes the action one action. Even if the general statute with reference to challenges applies, it was necessary for all the defendants to join in the challenge. In *Manhattan Building Co. v. City of Seattle*, 52 Wash. 226, 100 Pac. 330, we said: "The assignment based upon the fact that the defendants were required to join in their peremptory challenges is not well founded. The section of the statute providing for peremptory challenges (Bal. Code, § 4979; Pierce's Code § 593), provides that, when there are several parties on either side, they shall join in a challenge before it can be made. Construing this section, we have held that defendants representing conflicting interests and appearing separately must join in a challenge before it can be allowed." It follows, therefore, if this proceeding is a special one, no provision being made for peremptory challenges, no error can be based upon the fact that none were allowed. If the general statute applies, it was

not error to deny the peremptory challenge unless all joined therein.

The appellants Loeb and Moyses requested the court to give an instruction to the effect that persons owning property upon a navigable stream have the right to the use of that stream for the purposes of approach, the construction of wharves, docks, and for all the usual purposes of navigation; and that if the jury should find that either of such purposes would be lost as to Loeb and Moyses by reason of the improvement contemplated, that the jury might consider such fact in determining the amount of damages. The court refused this instruction, but gave an instruction to the effect that the jury should not take into consideration the fact that the main channel of the Duwamish river might be diverted by reason of the improvement, and that the state or its subsidiary corporation, the waterway district, might claim the bed of the river as a diverted stream. The waterway district was not seeking to take any of the property of these appellants. But it is claimed by them that because the channel of the Duwamish river was changed at the Ox Bow bend so as to leave the property of these appellants one-half mile from the new channel, that this was a damaging of their property on account of which they are entitled to be compensated. It is conceded in the case that the Duwamish river is a navigable river. These instructions raise the question which is presented here by the appellants whether the state takes title to the bed of navigable rivers, or whether, when the bed of the river is changed or reclaimed, the title to the bed belongs to the adjoining owners.

[2] There are many conflicting opinions upon this question; but we think it is set at rest in this state by many decisions heretofore rendered.

The Constitution of this state, at section 1 of article 17, declares that the state asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all rivers and lakes. In *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, it is said: "The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject; but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

In *Gray's Harbor Boom Co. v. Lownsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, this court said: "Legislation has proceeded upon

one of two theories with reference to tide and shore lands. The one that the state will recognize a riparian right in the upland owner and compel the public to subordinate its rights (except as to navigation) to his convenience. The other is that the title to all tide and shore lands is in the state, and may be sold, leased, or otherwise disposed of in aid of business and commerce, and without reference to the comfort and convenience of the upland owner. This state has asserted the latter doctrine. It will thus be seen that the case involves primarily the question of state policy. The state has a right to deal with its own property as its own. There is therefore no federal question involved." See, also, *Bilger v. State*, 63 Wash. 457, 116 Pac. 19; *Austin v. Bellingham*, 69 Wash. 677, 126 Pac. 59; *State ex rel. Ham v. Superior Court*, 70 Wash. 442, 126 Pac. 945.

In the case last cited, after reviewing the question as to the right of an upland owner to take water from a navigable lake, we said: "No decision of this court has come to our notice dealing directly with a claim of water for irrigation made by an upland owner by reason of such land bordering upon navigable water; but it seems to us that our constitutional declaration of ownership and former decisions touching the effect of that declaration are clearly opposed to the contention that an upland owner can make lawful claim to the use of navigable water upon which his land borders, and rest such claim solely upon the ground that he has a common-law right in such water by reason of his land bordering thereon, as against the state or one who appropriates such water in pursuance of the laws of the state."

And in *Commissioners' Commercial Waterway District No. 2 of King County v. Seattle Factory Sites Co.*, supra, 135 Pac. 1047, we said: "It may be conceded that a description in a conveyance which bounds the land conveyed by a stream, if unnavigable, will be construed as meaning the thread of the stream, but where the description is specific in its language, naming the bank of the stream as the boundary of the land conveyed, we think the decided weight of authority is to the effect that the grantee's rights will not extend beyond such specified boundary so as to give him any right in the bed of the stream (citing authorities). We understand it to be conceded in the briefs of counsel that Cedar river is unnavigable, and that Black river is navigable. As to the latter it is plain that the title to the bed thereof is not in appellant, but is in the state. Section 1, article 17, State Constitution."

From these and numerous other authorities which might be cited, it is plain that the state is the owner of the bed of the Duwamish river, being a navigable river, and that the appellants Loeb and Moyses have no interest therein. And the fact, if it is a fact, that their land borders upon the shore of the

river does not give them any rights either in the bed of the stream or in the waters thereof.

The jury returned a finding to the effect that the property of the appellants Loeb and Moyses would receive maximum benefits in the sum of \$3,100. The maximum benefits for the whole improvement was the sum of more than \$2,000,000; and the cost of the improvement was estimated to be \$1,650,000. It was conceded that King county had authorized a bond issue of \$600,000 to be applied to the cost of the improvement. It is argued by the appellants that because of the revenues which can and will be obtained by the sale of dirt taken from the excavation of the waterway, and because of the sale of the bed of the stream, that the cost of the improvement will be reduced to about \$850,000; that the assessment of maximum benefits against the land of the appellants will thereby be reduced to about \$1,500; and that the excess between this and \$3,100, as found by the jury to be the maximum benefits to this property, will be assessed against the property of the appellants and will stand as a lien against it in double the amount actually necessary to make the improvement; that this in substance is a taking of their property to that extent without due process of law.

[3] The Waterway Statute at section 14 provides that the jury shall find the maximum amount of benefits. From a reading of the whole act it is apparent that this maximum amount of benefits is to be the basis upon which the assessments for the amounts actually needed will finally be made by the district commissioners. While it is true that this assessment is in the nature of a lien against the property to pay for the improvement, it is in reality only a determination of the benefits which the property will receive by the improvement, and limits the extent to which an assessment may be made. As stated in *Commercial Waterway District No. 2 v. Seattle Factory Sites Co.*, supra, a trial upon the issue of maximum benefits is not a constitutional trial by jury. "The Legislature would have satisfied all constitutional requirements in that regard had it provided for the determining of maximum benefits, upon due notice and hearing, by some board or tribunal entirely without the aid of a jury, as it has in ordinary local assessment proceedings." The fixing of the amount of the maximum benefits does not, in our opinion, violate any rule of law, nor does it fix upon the appellants' property any amount which becomes a lien. That is done when the assessment is made by the commissioners, and then only to the extent of the cost. We are of the opinion, therefore, that there is no merit in this contention. In fact, the less the improvement may cost, the less the appellants will be required to pay; the benefits of their property will remain the

same. No authorities are cited to this proposition by the appellants, and it seems to us that the position of the appellants is not tenable.

[4] The appellants argue that the court erred in hearing the evidence of certain expert witnesses, for the reason that it is shown that these witnesses were disqualified to testify as to benefits and values. As we read the record, these witnesses upon direct examination testified that they were acquainted with the lands in question and with the values thereof, and with the benefits that would accrue to the lands by reason of the improvement. It is plain we think that this made their evidence proper to be considered by the jury. If, upon cross-examination, the witnesses disclosed a lack of knowledge as to values, the facts disclosed by such cross-examination were proper to be submitted to the jury for their consideration in passing upon the weight of such evidence. But the competency of the witnesses on direct examination was clearly shown. *North Coast R. Co. v. Gentry*, 58 Wash. 82, 107 Pac. 1060.

[5] In his instructions to the jury the court said: "In this case you have been permitted to view the premises in question. One of the objects of the view was that you might acquire such information as to the physical conditions and characteristics there as would come to one through the sense of seeing. What the jury sees they know; and another purpose of the view was that by putting you in possession of such information as would come to you through the sense of seeing you would be better thereby enabled to weigh, consider, and apply the testimony which would be introduced in the trial of the cause. In this case it is your duty to harmonize the testimony of the witnesses, if possible, so as not to impute false swearing to any witness. If this can be done consistently with the truth, you should do so, but if you find it impossible to harmonize the testimony, and if you find further from the evidence of your senses of view and from the testimony on the stand that any witness who has testified before you has willfully testified falsely concerning any material fact in the case, then you have a right to disregard his entire testimony, except in so far as you may find that the testimony of such witness is corroborated by other credible evidence or by facts and circumstances proved on the trial. And if in your judgment the evidence is conflicting as to the benefits, you should resort to the knowledge gained upon your view as bearing upon the weight to be given to the various and conflicting statements and estimates." It is contended by the appellants that the words "what the jury sees they know" and the last sentence of this instruction were erroneous. We think this instruction is substantially the same as one which was approved by us in *Seattle &*

Montana R. Co. v. Roeder, 30 Wash. 244, 70 Pac. 498, 94 Am. St. Rep. 864. See, also, *Murphy v. C. M. & St. P. Ry. Co.*, 66 Wash. 663, 120 Pac. 525. A large number of other instructions are complained of as erroneous, but, as the appellants rely upon the points which we have hereinbefore discussed, and as we find no merit in the objections to the instructions, we shall not notice them further.

We pass now to the appeal of the Puget Mill Company. It appears that the Puget Mill Company owns about 900 acres of land which is included within the improvement district. The jury found that the maximum benefits to this tract of land would be \$69,450. It is argued by the appellant that the improvement will not benefit this tract of land to any appreciable extent, and that therefore the finding of the jury was erroneous. It is sufficient to say that this question was tried to the jury. There was evidence to the effect that the land would be benefited in the amount claimed. There was also evidence and strong argument to the effect that it would not be benefited anything like the amount claimed. But this was a question which was properly submitted to the jury, and this court cannot say from the record that the amount of maximum benefits found exceeds the benefits which may accrue to the property. The other points presented by this appellant are decided in what we have already said heretofore.

The appellants Puget Sound Traction, Light & Power Company, the Seattle Electric Company, Boston Safe Deposit & Trust Company, and Old Colony Trust Company are interested in a tract of land bordering upon the river. This tract comprises 17½ acres used as one entire tract by the traction company, lying on the right bank of the river at a point which has been designated in the testimony as the "Big Bend." In 1906 the Seattle Electric Company began the construction upon this property of a steam electrical plant which cost \$945,000 to build, exclusive of the value of the land. This building was constructed for the purpose of generating a supply of electrical energy for the operation of its street cars in the city of Seattle. The plant consists of a heavy concrete building, practically indestructible, 75 feet wide, 220 feet long, and 70 to 80 feet high. As a part of the plant there are two smokestacks, one of steel, 110 feet high, and one of concrete, over 265 feet high and 17 feet in diameter. The building is fitted with machinery capable of generating 17,000 kilowatts of electricity or 22,000 horse power at a pressure of 13,200 volts. These engines are operated by steam, which, after passing through the engines, is condensed in a vacuum by a heavy flow of cold water. These engines cannot be operated in a manner to obtain their greatest efficiency without a continuous flow of cold water. The plant was

put in operation in the spring of 1907, and was continuously used thereafter until the spring of 1912 as one of the principal sources of supply of electric current by the Seattle Electric Company for the operation of street cars in the city of Seattle. Since that time it has been and now is maintained as an auxiliary and emergency plant in the event of the breakdown or damage of any of its water power plants. The plan of improvement proposed by the waterway commission is to excavate a canal in substantially a straight line from the upper to the lower end of the bend of the river upon which this property is located, and to construct a dam across the bed of the present channel at the upper end of the bend, so as to divert the flow of the river from its present natural channel into such canal or new channel, thereby diverting the whole of the flow of the river from in front of the plant of the traction company. The trial court refused to permit these appellants to show that after the water had been diverted from its present into its new channel it would be necessary for them to construct a pipe line for a distance of five miles in order to procure fresh water for the purpose of operating its machinery, and would have to construct pumping stations and procure a right of way for such pipe line and stations; and that the cost to these appellants of procuring water for this purpose would exceed \$444,000.

It is alleged that this was error, and that the diversion of the Duwamish river from its natural channel into the artificial channel would cause great damage to these appellants. It is argued: First, that the waters of the river were being used by the traction company for a public use, and that such waters could not be condemned for another public use; second, that the title to the traction company's property on which its plant is located extends into the bed of the Duwamish river and below the ordinary high tide; third, that, since its title extends into the bed of the river, such flow cannot be diverted without the paying of just compensation on account of damages caused thereby; fourth, that the levy of an assessment upon the property within the district in excess of the sum required to pay the cost of the improvement constituted a taking of property without due process of law; and fifth, that the action of the trial court in permitting counsel for the commissioners to attach to the forms of verdict submitted to the jury statements of what their witnesses testified the maximum benefits would be constituted reversible error. We shall notice these contentions in their order as stated.

[6] It is first contended that, because the appellants' property was already devoted to a public use, it cannot be condemned.

[7] The appellants cite cases to the effect that it is the established rule that property devoted to a public use may not be tak-

en for another public use without legislative grant, either in express terms or by necessary implication. There can be no doubt about this being the rule. Section 7 of the act of 1911 defining the powers of the waterway district provides at subdivision "a" that the district shall have the right of eminent domain, "with power by and through its board of commissioners to cause to be condemned and appropriated private property for the use of said organization in the construction and maintenance of a system of commercial waterways, and make just compensation therefor: Provided, that the property of private corporations may be subjected to the same rights of eminent domain as that of private individuals: Provided, further, that the said board of commissioners shall have the power to acquire by purchase all the property necessary to make the improvements herein provided for." Subdivision "d" of that section provides: "In the accomplishment of the foregoing objects, the commissioners of such waterway district are hereby given the right, power and authority by purchase or the exercise of the power and authority of eminent domain, or otherwise, to acquire all necessary and needed rights of way in the straightening, deepening, or widening or otherwise improving of such rivers, watercourses or streams." It seems to us that the power is there directly conferred, and at least by necessary implication upon the district to acquire, either by purchase or condemnation as the commission may see fit, all necessary and needed rights of way. We are of the opinion, therefore, that in case of necessity the waterway commission has at least implied authority under these provisions to take the property of the appellants. *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199.

[8] These appellants argue that the title of the traction company to the property upon which its plant is located extends into the bed of the Duwamish river and below the line of ordinary high water. On the trial of the case there was introduced in evidence several plats of the lands. It appears that the tract of 17½ acres had been platted into lots and blocks known as Queen addition and Queen addition supplemental. It is conceded that the appellants purchased the lots upon which their plant is located according to the recorded plats thereof. These plats, in the description of the additions, state that the boundaries begin at a certain point and run at a certain angle for a given distance "to the right bank of the Duwamish river, thence up stream with the meanders of said right bank." And in the supplemental plat it is stated that the boundaries begin at a certain point and extend a certain distance in a given direction "to the meanders of Duwamish river." It is apparent from a reading of the descriptions upon these plats that the description of Queen addition extended

only to the right bank of the Duwamish river, and that the description of Queen addition supplemental extended to the meanders of the Duwamish river and along the meanders thereof. We are unable to determine from the record whether these meanders were in the bed of the river or upon the bank, but that fact is not important. The trial court was of the opinion that the title acquired by the appellants extended only to the bank of the river. We are inclined to the opinion that the trial court was right in this respect. If the property of the appellants extended only to the bank of the river, and did not include the bed of the river, it is plain from what we have heretofore said that the appellants had no rights beyond the line of the property, and no rights in the waters of the river.

[9] If these meanders are in the bed of the river, the appellants have no rights therein, because it is conceded that the river is a navigable stream. In *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063, decided May 26, 1913 the Supreme Court was considering the right of the upland owners to the flow of the waters of a navigable stream, and it was there said: "But whether this private right to the use of the flow of the water and flow of the stream be based upon the qualified title which the company had to the bed of the river over which it flows or the ownership of land bordering upon the river is of no prime importance. In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable."

And in *Scranton v. Wheeler*, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126, the court said: "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation. * * * If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction away from the shore line of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, with-

in the meaning of the Constitution, a taking of private property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates Case* [10 Wall. 497, 19 L. Ed. 984], 'in due subjection to the rights of the public.'"

And in *McKeen v. Delaware Division Canal Co.*, 49 Pa. 424, it was said: "Every one who buys property upon a navigable stream purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of all her citizens."

In *Zimmerman v. Union Canal Co.*, 1 Watts & S. (Pa.) 348, it was said: "It seems, however, to be but in accordance with the decisions made upon the subject that it is one of the incidents to holding property on one or both sides of a navigable stream that the party is subject to, any inconvenience that may arise from deepening the channel, or otherwise improving the navigation of such stream, is to be submitted to, without any right to damages therefor, except as such improvement may flood or drown their lands." See, also, *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 64 L. R. A. 199; *Wilson v. O-W. R. & N. Co.*, 71 Wash. 102, 127 Pac. 847.

We are of the opinion, therefore, that the court properly excluded evidence tending to show the cost or the necessity for obtaining water at some other place and obtaining rights of way therefor, because the appellants have no interest in the waters of the navigable river which they can enforce against the state or its agency.

It is next argued that the levy of assessments for maximum benefits is void for the reason that it is grossly in excess of the estimated cost of the improvement. It is unnecessary to consider this question further. It is the same as hereinbefore determined.

[10] It is next argued that the finding of the jury of the maximum benefits is void because the court permitted statements of the benefits claimed by the respondents to be submitted to the jury. We have seen above, in so far as the finding of the jury of maximum benefits was concerned, that the jury was not a constitutional jury for that purpose. There were some 10,000 different pieces of land included within the assessment district. It was, of course, impossible for the jury to remember what the witnesses had testified with reference to the special benefits to each of these tracts. The court therefore permitted the estimates of the witnesses to be taken by the jury to the jury room. The jury was instructed that these memoranda were not in any sense to be considered as evidence, but were given to them as aids to their recollection of the testimony in case they needed to refresh their recollection. We think these estimates were of no greater moment than the allegations of the commissioners as to what the maximum benefits would be, which was held in *Commissioners' Commercial Wa-*

terway District No. 2 v. Seattle Factory Sites Co., supra, not to be prejudicial. In *Higgins v. Los Angeles G. & E. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717, the Supreme Court of California held that it was not error to permit the jury to take with them and use in their deliberations any exhibit, where the circumstances call for it, with a cautionary instruction as to the nature and use which they shall make of the exhibit. We think there was no prejudicial error in this.

[11] It is next argued that the finding of the jury of the maximum benefits is void for the reason that the appellants were not granted a separate trial upon that question. It is sufficient answer to this to say that the statute does not require a separate trial upon these questions. It in substance requires that the benefits shall be determined by the jury in one proceeding; and it would therefore be improper to award a separate hearing upon each assessment of maximum benefits. There is no merit in this assignment.

On the appeal of Columbia & Puget Sound Railroad Co., in addition to the constitutional questions and questions hereinbefore discussed, it is contended that the maximum benefits assessed against the right of way of the railroad company is excessive. It appears that the right of way of this appellant was located between the rights of way of two other railway companies running through this improvement district. And it is argued that by reason of the fact that this appellant in order to obtain any business will have to cross over the right of way of at least one of the other railway companies; that it therefore cannot be benefited by the improvement. It is also contended that this right of way is used exclusively for railway purposes and is not benefited by the improvement.

[12] It is sufficient answer to this contention to say that the maximum benefits assessed by the jury has evidence in the record to support it; and the fact that the right of way is at present being used for railway purposes only is no objection to its assessment for benefits. In *Great Northern R. Co. v. Seattle*, 73 Wash. 576, 132 Pac. 234, we said: "In the case cited (*Northern Pac. R. Co. v. Seattle*, 46 Wash. 674 [91 Pac. 244, 12 L. R. A. (N. S.) 121, 123 Am. St. Rep. 955]) we further held that property abutting upon a local improvement, and devoted to railroad purposes, might be assessed for benefits conferred, and that such use would not relieve it from liability to assessment; the controlling question being, not whether the present use would be benefited, but whether the property itself, irrespective of such use, would be benefited." This is decisive of the question presented upon behalf of this appellant.

[13] On the part of the appellants *Rines et al.*, in addition to the questions already hereinbefore decided, it is argued that the assessments upon unplatted property were greater

than that upon platted property by reason of the fact that no deductions were made for streets. The act under which this proceeding is maintained provides, at section 14, that the jury "shall further find a maximum amount of benefits per acre or per lot or tract to be derived by each of the land owners." Of course this means that the jury shall determine the maximum benefits upon the property as it appears at the time, and it is not for the jury to consider whether acreage or tracts will thereafter be platted. It is their duty to determine the maximum benefits that would accrue from the improvement to the property as it was at that time, irrespective of whether it might or might not be platted in the future. This is all the jury did in this case. We think there is no merit in the point raised.

[14] Upon the appeal of the estate of *Hartlett Macaulay*, deceased, it is argued that the verdict awarding this appellant damages for property taken was contrary to the evidence. It is conceded by the appellant that the evidence is conflicting upon the amount of damages sustained. In such cases we have held that we will not disturb the verdict of the jury upon questions properly submitted. *Bartlett v. Plaskett*, 73 Wash. 449, 131 Pac. 1125.

The other questions presented by these appellants are hereinbefore decided. We find no error in the record.

The judgments appealed from are therefore affirmed. The costs recoverable by the respondents will be taxed against the six appellants equally.

CROW, C. J., and PARKER and MORRIS, JJ., concur.

STATE ex rel. GRANT SMITH & CO. v.
CITY OF SEATTLE.

(Supreme Court of Washington. Jan. 16, 1914.)

En Banc. On rehearing. Denied.

For former opinion, see 74 Wash. 438, 133 Pac. 1005.

PER CURIAM. Upon a rehearing of this case by the court en banc, the majority still adhere to the original opinion as found in 74 Wash. 438, 133 Pac. 1005, and for the reasons there given are of the opinion that the judgment should be reversed.

JONES et ux. v. GILLIS et al.
(Supreme Court of Washington. Jan. 16, 1914.)

En Banc. On rehearing. Denied.

For former opinion, see 135 Pac. 627.

PER CURIAM. Upon a rehearing of this case by the court en banc, the majority still

adhere to the original opinion as found in 135 Pac. 627, and for the reasons there given are of the opinion that the judgment should be affirmed.

ETTOR et ux. v. CITY OF TACOMA et al.
HOWARD et al. v. SAME.

(Supreme Court of Washington. Jan. 2, 1914.)

1. APPEAL AND ERROR (§ 1197*)—PROCEEDINGS AFTER REMAND FROM UNITED STATES SUPREME COURT—JURISDICTION.

Where the United States Supreme Court, on writs of error to reverse judgment against plaintiffs in an action against the city and railroad to recover damages for injuries to abutting property from an original street grading done by the railroad under municipal authority, only decided the particular question upon which the former opinion of the state Supreme Court turned, i. e., the validity and constitutionality of Laws 1909, c. 80, § 1, repealing former laws and leaving no right to recover in such case, the city's and the railroad's defenses on grounds apart from such statute, never passed upon, are entitled to a consideration by this court, such consideration not being inconsistent with such decision.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4666, 4667, 4669-4671; Dec. Dig. § 1197.*]

2. MUNICIPAL CORPORATIONS (§ 751*)—PUBLIC IMPROVEMENTS—GRADING STREETS—LIABILITY OF RAILROAD GRADING UNDER MUNICIPAL AUTHORITY.

In an action under Laws 1893, c. 84, § 47, and Laws 1907, c. 153, § 48, prescribing the right to recover damages consequent on the original grading of a street, the railroad company, doing the actual grading under municipal authority and under the direction of municipal officers, stands in the situation of a contractor, and where no negligence in the work is shown is not liable for damages to abutting property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1580-1582; Dec. Dig. § 751.*]

3. MUNICIPAL CORPORATIONS (§ 385*)—PUBLIC IMPROVEMENTS—LIABILITY OF RAILROAD AUTHORIZED BY MUNICIPALITY—"COSTS OR CHARGES"—"EXPENSE."

Where defendant city by its engineer ordered the grading of a street in annexed territory to be done by defendant railroad in a certain manner, and vacated certain streets and the railroad company accepted such vacation and built the grade as directed under an agreement with the county, which formerly had jurisdiction of the location, that the grading should be at its "own expense and without cost or charge to or upon the said county," it was not a proceeding as though the original vacation order were a contract between itself and the city whereby it agreed to pay damages sustained by abutting owners, since the expenses, costs, and charges contemplated was the cost of making the grade conform to the specifications; the words "costs or charges" adding nothing to the word "expense," which word was used to define the promise of the railroad, the term "costs or charges" being used by the other contracting party to disclaim any liability to the railroad.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 925-928; Dec. Dig. § 385.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1633-1640; vol. 8, p. 7620; vol. 13, pp. 2590-2593; vol. 8, p. 7657.]

4. EMINENT DOMAIN (§ 101*)—HIGHWAYS—IMPROVEMENT OR CHANGE OF GRADE—DAMAGES TO ABUTTING OWNERS.

The property owner, abutting a public highway owned by the county and subject to the jurisdiction of county commissioners, cannot recover damages for an improvement of the highway or for a change in its grade.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.*]

5. CONTRACTS (§ 175*)—CONSTRUCTION—CONTRACT FOR PUBLIC IMPROVEMENT—PRESUMPTION—REFERENCE TO EXISTING LAW.

A contract by a railroad to grade and improve a certain street over which the county then had jurisdiction will be presumed to have been made with reference to the facts and the law as they then existed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.*]

6. MUNICIPAL CORPORATIONS (§ 35*)—ANNEXATION—EFFECT.

When territory is annexed to a city, the city's authority is ipso facto extended over the new territory, and it becomes subject to its control and supervision and subject to all its ordinances then and thereafter in force.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 35.*]

7. MUNICIPAL CORPORATIONS (§ 35*)—EXTENSION OF TERRITORY—EXTINGUISHMENT OF FORMER CONTRACT.

Contracts entered into by the authorities having jurisdiction of certain territory, and not executed when such territory was annexed to a city, or of such character that their execution would be inconsistent with or tend to defeat the contract and duties of the city, and not within any constitutional guaranty, would be extinguished by such annexation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 35.*]

8. MUNICIPAL CORPORATIONS (§ 35*)—CONTRACT FOR PUBLIC IMPROVEMENTS—CONSTRUCTION.

Where a contract for a public improvement pending upon annexation of the locality of a city is not unlawful and for that reason ultra vires, the city will be bound by the same rules which govern individuals in their contract dealings.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 102, 103; Dec. Dig. § 35.*]

9. MUNICIPAL CORPORATIONS (§ 248*)—UNAUTHORIZED CONTRACT—RATIFICATION.

An unauthorized contract may be ratified by a city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 684-686; Dec. Dig. § 248.*]

10. MUNICIPAL CORPORATIONS (§ 248*)—CONTRACTS FOR PUBLIC IMPROVEMENTS—ANNEXATION—RATIFICATION OF COUNTY'S CONTRACT.

A city annexing a certain locality pending the execution of a contract between a railroad company and county commissioners made, while the county had jurisdiction therein, for the grading of a certain street, while not bound to act upon or continue the contract, yet which knew of the contract and which subsequently directed work thereon and repaired a water main broken during the work, though it never formally accepted the completed work, thereby ratified such contract and adopted it as a measure of the relative rights of the city and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

railroad and as a proper municipal improvement, subject to payment of damages to abutting owners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 684-686; Dec. Dig. § 248.*]

11. Costs (§ 221*)—ON APPEAL.

In the absence of statute, the clerk of the Supreme Court did not err, when, in taxing costs on appeal to the Supreme Court of the United States, he disallowed certain items expended in the preparation of that appeal and paid without the intervention of this court or of his office.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 832, 834, 864-868; Dec. Dig. § 221.*]

Department 1. Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Actions by Manley Ettor and wife, and by Edwin Howard and others, against the city of Tacoma and the Chicago Milwaukee & St. Paul Railway Company. From a judgment of nonsuit and dismissal, Ettor and wife appeal; and from a judgment of dismissal entered upon a refusal to plead further after an order sustaining a demurrer to the complaint, Howard and others appeal. On further consideration after remittitur from the United States Supreme Court. Judgment in Ettor Case reversed and remanded for new trial, and judgment in Howard Case reversed and remanded, with instructions to overrule the demurrer, etc.

Boyle, Warburton & Brockway, of Tacoma, for appellants Ettor. T. L. Stiles, of Tacoma, for respondent City of Tacoma. Geo. W. Korte, of Seattle, for respondent Railway Co.

CHADWICK, J. The judgment of this court reported in 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061, and 57 Wash. 698, 106 Pac. 481, 107 Pac. 1064, was reversed by the Supreme Court of the United States. A remittitur has come down in each case commanding further proceedings not inconsistent with the decision of that court. *Ettor v. City of Tacoma*, 228 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. 773.

[1] The defendant Chicago, Milwaukee & St. Paul Railway Company, of Washington, and the city of Tacoma were sued by plaintiffs as joint tort-feasors. The liability of the railway company to respond in damages was not discussed by this court. It was argued in the briefs filed by the railway company in the Supreme Court of the United States, but that court did not pass upon the question. That court went no further in its opinion than to decide the particular question upon which our former opinions turn, that is, the validity and constitutionality of the act of the Legislature of this state. Session Laws 1909 (Laws 1909, p. 151, § 1). The railway company and the city filed separate answers denying liability on grounds other than those based upon the statute of 1909. The parties defendant appeared separately and filed briefs in this court. Their proffered defenses have never

been passed upon. This being made to appear by motion, we believe that the defendants are entitled to have the questions raised by them passed upon, and that our consideration of them will not be a proceeding inconsistent with the decision of the Supreme Court of the United States.

[2] In the year 1906 the railway company was seeking entrance into and terminal facilities at the city of Tacoma. It had acquired certain property for terminal uses. The property was at that time platted ground and a part of what was known as Indian addition to the city of Tacoma. It was not embraced within the corporate limits of the city. The railway company entered into a contract with the county commissioners of Pierce county, wherein it agreed that in consideration of the vacation of a part of M and N streets, in the plat of Indian addition, it would, at its own cost, grade a roadway 30 feet wide in the center of Twenty-Sixth street, in Indian addition. The work of grading was to be done under plans to be approved by the county engineer. These plans were prepared and submitted to the county engineer for approval. Pending the contract and the offer of the plans, a movement to bring Indian addition within the corporate limits of the city was put under way, and the county engineer suggested to the engineer of the railway company that he take the plans to the city engineer for his approval. This was done. The city engineer made some slight suggestions. He drew some marks upon the plat to indicate his ideas of what the grade should be. In the spring of 1906 the railway company graded Twenty-Sixth street. The city engineer was upon or about the work from time to time. He had a copy of the contract with the county commissioners. The mayor and the commissioner of public works were aware that the work was going on, and upon one occasion, if not more, the commissioner made some suggestion with reference thereto. Some of the city councilmen, probably a minority of them, visited the work and were aware of the fact that it was being done by the railway company. The members of the committee on streets were also upon the ground and had notice that the work was being done. In the progress of the work a water main was broken. This was repaired by the city under the direction of the city engineer. The work was completed to the satisfaction of the city engineer, but was never formally accepted by the city. Thereafter plaintiffs brought an action to recover damages under section 47, c. 84, Laws 1893, p. 207, and section 48, c. 153, Laws 1907, p. 836.

Upon this state of facts we are of the opinion that the railway company is not liable to answer in damages. The theory upon which it is sought to hold the railway company is that the city being a tort-feasor and having assumed to do or having permit-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ted the work to be done under circumstances that would estop it to deny its responsibility and the agency of the railway company, its agent is bound to answer with the principal. It will be borne in mind that the railway company occupies no part of the street in front of appellants' property. It has done no more than improve an unimproved street according to plans approved by and under the direction of the city engineer. We do not understand that it is charged that the work was negligently done. This court is committed to the doctrine that where work is done by a contractor for the city in accordance with plans furnished by the city and under its direction, and it is not made to appear that the work has been negligently done, the contractor is not liable. *Kaler v. Puget Sound Bridge & Dredging Co.*, 72 Wash. 497, 130 Pac. 894; *Casassa v. Seattle*, 66 Wash. 146, 119 Pac. 13; *Potter v. Spokane*, 63 Wash. 267, 115 Pac. 176; *Quinn v. Peterson & Co.*, 69 Wash. 207, 124 Pac. 502; *Stern v. Spokane*, 73 Wash. 118, 131 Pac. 476. In principle the railway company is in the same situation as a compensated contractor. It had no interest other than to do the work and to receive its compensation, which it did in property instead of money.

[3] We notice, however, that it is said by the plaintiffs, in their brief filed in the Supreme Court of the United States, that: "When the city, by its engineer, ordered the work to be done in a certain manner, and vacated M and N streets, and the railway company accepted such vacation and built the grade as directed by the city, they impliedly agreed that their rights and liabilities the one to the other should be as set out in the order of the board. One of these provisions was that the grading of the street should be at the railway company's 'own expense, and without cost or charges to or upon the said county of Pierce.' Under the statute governing the city, which by the mutual acceptance of the parties succeeded in the contract to the county of Pierce, a part of this expense so contracted to be paid was payment of compensation to the property owners. The railway company has therefore, by proceeding as though the original order of vacation were a contract between itself and the city, agreed to pay plaintiffs in error for the injury which they would sustain. The promise was obviously not only for the benefit of the city, but for the benefit of the property owners, and they may rely upon it in an action to recover such damages. This is not only the universal rule in the United States, but is made positive by the provisions of the Washington Code (Rem. & Bal. § 179) that 'every action shall be prosecuted in the name of the real party in interest,' except as otherwise specially provided." We are unable to follow the reasoning of counsel. The words "own expense and without cost or charges to or upon the said county of Pierce," cannot be given the meaning contended for

for two reasons: First, it is obvious that the expenses, costs, and charges contemplated were the cost of making the grade conform to the plans and specifications. The words "costs or charges" add nothing to the word "expense." The word "expense" is used to define the promise of the railroad company, and the words "cost or charges" are used by the other contracting party to disclaim any liability to those who might do the work. Furthermore, at the time the contract was made, the payment of damages as for compensation for property taken or damaged could not have been within the contemplation of the parties.

[4] It has rarely, if ever, been held, and certainly not in this state, that a property owner abutting a public highway owned by the county and subject to the jurisdiction of the county commissioners can recover damages for an improvement of the highway or for a change in its grade.

[5] At the time the words relied on were written, the county had jurisdiction over the street that was thereafter improved, and the law will presume that the parties contracted with reference to the facts and the law as they existed at the time.

It is earnestly contended by the city attorney that the city is not liable for the reason that the work was done under a contract made with the county which was lawful at the time it was made; that the plans were never formally adopted; that the approval of the city engineer of the plat was no more or less than a suggestion which in itself was so slight that it would not bind the city; that the superintendency of the city engineer was unauthorized; that the work was never formally accepted and that a knowledge on the part of a minority of the councilmen would not amount to a ratification or work an estoppel on the part of the city. No cases have been cited by counsel nor have we been able to find any covering the exact state of facts now before us. In consequence we are put to the stress of searching out such fundamental principles as in our judgment are controlling.

[6] It is settled in this period of the law's evolution that when territory is annexed or brought into a city the authority of the city is ipso facto extended over the new territory, and it becomes subject to the control and supervision of the municipal authority. Outside territory when annexed "shall thereupon become a part of such city and subject to all its laws and ordinances then and thereafter in force." Rem. & Bal. Code, § 7449; *Peterson v. Tacoma R. & Power Co.*, 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936; *Railroad Co. v. Defiance*, 52 Ohio St. 263-299, 40 N. E. 89; *St. Louis Gas Light Co. v. City of St. Louis*, 46 Mo. 121; *Trustees of Schools v. Board of School Inspection*, 214 Ill. 30, 73 N. E. 412.

[7-10] It would necessarily follow that contracts theretofore entered into by the legis-

lative or administrative body having jurisdiction over the new territory, and not then executed, or if of such character that their execution would be inconsistent with or tend to defeat the contracts, rights, powers, and duties of the annexing municipality and not coming within some guarantee of the Constitution, should be held to be extinguished by the act of annexation. The case of Peterson is controlling in principle. We there held, that where the limits of a city were extended so as to take in a part of a street railway then being operated through the city and upon a public road beyond the city limits under franchise from the county commissioners, that the franchise was abrogated by the annexation, and that the railway company was bound to carry passengers within the limits of the city as extended for one fare of five cents as then provided in its contract with the city and as evidenced by an ordinance. The city was not bound to act upon or acquiesce in a contract made by the county with the railway company; but the contract that was made was a lawful one and might have been entered into by the city on its own account. This court has frequently held that, where a contract is not unlawful and for that reason *ultra vires*, the city will be bound by the same rules which govern individuals in dealing one with another. *State ex rel. Maddaugh v. Ritter*, 14 Wash. 649, 134 Pac. 492; *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457; *Franklin County v. Carstens*, 68 Wash. 176, 122 Pac. 999; *Crisswell v. Directors of School Dist.*, 34 Wash. 420, 75 Pac. 984; *Coliseum Inv. Co. v. King County*, 72 Wash. 687, 131 Pac. 245; *Turner Inv. Co. v. Seattle*, 70 Wash. 201, 126 Pac. 426, 41 L. R. A. (N. S.) 781. There is much confusion in the books in applying the principles of ratification and estoppel to municipal corporations. We confess our confusion in determining upon which ground we should rest our decision. We believe that it may be rested upon either ground, but more securely upon the ground of ratification. That an unauthorized contract may be ratified by a city will not be denied and needs no citation of authority. The only question for us is whether the conduct of the city has been such as to make ratification. We think there was sufficient notice to the various administrative officers of the city to make it chargeable with knowledge of the fact that the work was going on, it having extended, as we now remember, over a period of two or three months. The contract with the county was a matter of public record. The city might have disclaim-

ed the contract and denied the right of the railway company to proceed. A city is not bound to accept the incumbrance of an executory contract when annexing territory, but it may do so. For the purposes of this argument we will assume, as the city attorney insists the fact to be, that the city council did not by any affirmative act ratify the contract under which the work was done. But it does not follow that the lack of an affirmative act will exempt the city. It may be bound by its inaction. It may be bound by a vote of its council; by the acceptance of benefits; by paying for services in connection with the work; or by bringing an action at law upon the contract, or by mere silence. *McQuillin on Municipal Corporations*, § 1258. But it does not follow that the city can escape the payment of damages, if any there be. The contract made by the county measures the relative rights of the city and the railway company. Not having arrested the work pending an assessment of damages, the city must be held to have adopted it as a proper municipal improvement, and cannot now assert that it was not done under its authority. *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504. Under the law as the Supreme Court of the United States has declared it to be at the time the work was done the city must meet its liability.

[11] In taxing the costs on appeal to the Supreme Court of the United States, the clerk of this court disallowed certain items that were expended in the preparation of the appeals. There is no statute covering the taxation of costs in a case like this, and we think the clerk did not err when he refused to tax items of expenditure as costs that were paid without the intervention of this court or of his office, which cannot be checked by reference to our statutes or to our practice in cases appealed to this court. If the items complained of are properly taxable, it would seem that they should have been so taxed in the other court. The order taxing costs is approved.

The Ettor Case comes here from a judgment of nonsuit and dismissal. It will be remanded for a new trial.

The Howard Case comes here from a judgment of dismissal entered upon a refusal to plead further after the entry of an order sustaining a demurrer to the complaint. It will be remanded with instructions to overrule the demurrer and for further proceedings.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

TIEDEMANN v. TIEDEMANN. (No. 2,076.)
(Supreme Court of Nevada. Dec. 31, 1913.)

1. COURTS (§ 12*)—JURISDICTION—RESIDENCE OF PLAINTIFF.

The Legislature may permit an action by nonresident plaintiff against a resident defendant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 32-36, 40, 41, 43, 45; Dec. Dig. § 12.*]

2. STATUTES (§ 270*)—AMENDMENT—EFFECT.

An amendment not in force when an action was brought under the original statute does not affect such action.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 363; Dec. Dig. § 270.*]

3. DIVORCE (§ 62*)—ACTIONS—RIGHT TO MAINTAIN.

It is competent to permit a resident plaintiff to maintain an action for divorce in the county where the defendant may be found.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 200-202, 208-216, 220, 282; Dec. Dig. § 62.*]

4. PLEADING (§ 214*)—DEMURRER—EFFECT.

A demurrer admits the allegations of the pleading attacked.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

5. DIVORCE (§ 62*)—ACTIONS—MAINTENANCE—"FOUND."

Under Rev. Laws, § 5838, providing that divorce may be obtained by complaint under oath to the district court of the county in which the defendant shall reside or be found, or in which the plaintiff shall have resided six months before suit, the expression "found," being used in contradistinction to "reside," must, in view of St. 1861, c. 103, tit. 3, § 28, providing that summons shall be served by the sheriff of the county where the defendant is found, be held to mean in the county in which personal service may be had on the defendant, and hence a complaint in an action for divorce is sufficient where service was duly made on the defendant, even though it did not show that plaintiff had been an actual resident for the six months required to give the court jurisdiction regardless of defendant's residence.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 200-202, 208-216, 220, 282; Dec. Dig. § 62.*]

For other definitions, see Words and Phrases, vol. 3, p. 2927; vol. 8, p. 7666.]

McCarran, J., dissenting.

Appeal from District Court, Ormsby County; Frank P. Langan, Judge.

Action for divorce by Gertrude Eleanor Tiedemann against Rudolph Ernest Tiedemann. From a judgment dismissing the complaint, plaintiff appeals. Reversed and remanded.

Alfred Charts, of Carson City, for appellant. Samuel Platt, of Carson City, for respondent.

NORCROSS, J. This is an appeal from a judgment of dismissal of plaintiff's action for a divorce, based upon an order sustaining a demurrer to plaintiff's complaint. The complaint in the action was filed in the First judicial district court in and for Ormsby county on August 16, 1912. On the same day summons was issued and served on the de-

fendant within said county of Ormsby. Thereupon the defendant appeared specially by his counsel for the purpose of moving to set aside the service of summons. An order was subsequently made setting aside the service. From this order an appeal was taken to this court and the order reversed. *Tiedemann v. Tiedemann*, 35 Nev. 259, 129 Pac. 813. Defendant, through his counsel, then filed a demurrer to the complaint upon two grounds:

"I. That said complaint does not state facts sufficient to constitute a cause of action.

"II. That the court has no jurisdiction of the person of the defendant nor of the subject-matter of the action for the reasons:

(a) The complaint does not show on its face that the plaintiff was at the time of the filing of the complaint a resident within the county of Ormsby, state of Nevada, six months immediately last past preceding the filing of said complaint. (b) The complaint does not show upon its face that the defendant was a resident within the county of Ormsby, state of Nevada, for six months immediately last past preceding the filing of said complaint. (c) The complaint does not show upon its face that the plaintiff was a resident within the county of Ormsby, state of Nevada, for the continuous period of six months last past preceding the filing of said complaint. (d) The complaint does not show upon its face that the defendant was a resident within the county of Ormsby, state of Nevada, for six months continuously last past immediately preceding the filing of said complaint."

The first and second paragraphs of plaintiff's complaint contain the only allegations relative to residence of either plaintiff or defendant. These allegations are as follows:

"I. That plaintiff is a resident of Carson City, Ormsby county, state of Nevada.

"II. That plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that said defendant is now within and can be found in said county of Ormsby, and within the jurisdiction of this court."

Section 22 of "An act relating to Marriage and Divorce," approved November 28, 1861, provides: "Divorce from the bonds of matrimony may be obtained, by complaint under oath, to the district court of the county in which the cause therefor shall have accrued, or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be either the county in which the parties last cohabited, or in which the plaintiff shall have resided six months before suit be brought, for the following causes." Rev. Laws, § 5838.

Section 1 of "An act defining what shall constitute legal residence in the state of Nevada," approved March 22, 1911, provides:

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"The legal residence of a person with reference to his or her right of suffrage, eligibility to office, right of naturalization, right to maintain or defend any suit at law or in equity, or any other right dependent on residence, is that place where he or she shall have been actually, physically and corporeally present within the state or county, as the case may be, during all of the period for which residence is claimed by him or her." Rev. Laws, § 3609.

In the recent case of *Flemming v. Flemming*, 36 Nev. —, 134 Pac. 445, we had occasion to consider the sufficiency of allegations in a complaint for divorce, where the plaintiff based his right of action solely upon his own residence. In that case we held "that the residence required by the statute (section 5838, R. L.) and contemplated by the Session Act of 1911 was actual residence; that is, physical, corporeal presence and not alone legal residence or domicile," for the period of six months within the county where suit was instituted.

Counsel for respondent contends that the *Flemming* Case is conclusive against appellant on this appeal. If, as in the *Flemming* Case, appellant in this case was relying on her own residence within the state as a basis of jurisdiction over the subject-matter of the action, the complaint, unquestionably, would be insufficient. Appellant, however, is not relying alone upon the allegation of her own residence, as a basis for the court's jurisdiction, but, together with that, upon the allegation that the suit is brought within the county where the defendant can be "found."

It will be observed that by the provisions of section 22 of the Marriage and Divorce Act, quoted supra (Rev. Laws, § 5838), jurisdiction may be acquired in the court of a county when either of five different states of fact is shown to exist, to wit: (a) In which the cause therefor shall have accrued. (b) In which the defendant shall reside. (c) In which the defendant shall be found. (d) In which the plaintiff shall reside and the parties last cohabited. (e) In which the plaintiff shall have resided six months before suit was brought.

It is manifest that the territorial Legislature of 1861 only intended to make a six months' residence essential when the plaintiff relied alone on his or her residence. The Marriage and Divorce Act provided for seven distinct grounds for divorce. If both parties were within the territory or state, a cause of action might accrue, regardless of the time the parties may have been within the territory or state, under either the first, second, fourth, or sixth specifications of grounds for divorce. In such an event the length of residence of either of the parties was immaterial so far as being essential to invest the court with jurisdiction. If the suit was brought in the county where the defendant resided or was found, the length of residence of the plaintiff was likewise im-

material. If the plaintiff instituted action within the county where the parties last cohabited, a six months' residence upon the part of plaintiff is, also, not required. The act of 1911, supra, only affects the character of residence, where residence is essential to jurisdiction.

In the *Flemming* Case the plaintiff relied on his own residence for six months to establish jurisdiction in the court over the parties and the subject-matter of the action. In this case jurisdiction rests upon the allegation of residence upon the part of the plaintiff and that defendant could be found in the county in which suit was instituted. The defendant was served with summons within Ormsby county the same day the complaint was sworn to and filed. Whether the court below was invested with jurisdiction by virtue of the allegations in the complaint depends upon the construction to be placed on the word "found" as used in the statute.

The circumstances which brought the defendant from his home in Connecticut to Carson City are set forth in the statement of the case upon the former appeal from the order quashing the service of summons. 35 Nev. 259, 129 Pac. 313. There is no contention that the defendant was within Ormsby county, at the time the suit was instituted and the summons served, by reason of any collusion between the parties for the purpose of such a service, and the case presents no question of collusion. If neither of the parties had a residence or domicile within the state, and one of the parties took up a temporary abode therein for the purpose of procuring a divorce, and thereafter the other party, in collusion with the plaintiff, entered the state for the purpose of permitting service to be made upon him or her, as the case might be, doubtless, such a state of facts would not confer jurisdiction.

[1] None of the states, so far as we are advised, have a statute similar to the one under consideration, and there are no decisions directly in point to aid in construing our statute. While we may concede, for the purposes of this appeal, that one of the parties to the marriage sought to be dissolved must be a resident of the state, it does not follow that a residence for any particular length of time is in every case essential. A statute may permit an action by a nonresident plaintiff against a resident defendant. *Smith v. Smith*, 4 Mackey (D. C.) 255; *Watkins v. Watkins*, 135 Mass. 83.

[2] Although our Divorce Act, so far as the question here involved is concerned, has remained unchanged from the date of its enactment, more than a half century ago, it has never before become necessary for this court to construe its peculiar provisions. The act was not borrowed from any of the then existing Pacific Coast states or territories. Whether its provisions were taken from the laws of some eastern state or territory, or originated with the Argonauts who com-

posed the first territorial assembly, we are not at this time advised. Suffice it to say it was adopted as the law of the territory and by the provisions of the Constitution became a part of the laws of the state. The Legislature of 1913 adopted an amendment to section 22, *supra*, which takes effect January 1, 1914, adding the proviso: "That when at the time the cause of divorce accrues, the parties shall not both be bona fide residents of the state, no court shall have jurisdiction to grant a divorce, unless either the plaintiff or the defendant shall have been a bona fide resident of the state for a period of not less than one year next preceding the commencement of the action." St. 1913, p. 10. As this amendment was not in force at the time the action was brought, it does not affect rights of action instituted prior to the time the amendment is in effect.

[3] We can find no legal inhibition to the Legislature giving to plaintiff, who is a resident of the state, a right of action for divorce and establishing jurisdiction over the subject-matter of the action in the county where the defendant may be found. Whether the Legislature would have such power in case both parties were nonresidents and there was no collusion, it is unnecessary to consider.

[4, 5] For the purpose of the demurrer it is admitted that the plaintiff is a resident of the state, and it will be assumed that her domicile is identical with her residence, as it is not contended that the complaint does not state a cause of action for divorce. *Bishop on Marriage & Divorce*, vol. 2, § 124.

When, then, may a defendant be said to be "found" within the meaning of the statute? It is clear from the statute that the word "found" is used in contradistinction to the word "reside." The action then may be instituted by a resident of the state in a court of a county, regardless of the residence of the defendant, if it is alleged that he can be found within the county where suit is instituted and is actually served with process therein.

There is nothing in the language of the statute to indicate that the Legislature in using the word "found" intended to use it in any sense other than is frequently used in statutes relative to the service of process. The same legislative assembly which adopted the Marriage and Divorce Act (1861) adopted a Civil Practice Act which provides that "summons shall be served by the sheriff of the county where the defendant is found" (Stats. 1861, p. 318). The word is used in other sections relative to service and has been so used in every Civil Practice Act since adopted. It is used in the practice acts of most, if not all, the states, to mean the county in which the service of process may be had personally upon the defendant. As no other reasonable meaning to be applied to the word suggests itself, we feel constrained

to apply the same meaning which the word imports when used in other provisions of law relative to the service of process.

As the Legislature had the power to enact this law, we have no province other than to construe it according to its meaning and, so construed, to enforce it.

It is our conclusions that the complaint alleges sufficient requisite facts to invest the court with jurisdiction of the subject-matter and the parties, and that hence the ruling and judgment of the court were erroneous.

The judgment is reversed, and the order sustaining the demurrer is set aside, subject to the privilege of defendant to answer, within such time as the court below may order.

TALBOT, C. J. I concur in the opinion and order as written by Justice NORCROSS.

It is not denied by any of the authorities that the power to regulate marriage and divorce is vested in the different states, and not in Congress, under the federal Constitution. In the absence of some prohibitive organic or fundamental provision—and it is not claimed that there is any in our state Constitution—the Legislature is empowered to pass such laws regulating these matters as it deems best. Generally speaking, the marital status of the citizen, the age of consent, the manner in which marriages may be solemnized, the obligations it imposes affecting personal or property rights, the time, condition of residence, and causes required for obtaining divorce, are all within the control of the state and subject to her laws as enacted by the Legislature. The question is not whether as individuals or as legislators we would desire to have other restrictions or a different enactment. Unless clearly void for some fundamental cause, it is the duty of the courts to construe the statute according to its language and the evident intention of the Legislature. *Humboldt County v. Churchill County*, 6 Nev. 30; *Sawyer v. Dooley*, 21 Nev. 390, 32 Pac. 437; *State v. Irwin*, 5 Nev. 111; *State v. Parkinson*, 5 Nev. 15; *State v. Board of Commissioners*, 21 Nev. 235, 29 Pac. 974; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090.

The policy of the law is for the legislative department of the state government, and it is not for the courts to give the act a meaning different from any implied from the words it contains. *State v. McClear*, 11 Nev. 39; *State v. Parkinson*, 5 Nev. 15; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66.

The court cannot read into the statute something beyond the manifest intention of the Legislature as gathered from its language. The function of the court is to determine the intention of the Legislature from the words used, in accordance with established rules of statutory construction. *Ex parte Pittman*, 31 Nev. 43, 99 Pac. 700, 22 L. R. A. (N. S.) 266, 20 Ann. Cas. 1319.

In the *Andrews Case*, 188 U. S. 15, 23 Sup. Ct. 237, 47 L. Ed. 366, it was held that the appearance of a nonresident defendant does not invest the court with jurisdiction of a divorce suit instituted by a person who has no bona fide domicile within the state. Our district court in Washoe county dismissed the *Sothern Case* a few years ago because the plaintiff while living in New York, and without coming here, brought suit in Nevada and had summons served upon the defendant, who by chance or collusion was found here, when neither was a resident of this state. The restriction, as held by these and other decisions, that the court is without jurisdiction in an action for divorce when neither of the parties is a resident of the state, does not apply to any question presented by this appeal, because it is alleged, and for the purposes of the demurrer admitted, that the plaintiff is a resident, and consequently it is not necessary to determine whether these decisions are good law or should be followed, when it does not appear that there is any constitutional inhibition against allowing the Legislature to confer jurisdiction upon the courts to try cases for divorce between non-residents; nor is it necessary to consider whether these cases will bear analysis in view of the later opinions of the Supreme Court of the United States, holding that the federal courts have jurisdiction of cases in which both of the litigants are nonresidents if no motion is made to move the case away or objection made to the jurisdiction. If it be conceded that regardless of statute it is essential that at least one of the parties must be a resident of the state in order to give the court jurisdiction over the marital status or to grant a divorce the decisions do not hold that this residence must be for any particular length of time unless required by legislative enactment.

As our statute passed at the territorial session in 1861 provides that divorce from the bonds of matrimony may be obtained by complaint under oath to the district court of the county in which the defendant shall reside or be found, and this action was brought in the county in which it is alleged, and for the purposes of the demurrer and this appeal admitted, the plaintiff resided and in which the defendant was found at the time it was commenced and has been brought within the provisions of the statute, in order to hold that the action is not properly brought or cannot be maintained, it would be necessary to set aside or in effect judicially amend this act. If it be argued or conceded that it is necessary that in addition to the provision of the statute that suit may be commenced in the county where the defendant is found, it is required that one of the parties must be a resident of the state, that requirement is fulfilled by the record. The act does provide that suit may be brought in the county in which

the plaintiff shall have resided for six months before the commencement of the action, but does not require any specified length of residence by the plaintiff if suit be brought in the county in which the cause of action accrued or in which the defendant shall reside or be found, or in which the plaintiff shall reside, if the latter be the county in which the parties last cohabited. No question regarding collusion or the bona fides of the residence of the plaintiff being involved, and the time of residence being one of policy for the Legislature, the courts are as much unauthorized to require six months' residence of the plaintiff in the county in the cases where the statute requires no specified length of residence, as they would be to exact one or more years residence in the cases in which the statute in force to the end of this year designates six months.

In *Bishop on Marriage & Divorce* (6th Ed.) vol. 2, §§ 343b, 113, and 113a, it is said: "The court, to render a valid decree of divorce, must, as shown in preceding discussions, have jurisdiction over the subject-matter, which is the marital status either of one of the parties or of both, and over the person of the party or parties whose status is to be dissolved. * * * For the state, including its government in every other department as well as its courts, is bound by the law of nations, and it has no just right to establish a domestic rule, pertaining to a thing of international law like the marital status, in conflict therewith. Still, if it does, the courts are compelled to obey the statute, in preference to the unwritten rule of nations. * * * As the Legislature is under high obligations not to violate the law of nations, its commands on this question of international law may well be accepted by the courts as expressive of its opinion of what such law permits. When, therefore, a judicial tribunal finds a statute of its own state directing it to take the jurisdiction and dissolve marriages in specified circumstances, it, accepting this as expressive of the legislative interpretation of what the law of nations allows, may properly regard itself at liberty, and perhaps required, to hold as valid a divorce pronounced in the same circumstances in another state or country. It was as competent for the Legislature to commend this as the other, and the implication is very distinct that it so intended. In a Wisconsin case, it appeared that parties were married in Wisconsin, where they lived together, and there the husband committed a matrimonial offense. The wife, afterward, without him, went to reside in Minnesota, in which state she obtained a divorce for this offense from him; he not appearing, and having merely the notice by publication which the laws of Minnesota provided for nonresident defendants. Yet the Wisconsin

courts accepted this divorce as adequate to change in Wisconsin her matrimonial status."

In *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447, and *Jones v. Jones*, 60 Tex. 451, in an action for divorce brought by the husband in New York, it appeared that the wife had obtained a decree of divorce from him in Texas, on the ground of cruel treatment, in a suit commenced in Texas, on service of the petition and citation on the husband in the city of New York while he was a resident there. Thereafter the husband went to Texas, filed an answer to the petition which, after alleging want of jurisdiction of the person and that he appeared solely for the purpose of a motion to quash the service of the citation, contained a general denial of the allegations of the petition. The court overruled the motion to quash the service, the case was continued until the next term to enable the husband to prepare for trial, was tried, and a decree was granted which on appeal by the husband was affirmed. It was held by the New York Court of Appeals that the Texas decree was a valid and binding adjudication, that the husband became bound by it and the statute of that state, which made the filing of an answer by defendant an appearance and submission to the jurisdiction.

In *Donegal v. Donegal*, 3 Phillim. 597, a resident of Dublin appeared in a divorce suit brought in London and admitted an allegation of the bill that she was a resident of St. James, Westminster. There being no collusion, it was held that the court had jurisdiction of the person.

In *Cheever v. Wilson*, 76 U. S. (9 Wall.) 110, 19 L. Ed. 604, it was held that the Constitution and laws of the United States give an Indiana decree of divorce the same effect elsewhere which it has in that state, that the finding of the residence of the plaintiff by the decree was sufficient, that the wife may acquire a separate domicile from her husband whenever it is necessary and proper that she should do so, that suit may be instituted where the wife resides, regardless of the place of marriage, of the offense, and the domicile of the husband. The following appears in the opinion of the Supreme Court of the United States in that case: "It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and of the change of domicile. *Case v. Clarke*, 5 Mason, 70 [Fed. Cas. No. 2,490]; *Cooper's Lessee v. Galbraith*, 8 Wash. C. C. 550 [Fed. Cas. No. 3,193]; *McDonald v. Smalley*, 1 Pet. 620 [7 L. Ed. 287]. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive, or only prima facie sufficient, is a point on which the authorities are not in harmony. *Noyes v. Butler*, 6 Barb. [N. Y.] 618; *Hall v. Williams*,

6 Pick. [Mass.] 239 [17 Am. Dec. 356]; *Mills v. Duryea*, 7 Cranch, 481-487 [3 L. Ed. 411]. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect it only raises a suspicion that the animus amendi may have been wanting. It is insisted that Cheever never resided in Indiana, that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues. 2 Bishop on Marriage & Divorce, 475. The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence. *Ditson v. Ditson*, 4 R. L. 87." A number of other cases holding that the appearance of a nonresident defendant gives the court jurisdiction to enter a decree are cited in the note under this decision in 19 L. Ed. 605.

The personal service of summons on the defendant may be considered as equivalent to his appearance, so far as the giving of jurisdiction is concerned. Section 5084 of the Revised Laws provides: "From the time of the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him."

In the *Atherton Case*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 795, it was held that constructive service by mailing to another state notice of suit will make a decree granting a divorce as binding on the defendant as though service had been made with notice in the state where the suit was pending, or there had been voluntary appearance in the action. Any modification of that case or of the one of *Cheever v. Wilson* by the divided court of five to four in the *Haddock Case*, 201 U. S. 565, 26 Sup. Ct. 527, 50 L. Ed. 867, 5 Ann. Cas. 1, does not affect their application to this case; for there is nothing in the opinion of any of the justices concurring or dissenting which might have that effect. In the majority opinion in the *Haddock Case* it is said: "That where a court of one state, conformably to the laws of such state, or the state through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its

own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicile in the territory of Washington. Being there so domiciled, an act of the Legislature of the territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the territory of Washington to recover real estate situated in the territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice, and that she was not a resident of the territory when the act was passed. * * * The power of the territorial Legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the territory was, however, upheld, in view of the nature and extent of the authority which the government possessed over the marriage relation. It was therefore decided that the courts of the territory committed no error in giving effect within the territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy."

In the dissenting opinion of Justice Brown in the *Haddock Case*, concurred in by Justice Harlan, Brewer, and Holmes, it is said: "There is no doubt of the proposition that a decree of divorce may be lawfully obtained at the matrimonial domicile, notwithstanding that the defendant may have taken up his or her residence separate from the other party in another state, providing that the law of the domicile with respect to the personal service of publication be scrupulously observed. *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794. Doubtless the jurisdiction of the court granting the divorce may be inquired into, and, if it appear that the plaintiff had not acquired a bona fide domicile in that state at the time of instituting proceedings, the decree is open to a collateral attack (*Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804), and a recital in the proceedings of a fact necessary to show jurisdiction may be contradicted (*Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897;

Streitwolf v. Streitwolf, 181 U. S. 179, 21 Sup. Ct. 553, 45 L. Ed. 807; *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 866). Subject to these conditions, each state has the right to regulate the marital status of its citizens, at least so far as to determine in what manner and by whom marriages may be solemnized, what shall be deemed the age of consent, what obligations are assumed, what property rights are created, for what causes divorces shall be granted, for what length of time the domicile of plaintiff shall have been acquired prior to the institution of the proceedings, and in what manner notice shall be given to the defendant. Nor is the power of the Legislature in this connection ousted by the fact that the other party to the contract resides in another state, provided that in case of proceedings adverse to such party he or she shall be given such notice as due process of law requires. If such proceedings be in rem or quasi in rem, notice by publication is ordinarily deemed sufficient. But in case of actions in personam for the recovery of damages, personal service within the jurisdiction is vital to the proceedings. *Pennyoy v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Huling v. Kaw Valley R. & Improv. Co.*, 180 U. S. 559, 9 Sup. Ct. 603, 32 L. Ed. 1045."

McCARRAN, J. From the opinion of Judge NORCROSS, as well as the concurring opinion of Chief Justice TALBOT, I dissent.

STATE v. BESS.

(Supreme Court of Utah. Dec. 22, 1913.)

1. PARENT AND CHILD (§ 17*)—PROSECUTION FOR NONSUPPORT—DESTITUTION—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution of a father for failure and refusal to support his minor children, in violation of Sess. Laws 1911, c. 105, § 1, held to support a finding that such children were in destitute and necessitous circumstances.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

2. PARENT AND CHILD (§ 17*)—PROSECUTION FOR NONSUPPORT—DEFENSE.

In a prosecution of a father for failure to support his minor children, in violation of Sess. Laws 1911, c. 105, § 1, it was no defense that the destitution of the children was relieved by the charitable acts of third persons.

[Ed. Note.—For other cases, see *Parent and Child*, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

3. PARENT AND CHILD (§ 17*)—PROSECUTION FOR NONSUPPORT—WILLFUL DERELICTION.

Where, in a prosecution of a father for failure to support his minor children, in violation of Sess. Laws 1911, c. 105, § 1, the evidence conclusively showed that the custody of two boys had been awarded him by a divorce decree, and that the custody of the children concerning whom the complaint was made had been awarded to the mother, that he had nothing but his earnings, that the current and necessary expenses of himself and the two boys far exceeded his earnings, and that he did not remain idle when he could have obtained em-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ployment, or waste any part of his earnings, a verdict should have been directed in his favor; it being essential to sustain a conviction that he should have willfully neglected and refused, without just excuse, to provide for the children concerning whom complaint was made.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176-181; Dec. Dig. § 17.*]

Appeal from District Court, Salt Lake County; F. C. Loofbourow, Judge.

Robert E. Bess was convicted of having willfully neglected and refused to provide for the support of his minor children, and appeals. Reversed, with directions to dismiss.

S. P. Armstrong and A. E. Christensen, both of Salt Lake City, for appellant. A. R. Barnes, Atty. Gen., and E. V. Higgins and Geo. C. Buckle, Asst. Attys. Gen., for the State.

MCCARTY, C. J. The defendant was tried and convicted in the district court of Salt Lake county of the crime of having, on the 1st day of August, 1911, and continuously thereafter until the filing of the information (December 27, 1911), willfully neglected and refused, without just cause or excuse, to provide for the support and maintenance of Leona May Bess, aged 13 years, Inez Bess, aged 8 years, and Eva Bess, aged 5 years, he being then and there the father of said children, all of whom, it is alleged in the information, were in destitute and necessitous circumstances. The defendant was sentenced to imprisonment in the county jail for a term of three months. The information was filed and the action prosecuted under Sess. Laws 1911, c. 105, § 1. The provisions of the act, so far as material to the determination of the questions presented by this appeal, are as follows: "Any person who shall without just excuse, desert or willfully neglect or refuse to provide for the support and maintenance of his or her minor child or children under the age of sixteen years, in destitute or necessitous circumstances, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail at hard labor for not more than six months, or by both such fine and imprisonment." The record shows that the complaining witness, Mrs. Bess, and defendant were married April 12, 1893, and that six children, four girls and two boys, the issue of the marriage, were born to them. In May, 1911, Mrs. Bess obtained an interlocutory decree of divorce from defendant, which was made final in November, 1911. By the decree of divorce Mrs. Bess was awarded \$40 per month as alimony, and was given the custody of the four girls, and the defendant was awarded the custody of the two boys, Robert Vernal and Clarence Edward. The defendant, at the conclusion of

the state's case, moved for a directed verdict in his favor on the ground that the evidence failed to show the commission of the crime charged. The court overruled the motion. When the evidence was all in and both sides had rested, the defendant again requested the court to instruct the jury to return a verdict of not guilty. The refusal of the court to direct a verdict as requested by defendant is the principal error assigned, and involves the question of the sufficiency of the evidence to support the verdict returned by the jury and the judgment entered thereon.

[1] It is conceded that when the divorce was granted Mrs. Bess got what little property there was, which consisted of a small amount of furniture, the value of which was about \$100, and a piano; that since the granting of the interlocutory decree she has worked in a knitting factory, done sewing, and has at times been employed as a nurse; that during the time covered by the information her earnings were very small, and that the defendant during that period contributed \$5 only for the support of the children mentioned in the information. In fact it is in effect conceded that since the granting of the divorce it has been one continuous hard struggle for her to provide the commonest necessities of life for herself and the three children named in the information. The evidence shows that Leona Bess, the child 13 years of age, lived, a part of the time covered by the information, with a friend, a Mrs. Lenny. Mrs. Bess testified, and her evidence is not disputed: "I had her at home about a month, but found I could not support them (the children) on the wages I could make, * * * and I had to let her go. She went to Mrs. Lenny's in August, before school started. * * * She was not dressed comfortably at all. She had no underwear until after January, 1912, nothing except some old things that I had patched up that had been given to me for them. * * * Eva was with me during all the time. I furnished her with what she had. Did not have very much. She was not dressed as well as she is now [in the courtroom]. What she has got has been given to her. People gave me old things to make over. * * * Sometimes we went quite hungry. * * * There are times my children have been suffering."

The defendant testified, and his evidence is not disputed, that four months of the time covered by the information he and his son Vernal boarded at the home of a Mr. Barrett for which he agreed to give Barrett \$30 per month; that during a portion of this time he worked for Barrett and earned \$113; that Barrett paid him \$56 of his wages in money, and applied the balance in part payment of the amount due for his board; that in addition to the \$56 paid to him by Barrett he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

earned and received \$25 from other parties, a portion of which (how much does not appear) he paid for board, making \$81 in money that he received for wages during the time covered by the information; that from these wages he paid \$30 for medicines furnished and medical services rendered his son Clarence, paid \$16 for clothes for Vernal, and paid \$10 for clothes for himself, leaving a balance of \$25, a part of which, as above stated, was paid for board. On cross-examination he was asked the following question: "What did you do with this additional \$25?" He answered: "Why, some of it went to pay for the clothes, and some I paid for board." It is conceded that the defendant has no property of any kind other than his personal effects, and no income whatever except his daily wages.

The foregoing are, in substance, the facts of this case as established by the evidence.

[2] It is contended on behalf of defendant that the evidence is insufficient to support a finding by the jury that the children named in the information were in "*destitute and necessitous circumstances*" as contemplated by the statute," and that it wholly fails to show that the defendant without "just excuse" willfully neglected and refused to support or to contribute to the support of the children during the time covered by the information. We think there is sufficient evidence to sustain a finding that the children were in destitute and necessitous circumstances. The fact that the destitution and suffering of the children were relieved by the acts of kind and charitable friends does not, as counsel seem to contend, exculpate the defendant for his dereliction, if he were willfully derelict in failing to relieve the wants and suffering of the children by providing them with the common necessities of life.

Counsel for defendant, in support of their contention, cite and rely upon the following decisions from states having statutes similar to the one under which the defendant was prosecuted: *Baldwin v. State*, 118 Ga. 328, 45 S. E. 399; *Williams v. State*, 126 Ga. 637, 55 S. E. 480; *State v. Thornton*, 232 Mo. 298, 134 S. W. 519, 32 L. R. A. (N. S.) 841. These cases seem to support the contention made in behalf of defendant "that when children are provided for by either parent, even though able to so provide only by the grace or good offices of relatives, the other parent commits no offense under the statute by refusal or neglect to contribute to their support; that is, the children, when so provided for, are not in destitute or necessitous circumstances." There are, however, well-considered cases which, under the desertion and nonsupport statutes, hold that it is a violation of such statute for a husband and parent to willfully neglect or refuse to provide for the support of his wife and dependent minor children, regardless of whether they are supported and kept from actual destitution and want by the labor of the wife or by the charity of kind

and generous friends or relatives. *Poole v. People*, 24 Colo. 510, 52 Pac. 1025, 65 Am. St. Rep. 245; *People v. Malsch*, 119 Mich. 112, 77 N. W. 638, 75 Am. St. Rep. 381; *State v. Witham*, 70 Wis. 473, 35 N. W. 934; *Burton v. Commonwealth*, 109 Va. 800, 63 S. E. 464; *State v. Waller*, 90 Kan. 829, 136 Pac. 215. The object of the statute is to compel a parent to provide for the support and maintenance of his or her dependent minor children. To give the statute the construction contended for by defendant would, in most cases where the husband is prosecuted under the statute, enable him to excuse his delinquencies in willfully failing to provide for the support and maintenance of his family. He would be permitted to show, if such were the fact, that his neglected wife by her own labor and exertions had provided and was continuing to provide herself and the children with the common necessities of life; and he might also show that sympathetic and generous relatives or friends, or some charitable institution, had furnished, and were continuing to furnish, them with shelter, food, and clothing, thereby preventing actual physical suffering on their part. Therefore the effect of the statute, in so far as it is designed to aid in the enforcement of the continuing liability of the husband to provide for the support of his family, would, in the majority of cases, be counteracted by thus permitting him to use as a shield the motherly love and devotion of his neglected wife for her children and the hardships and privations endured by her for their sake—hardships caused in many cases by the husband's moral and legal wrong in willfully neglecting and refusing to support and provide for his family—and to interpose as a defense the fact, if it should be a fact, that his children are being properly supported and cared for by charity bestowed upon them by relatives, friends, and charitable institutions. In other words, we would have this anomaly: A defendant, whose family, because of his violation of a penal statute, is being sheltered, fed, and clothed by sympathetic friends or charitable institutions, interposing this same charity as a shield to protect himself from the penalties which the law imposes for the violation of the statute under which he is prosecuted. Such is not the intent or spirit of the law. To so hold would be to make a farce of the law and a mockery of justice.

In *State v. Waller*, supra, the court, in construing a statute which is almost identically the same as ours, among other things, said: "The duty of a husband to maintain his wife is * * * independent of the native disposition to generosity on the part of relatives, friends, and even strangers, which may be confidently relied on to protect a neglected woman from suffering and want. If a husband fail to provide his wife with the necessities of life, she is authorized to procure them on his credit, if she can. Civil remedies exist whereby support may be compelled.

But the duty is too often evaded in such a way that these measures are wholly inefficient. In view of this fact the Legislature undertook to provide a method and a sanction adequate to secure performance. The essence of the act is that a man shall not be allowed to shift the burden of supporting his wife and children upon others under no obligation to bear it, and possibly upon the state itself. Therefore, whenever a husband, without just cause, neglects or refuses to provide for the support and maintenance of his wife, and thereby places her in such a situation that she stands in need of the necessities of life, it is not material that they are supplied by her own labor or by sympathizing friends, relatives, or strangers, so that she does not in fact suffer from the privation. He is guilty if he leaves her in such circumstances that, without her own efforts or outside help, she would lack the necessities of life." The court also observed: "A man is not permitted to degrade his wife to the level of the brutes. Sustenance which barely meets animal needs, which does no more than relieve the pangs of hunger, cover nakedness, and afford shelter from the elements, is not support or maintenance. He is obliged to provide such a place of abode, such furniture, such articles of food, wearing apparel, and use, such medicines, medical attention, and nursing, such means for the education of children, and such social protection and opportunity as comport with health, comfort, welfare, and normal living of human beings according to present standards of civilization, considering his own means, earning capacity, and station in life." We have copied somewhat extensively from the Kansas case because the views therein expressed accord with our own notions regarding the intent and scope of the statute under consideration. But, even under the construction of the statute as contended for by defendant, the children here involved were in destitute circumstances. The undisputed evidence shows that the children actually suffered because they were not supplied with the common necessities of life.

[3] We are of the opinion, however, that the evidence fails to show such willful dereliction on the part of the defendant in failing to provide for the support and maintenance of the children as would make him amenable to the penal statute under which he was prosecuted. It will be noticed that the undisputed evidence shows that during the time covered by the information the current and necessary expenses of the defendant and the two boys, whose custody was awarded to him by the decree, far exceeded his earnings. It is not contended, or even suggested, that defendant, during the time mentioned, willfully or otherwise remained idle when he could have obtained employment; nor is it contended or suggested that he spent or wasted any part of the money earned by him in dissipation or riotous living. In fact the evidence affirmatively shows that

defendant is not addicted to the use of tobacco or spirituous liquors, and does not gamble. We think the evidence wholly fails to show willful neglect on his part as contemplated by the statute to provide for and support the children mentioned in the information. True, evidence was introduced showing that he failed to contribute anything for their support; but the evidence also shows that the current and necessary expenses of himself and two boys far exceeded his earnings during the time covered by the information, hence his neglect in that regard was not without "just excuse." Moreover, the record shows that on different occasions immediately preceding the time covered by the information Mrs. Bess had the defendant cited into court to show cause why he should not be adjudged guilty of contempt because of his failure to pay alimony as provided in the decree of divorce. It seems that on each occasion the defendant was discharged by the court. It does not appear, however, whether on those occasions the defendant procured his discharge by paying alimony or by satisfying the court that, because of circumstances for which he was not responsible, he was unable to do so. The evidence for the state does show that after the filing of the information, and about six weeks before the cause came on for trial, the defendant, by order of the court, paid Mrs. Bess \$10. It is therefore apparent that supplementary proceedings under the decree of divorce are much more effective in securing to Mrs. Bess and the children their legal rights than is the prosecution of the defendant in a criminal action. In supplementary proceedings the element of "destitute and necessitous circumstances" on the part of the children, and of "willful neglect" without "just excuse" on the part of the defendant to provide for their support and maintenance, is not essential in order to authorize the court to compel him to pay the alimony awarded by the decree, whereas in criminal proceedings it must be established by the evidence beyond a reasonable doubt that the children were in destitute and necessitous circumstances, and that the defendant without just excuse willfully neglected and refused to provide for their support and maintenance, before the defendant can be legally convicted. The defendant's request for a directed verdict in his favor should have been granted.

We think the record clearly shows that the defendant cannot, under any theory of the case, be legally convicted of the crime charged in the information. The judgment is therefore reversed, with directions to the trial court to dismiss the action.

STRAUP, J. I concur. Yet I do not think the defendant has done all he ought to have or could have done to support his children. Many a man would go hungry himself before he would let his children go hungry, or be-

fore he would cast the burden of their support on the labors of his wife, divorced from him or not. But I cannot penally punish a man who does not take that view of the matter, and who, unwilling to share his earnings, selfishly appropriates them to his own need and want, as here did the defendant. Of course the home was disrupted, the husband granted the custody of two children, the wife four, and awarded \$40 per month "permanent alimony." No other order was made requiring him to support or to contribute to the support of the children awarded to the wife; neither was there one relieving him from such duty or obligation. It may be assumed the court expected that the moneys ordered paid to the wife would be applied by her both to her support and that of the children awarded to her. At first the defendant made partial payments of alimony, and then ceased paying anything. There is no doubt that the wife and children awarded to her were in destitute circumstances. As testified to by her, demands were made on the defendant, which were answered by refusals and statements that he would pay no more alimony "until he got good and ready." She had him ruled in on orders to show cause. On one occasion she procured an order of arrest, but service of it, as testified to by her, was avoided by concealing himself. He himself testified that he forbade one of his employers paying one-half of his wages to his wife in response to an inquiry from his employer whether he should do so, stating, "I am paying my own bills." The time alleged in which he had willfully failed to support his children covered a period from August to December. During that time he did not pay anything to his wife, and contributed nothing to the support of the children awarded her. He also testified that covering that period he was employed about half of the time, and earned \$113. One of the children awarded to him was kept by his sister. He contributed \$30 towards its support for medical attention; nothing for board or care. The other child awarded to him was most of the time kept and maintained by him. Some of the time that child was with relatives. He testified it took all of the \$113 to pay his own board, clothes, shoes, hats, and shirts for himself, clothes for the two children and board for one of them; and that he still was indebted for board for himself and for both children. And then, I do not think he has satisfactorily explained why he was idle one-half of the time. He further testified that the custody of the children was the principal controversy in the divorce proceeding, and that "his folks" then, and at the time of this trial, were willing to take and were able to care for the children awarded to his wife, and that he desired his folks to have the children, but his wife was unwilling to surrender them. And there is the nub of

this controversy; his unwillingness that she have the custody of the children awarded to her by the court. I do not think he has made reasonable efforts to comply with the decree and pay the moneys required by him to be paid by it. I think he somewhat willfully disobeyed it and stood in defiance of it.

Now, where ought the rights and obligations with respect to such matters be vindicated and compliance with them enforced? Not through the criminal, but the civil, procedure. The latter is speedy and effective, and better than the criminal adapted to vindicate such rights and obligations, and to compel the defendant's obedience to and compliance with them. I, therefore, concur in the reversal of the judgment.

FRICK, J. I concur. As pointed out by the CHIEF JUSTICE, the marital relations theretofore existing between Mr. and Mrs. Bess had been legally dissolved for some time prior to the filing of the complaint in this case, and the six children, four girls and two boys, had been separated, the mother being awarded the girls while the father was given the care and custody of the boys, one of whom was sickly. The first duty of the father, therefore, was to provide maintenance for the boys, since he was especially charged by the divorce court with their care. If, however, he had ability to earn money, or had other means, the law still required him to provide maintenance for the girls, notwithstanding the fact that their custody had been awarded to the mother. But, as is said by the CHIEF JUSTICE, Mr. Bess, in his struggle to obtain the means of support, could hardly obtain sufficient for the two boys and himself, and was utterly unable to provide means for the mother or the girls. In view of this, it would be a somewhat peculiar administration of the law in question, to say the least, if it should be held that Mr. Bess should be punished for what he was utterly unable to prevent. Moreover, to imprison him could result only in depriving the little boys of their means of support. Such a result would be more or less tragic for them, to say the least. Would either the county, the state, or any one else, not excluding the mother and the four girls, be benefited by his imprisonment, and thus make the little boys also objects of charity, as it is contended is the case with the little girls? I think not. While the law in question is salutary, it nevertheless is of that character which requires it to be administered with some care so as to not produce more mischief by its enforcement in certain cases than can be prevented thereby. The law only punishes for a willful neglect of duty imposed by it, and the evidence is wholly insufficient to sustain a finding to that effect. I thoroughly agree with the comments of the CHIEF JUSTICE relative to the duty of a parent to provide for his children, but where it appears, as it

does in this case, that the parent is unable to discharge such duty, it would be a travesty of justice to punish him.

F. W. NIEBLING CO. v. JAMES COAL & ICE CO.

(Supreme Court of Utah. Dec. 23, 1918.)

1. SALES (§ 52*)—ACTION FOR PRICE—ACCEPTANCE OF CONTRACT—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for the price of machinery and supplies for an ice plant, wherein the defense was that there was no contract since plaintiff's acceptance of the proposal in its final form had never been communicated to defendant, *held* to sustain a finding that defendant had knowledge of plaintiff's acceptance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 118-144, 1045; Dec. Dig. § 52.*]

2. SALES (§ 364*)—ACTION FOR PRICE—INSTRUCTIONS—ACCEPTANCE OF CONTRACT.

Where, in an action for the price of machinery and supplies for an ice plant, there was evidence sufficient to justify a finding that defendant had knowledge of plaintiff's acceptance of the contract sued on, it was not error to instruct that notice of acceptance need not have been formally given, but that it would be sufficient if defendant had actual notice or knowledge thereof prior to the cancellation or withdrawal of the proposal made by him to plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—OBJECTION TO DEPOSITIONS.

Error, if any, in a ruling that plaintiff could put in evidence a portion of a deposition without introduction of the remainder was harmless where the whole deposition was read in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

Action by the F. W. Niebling Company, a corporation, against the James Coal & Ice Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

Joseph Chez and Halverson & Pratt, all of Ogden, for appellant. John E. Bagley, of Ogden, for respondent.

STRAUP, J. The plaintiff is an Ohio corporation doing business in Cincinnati; the defendant a Utah corporation doing business in Ogden. The plaintiff sued the defendant on an alleged breach of contract. The trial before the court and jury resulted in a judgment in favor of the plaintiff. The defendant appeals.

[1] The plaintiff was engaged in manufacturing and furnishing machinery and supplies for ice plants, and in installing them. It had a soliciting agent at Ogden. He also supervised the installation of machinery, or assisted in that work. Upon negotiations between him and the defendant, he submitted to it mostly a printed and a partially type-written proposal called "Specifications and

Proposal Made" and "Memoranda of Agreement Submitted" by the plaintiff with respect to machinery and supplies to be manufactured, furnished, and installed by the plaintiff for the defendant in the construction of an ice plant for it at Ogden. The instrument is lengthy, covering 26 printed pages of the abstract. It is dated October 29, 1910. It in detail specifies and describes the machinery and supplies to be manufactured and furnished by the plaintiff and the plant to be erected by it. It provides that the purchaser, the defendant, was "to furnish all buildings, complete foundations, masonry, and carpentry work," etc., and to have the premises and work ready for the erection of the machinery by April 1, 1911; the plaintiff to ship the machinery and supplies 120 days, and to install them 165 days, after "acceptance of contract." The price was \$28,850, payable in installments. It prescribes and defines many other covenants and obligations of the respective parties. The contract, as put in evidence, required the defendant to pay the freight from Cincinnati to Ogden, and shipments to be made 30 days earlier than heretofore stated upon 30 days' written notice by the defendant prior to shipments of the readiness of the building, etc. It further provides that "this proposal shall become a contract when accepted by purchaser (the defendant), and approved in writing by the" plaintiff at its home office in Cincinnati. It was accepted by the defendant in writing November 15th, and in writing approved by the plaintiff December 1st. The instrument thus, on its face, is a completed contract, signed and executed by both parties. But it was shown by evidence that the proposal or memoranda of agreement, when first submitted to and accepted and signed by the defendant, did not contain the provisions requiring the defendant to pay the freight, and shipments to be made 30 days earlier, and that the proposed agreement, so accepted by the defendant without these provisions, was delivered to the plaintiff's agent at Ogden, who forwarded it to the plaintiff at Cincinnati for approval. It was approved by it in every particular on December 1st; but it added the provision requiring the defendant to pay the freight, and then returned the proposed agreement to its agent at Ogden for submission to the defendant. It was submitted to it on December 5th. The defendant, on the 8th, approved that provision, and again accepted the agreement, but inserted the provision requiring shipments to be made 30 days earlier, and again delivered the agreement so approved and signed by it to plaintiff's agent and retained a duplicate. The agent at once forwarded the original to the plaintiff, who approved and accepted the agreement with the provision inserted by the defendant. But it was shown that the plaintiff did not, by writing or otherwise, directly

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

notify the defendant that it had approved and accepted such provision inserted by the defendant.

It, however, was shown by testimony on behalf of the plaintiff that it, on the last receipt of the agreement, at once proceeded to manufacture machinery and supplies called for by the agreement, and sent to the defendant maps and plans of the dimensions and kind of building and structures to be constructed by it under the contract; that blueprints of the floor plan, base, and foundation of the plant were sent to and received by the defendant on the 14th and 17th of December, and other maps and plans at different times between the 23d and 30th of December; and that, in pursuance of them and the agreement, the defendant "broke ground," and "laid off the foundation" for the erection of the necessary buildings and structures so to be constructed and prepared by it under the agreement. It was shown several conferences and consultations with respect to that were had between the defendant and the plaintiff's agent, and some work done by it. Machinery and supplies, with the defendant's knowledge, were ordered by the plaintiff's agent; some of it ordered at the defendant's request. That was also partly shown by the testimony of one of the defendant's officers in charge of the work in its behalf. As testified to by him, controversies arose between him and the plaintiff's agent as to the things to be done and furnished by the plaintiff under the agreement. He testified that he and the plaintiff's agent "had a disagreement right on the ground about the pump. I said to him, 'Where does the well go on this foundation plan for the pump?' He said, 'There ain't no pump.' I said, 'What! No pump in the contract?' He said, 'No; there is no pump.' I said, 'I know darned well there is a pump. How are you going to get water without a pump?' He said, 'There ain't no pump in the contract, and I'll just dig down in my pocket and furnish a pump.' That didn't sound good to me, and we (he and his associates) went and examined the specifications, and we saw they had been changed, and that a concrete ice tank had been substituted for a steel plate tank."

He further testified that he and his associates the next day went to their lawyer and "framed" a telegram and letter canceling the contract or agreement, which, in the telegram and letter, was called "order," and on the 24th of December sent and mailed them to the plaintiff at Cincinnati. The telegram is: "Radical changes have been made in our order by your agent Keener without our knowledge and consent and we hereby cancel the same. Letter follows." The letter is: "You are hereby notified to cancel our order dated October 29 and November 15, 1910, for a 30-ton plate ice plant that was to be installed for the undersigned, and we hereby countermand the same. We are not satisfied with

the order and the supplemental interpretations made of it by your agent, Mr. Keener. The express understanding was that the ice plant was to be erected by your engineer, Mr. Keener, and that the prices specified were to be f. o. b. Ogden, and not at your factory, as present order seems to provide. It was clearly understood between all parties that the machinery was to come from your factory direct, and not to be supplied and shipped from various places in the West. It seems that your agent, Mr. Keener, failed to include all the articles and pieces of machinery necessary to complete the ice plant, and now he is expecting us to supply said pieces of machinery and articles that he omitted to include, and which are a part of said plant, at an additional expense to us outside of the contract price. For instance, how could we expect to install and operate an ice plant without a pump? yet we are now told that the contract does not include a pump. We are also informed that your agent, Mr. Keener, expects to be compensated from us while installing the ice plant, while we were expressly made to believe that this was fully covered by the contract, and included in the order price. The alterations and omissions are certainly not satisfactory to us, hence we hereby notify you that, under the terms and provisions of the order giving us the privilege to countermand and cancel the same before January 1, 1911, we hereby cancel the order, and countermand the same, and you will govern yourself accordingly."

It was also shown that between the 15th and 25th of December representatives of competitors of the plaintiff appeared at Ogden and entered into negotiations with the defendant to build an ice plant for it at Ogden. As a result of such negotiations a contract to construct a plant for the defendant was entered into between the 25th of December and January 1st between the defendant and one of such competitors, who put up a plant at Ogden for the defendant, the foundation work of which was begun about the 1st of January.

The defense is this: (1) That there was no contract; and (2), if so, the terms of it were not as shown by the instrument put in evidence by the plaintiff. The first is based on the claim that, to constitute a meeting of the minds, notice of acceptance by the plaintiff of the provision requiring shipments to be made 30 days earlier, and which was inserted in the agreement by the defendant on the 8th of December, and after the plaintiff had accepted, approved, and signed the contract, was essential, and that no such notice was given. The second is based on the claim that the contract, when finally approved and accepted on the 8th, the original delivered to the plaintiff's agent, and by him forwarded to the plaintiff, and a duplicate retained by the defendant, contained provisions reserving to the defendant the

right, with or without cause, to annul and cancel the contract at any time before January 1st, and requiring the plaintiff to furnish a steel plate ice tank instead of a concrete tank. Neither the original contract nor the duplicate as produced by the parties contained such provisions. The defendant, however, as to that charged that the plaintiff's agent, after the delivery of the contract, surreptitiously obtained possession of the duplicate retained by the defendant, and abstracted therefrom 2 typewritten pages containing such provisions, and inserted in place of them 2 other pages not containing such provisions, and likewise, by some means not very clearly outlined, made such substitution in the original sent to the plaintiff. The defendant gave some evidence which, in a way, may be said tended to support the charge; plaintiff, much against it.

The court took the defendant's view that notice to the defendant of plaintiff's acceptance of the provision requiring shipments to be made 30 days earlier was essential to constitute a binding contract, and submitted the case to the jury on that theory. The defendant, however, contends that there is no evidence of such an acceptance, and for that reason the case ought to have been withheld from the jury. This is based on the contention that, to constitute such notice, it was essential that the plaintiff should have given it by some communication, either oral or in writing, in terms stating an acceptance, which was not done.

[2] And in this connection complaint is also made of the charge on that subject. The court, after charging that notice of such acceptance was essential, and to return a verdict for the defendant, if the jury found no such notice was given, further charged that, to constitute such notice, "it was not necessary" that it should have been given "formally and in express words," or "that the plaintiff should have used express language, and caused the same to be conveyed to the defendant of such acceptance. It would be sufficient if you find by a preponderance of the evidence that the defendant had notice or knowledge prior to the cancellation or withdrawal of the proposal that the said plaintiff was proceeding to carry out the terms of said contract." We think no error was committed in these particulars.

After the contract with the proviso inserted by the defendant was received and approved by the plaintiff, the defendant, before its attempted cancellation, received maps and plans for the buildings and structures to be built by it, and in which the machinery to be manufactured by the plaintiff was to be installed; staked and laid off the ground for the foundation, and had different consultations with plaintiff's agent as to the structures to be erected by the defendant in accordance with such maps and plans; itself

requested orders and had knowledge that plaintiff's agent was giving orders for machinery and supplies to be installed; had controversies and disagreements with the plaintiff's agent as to the things to be furnished and done by the plaintiff under the contract; and, in its letter canceling the "order" or contract, proceeded on the theory that there was a contract, and attempted to repudiate it upon the grounds that "we are not satisfied with the order and the supplementary interpretations made of it by" plaintiff's agent, that shipments of machinery were to be made directly from plaintiff's factory, and not from "various places in the West," that the necessary articles and pieces of machinery were not included, that plaintiff's agent "expects to be compensated from us while installing the ice plant, while we were expressly made to believe that this was fully covered by the contract, and included in the order price," and that "the alterations and omissions are certainly not satisfactory to us, hence we hereby notify you that, under the terms and provisions of the order giving us the privilege to countermand and cancel the same before January 1, 1911, we hereby cancel the order, and countermand the same," etc. All this justifies a finding that the defendant had knowledge of plaintiff's acceptance and approval of the contract as finally signed and delivered by the defendant, and that, not only the plaintiff, but the defendant as well, treated it as fully accepted and completed. If it in fact was not an existing and a completed contract, and was only what the defendant now regards it, a mere unaccepted proposal or offer, then did the defendant, in its letter, employ much useless and meaningless language to indicate a withdrawal of a mere unaccepted proposal or offer. The import of the letter shows it to be not such a mere withdrawal, but a repudiation of or withdrawal from an existing agreement on the grounds of mistake, noncompliance, alterations, and omissions, and especially on the ground that the agreement or the so-called order in express terms gave the defendant the right to withdraw from or abandon the contract or order at any time prior to January 1, 1911. And on that ground did the defendant, as stated in its letter, "countermand and cancel the same," and on the further ground, as testified to by its principal witness, its president, that "the cancellation was on account of the contract being changed by the purchaser (the defendant) furnishing the tank when we knew the company (the plaintiff) was to furnish it." When the defendant entered or was about to enter into a contract with the plaintiff's competitor, it did not even then claim or pretend that its dealings with the plaintiff constituted a mere unaccepted offer or proposal, but regarded them as consummated into an existing agreement, and sought to abandon or withdraw from it on the grounds

of noncompliance, alterations, and mistake, and of the reservation contained in it giving the defendant the option, with or without cause, to countermand and abandon it at any time prior to January 1st. So, on the defendant's theory adopted by the court that notice to the defendant of plaintiff's acceptance of the clause inserted by the defendant, requiring shipments to be made 30 days earlier, etc., was essential to complete the contract, and to render it binding, we think there is ample evidence to justify a finding of the defendant's knowledge of such acceptance, and that, in view of the evidence, the instruction as to what constituted sufficient notice or knowledge was not erroneous. Whether the agreement, when accepted and signed by the defendant, contained the provision giving it the option to countermand or withdraw from it at any time before January 1st was a disputed matter; the defendant contending that it did, the plaintiff that it did not. As to that the court instructed the jury to return a verdict for the defendant, regardless of all other questions, if they found that the proposed agreement or order, when accepted and signed by the defendant, contained such a provision. So the defendant had the full benefit of a submission of the case as to that issue.

Complaints also are made of the charge, and of some evidence received concerning the measure of damages. We do not think any error is shown as to that; at least, not of such character as to require a reversal of the judgment.

[3] Further complaint is made of a ruling relating to a deposition of one of plaintiff's witnesses. The plaintiff put in evidence only a portion of the direct examination as contained in the deposition. The defendant objected to that, urging that the plaintiff should read in evidence the whole deposition, both direct and cross-examination, and moved to strike the testimony read of the direct examination. The court overruled these objections, and remarked that the defendant could offer the portions not offered by plaintiff. Altercations followed as to what was read and what not, and finally by consent of counsel the whole of the deposition was read. That ought to end that. Why further trouble us with it?

We think the judgment should be affirmed, with costs. Such is the order.

MCCARTY, C. J., and FRICK, J., concur.

LINDSAY LAND & LIVESTOCK CO. v. SMART LAND & LIVESTOCK CO.

(Supreme Court of Utah. Nov. 24, 1913. Rehearing Denied Jan. 12, 1914.)

1. APPEAL AND ERROR (§ 713*)—QUESTIONS PRESENTED FOR REVIEW—RECORD.

As Utah Comp. Laws 1907, § 3197, as amended by Laws 1911, c. 94, providing what

shall constitute the judgment roll, does not include motions to quash the summons and service and to transfer the cause, the rulings of the trial court thereon cannot be considered, where they were not incorporated in the bill of exceptions, although they were improperly included by the clerk in the transcript of the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2379, 2463, 2645, 2956, 2957; Dec. Dig. § 713.*]

2. APPEAL AND ERROR (§ 905*)—REVIEW—PRESUMPTIONS.

It is presumed on appeal that rulings of the trial court are correct, until the contrary is shown by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3672; Dec. Dig. § 905.*]

3. APPEAL AND ERROR (§ 1053*)—REVIEW—HARMLESS ERROR.

Where the trial court improperly received hearsay testimony which was very brief and direct, and becoming convinced of his error ordered it stricken from the record, and directed the jury not to consider it, the improper admission of the evidence was not prejudicial error.¹

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4178-4184; Dec. Dig. § 1053.*]

4. EVIDENCE (§ 553*)—OPINION EVIDENCE—EXAMINATION OF EXPERTS.

Hypothetical questions to an expert witness may be based either upon all the facts of the case, or upon such facts in evidence which are sufficient in themselves to reflect the examiner's theory of the case, since each party has the right to propound hypothetical questions on his own theory.²

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.*]

5. PLEADING (§ 35*)—COMPLAINT—SUFFICIENCY.

As Comp. Laws 1907, §§ 60, 61, and 62, giving a right of action for the commingling of diseased animals with those not infected, do not make the right of action dependent upon a willfully commingling, an allegation that defendant willfully and negligently drove his diseased sheep with a herd of plaintiff's alleges more than is necessary, and the allegations of willfulness will be disregarded as surplusage.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76-80; Dec. Dig. § 35.*]

6. APPEAL AND ERROR (§ 525*)—RECORD—MATTERS INCLUDED.

Under Comp. Laws 1907, § 3151, providing that all instructions requested or given shall become part of the judgment roll, requests to charge are part of the record, even though not incorporated in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2376-2378; Dec. Dig. § 525.*]

7. APPEAL AND ERROR (§ 730*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

While, in order to properly present for review the action of the court in giving an instruction, the precise language given must be set out in the assignments of error, that is unnecessary where the assignment is based on the refusal of the trial court to charge as requested; it being sufficient to refer to the request refused by number.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

¹ Loofbourov v. Utah L. & Ry. Co., 33 Utah, 480, 94 Pac. 981; Groot v. Railroad, 34 Utah, 152, 96 Pac. 1019.

² Palmquist v. Mine & Smelter Supply Co., 25 Utah, 263, 70 Pac. 996.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

8. APPEAL AND ERROR (§ 231*)—PRESENTATION OF GROUNDS FOR REVIEW IN COURT BELOW—NECESSITY.

The reason for requiring specific objections in case of complaint of the charge given is to give the trial court an opportunity to correct his error, and, unless such exceptions and objections are made, the error will not be reviewed on appeal.³

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. § 231.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL.

Where requests to charge were covered by the instructions given, their refusal is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

10. APPEAL AND ERROR (§ 974*)—TRIAL (§ 349*)—SPECIAL INTERROGATORIES—DISCRETION OF TRIAL COURT.

While Comp. Laws 1907, § 3163, authorizes the trial court to direct the jury to make special findings upon all or any of the issues, the question whether special findings shall be submitted rests in the sound discretion of the trial court, which will not be disturbed unless abused.⁴

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3853, 3859; Dec. Dig. § 974.* Trial, Cent. Dig. §§ 823-827; Dec. Dig. § 349.*]

11. TRIAL (§ 350*)—SPECIAL VERDICT—SUBMISSION.

In an action for damages for commingling diseased sheep with plaintiff's healthy animals, it was not an abuse of discretion on the part of the trial court to refuse to submit special issues to the jury because there were different items of damages.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 828-833; Dec. Dig. § 350.*]

12. APPEAL AND ERROR (§ 1066*)—REVIEW—HARMLESS ERROR.

Where the charge fully protected defendant's rights, the improper inclusion of two immaterial sections of the statute was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

13. APPEAL AND ERROR (§ 1001*)—REVIEW—FINDINGS.

A verdict will not be disturbed on appeal, where there is substantial evidence in its favor.⁵

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3923-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Weber County; N. J. Harris, Judge.

Action by the Lindsay Land & Livestock Company against the Smart Land & Livestock Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Stewart, Bowman & Morris, of Salt Lake City, for appellant. H. H. Henderson, of Ogden, for respondent.

FRIOK, J. In January, 1912, the respondent, a corporation, commenced this action against the Smart Land & Livestock Com-

pany, a corporation, and also against one Thomas Smart. The action was commenced to recover damages to respondent's sheep, which, it was alleged, were caused by the defendants driving their sheep and commingling them with the sheep of respondent after the defendants knew that their sheep were afflicted with a contagious and infectious disease, thereby causing respondent's sheep also to become affected with said disease, by reason of which it was compelled to dip said sheep, after which many died, and that others which did not die depreciated in value to respondent's damage. Respondent also asked to recover the cost and expenses of dipping said sheep. The action was commenced in the district court of Weber county, Utah. The defendants were, however, served with summons in Cache county, while the acts complained of occurred in Box Elder county, this state. After interposing the motions hereinafter mentioned, the defendants answered the complaint, denying the alleged negligence and wrongs, and also set up an affirmative defense not material here. A trial to a jury resulted in a verdict against the defendant Smart Land & Livestock Company only, and it prosecutes this appeal.

[1, 2] Counsel for appellant vigorously insist that the judgment should be reversed and the cause remanded for a new trial for the reason that the district court of Weber county erred in overruling the motion of both defendants to quash the summons and the service thereof, and further erred in refusing to grant their motion to transfer said action to Cache county, the home of said defendants. We cannot review either of the foregoing rulings, because neither of the motions aforesaid, nor the evidence in support thereof, are made a part of the record on appeal. Counsel, in their brief, refer us to certain pages of the "transcript" as containing the motions and evidence in support thereof, and the rulings of the court thereon. By referring to those pages we find that the matters referred to are included with what, under our practice, constitutes the judgment roll. Comp. Laws 1907, § 8197, as amended by Laws 1911, p. 136, specifically defines what shall constitute the judgment roll. Neither the objections to the summonses nor to the service thereof, nor the motion to transfer the case are part of the judgment roll, and therefore, in order to bring these matters up for review on appeal, they must be allowed and certified by the trial court. That was not done. By referring to the bill of exceptions, we find that it is composed of 516 typewritten pages and is specifically limited to the "testimony and other evidence adduced * * * and objections and exceptions of counsel and rulings of the court thereof" produced and made at the trial. The district court certifies to what is contain-

³ Farnsworth v. Union Pac. Coal Co., 32 Utah, 112, 39 Pac. 74.

⁴ Genter v. Conglomerate Min. Co., 23 Utah, 165, 64 Pac. 263; Mangum v. Bullion, Beck & Champion Min. Co., 15 Utah, 534, 50 Pac. 834.

⁵ James v. Robertson, 39 Utah, 414, 117 Pac. 1063; Harris v. Laundry Co., 39 Utah, 436, 117 Pac. 700.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed in those 516 pages and to nothing else. The transcript to which counsel have referred us is composed of 81 pages in which are included all of the matters comprising the judgment roll, together with many matters that were inserted by the clerk and which perform and can perform no function whatever, among which latter are included the matters complained of as before stated. From what has been said it follows that under the practice prevailing in this state there is nothing before us from which we can judicially know or determine whether the trial court erred or not with respect to the rulings complained of. The presumption that the rulings of that court are correct until the contrary is affirmatively made to appear must therefore prevail.

[3] The next assignment relates to the admission in evidence of certain statements of a witness called by respondent. The witness, over appellant's objection and exception, was permitted to state that he received a certain report from his subordinates, who were official sheep inspectors, respecting the diseased condition of appellant's sheep at a certain time and place. The statement of the witness in this regard was very brief and direct. The trial court, after having admitted the evidence, became convinced that he had erred in doing so, and the record discloses that he, on his own motion, advised counsel that after reflection he had concluded that the evidence of the witness relating to the report aforesaid was hearsay, and hence should have been excluded. The court therefore suggested to counsel that, if they desired the statement of the witness stricken from the record, he would grant their request. Appellant's counsel thereupon moved that the testimony of the witness be stricken, which motion was sustained, and the statement of the witness was eliminated from the evidence and the jury were specially instructed not to consider the statement of the witness for any purpose. Counsel for appellant, at the time at least, seemed to be satisfied with this ruling, while counsel for respondent excepted to the action of the court in withdrawing the evidence from the jury. Assuming, for the purposes of this decision, that notwithstanding the granting of the motion to strike the evidence, appellant did not thereby waive or lose its right to insist upon its original objection and exception, yet we think that the matter comes squarely within the rule laid down by this court in the cases of *Loofbourrow v. Utah L. & Ry. Co.*, 33 Utah, 480, 94 Pac. 981, and *Groot v. Railroad*, 34 Utah, 152, 96 Pac. 1019, where we held that by striking the evidence and instructing the jury to disregard it the original error, if one was committed, was cured. While we do not wish to be understood as holding that under no circumstances may a party predicate error upon the admission of evidence after it is

stricken from the record and the jury are instructed to disregard it, yet where, as in this case, the evidence stricken is directed to be one particular matter, and is brief, and can easily be segregated and distinguished from all the other evidence, and it is apparent that no prejudice has resulted, the error, if any has been committed in admitting the evidence, may be deemed as cured by striking it, and by instructing the jury to disregard it. In matters of this kind no hard and fast rule can be laid down which shall control in every case. Much depends upon the nature or character of the evidence that is sought to be stricken. The only safe rule to follow is that, if after giving the matter due consideration the court is satisfied that no prejudice resulted from the admission of the evidence which is stricken, the verdict should stand; otherwise not. In view of the whole case, we are clearly of the opinion that in this case no prejudice resulted, and hence the assignment must fail.

[4] It is next contended that the court erred in permitting certain hypothetical questions to be propounded to and answered by an expert witness, upon the ground that the facts detailed in the questions did not sufficiently reflect the evidence. This contention is untenable. We think that under the rulings of this and other courts the question objected to was not objectionable upon the ground stated. The question was sufficient, and clearly comes within the rule laid down by this court in *Palmquist v. Mine & Smelter Supply Co.*, 25 Utah, page 263, 70 Pac. 996, where it is said: "Hypothetical questions to an expert witness may be framed either upon all the facts in the case or upon any part of the facts assumed to be true which is sufficient in itself." That is, the party producing the expert and propounding the question may do so upon his own theory of the case, and, so long as he sufficiently reflects the evidence which goes to establish his theory, the question is not objectionable upon the ground that all the evidence in the case is not reflected in the question. See cases cited in the *Palmquist Case*, supra.

[5] It is further asserted that the court erred in omitting the word "willfully" from its instruction in charging the jury with respect to appellant's acts in permitting its infected sheep to commingle with those of respondent, which were claimed not to have been infected. The contention is based entirely upon the fact that in framing the complaint the pleader alleged that the appellant, after it knew its sheep were afflicted with a contagious and infectious disease, had "willfully and negligently" driven them among those of the respondent, and had thereby caused the latter sheep to become infected with the disease aforesaid. Under our statute (Comp. Laws 1907, §§ 60, 61, and 62) it was not necessary to allege or prove that the diseased sheep were willfully inter-

mingled with others, but it was sufficient if such intermingling were done or permitted after the person who is charged with the wrong knew that his sheep were "afflicted with a contagious or infectious disease." The case, therefore, is one where the complaint alleged more than the plaintiff was required to prove in order to recover. This is often the case, and where, as in the case at bar, the allegation does not relate to a matter of description, that is, to matters of identity, but refers to matters of substance, it is not necessary to prove more than the law requires, although more is alleged. This is elementary doctrine, and needs no citation of authorities. The court, therefore, did not err in omitting the word "willfully" from the charge.

[8] It is next contended that the court erred in refusing certain of appellant's requests to charge. Counsel for respondent, however, insists that we cannot review the alleged errors, for the reason that the several requests are not properly presented for review. In this connection counsel for respondent contends that the requests are not properly made a part of the record on appeal, but if they are, that the exceptions are nevertheless insufficient. These contentions are not tenable. Under our statute (Comp. Laws 1907, § 3151) "all instructions requested or given * * * become a part of the judgment roll." The requests to charge are therefore properly in the record.

[7, 8] In order to dispel some apparent confusion which seems to exist in the minds of some attorneys, we shall once for all state here that, in presenting to this court an exception to the refusal of the trial court to charge as requested, it is not necessary to do more than to refer to the request refused by number, or by clearly identifying it in some other way. It is not necessary to set forth the request at large in the exceptions or assignments of error as contended for by counsel for respondent, but this may be done in the printed abstract or in counsel's brief. While it is true that in order to properly present to this court for review an instruction given by the court, which is claimed to be erroneous, it is ordinarily necessary to set forth the precise language of the charge that is claimed to be erroneous, yet such is not the case where an exception is taken to a refusal to charge as requested. The reason for the rule is obvious. When the trial court charges the jury, any defect or omission or misstatement of the law should be clearly pointed out to that court, so that it may be corrected before the jury has passed on the case. Where it is contended, therefore, that only a portion of a paragraph is faulty, the particular portion must be pointed out in the trial court by the party excepting, so that the court may know just what is excepted to. If this be not done, the trial court has no means of knowing to what point or matter or thing the exception is directed,

and hence is unable to supply an omission or to correct an incorrect statement of the law. The rule is intended to aid the trial courts in correcting erroneous statements of the law, and in supplying omissions in instructions, and if strictly enforced will tend to correct many errors that otherwise would go undetected. See *Farnsworth v. Union Pac. Coal Co.*, 32 Utah, 112, 89 Pac. 74. Of course where the whole charge is bad, or where the whole of the paragraph excepted to is erroneous, an exception to the whole is sufficient. Where, however, the exception goes to a whole paragraph, or to the charge as a whole, the exception cannot be reviewed, unless the whole paragraph or the charge as a whole, as the case may be, is bad. In making a request, however, the trial court has the whole request before it for inspection, and unless it is good as a whole the court may reject it with impunity. If it is rejected, all that is necessary to do by the party who makes the request is to note his exception and file the request with the clerk, and thus make it a part of the judgment roll as provided in the statute. This was done in this case and hence the requests are properly before us for review.

[9] We have carefully read all the requests and have compared them with the court's charge, and after doing so we are convinced that the appellant has no cause for complaint. The requests were quite numerous, and the trial court in some instances incorporated them in full and in other instances merely incorporated the substance thereof in its charge. The appellant, however, received the full benefit of its requests whenever they were proper. We have also carefully examined into and considered appellant's exceptions to the charge of the court as given. The charge is exceptionally full for a case of this kind, and in view that the court adopted requests from both sides the charge is quite long and contains some unnecessary repetitions. The charge as a whole is, however, as fair to appellant as it well could be made. We refrain from setting forth any portion of the charge, because to do so would extend this opinion beyond proper limits, and could subserve no good purpose either in this or in any other case.

[10] It is also contended that the court erred in refusing to submit to the jury certain special findings requested by appellant. While it is true that under our statute, Comp. Laws 1907, § 3163, the trial court may direct a jury to make special findings upon "all or any of the issues," yet whether or not special findings should be submitted to the jury in any given case is, under our decisions, a matter left to the sound discretion of the trial court. *Genter v. Conglomerate M. Co.*, 23 Utah, 165, 64 Pac. 362; *Mangum v. Bullion-Beck M. Co.*, 15 Utah, 534, 50 Pac. 834. It may be that a trial court, under certain circumstances, may abuse the discretion vested in it in refusing to submit

special findings, but, unless it is made to appear that such discretion has been abused, we are not authorized to review the action of the trial court with respect to the submission or the refusal to submit special findings.

[11] It is argued in this case that, inasmuch as respondent sought to recover damages for loss of sheep by death, for damages sustained in dipping the sheep, and also for the depreciation of the value of those sheep which did not die, therefore appellant was entitled to know just how much the jury allowed for each one of the foregoing elements of damages. In cases where several elements of damages are involved, it no doubt would sometimes be of interest to the losing party, at least, to know just how much he is required to pay for each separate element. While this may be so, it does not follow that he is legally prejudiced if he is not judicially informed with regard to that matter. If, for instance, in this case we should hold that the refusal to submit to the jury the special findings requested constitutes prejudicial error, then it unavoidably follows that in every case where there are a number of items or elements of damages a refusal to direct the jury to specially find upon each one would constitute error. The foregoing statement, without more, clearly demonstrates that the matter is one that should be left to the sound discretion of the trial court. Nothing is made to appear in this case from which we can determine whether the trial court abused its discretion or not.

[12] Error is also assigned because the court copied two sections of our statute in its charge to the jury. It is contended that the sections copied were not applicable. Although this be conceded, yet we cannot see wherein appellant was harmed. Quite independent of these sections the court, as we have already remarked, very fairly and fully charged the jury upon all questions of law arising in the case. It is quite clear that the appellant could not have been prejudiced by reason of what the court did in copying said sections into the charge.

[13] Finally it is contended that the evidence is insufficient to sustain the findings of the jury. We cannot yield assent to this contention. While it may be that upon one or two phases of the case we might perhaps have arrived at a conclusion other than the one reached by the jury, yet there is ample evidence in support of each essential fact found in favor of respondent. The most that can be said is that the evidence is in sharp conflict on some essential matters, and that perhaps in the judgment of some, if appellant's witnesses were believed, the weight of the evidence is contrary to some of the findings. This, however, does not authorize us to interfere with the verdict. Where there is some substantial evidence in support of every essential finding, this court is pow-

erless and cannot interfere. This rule has become elementary in this jurisdiction. For very recent cases, see *James v. Robertson*, 39 Utah, 414, 117 Pac. 1068, and *Harris v. Laundry Co.*, 39 Utah, 436, 117 Pac. 700.

After a careful scrutiny of the entire record we are constrained to hold that the trial court committed no reversible error. The judgment is therefore affirmed, with costs to respondent.

McCARTY, C. J., and STRAUP, J., concur.

KEINATH, SCHUSTER & HUDSON v.
REED.

(Supreme Court of New Mexico. Dec. 5, 1918.)

(Syllabus by the Court.)

1. BROKERS (§ 82*)—ACTION FOR COMMISSIONS—ANSWER—ISSUES OF LAW.

In an action for commission earned by a broker in effecting an exchange of property of his principal, where the complaint pleaded a written contract of employment of the broker by the principal to make an exchange and a written contract of exchange between the principal and a customer procured by the broker, an answer which alleged (a) that the principal had not accepted the property of the customer; (b) that the principal had not accepted the customer as a proper party with whom to make an exchange other than on the terms of the written contracts entered into by them; (c) that the written contracts of exchange were intended by the parties to be merely stipulations by which an exchange of property might be effected, and not a valid, binding, and enforceable contract of exchange; (d) that the broker had not done all he was required to do in order to earn his commissions; (e) that the customer had failed to perform his part of the contract—tendered issues of law and not of fact.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 101-103; Dec. Dig. § 82.*]

2. PLEADING (§ 345*)—MOTIONS—JUDGMENT ON PLEADINGS.

Where the answer raises issues of law only, the case is ripe for judgment on the issues of law involved, and a motion for judgment on the pleadings is properly entertained.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1055-1059; Dec. Dig. § 345.*]

3. BROKERS (§ 51*)—PERFORMANCE OF UNDERTAKING—WHAT CONSTITUTES.

Under an employment to sell or exchange the property of his principal, a broker has fully performed his undertaking when he procures a customer with whom the principal makes a valid contract of sale or exchange.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 69; Dec. Dig. § 51.*]

4. BROKERS (§ 54*)—RIGHT TO COMMISSION—PERFORMANCE.

In an action by a broker for commissions earned by him in effecting an exchange of the property of his principal, where the complaint pleads a valid and enforceable written contract, between the principal and a customer procured by the broker, to exchange property, it was not necessary for the complaint to allege that the customer was "in a position and able to convey a perfect title to the property which he proposed to exchange."

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. BROKERS (§ 54*)—PERFORMANCE OF CONTRACT—ACCEPTANCE OF CUSTOMER.

In such a case the principal, by entering into a contract of exchange with the customer produced by the broker, accepted the customer as able, ready, and willing to make the exchange.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 75-81; Dec. Dig. § 54.*]

6. DAMAGES (§ 78*)—LIQUIDATED DAMAGES AND PENALTIES.

A stipulation that "both parties hereunto have this day deposited in escrow with K., S. & H. this contract and a copy of the original contract, his demand note for \$1,000 as evidence of good faith and as a forfeit in event either party hereto fails or refuses to comply with the terms of the contract as therein provided," held to be a penalty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

7. BROKERS (§ 82*)—ACTION FOR COMMISSION—COMPLAINT—SUFFICIENCY.

In an action for a broker's commissions for effecting an exchange of real estate, where the complaint states the making of a valid written contract of exchange between the principal and the customer procured by the broker, the complaint need not further state that the customer was able, ready, and willing to complete the exchange on the terms of the contract, or that he made any effort to that end, or the refusal of the principal to complete it.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 101-103; Dec. Dig. § 82.*]

8. CONTRACTS (§ 175*)—CONSTRUCTION—EVIDENCE.

In an action based upon a written contract which is admitted by the answer, the intentions of the parties as to what should be the effect of the contract is to be decided by the court upon an inspection of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 766, 978, 1010, 1067-1069, 1786, 1803, 1810; Dec. Dig. § 175.*]

9. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTION OF LAW.

An allegation in the answer of what the parties intended or did not intend the contract should effectuate raises a question of law to be decided by the court.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

(Additional Syllabus by Editorial Staff.)

10. DAMAGES (§ 78*)—LIQUIDATED DAMAGES AND PENALTIES—"FORFEIT"—"MULOT"—"FINE"—"PENALTY."

The word "forfeit," in its ordinary use in cases, is synonymous with "mulot," "fine," or "penalty." (*Citing Words and Phrases*, vol. 2, p. 2893. See, also, vol. 8, p. 7665; vol. 5, p. 4616; vol. 8, pp. 2810-2813; vol. 6, p. 5272-5276; vol. 8, p. 7750.)

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

Appeal from District Court, Eddy County; McClure, Judge.

Action by Keinath, Schuster & Hudson, a partnership, against J. D. H. Reed. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellee, plaintiff below, brought this action to recover the sum of \$500 as a commission for the sale of certain real estate belonging to the appellant. The complaint alleges: (a) That on or about the 13th day

of June, 1912, the defendant was the owner of certain real estate, and that defendant listed said real estate with plaintiff for sale or exchange, by executing a written list contract, a true copy of which is attached to the complaint marked "Exhibit A." The listing contract recites: "I, J. D. H. Reed, hereby authorize and appoint Keinath, Schuster & Hudson, of Artesia, N. M., as my agent to sell or exchange the within described real estate, now owned by me to wit: [Describing the real estate and prices fixed.] For services rendered by said agent in making the sale of said land, or being instrumental in any manner whatsoever in selling or transferring said property, I agree to pay to said agent a commission of five hundred dollars."

(b) That acting by authority of and in pursuance to the agency so created the plaintiff did procure one G. E. Shackleton, who was an acceptable party to defendant, and with whom defendant entered into a valid binding written contract, providing for the exchange of said defendant's real estate for certain real estate of the said Shackleton, a copy of which written contract is attached to the complaint as a part thereof and marked "Exhibit B." By the contract mentioned the defendant and Shackleton agree to exchange properties, each assuming certain incumbrances existing on the other's property, each to have full and peaceable possession of the property of the other on or about October 1, 1912, or as mutually agreed otherwise, with the further provision that Shackleton was to have until July 10, 1912, to investigate and approve the property he was trading for. (c) That on the 6th day of July, 1912, the defendant and Shackleton entered into another written contract, designed and intended to be a continuation of contract herein referred to as Exhibit B, which supplemental contract is attached to and made a part of the complaint and marked "Exhibit C," and at the same time the defendant and Shackleton executed their promissory notes each for the sum of \$1,000, payable on demand, copies of which notes are attached to the complaint as parts of Exhibit C. The contract marked "Exhibit C" is as follows: "Continuation of contract of sale made between G. E. Shackleton, party of the first part, and J. D. H. Reed, party of the second part, in the exchange of the several properties as provided for, in the original contract made and executed in Pallsade, Colo., on June 28, 1912, witnesseth: Party of the first part has this day accepted the property of party of the second part, and agrees to accept the trade and deed his property to said second party as provided for in the original contract above mentioned and of which this is a part. Both parties hereunto have this day deposited in escrow with Keinath, Schuster & Hudson this contract and a copy of the original contract, his demand note for \$1,000 as evidence of good faith and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as a forfeit in event either party hereto fails or refuses to comply with the terms of the contract as therein provided." The note of Shackleton was payable to Reed, and vice versa. (d) That at the time defendant entered into said contract the defendant accepted said Shackleton as a proper and suitable person with whom to make such contract, and that plaintiff, "acting in good faith, did all it was requested or required to do by defendant in the way of effecting a valid and binding contract aforesaid, did by its efforts become the procuring cause in producing for said defendant the said G. E. Shackleton for the purposes aforesaid."

The defendant's answer admits (a) the execution of Exhibit A; (b) admits that appellee procured Shackleton to exchange property with him, but denies that he entered into a valid and binding contract with said Shackleton, but admits he did enter into a stipulation, setting out the terms upon which he and Shackleton were to exchange properties, and that Exhibit B attached to the complaint is a copy thereof; (c) admits the execution of contract Exhibit C attached to the complaint and the notes therein mentioned, but denies that the notes were to be a payment on the properties, or for any other purpose, except to be a forfeit and for the special purpose of indemnifying each, respectively, against the loss which they might sustain in case the other failed to perform his part of the stipulation by which the sale was to be effected, or to perfect the sale; and further denies that defendant accepted the property of G. E. Shackleton, except upon the condition of the original stipulations by which the exchange was to be made between defendant and G. E. Shackleton; (d) denies that he accepted Shackleton as a proper and suitable party with whom to make such contract as was made, "except on the condition and with the understanding that the said Shackleton would perform his part of the stipulation in the contract; and denies, further that the plaintiff did all that was required of it in the way of effecting a valid and binding contract between defendant and Shackleton." By way of new matter the defendant in his answer alleged: (a) That he employed the plaintiff to sell or exchange his property, as is stated in the copy of listing contract Exhibit A, of plaintiff's complaint, and that plaintiff was not to have any commission on the exchange of the property unless the exchange was perfected or completed; that the contract Exhibit B was intended to be a stipulation upon which he and Shackleton were to exchange properties, and was not a valid, binding, and enforceable contract of sale; (c) that the notes set out in Exhibit C were executed for the purpose of indemnifying himself and Shackleton, in damages, in case the other party failed to perform his part of the stipulations in the contract Exhibit B and for no other reason; (d) that the said Shackleton failed to per-

form the stipulation in his contract Exhibit B, and for that reason the exchange of property was never effected between defendant and Shackleton.

Plaintiff moved for judgment in its favor upon the pleadings. Motion granted, and judgment rendered as prayed in the complaint.

J. B. Atkeson, of Artesia, for appellant.
C. A. McCrary, of Artesia, for appellee.

MECHEM, District Judge (after stating the facts as above). [1, 2] 1. Appellant insists that by his answer he raised the following issues of fact: (1) Whether or not appellant accepted the property of Shackleton; (2) whether or not appellant accepted Shackleton as a proper party with whom to make an exchange other than upon the conditions in the contract or stipulation, Exhibit B; (3) whether or not appellee had done all it was required to do in order to earn its commission; (4) whether or not the contract or stipulation, Exhibit B, between appellant and Shackleton, was intended to be a stipulation by which an exchange of property was to be effected, or whether it was intended to be a valid, binding, and enforceable contract; (5) whether or not the contracting party, Shackleton, failed to perform the contract or stipulation, Exhibit B, and if that was the reason why the exchange was never effected between appellant and said Shackleton. Argument is not required to demonstrate that the issues raised on these points were issues of law and not of fact. The question whether Shackleton's failure to comply with his agreement was a good defense will be discussed hereafter, but the allegation of that fact presented no issue, because admitted by the motion for judgment. As the pleadings stood, the case was ripe for judgment on the issues of law involved, and the motion for judgment was properly entertained.

[3] 2. It is contended by appellant that the appellee does not plead a performance of the terms of its employment, because the exchange of properties was not consummated. The law is well settled that, under an employment to sell or exchange the property of his principal, a broker has fully performed his undertaking when he procures a customer with whom the principal makes a valid contract of sale or exchange. *Shepherd-Teague Co. v. Herman*, 12 Cal. App. 394, 107 Pac. 622; *Ward v. Cobb*, 148 Mass. 518, 20 N. E. 174, 12 Am. St. Rep. 587; *Wilson v. Mason*, 158 Ill. 304, 42 N. E. 134, 136, 49 Am. St. Rep. 162; *Odell v. Dozier*, 104 Ga. 203, 30 S. E. 813; *Scully v. Williamson*, 26 Okl. 19, 108 Pac. 395, 27 L. R. A. (N. S.) 1089, Ann. Cas. 1912A, 1265; *Kalley v. Baker*, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542.

[4, 5] 3. Nor, as claimed by counsel, was it necessary for appellee to aver that Shackleton was "in a position and able to convey a perfect title to the property which he pro-

posed to exchange to defendant." By entering into the contract of exchange the appellant accepted Shackleton as able, ready, and willing to make the exchange.

In *Roche v. Smith*, 176 Mass. 595, 58 N. E. 152, 51 L. R. A. 510, 79 Am. St. Rep. 345, the court said: "It was held in *Knapp v. Wallace*, 41 N. Y. 477, where the broker was employed to find a person to convey land to be paid for in money, and in *Kalley v. Baker*, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542, where the broker was employed to find a person to convey land to be paid for by a conveyance of other land—that is to say, to effect an exchange—that, where the principal makes a valid agreement with the customer produced by a broker, the broker has earned his commission, even if it turns out that the customer cannot make a good title and the land is not conveyed, provided the broker acted in good faith in the matter. In the opinion of a majority of the court those cases were rightly decided. The question is the same in the two cases; the only difference is that in one case payment is to be made in money, in the other by a conveyance of other land. * * * The ground on which this is settled is that by entering into a valid contract with the customer produced by the broker the principal accepts the customer as able, ready, and willing to buy the land and pay for it."

In *Fox v. Ryan*, 240 Ill. 391, 88 N. E. 974, the reason for this doctrine is well stated: "The vendor of property is not required to accept a purchaser without opportunity for investigation as to his ability to comply with the terms of the contract, but where he does accept such purchaser, uninfluenced by fraud or misrepresentation, it is a determination by him of the purchaser's ability to perform his contract, and, if the purchaser afterwards fails to perform it, the seller cannot defeat the broker's commissions on the ground that the purchaser was not able to buy the property."

[6] 4. Appellant insists that the contract is not enforceable, because of the provision in regard to the notes deposited by the parties in escrow "as evidence of good faith and as a forfeit" for nonperformance. In his answer the appellant alleged that these notes were given for the purpose of indemnifying the party not in default in damages. The contract, however, speaks for itself, as its language is plain. It appears conclusively that the notes were given simply for the purpose of securing the performance of the contract.

[10] The word "forfeit," in its ordinary use in cases of contract is synonymous with "mulct," "fine," or "penalty." *State v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; and see other cases cited in *Words and Phrases*, vol. 3, p. 2893.

In the case of *Van Buren v. Digges*, 52 U. S. (11 How.) 461, 467 (13 L. Ed. 771), the

court said: "The second exception by the defendant states that, in addition to the evidence previously tendered by him, he offered proof tending to show * * * that the amount of 10 per centum on the contract price stipulated to be forfeited if the house was not entirely finished and ready for occupation, as therein provided, on the 25th of December, 1844, was intended by the parties as and for liquidated damages, that would result and fairly belong to the said defendant by reason of said failure to finish the said house on the 25th of December, 1844, and that the court refused to hear the evidence thus tendered. In the refusal of the court to admit the evidence thus tendered we think they decided correctly. It would have been irregular in the court to go out of the terms of the contract, and into the consideration of matters wholly extraneous, and with nothing upon the face of the writing pointing to such matters as proper or necessary to obtain its construction or meaning. The clause of the contract providing for the forfeiture of 10 per centum on the amount of the contract price, upon a failure to complete the work on a given day, cannot properly be regarded as an agreement or settlement of liquidated damages. The term 'forfeiture' imports a penalty. It has no necessary or natural connection with the measure or degree of injury which may result from a breach of contract, or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by courts of justice, who leave it to be enforced where this can be done in its real character, viz., that of penalty."

We do not decide that a provision for liquidated damages in a contract such as this renders is unenforceable, but that in this case the provision considered is plainly in the nature of a penalty to secure the performance of the contract, which of itself is no bar to specific performance.

[7] 5. From the law announced on the question above discussed it follows that the further objections of the appellant, viz., that the complaint failed to state a cause of action because it is not alleged that Shackleton was able, ready, and willing to complete the exchange on the terms of contract B, or that he made any effort to complete the exchange, or that the defendant refused to complete the exchange of properties, and that the court erred in holding that, by entering into the contract, the appellant accepted Shackleton as able, ready, and willing to make the exchange, are not well taken.

[8, 9] 6. Appellant insists that by his answer he raises as an issue of fact the question of whether the contracts B and C were mere stipulations of the terms of a proposed

exchange, and not intended by the parties to be enforceable contracts, or to be enforced. Appellant does not plead any other contract which would vary the terms of contracts B and C, and what the parties intended by those contracts was for the court to decide by an inspection of the contracts, unaided by proof alunde.

There is no error disclosed by the record, and the judgment is therefore affirmed.

ROBERTS, C. J., and PARKER, J., concur.

STATE v. MARRON, State Treasurer.

(Supreme Court of New Mexico. Dec. 17, 1913.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 18*)—PERMANENT SCHOOL FUND—"INVESTMENT."

The deposit of the permanent school fund of the state in interest-bearing deposits in banks, under the provisions of Joint Res. No. 14 (Laws 1913, p. 174), is an investment of the same (citing Words and Phrases, vol. 4, pp. 3755-3758).

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 25-33; Dec. Dig. § 18.*]

2. PERMANENT SCHOOL FUND—INVESTMENT IN SECURITIES.

Whether the word "securities" as used in the Enabling Act (Act June 20, 1910, c. 310, 36 Stat. 557) and the Constitution is not limited to public obligations, for the payment of which the taxing power is available, is not decided, because its decision is not necessary to a determination of this case, and is not discussed by counsel.

3. SCHOOLS AND SCHOOL DISTRICTS (§ 18*)—INVESTMENT OF PERMANENT SCHOOL FUND—CONTROL OF DISCRETION.

Said Joint Res. No. 14 (Laws 1913, p. 174), in so far as it requires the deposit of these funds in banks, is beyond legislative power and void.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 25-33; Dec. Dig. § 18.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 18*) —MANDAMUS (§ 100*) — PERMANENT SCHOOL FUND—POWER TO SELECT SECURITIES.

The Governor, Secretary of State, and Attorney General have power to eliminate by means of disapproval any given form or forms of investment, and thereby bring the State Treasurer to one single form of investment, and in such event he is subject to mandamus to perform all acts necessary to accomplish the same. Whether he does not possess discretion, as to the safety of the investment, which he may exercise independent of control by mandamus not decided, because not involved.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 25-33; Dec. Dig. § 18; Mandamus, Cent. Dig. §§ 205-210; Dec. Dig. § 100.*]

5. MANDAMUS (§ 160*)—ALTERNATIVE WRIT—SUFFICIENCY—DENIAL OF RELIEF.

The alternative writ of mandamus in this case examined and found to be inadequate to justify the issuance of a peremptory writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.*]

Original proceeding in mandamus by the State against Owen N. Marron, State Treasurer. Writ denied.

Frank W. Clancy, Atty. Gen., for the State. Francis E. Wood, of Albuquerque, for respondent.

PARKER, J. This is a proceeding in mandamus to compel the investment of the permanent school funds of the state in the state highway bonds. It appears that respondent, as State Treasurer, received from the Territorial Treasurer, at the inception of the state government, the sum of \$110,453.52, the result of the sales of public lands of the United States in the territory, under the terms of the act of Congress of June 21, 1898, c. 489, 30 St. L. 484, 6 Fed. St. Ann. 482. These funds, at the time respondent took office, were deposited in banks, in pursuance to the provisions of section 86 of chapter 104, Laws of 1907, where they still remain. Since statehood respondent has received funds of the same class and from the same source in the amount of \$10,587.31 and \$8,825.86 as proceeds of the sale of school lands in the state. All of these funds constitute the permanent school funds of the state.

Chapter 104, Laws of 1907, was repealed by section 79 of chapter 82 of the Laws of 1912, leaving no statutory authority for the deposit of these funds in banks, until the session of the state Legislature of 1913.

By section 10 of the Enabling Act (36 St. L. 557, c. 310, 1 Supp. 1912, Fed. St. Ann. 362) it was provided as follows:

"Sec. 10. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said territory, are hereby expressly transferred and confirmed to the said state, shall be by the said state held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same. * * * A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the State Treasurer in the fund corresponding to the grant under which the particular land producing such moneys were (sic) by this act conveyed or confirmed. * * * The State Treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the Governor and Secretary of State of said proposed state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defined by this act and the laws of the state not in conflict herewith."

By section 7 of Article 12 of the Constitution of the state, it was provided as follows:

"Sec. 7. The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein. The Legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first approved by the Governor, Attorney General and Secretary of State. All losses from such funds, however occurring, shall be reimbursed by the state."

In pursuance of the provisions of this section of the Constitution, the state Legislature of 1913 (by a required three-fourths vote of each house, it is assumed by counsel on both sides) passed joint resolution No. 14, which is as follows:

"Section 1. That the principal of the permanent school fund may be invested in an interest-paying deposit in any bank or banks in this state, in the manner hereinafter provided.

"Sec. 2. It is hereby made the duty of the Governor, State Treasurer, Attorney General and Secretary of State, to ascertain which bank or banks in the state will pay the highest rate of interest for the deposit of the said permanent school fund and deposit the same therein upon said bank or banks giving a bond as hereinafter required.

"Sec. 3. Before the making of the deposit of the said permanent school fund in any bank or banks applying therefor, the said bank or banks shall make, execute and deliver a bond to the state of New Mexico in a penalty which shall not be less than one and one-fourth the amount of the deposit applied for and which it is to receive, conditioned that such bank will promptly pay out, to the parties entitled thereto, all such public moneys in its hands upon lawful demand made therefor and will whenever thereunto required by law, pay over to the State Treasurer such moneys. The surety on such bond shall be a surety company authorized to do business under the laws of the state and such bond shall be approved as to form by the Attorney General, and as to the sufficiency by the Governor, State Treasurer and Secretary of State."

In pursuance of said joint resolution No. 14, the Governor, Secretary of State, Attorney General, and State Treasurer met on June 16, 1913, and decided to request bids from banks for the deposit of the entire permanent school fund, amounting to \$121,040.78, and accordingly the State Treasurer requested bids for the deposit of the same from the banks of the state to be received up to July 1, 1913. Many of the banks responded, and

offered to pay interest at rates ranging from 3½ per cent. to 7% per cent. per annum.

At a meeting of said officers, held on July 1, 1913, for the purpose of opening and passing on said bids, the following resolution was adopted, the respondent, as said treasurer, voting in the negative, viz.: "Resolved, that all of the bids received from the various banks for deposits of the permanent school fund be rejected for the purpose of investing said funds in the state highway bonds, the difference in the rate of interest received, which would be about four cents per annum per capita of school children as shown by the last enrollment, being so small as to be more than offset by the benefits to be derived from the construction of highways to the schools themselves as well as to all other interests."

On July 7, 1913, the respondent addressed a letter to the Governor, Secretary of State, and Attorney General, which is as follows: "Dear Sir: I am firmly of the conviction that the investment of the permanent school fund of the state in the securities offered under House Joint Resolution No. 14, by the banks offering the highest rate of interest in the bids opened on Tuesday last, the first of July, is the best and safest investment that could be made of these funds. In the resolution rejecting these bids, which is as follows (the preceding resolution), you do not base your disapproval of these securities upon the ground that they are not safe nor that they would not bring the largest returns to the permanent school fund, but solely upon the ground that it was for the purpose of investing these funds in the highway bonds. I deem it to be my duty, under the law, to most respectfully decline to invest these funds in the highway bonds for the reason that the highway bonds yield only 4% while the bank securities offered will average more than 6%, and for the further reason that the value of the highway bonds, measured by the best bids obtained therefor, is only 77, while we would be required to pay par or 100. I respectfully request, therefore, that you indicate to me whether or not you deem these bank securities offered to be unsafe. In the event that you approve the same as to their safety, I will make the investment in the proper bank securities. Yours very truly."

On July 10, 1913, the Governor, Secretary of State, and Attorney General addressed to the respondent a letter, in reply to his letter of July 7th, as follows: "We decline to pass upon the question as to whether the bank securities are unsafe or not, as it is not part of our duty to do so, nor have you any right to demand of us that we should pass on that question, especially after we have united in rejecting the bids of the banks for the avowed purpose of investing the funds in the state highway bonds. We cannot find any provision of law giving you any authority to make any investment of this fund except as directed by us, nor are you in any way

charged with any responsibility as to such investment. No investment of the fund can be made in any securities unless they are first approved by the Governor, Secretary of State, and Attorney General, and if there should be any resulting losses from such investment the state must reimburse them, but there is nothing to make you officially or personally liable for what is done. Therefore we now say to you that, under existing circumstances, we approve of the investment of this fund in the state highway bonds, and that we will not approve of its investment in any other securities at this time."

The State Treasurer still persisting in his refusal to withdraw these funds from the bank and invest them in the state highway bonds, this proceeding was instituted by the Attorney General, ex officio, in behalf of the state.

[1] 1. It is to be observed that the Enabling Act imposes no restrictions, in terms, as to the class of interest-bearing securities in which the funds may be invested, the only restriction in this regard being that they be "safe." The supervising control over the investment, conferred upon the Governor and Secretary of State by that act, however, would seem to vest in them power to exclude any given class of securities which might, in their judgment, be deemed unsafe. On the other hand, the Constitution expressly limits, in terms, the class of securities which these funds may be invested, until the Legislature shall otherwise provide. The supervising body is enlarged by the addition of the Attorney General. Otherwise the Enabling Act and the Constitution are the same in substance and effect, except that, by the Constitution, the Treasurer is not, in terms, charged with the duty of investing the funds. This latter divergence we deem of no importance, as it would seem clear in the light of both provisions that it is still the duty of the State Treasurer to invest the funds in interest-bearing securities, subject to the restrictions and the supervision and control provided for in the Constitution. As before stated, the Legislature of 1913, by said joint resolution No. 14, attempted to pursue the power conferred by the constitutional provision and provided that these funds should be "invested in an interest-bearing deposit in any bank or banks in this state," in the manner in the resolution provided. The deposit, when made, is not for any definite period of time, but is "conditioned that such bank will promptly pay out to the parties entitled thereto all such public moneys in its hands upon lawful demand made therefor, and will whenever thereunto required by law pay over to the State Treasurer such moneys." It thus appears that, by the terms of the resolution, these funds are always subject to the immediate call of the State Treasurer, and the bank makes no contract to retain them and may at any time, we assume, surrender

them to him. The funds are subject to the check of the State Treasurer at any time in favor of any person entitled to receive the same by reason of some investment thereof, or the State Treasurer may at any time recall the funds from any given bank or banks. The words "required by law," in this connection, must evidently mean that whenever, by reason of demand of the State Treasurer, the legal duty to return the funds arises, the bank or banks are "required by law" to return the same. Otherwise, if it be required to have a new act of legislation before the banks can be held to be "required by law" to return the moneys, then, when the State Treasurer has once deposited them in a bank they must remain there until the Legislature recalls them, regardless of the solvency or insolvency of the bank and the consequent danger of loss of the funds and vexatious litigation with the sureties on the bank's bond. Such could not have been the legislative intent as expressed in the joint resolution. The State Treasurer must be held to have at all times the right to immediately call for the funds, either for the purpose of investing them in interest-bearing securities, or of recalling them from any bank in which, for any reason satisfactory to him, or for no reason, he no longer desires the deposit to remain.

We have, then, a case where the Enabling Act and the Constitution require the investment of the permanent school fund of the state in interest-bearing securities, and where the Legislature has authorized and required the deposit of these funds in banks subject to the call of the State Treasurer, and the question is whether this is an investment of the funds within the meaning of the provisions of the Enabling Act and the Constitution.

Various cases are reported in which the question as to what amounts to an investment of public and private funds has arisen. In *State v. McFetridge*, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223, the State Treasurer of Wisconsin was sued on his official bond for interest received by him on deposits in banks of the public funds, and his liability was made to turn upon whether his act in making the deposit was lawful or unlawful, which, in turn, depended upon whether or not the deposit was an investment of the funds. If it was an investment of the funds it was unlawful, because the concurrence of the Governor and Commissioners of Public Lands was necessary, and had not been obtained. The court said: "If those deposits were 'investments,' within the meaning of the above statutes, they were unlawfully made. Were they investments? The distinction between a general deposit of money in a bank payable at any time on demand and an investment of such money is plain and substantial. By such a deposit the depositor does not lose control of the money, but may reclaim it at any

time. True, he loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value, which, as we have seen, is all that is required of him. But if the funds in the treasury are invested in United States or state bonds, or in loans on time to counties, cities, etc., the treasurer loses control thereof, and the same cannot be replaced in the treasury until such bonds are paid or sold, or such loans become due, and are collected by the due course of law. The retention by the treasurer of substantial control over the funds in the one case and his loss of such control in the other mark the leading distinction between a mere deposit of the funds and an 'investment' thereof, as those terms are used in statutes."

In *State v. Bartley*, 39 Neb. 853, 58 N. W. 172, 23 L. R. A. 67, a different definition was given to the word. The Constitution of that state required the investment of the permanent school fund in the United States or state securities, or registered county bonds, and the Legislature provided that all public funds should be deposited in banks which should pay interest and give security for the safety of the funds, and hold the funds subject to check by the State Treasurer. Mandamus was brought to compel the deposit of some of these funds in a bank, and it was held that, in so far as the act authorized or required the deposit of the educational funds, it provided for an "investment" of the same in a manner not authorized by the Constitution, and was therefore invalid. The court defined the word "investment" as including bank deposits, notwithstanding they are subject to immediate withdrawal. As applied to private funds, the word "investment" has been frequently defined. Thus in *Law's Estate*, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103, a guardian had deposited funds of his ward in a bank awaiting investment. The bank was to pay 3 per cent. interest, and he was to give two weeks' notice before withdrawing the funds. The bank failed, and the guardian was sought to be charged with the loss, on the theory that he had invested the moneys and was consequently liable. The court said: "Was this transaction with the Bank of America a deposit of the money, or was it a loan or investment of it? A deposit is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor and creditor simply, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes all the characteristics of a loan."

In *Jennings v. Davis*, 31 Conn. 134, 143, it

is said: "It is not stated whether the money was deposited in the bank for safe-keeping merely, or in the character of a loan to the bank for which a stipulated rate of interest was to be paid during its continuance there; nor is it material to inquire, because, in either case, the deposit (being a general as contradistinguished from a special one) created a debt in favor of the depositor and against the bank, and then the money became 'invested' in that debt, and being thus invested in the name of Mrs. Morehouse was protected by the statute against her husband's claims upon it." See, also, 4 Words and Phrases, title Investment, where many cases are collected.

The Wisconsin and Pennsylvania cases draw a distinction between deposits for a definite period of time and those which are subject to call by check or order, holding that the former would constitute an investment, and that the latter would not. The Nebraska and Connecticut cases recognize no such distinction, and rely upon the well-known principle that, upon the deposit of funds in a bank, the title to the money passes to the bank, and the relation of debtor and creditor arises between the bank and the depositor. This is so whether the money is subject to call, or whether the debt of the bank to the depositor matures at some specified future time. The law applies to a transaction, in either form mentioned above, an obligation to pay its debt to the depositor according to the terms of the deposit.

We assume that, had the Legislature in its joint resolution No. 14 provided for the deposit of these funds for stated periods of time, no one would question that their deposit in that form would be an investment for the same. If this is so, then the Legislature might have provided for annual, or semi-annual, or quarterly periods of time, or even a shorter period, so that the transaction of depositing these funds would be, in substance and effect, as a practical matter, the same as it now is provided for in said joint resolution. It may be that the definition of the word "investment" by the Wisconsin and Pennsylvania courts is more scientifically correct, but we can see no good reason to unduly hamper the legislative branch of the government by adopting a construction of the Enabling Act and the Constitution which would subserve no useful purpose. The Legislature has, to all intents and purposes, accomplished by the joint resolution all that it could accomplish by a more scientifically drawn act, if, indeed, it has not added to the security and safety of these funds by providing that they may be withdrawn, at any time, from any bank in which they may have been deposited.

We therefore hold that the deposit of the permanent school funds of the state in banks, in pursuance of provisions of said joint resolution, is an investment of the same, unless

prohibited by the considerations mentioned in the next paragraph.

[2] 2. The Attorney General argues that the words "other interest-bearing securities" are to be construed ejusdem generis with the class of securities specifically mentioned in the section of the Constitution, and that therefore bank deposits are prohibited as a form of investment of these funds. The argument has great force. Taking into consideration the character of the fund provided by the federal government for the education of the youth of the state, its permanency and ever increasing volume, the evident care with which the donor has safeguarded the same by the terms of its grant, and the character of the investments enumerated in the Constitution, there is presented to the mind, at once, the question whether it was not the intent of both Congress and the Constitutional Convention, by the use of the words "securities," to limit the investment of these funds to some form of obligation for the payment of which the taxing power is available. It may be said, however, that the taxing power of the state is available to reimburse the fund in case of loss for any reason. But loss of the fund is exactly what is not to be desired, and every consideration consistent with the circumstances and language used should be indulged to avoid the possibility of the same. On the other hand, the rule of construction mentioned may not be employed unless the same is consonant with the intent of Congress and the Constitutional Convention as expressed in the Enabling Act and the Constitution.

In this connection, it may be said that, while the permanent school fund, at present, is comparatively small, it is to be borne in mind that this fund is a permanent fund for all time, and must, necessarily, constantly and rapidly increase. The proceeds from the sales of the lands so bountifully granted by the United States for educational purposes will swell this fund so that within a comparatively short time it may reach such proportions as that it may become difficult to find in the class of securities enumerated in the Constitution a place for the profitable investment of the same. The Legislature, it may be said, should be left free, if possible, to met such conditions when they arise, and for that reason, the restricted interpretation before mentioned ought not to be applied. We expressly decline to decide this proposition at this time, and what has been said is for the purpose merely of calling attention to the question, so that its importance may be more fully appreciated. We decline to decide the question, because its decision is not necessary to a decision of this case, and because the same was not fully treated by counsel in argument or in the briefs. When, if it shall be in some case in future, the question is clearly presented to the court, and fully argued, we shall then feel that it is proper to dispose of it.

[3] 3. The Legislature, in said joint resolution No. 14, has attempted to control the discretion of the Governor, Secretary of State, and Attorney General in the exercise of their supervisory control over the investment of these funds. The act is mandatory in terms, and requires them absolutely to deposit the funds in banks. In this the Legislature has evidently exceeded its constitutional power. The Constitution has conferred upon the Governor, Secretary of State, and Attorney General the power to approve or disapprove any proposed investment of these funds. This discretion is in no way limited, but is absolute. It is not confined to the question as to whether the investment is safe or not. If for any reason, lack of safety, length or shortness of time for which the loan can be obtained, rate of interest obtainable, or any other consideration of public policy, any given investment of these funds is deemed inadvisable, the Governor, Secretary of State, and Attorney General clearly have the power to withhold their approval, and we know of no authority, neither legislative nor judicial, to control this discretion. The grant of legislative power in the section of the Constitution is not a grant of power to direct the investment in any particular form of security. The selection of the investment is not a legislative function under the provisions of the Constitution.

We therefore hold that said joint resolution, in so far as it requires the deposit of these funds in banks, is beyond the legislative power and void. This conclusion leaves the respondent without any authority to make these deposits, the approval thereof having been expressly refused by the Governor, Secretary of State, and Attorney General.

[4] 4. The real, practical controversy between the State Treasurer on the one hand, and the Governor, Secretary of State, and Attorney General on the other, is as to who has the right to select the securities for the investment of these funds. The State Treasurer, believing in the validity of the joint resolution, and being desirous of obtaining the largest possible return in the way of income on the money, insists upon the deposit of the funds in banks. In his right to do so over the objection of the Governor, Secretary of State, and Attorney General, as we have seen, he is mistaken. On the other hand, the Governor, Secretary of State, and Attorney General, notwithstanding the income will be slightly less, insist upon the investment in the state highway bonds. It is argued by the Attorney General that the greater permanency of the investment in these bonds, the direct benefit of good public highways to the schools themselves, and the subserving of the general welfare of the people of the state, more than counterbalance the temporary slight loss in income. It is argued for the State Treasurer that, as he is charged by the Enabling Act with the duty of keeping

the funds constantly invested and is required to give bond for the faithful performance of his duty, he must secure the highest possible income from these bonds consistent with safety. On the other hand, the Attorney General argues that there is no liability of the State Treasurer on his bond so long as he in good faith invests the funds within the constitutional restrictions, and with the approval of the Governor, Secretary of State, and Attorney General. In this position he is correct. It is to be observed in this connection that no absolute duty is imposed upon the State Treasurer to invest these funds. The duty of doing so is conditioned upon his obtaining the approval of the Governor and Secretary of State, by the Enabling Act, and of the same officers together with the Attorney General, by the Constitution. If he endeavors to obtain this approval and exhausts all available sources, and fails to obtain it, his duty and, consequently, his liability, necessarily ceases.

We have then, simply, a question as to who, the State Treasurer on the one hand, or the Governor, Secretary of State, and Attorney General on the other, has the right to determine the particular form of investment in which these funds may be placed. It is argued that this supervisory power of the Governor, Secretary of State, and Attorney General is in the nature of a veto power. This may be admitted. The usual and orderly course of procedure, we assume, would be for the State Treasurer to submit to the Governor, Secretary of State, and Attorney General a list of available and safe investments for approval. He is, no doubt, primarily chargeable with the duty of ascertaining these available channels of investment, and is entitled to present the same for approval, and to urge upon the Governor, Secretary of State, and Attorney General the advisability and expedience of making such investments. It nevertheless remains true that the Governor, Secretary of State and Attorney General have the power to eliminate any given form of investment, and by that process of elimination they may reduce the State Treasurer to one single form of investment, that being the one form left to him which will receive the necessary approval. Thereupon there arises, except under circumstances to be hereafter mentioned, a ministerial duty on the part of the State Treasurer to invest the funds. This duty does not arise by reason of any order or direction of the Governor, Secretary of State, and Attorney General. The State Treasurer occupies as important a position, and is charged with even greater responsibility than they are, in regard to the investment of these funds. His ministerial duty arises out of the law provided by Congress in the Enabling Act for the administration of this fund, and which act requires the fund to be kept invested in safe, interest-bearing securities. The duty is ever present, and is

never discharged until the whole field has been explored and exhausted without avail. It is the law of the administration of the trust, not any order or direction of the Governor, Secretary of State and Attorney General, which furnishes the basis for any remedy against the State Treasurer by mandamus. If a given investment, under such circumstances, is safe, there is no discretion left in the State Treasurer under the terms of the rule for the administration of his trust prescribed by the Enabling Act. He must invest the funds in safe, interest-bearing securities, and he may be compelled to do so by mandamus.

At this point a consideration presents itself which is not directly involved in this case. It is this. By the terms of the Enabling Act, which, together with the Constitution, is the law for the administration of this trust, the State Treasurer is charged with the duty of safely investing these funds, and must give bond for the faithful performance of this duty. It therefore becomes his duty to inquire into and pass upon the safety of any given investment before it is made, and he may have a discretion in that regard not subject to control by mandamus. This discretion if possessed by the State Treasurer, is of no importance, where the proposed security is one of those specifically enumerated in the Constitution, as in this case. But if the proposed investment were bank deposits, as now authorized, or were in some other form, as might be provided by the Legislature in the future, then this discretion of the State Treasurer, if he possesses the same, might become of vast importance in safeguarding the fund. Whether important or unimportant in any given case is not the question. If it is possessed by him, he is entitled to exercise it, and it cannot be controlled by mandamus. As before stated, this question is not directly involved in this case, and is not relied upon in argument, and, for that reason, we expressly refrain from deciding whether the State Treasurer has this discretion, or, if he has, just what its nature and extent is, reserving the question for future determination when it arises.

If the State Treasurer has the discretion hereinbefore mentioned, he is not, of course, subject absolutely to mandamus to make any particular form of investment of these funds. But when, by the process of elimination heretofore mentioned, he is left with but one form of available investment, he may be proceeded against and put in motion, and compelled to do all of such acts, including the exercise of such discretion as he may possess, as are required of him by the law of his trust, all to the end that it shall be determined whether the given investment shall be made or not.

[5] 5. A practical difficulty is presented by the record in this case. Chapter 58, Laws of 1912, authorizes the issuance of these bonds. Section 4 of the act requires the bonds to be

sold at not less than par and accrued interest from the next preceding interest date, and requires four weeks' publication of notice of the time and place of sale. No such notice has been given, and the proposed sale under the former notice was not continued by the State Treasurer. The proceeding, in its present form, is not broad enough to compel the State Treasurer to readvertise a sale of these bonds, nor to bid at such sale the amount required by the act. As we understand the rule, relief may be granted for less than what is prayed for, but not more, and the acts sought to be enforced must be specifically pointed out in the alternative writ. *High Ex. Leg. Rem.*, § 450; 28 Cyc. 466; *State v. Cavanac*, 30 La. Ann. 237; *People v. Dulaney*, 96 Ill. 503; *State v. Einstein*, 46 N. J. Law, 479. This has not been done in this case, and the relief sought for this reason alone must be denied.

The peremptory writ is denied.

ROBERTS, C. J., concurs specially. HANNA, J., concurs.

ROBERTS, C. J. I do not believe that any duty rests upon the Governor, Secretary of State, or Attorney General to seek out the mode or avenue of investment of the school fund. It was never the intention to place upon these officials this duty. Their power, as stated by Justice Parker, is simply a veto power. This being true, the power cannot be exercised in advance of its lawful requirements. It might be argued with as much consistence that the Governor of a state could say in advance to the Legislature that he vetoed a pending bill, prior to its passage by that body.

The construction sought to be placed upon the Constitution and Enabling Act by the Governor, Secretary of State, and Attorney General would strip the Treasurer of all discretion in the matter of investing the school fund, and relieve him from all responsibility in this regard, casting this duty upon three men, no one of whom is required by law to execute a bond for the faithful performance of his duties in this respect. Such I do not believe was ever the intention of Congress or the Constitutional Convention. In the Enabling Act we find this language: "The State Treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the Governor and Secretary of State of said proposed state, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto as defined by this act and the laws of the state not in conflict therewith." Thus placing upon the State Treasurer the duty of keeping these funds invested in safe, interest-bearing securities, but these securities in which the funds are invested must be approved by the Governor and Secretary of State.

The Constitutional Convention adopted section 7 of article 12, which reads as follows: "The principal of the permanent school fund shall be invested in the bonds of the state or territory of New Mexico, or of any county, city, town, board of education or school district therein. The Legislature may by three-fourths vote of the members elected to each house provide that said funds may be invested in other interest-bearing securities. All bonds or other securities in which any portion of the school fund shall be invested must be first approved by the Governor, Attorney General and Secretary of State. All losses from such funds, however occurring, shall be reimbursed by the state." It will be observed that the clause quoted, does not in specific terms require the Treasurer to invest funds, but it says the "funds shall be invested," and, in view of the Enabling Act requiring the Treasurer to perform this duty, it must be presumed that the Constitution likewise requires the same duties of this official. It was the purpose of Congress and the Constitutional Convention to throw every possible safeguard around this trust fund, so that it might forever remain intact for the benefit of the schools of the state. With this end in view, they placed the duty of keeping this fund invested upon the fiscal officer of the state, supposedly because the Treasurer would be in close touch with financial affairs, the issuance and sale of bonds and securities by the state and its subdivisions, and he thereby be enabled to propose the best investment for the fund, from time to time. He was by the Enabling Act required "at all times to be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto." As an additional safeguard to the fund, the Enabling Act provided that the securities in which the Treasurer proposed to invest the fund should be "approved by the Governor and Secretary of State." This provision was carried forward in the state Constitution, but the further approval of the Attorney General, the law officer of the state, was also required as an additional safeguard; thereby requiring the affirmative sanction of four separate individuals before the money could be invested, first, the proposition by the Treasurer to invest, and second, the approval of each of the officials named. But it is argued that the Treasurer, by failing to propose any investment of the fund, might retain the same in his hands and derive a profit therefrom. This argument is based upon the assumption that the Treasurer would be remiss in his duties. The law always presumes that an official will do his duty, and, it might be further said, that no Treasurer would dare assume the risk which such action would entail. If he should be so remiss in his sworn duty, he would, of course, be liable on his bond at the suit of the state for the interest which could have been procured by an investment of the fund, and

would further be liable for all loss that might accrue to the fund. Again, it might be said that the investment of the fund could likewise be prevented by either the Governor, Secretary of State, or Attorney General by the failure to approve of proposed investments. These officials are not required to give bond for the faithful performance of the duties imposed upon them in this regard. The securities in which the Treasurer is authorized to invest the funds are specified in the Constitution. In the named or authorized securities only can he propose investments. While mandamus would not lie to compel him to propose to the three named officials an investment of the fund in any particular security, it would issue to compel him to propose the investment in some of the named securities, leaving it to his discretion to propose the avenue of investment within the limits fixed. The writ would set him in motion. High's Extraordinary Legal Remedies, § 34.

I do not understand by what rule of grammatical construction the word "approve" can be given the meaning of "direct." The words are not synonymous, and the meaning is in no wise related. The word "approve" is defined by Webster to mean "to sanction officially; to ratify; to confirm; to regard as good; to commend; to think well of." It will be seen that the word relates for its object to something already done, made, or said by another. How could the named officials approve, unless something was proposed by the Treasurer? In the case now under consideration the Treasurer proposed to invest the funds by depositing them in banks upon certificates of deposit. This was the proposition before the officials for their approval. They did not approve; consequently the Treasurer had no right to invest the funds in that manner. This was the only question before them, or that was proposed for their consideration and approval. The three officials went further, however, and directed the Treasurer to invest the funds in the state highway bonds. True, it is argued that they did not "direct," but by a process of elimination and disapproval confined the Treasurer to this one avenue of investment, but it amounts to the same thing as "directing," and it would hardly be argued that these officials could do indirectly what they could not do directly.

In the case of *Thaw v. Ritchie*, 5 Mackey, 200, the Supreme Court of the District of Columbia discussed the word "approve" as used in a statute which authorized the orphans' court to order a sale of real estate, but provided that the realty should not thereby be diminished without the approbation of the general court of chancery. The court says: "The action of the orphans' court must precede that of the chancellor, and it is this action which he is to approve. He is not to order or decree a sale, which would be

the appropriate terms for an original proceeding before him, but is to approve, which term is only appropriate to a revisory proceeding. And, as the statute clearly contemplates a previous decree by the orphans' court, it must be this which is to receive his approbation." The term "approve," only being appropriate to a revisory proceeding, the Enabling Act and our Constitution therefore must have contemplated a proposed action by the State Treasurer, which should be revised by the officials named.

In the case of *Long v. Commissioners*, 75 Ohio St. 539, 80 N. E. 188, the Supreme Court of Ohio say: "The word 'approve' seems to relate for its object to something made, done, or said by another."

In the case of *Old Colony Trust Co. v. City of Atlanta* (C. C.) 83 Fed. 39, it was contended, on behalf of the city, that it had the power to fix the rates of fare and freight by reason of a provision in the ordinance which read "provided that the rates of fare and freight upon said railroad shall be subject to the approval of the mayor and city council of the city of Atlanta." The power was denied, the court holding that the power to approve rates did not grant the right to fix the rates originally.

It seems to me that the construction contended for by the Attorney General would destroy, in the main, the purpose of the carefully worded provisions in the Enabling Act and Constitution, and relax the safeguards which Congress and the framers of the Constitution sought to place over the administration of this sacred fund. Our government is a government by the people through chosen representatives. Some of the officers, it is true, are required to execute a bond for the faithful performance of their duties, but acts within their discretion, and within the limits of their power to act, and not corruptly or willfully done, are without the terms of the bond. Many officials are not required to execute any bond. All however, are answerable before the bar of public opinion for their stewardship. It has always been the policy of the law to require public records to be kept of the actions and doings of public officials, so that the public might have full information, at all times, relative to such matters, and to judge of the conduct and doings of their representatives. This, I judge, is largely the purpose of the carefully framed provisions relating to the investment of this fund. The State Treasurer is required to propose to the three officials named an investment of the school fund in certain bonds specified. By his proposition he goes on record as being willing to invest this fund in the named security at the rate of interest specified and for the price stated in his proposition. If the three men each approve, he can proceed to make such investment; if they disapprove, he must look further. Now, if the treasurer should propose a poor in-

vestment for the fund, he is answerable to the people. If, on the other hand, the three officials named, or any one of them, should refuse to approve a good investment for the fund and force the Treasurer, by elimination, to propose a poor investment, such official or officials would be held accountable by the people, and by them only, for they are not under bond. Suppose, for instance, that the State Treasurer should propose to pay 125 for bonds selling in the market for but par, would he not be severely criticized for so doing, and never afterwards intrusted with place or power? Or, on the other hand, suppose the State Treasurer should propose to the three officials the purchase of solvent securities, within the class named, which would pay the fund 6 per cent. interest, and the proposition should be rejected and the Treasurer forced to invest in securities returning only 3 per cent. or 4 per cent. For a breach of duty in either of the supposed cases, it is probable that the official would only be answerable before the bar of public opinion. It was the design, however, of the framers of the provision that the public should have full information, and so important was it considered that the people should be able to fix the responsibility that each official was required to assume the whole of the same. No investment could be made without being proposed by the State Treasurer, and hence he was not to be permitted to escape responsibility by shouldering it upon the other three officials. On the other hand, the proposed investment could not be made without the affirmative approval of each of state officials named, so that no one man could say that the act was done without his concurrence. All were answerable alike to the people for the management of the fund. The construction contended for would absolutely absolve the State Treasurer from his accountability to the people for the management of the fund, and, so long as he followed the directions of the three officials named, he would be held blameless. All opportunity for the people knowing how profitable an investment might be made of the fund can be cut off at once by the Governor, Attorney General, and Secretary of State, adopting a resolution, as was done in this case, that they will approve only the one named investment. This being true, and the Treasurer being bound thereby, how is he to present to them more advantageous sources of investment? Again, no one of the three is under bond, and this construction relieves the only bonded official from liability, so long as he follows the direction given him.

Before mandamus will lie, it must be determined that the investment of school moneys by the State Treasurer requires the exercise of no judgment or discretion on his part.

"The only acts to which the power of the courts by mandamus extends are such as are purely ministerial, and with regard to which

nothing like judgment or discretion, in the performance of his duties, is left to the officer; but wherever the right of judgment or decision exists in him, it is he, and not the courts, who can regulate its exercise." *Goodrich v. Guthrie*, 58 U. S. (17 How.) 284, 15 L. Ed. 102.

An added reason might be given for the above conclusion that the Governor, Secretary of State, and Attorney General have not the right to direct in advance the action of the State Treasurer relative to the investment of the school fund. The fund is by law committed to the care and custody of the Treasurer. While now the money in his hands is only slightly in excess of \$100,000, eventually it will amount to millions. He is the only official who keeps a daily check on this money and knows the amount of the same. When received, it is by him, and he is not required by law to account to either of the three officials. Suppose, for instance, that the resolution adopted by the board be treated as sufficient authority for him to invest the school funds in the state highway bonds. The other officials are occupied with a multiplicity of duties which necessarily occupy much of their time. They do not keep in touch with the amount of money on hand, belonging to this fund, and might assume that a small amount is being invested by the Treasurer in the channel authorized. In the meantime, millions of dollars come into the Treasurer's hands, which he, acting under the authority conferred by the three officials, and as required by their resolution, invests in the named securities, when it might never have been the intention of the three officials to authorize such an amount to be invested. Such was never the intention. Upon the Treasurer was placed the responsibility of keeping the fund invested and for so doing he would be held responsible under his bond, which he is required to execute as a guaranty of his conduct in that regard. He is the custodian of the fund and at all times is fully informed as to the daily receipts. He dare not permit it to lie idle without investment, and must present to the officials named a proposition to invest it so often and as soon as he has on hand an amount justifying investment. The board should have at the time each investment is proposed an opportunity of passing upon the advisability of the proposed investment. The bond market, as is well known, is subject to fluctuation. Each proposed purchase of bonds, were an individual buying, would be governed as to price by the market value of such a security. Should we, by a strained construction, hold that the three officials, by a resolution, may authorize the Treasurer to act for an indefinite time in the purchase of securities, regardless of changing conditions of the market? Such, I believe to be foreign to the purpose of Congress and the Constitutional Convention.

Again, the resolution adopted by the three officials, and upon which this action of mandamus is predicated, reads as follows: "Resolved, that all of the bids received from the various banks for deposits of the permanent school fund be rejected for the purpose of investing said funds in the state highway bonds, the difference in the rate of interest received, which would be about four cents per annum per capita of school children as shown by the last enrollment, being so small as to be more than offset by the benefits to be derived from the construction of highways to the schools themselves as well as to all other interests," which may be considered as supplemented by the following extract from a letter sent by the three officials to the State Treasurer: "Therefore we now say to you that, under existing circumstances, we approve of the investment of this fund in the state highway bonds, and that we will not approve of its investment in any other securities at this time."

If mandamus will lie, it must be that the Treasurer has no discretion in the matter of the investment, and must blindly follow the direction contained in the above resolution. That is, he must invest these funds in the state highway bonds, regardless of the price which he might be compelled to pay for the same. Suppose, for instance, that he should purchase these bonds at a premium of 25 cents on the dollar, could he justify under the above resolution or direction? Again, is the above direction sufficient warrant for his action, should he buy the bonds, and would he not be required to report to the three officials the price which he paid for the bonds? If it is not sufficient warrant for his so acting, clearly mandamus would not lie to compel him to act.

The question is as to who, the State Treasurer on the one hand, or the Governor, Secretary of State, and Attorney General on the other, has the right to determine the particular form of investment in which these funds shall be placed. It seems to me that the answer is plain that neither has the right, but the form of investment must be concurred in by the four officials named, and any one of the four has the power to prevent any particular form of investment.

I concur in the denial of the writ.

STATE ex rel. GRAVELY v. STEWART et al.

(Supreme Court of Montana. Dec. 29, 1913.)

MANDAMUS (§ 85*)—SALE OF SCHOOL LANDS—CONTROLLING DISCRETION OF BOARD.

The state board of land commissioners, intrusted by Const. art. 11, § 4, with the control and sale of state school lands, in determining, under Laws 1909, c. 147, § 40, whether it shall confirm a sale of state school lands, acts quasi judicially, so that its discretion in such respect, in the absence of manifest abuse there-

of, it merely considering the price inadequate, cannot be controlled by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 184-188; Dec. Dig. § 85.*]

Petition by the State, on the relation of C. A. Gravely, for writ of mandate against S. V. Stewart and others. Dismissed.

S. P. Wilson, of Deer Lodge, for relator. D. M. Kelly, Atty. Gen., and W. H. Poorman, Asst. Atty. Gen., for respondents.

SANNER, J. On or about July 1, 1913, the state board of land commissioners made an order directing the sale of certain school lands, to be held at Deer Lodge, Powell county, on August 15, 1913. The sale was duly advertised, and included within the lands directed to be sold were three tracts of 160 acres each, in section 10, Tp. 10 N., R. 8 W. At the time and place set, the register of state lands appeared, and at public auction offered these tracts for sale in separate parcels. For them the relator herein made the highest and best bids, offering \$10 per acre for one of said tracts, and \$10.25 per acre for each of the others; and the said tracts were struck off to him by the register, acting as auctioneer. The relator paid to the register 15 per cent. of the purchase price, together with the fees for issuing the certificate of sale, which moneys were received by the register, who in turn delivered a receipt to the relator. Subsequently the relator made demand that a certificate of purchase be issued and delivered to him, but this was refused; thereupon he tendered and offered to the state board of land commissioners the full purchase price as bid by him, with interest, and offered to pay the appraised value of all surface improvements owned by former lessees, and at the same time demanded the issuance and delivery to him of deeds or patents to said tracts. But the state board, refusing to confirm the sale, canceled and disapproved it, rejected the relator's tender, and denied his demand. It is alleged in the petition that the sale was fair, the sums bid were equal to the value of the land, and that the actions of the board and of the respondents, as members thereof, were arbitrary, malicious, capricious, and unjust. In their reply the respondents state their position as follows: "That subsequent to the time when said land was offered for sale, and the said bid so made by said plaintiff, the said register made due report thereof to the state board of land commissioners, and that at a hearing subsequently had thereon, at which hearing said plaintiff was represented, the said state board of land commissioners was informed and believed, and still believes, that the price so bid for said land by said plaintiff was inadequate, and was less than the real value of said land; that the same at a subsequent sale

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

could be sold at a much greater price; that in fact at said hearing said board received offers in writing for said land at a price of \$3 per acre in excess of the amount so bid at said sale, and, deeming it to the best interests of the state of Montana that said sale be not confirmed and in and by virtue of the authority so vested in said board by the provisions of section 40, chapter 147 of the Session Laws of 1909, refused to confirm or approve the sale of said lands, and refused and still refuses, to issue any deed of conveyance to said plaintiff for said land." Upon the hearing it was established by evidence that the action of the board was prompted by the views set forth in the reply. No reason, however, was assigned for the entertainment of these views, except that the board had received a letter from one McGilvray offering \$3 per acre, or \$1,440 more for the land, and believed that under the special circumstances it might, on a resale, secure as much as \$30 per acre.

The question, then, is whether, under the circumstances stated, the peremptory writ of this court should issue as prayed by the relator, directing that the board confirm the sale to him and cause to be issued a certificate of purchase accordingly, directing that the board accept his tender of the balance of the purchase price and cause to be issued and delivered to him a deed or patent to the lands, and directing the Governor to sign, the register to countersign, and the Secretary to seal, such deed or patent. To this but one answer can be given—an unhesitating negative. The grant of lands for school purposes by the federal government to this state constitutes a trust (State ex rel. Bickford v. Cook, 17 Mont. 529, 43 Pac. 928; State ex rel. Dildine v. Collins, 21 Mont. 448, 53 Pac. 1114; State ex rel. Koch v. Barret, 26 Mont. 62, 66 Pac. 504); and the state board of land commissioners, as the instrumentality created to administer that trust, is bound, upon principles that are elementary, to so administer it as to secure the largest measure of legitimate advantage to the beneficiary of it. To that end, and of necessity, the board must have a large discretionary power over the subject of the trust; and therefore it has been expressly given "the direction, control, leasing and sale" of these lands, under such regulations and restrictions as may be prescribed by law. Constitution, art. 11, § 4. Such "regulations and restrictions" as the Legislature has seen fit to prescribe are embodied in chapter 147, Session Laws 1909, wherein we find the following provisions: The board shall have the direction and control of all lands belonging to the state, to manage the same as the best interests of the state shall require (section 1); the board may direct the sale of any state lands, except as provided in this act, in such parcels as they shall deem for the best interests of the state (section 35); all sales of state lands

shall be conducted by the register, but no land shall be sold for less than the minimum price of \$10 per acre, nor for less than its appraised value (section 37); "all sales of state lands * * * shall be subject to the approval and confirmation by the state board of land commissioners, and no sale shall be deemed completed until after such approval and confirmation" (section 40). That the board in proceeding under this statute, in determining whether it shall or shall not confirm a sale, acts quasi judicially seems so obvious that the citation of authority ought not to be necessary. The matter has been before the courts, however, and with substantial uniformity of result, under conditions at all similar to those prevailing in this jurisdiction. *Rount v. Land Co.*, 18 Colo. 132, 31 Pac. 858; *State v. Scott*, 18 Neb. 600, 26 N. W. 386; *State v. Land Commissioners*, 7 Wyo. 478, 53 Pac. 292; *Miles v. Wells*, 22 Utah, 55, 61 Pac. 534; *State v. Eaton*, 78 Neb. 202, 110 N. W. 709.

Since the board is a constitutional agency charged with the administration of a public trust, since it is vested with discretionary power in that behalf, and since its discretion is invoked whenever it is called upon to confirm or reject a sale, this court cannot compel it to exercise that discretion in any particular way. *State ex rel. Harris v. District Court*, 27 Mont. 280, 70 Pac. 981; *State ex rel. King v. District Court*, 25 Mont. 202, 64 Pac. 352; *Montana Ore. Pur. Co. v. Lindsay*, 25 Mont. 24, 63 Pac. 715; *State ex rel. Independent Pub. Co. v. Smith*, 28 Mont. 329, 58 Pac. 867.

In *State v. Scott*, supra, it was said: "The board of educational lands and funds is a trustee for the sale and leasing of the land set apart for the support of educational institutions, and, to justify the interference of a court, there must be an abuse of the trust. * * * It is the duty of the board to sell or lease the educational lands of the state for the highest price possible to be obtained, and increase and protect by all honorable means the funds for the support of the educational institutions; and, so long as the board is faithfully performing its duty in that regard, this court will refuse to interfere." If this be sound, as we think it is, then in the course complained of the board was actuated by the very considerations which are supposed to govern it. It therefore cannot be said that there was a manifest abuse of its discretion, but the case is resolved into the mere inquiry whether these considerations were entertained upon an erroneous or insufficient basis. *Mandamus* cannot be invoked to aid such an inquiry. *State ex rel. Independent Pub. Co. v. Smith*, supra; *Ex parte Newman*, 14 Wall. 152, 20 L. Ed. 877; *Douglass v. Commonwealth*, 108 Pa. 559; *Hoole v. Kinkad*, 16 Nev. 217.

Nor from the bidder's point of view can any just complaint be made of this conclu-

sion. Bidders at sales of school lands are bound to know that no sale by the register is complete without the approval and confirmation of the board, and that the board in confirming or rejecting a sale by the register will be governed by the interests of the trust which it is charged to administer. The situation of the parties to a sale by the register is thus quite analogous to that of parties to a sale by a receiver, concerning which this court said: "The purchaser at such sale takes the property with notice that the court has power, in its discretion, to set it aside; that, while mere inadequacy of consideration is not ordinarily in itself sufficient to warrant the court in setting aside a sale to a bona fide purchaser, if it shall appear that for some reason, disclosed or undisclosed, the property has been greatly undersold, and the purchaser has, even in good faith, obtained an undue advantage of the persons for whose benefit the sale was made, the court may, in its discretion, set it aside." *Gazette Printing Co. v. McConnell*, 45 Mont. 89, 122 Pac. 561, Ann. Cas. 1913C, 1327.

It follows that the proceeding must be dismissed; and it is so ordered.

Dismissed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

KEADY v. MARTIN et al†

(Supreme Court of Oregon. Jan. 13, 1914.)

ESTOPPEL (§ 15*)—BY DEED—BARGAIN AND SALE DEED.

A deed by husband and wife whereby they bargain, sell, and quitclaim to the grantee, his heirs and assigns forever, without naming any estate which the grantors or either of them had in the land, which the husband had previously assigned, without the wife's signature, for the benefit of creditors, cannot be restricted to a release of the wife's inchoate right of dower but, as against the grantors, conveys the fee-simple title, and neither of them nor those claiming under them can be heard to say aught to the contrary.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 19-21; Dec. Dig. § 15.*]

Department 2. Appeal from Circuit Court, Multnomah County; William N. Gatens, Judge.

Suit by L. Y. Keady against Hattie L. Martin and another. From a decree dismissing the suit, plaintiff appeals. Affirmed.

Claiming to be the assignee of a right to dower in certain real property, the plaintiff brings this suit to secure an admeasurement of that estate and to recover for the use and occupation thereof. His claim was resisted principally upon the ground that he was estopped by a former deed of his immediate grantor. From a decree dismissing the suit, the plaintiff has appealed. Other facts are stated in the opinion.

H. K. Sargent, of Portland (Sargent & Swope, of Portland, on the brief), for appellant. R. C. Wright, of Portland, for respondent. Warren E. Thomas and Omar C. Spencer, both of Portland (Carey & Kerr, of Portland, on the brief), amici curiæ.

BURNETT, J. On October 8, 1896, J. M. Moyer, husband of the plaintiff's grantor, conveyed the real property involved here to an assignee for the benefit of the creditors of Moyer. The latter's wife did not join in that deed. On February 21, 1899, Moyer and his wife executed and acknowledged their joint deed to Jefferson Myers, the material parts of which are as follows: "This indenture witnesseth: That J. M. Moyer and Elizabeth D. Moyer, his wife, for the consideration of the sum of five hundred dollars to them paid, have bargained, sold, and quitclaimed, and by these presents do bargain, sell and quitclaim unto Jefferson Myers the following described premises, to wit: [Here follows, among others, a description of the realty involved in this suit.] * * * To have and to hold the said premises with their appurtenances unto the said Jefferson Myers, his heirs and assigns forever." On March 17, 1899, Jefferson Myers, unmarried, conveyed to P. H. Blyth the property here in suit, being lot 3, block 190, in the city of Portland, Multnomah county, Or., by a deed in identical terms, for the consideration of \$1,000. The defendant Martin is the successor in interest by mesne conveyances from Blyth. J. M. Moyer died July 25, 1904. On August 3, 1912, Elizabeth D. Moyer executed and delivered her deed to the plaintiff, reciting as follows: "Know all men by these presents: That Elizabeth D. Moyer, unmarried, widow of J. M. Moyer, deceased, of Brownsville, Oregon, in consideration of one dollar to her paid by L. Y. Keady of Portland, Oregon, has bargained and sold, and by these presents does bargain, sell, assign and transfer unto L. Y. Keady, his heirs and assigns, all of her right, title, and interest, including dower and claim of dower in and to the following described real property: [Describing the same as above with others.] * * * To have and to hold the same unto the said L. Y. Keady, his heirs and assigns forever."

The contention of the plaintiff is that, the husband having conveyed the land to his assignee for the benefit of creditors, the wife had no estate in the land which she could convey at any time during the life of her husband; that, having nothing, the deed of Moyer and wife passed no title to Myers, whose deed, in turn, was ineffectual to transmit any property to Blyth. The contention of the defendant is that by the deed to Myers from Moyer and his wife, under the latter of whom plaintiff claims, an estoppel exists which prevents the plaintiff from taking anything in this suit. Stripped of immaterial collateral-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 17, 1914.

al questions injected into this record, the issue must turn upon the construction and effect of the deed from Moyer and wife to Myers.

The leading case upon this subject in this state is *Taggart v. Risley*, 4 Or. 235. In discussing the question of whether a deed of bargain and sale carried on after acquired title, the court, speaking by Mr. Justice McArthur, says: "Thus it will be seen that the ancient doctrine that estoppel grows out of warranty has been departed from by the Supreme Court of the United States, and it is now held that a deed without warranty may operate as an estoppel, in order to prevent a failure of the purpose with which it was executed. *Van Rensselaer v. Kearney* [11 How. 325, 13 L. Ed. 703] supra; *Fitzhugh's Heirs v. Tyler*, 9 B. Mon. [Ky.] 559. The question is one of intention (*Trull v. Eastman*) 3 Metc. [Mass.] 121 [37 Am. Dec. 126]; [*Miller v. Ewing*] 6 Cush. [Mass.] 33, and the whole instrument must be taken together, and effect must be given to its meaning as derived from each and every part of it. If the terms of a deed plainly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantee had at the time, it will bind and pass every estate or interest, which may vest in him subsequent to its execution, though it contain no warranty. *Fairbanks v. Williamson*, 7 Greenl. [Me.] 96; *White v. Erskine*, 10 Me. (1 Fairfield) 306; *Kimball v. Blaisdell*, 5 N. H. 533 [22 Am. Dec. 476]; *Trull v. Eastman*, 3 Metc. (Mass.) 121 [37 Am. Dec. 126]; *Bean v. Welsh*, 17 Ala. 772. In *Doe v. Oliver* (2 Smith's Ldg. Cases, 637), it is said that these decisions abandon the technical ground, taken in some of the earlier cases, that estoppel grows out of warranty, and rest it upon the broader basis of giving effect to the intention of the parties as expressed in the deed. No reason exists, under this view of the law, for attributing a more conclusive effect to the covenants in a deed than to any other portion of its contents." This case is followed in the later cases of *Gardner v. Wright*, 49 Or. 609, 91 Pac. 286; *Morrow v. Warner Valley Stock Co.*, 56 Or. 312, 101 Pac. 171; *Langley v. Kesler*, 57 Or. 281, 110 Pac. 401, 111 Pac. 246.

As to the effect of a bargain and sale deed on after-acquired title, see, also, the following cases: *Balch v. Arnold*, 9 Wyo. 17, 59 Pac. 434; *Carter v. Chaudron*, 21 Ala. 72; *Belcher Consol. Gold Min. Co. v. Deferrari*, 62 Cal. 160; *Needham v. Clary*, 62 Ill. 344; *Littell v. Hoagland*, 106 Ind. 320, 6 N. E. 645; *Thomas v. Stickle*, 32 Iowa, 71; *Damouth v. Klock*, 29 Mich. 289; *Jackson v. Demont*, 9 Johns. (N. Y.) 55, 6 Am. Dec. 259; *Buchanan v. Harrington*, 141 N. C. 39, 53 S. E. 478.

In the pleadings there are no allegations in any way impeaching the deed from Moyer and wife to Myers or seeking to reform the

same. It must take effect, therefore, according to its own terms. Considering its language, we find that the grantors therein, without naming the estate which either had in the land, assumed to bargain and sell, not any particular interest therein, but the whole fee, for they say that they "do bargain, sell and quitclaim unto Jefferson Myers the following described premises. * * * To have and to hold the said premises with their appurtenances unto the said Jefferson Myers, his heirs and assigns forever." The terms "bargain and sell" are not lessened nor qualified in their effect by the additional term of "quitclaim." In the absence of any language in the deed indicating such a purpose, that instrument cannot be restricted in its effect to a mere release of an inchoate right of dower. As against the grantors therein, it operates with the wider effect of conveying the fee-simple title to the property in question, and, with such a deliberate declaration of their purpose in making the conveyance, neither of them, nor those claiming under them, can be heard to say aught to the contrary. Assuming, as they did, to deal with the fee-simple title, and considering that no effort is made to impeach or qualify the deed, as for fraud or mistake, we cannot now allow them to say that the deed meant anything less than what appears upon its face. The decree of the circuit court is affirmed.

BEAN, McNARY, and RAMSEY, JJ., concur. The other Judges not sitting.

ASTORIA SOUTHERN RY. CO. v. PACIFIC SURETY CO. et al.

(Supreme Court of Oregon. Jan. 13, 1914.)

1. PRINCIPAL AND SURETY (§ 75*)—NATURE OF LIABILITY—PERFORMANCE BY CREDITOR.

Where a surety company bond of a railroad contractor makes conditions precedent to a recovery on the bond that the railway shall perform everything required by the principal contract, and that the surety shall be immediately notified of any breach by the contractor, the railway can recover on the bond only if it performs all of the conditions of the principal contract and of the bond on its own part.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 128; Dec. Dig. § 75.*]

2. PRINCIPAL AND SURETY (§ 123*)—DISCHARGE OF SURETY—NEGLECT TO NOTIFY OF DEFAULT.

Where the bond of a railway contractor required the railway to give the surety company immediate notice of any breach of contract by the principal, the surety was entitled to notice of breaches by subcontractors employed by the principal with the consent of the railway.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 304-311; Dec. Dig. § 123.*]

3. PRINCIPAL AND SURETY (§ 75*)—NATURE OF LIABILITY—PERFORMANCE BY CREDITOR.

Where a railway construction contract required the railway to furnish the contractor all the lumber, iron, and piling where needed,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

though it did not state when they were to be furnished, the railway was bound, as against a surety of the contractor, to furnish them when they were needed for the work.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 128; Dec. Dig. § 75.*]

4. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

Charges excepted to should not be construed apart from the whole charge, and the instructions are sufficient when, as a whole, they cover all the issues properly and fairly submit the case to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

A trial judge may instruct the jury in his own language, and, where the charge properly covers all points at issue, he may refuse requests that state the law correctly.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on a railway contractor's bond, a straight verdict for defendant shows that any error in the admission of evidence that some of the delay in the work was caused by acts or omissions of the plaintiff was harmless, where the issue raised thereby was not submitted, and no reference to the evidence was made in the charge.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Department 2. Appeal from Circuit Court, Multnomah County; Henry E. McGinn, Judge.

Action by the Astoria Southern Railway Company against the Pacific Surety Company and another to recover from the defendants the sum of \$20,000 upon a surety company bond. In the court below there was a judgment in favor of the defendants. Plaintiff appeals. Affirmed.

Warren E. Thomas and Lester W. Humphreys, both of Portland (Chamberlain, Thomas & Kraemer and Carey & Kerr, all of Portland, on the brief), for appellants. R. W. Wilbur, of Portland, and T. H. Crawford, of La Grande (Wilbur & Spencer, of Portland, on the brief), for respondents.

RAMSEY, J. On the 7th day of July, 1910, the plaintiff entered into a contract with the defendant S. A. Cobb for the construction of eight miles of railroad in Clatsop county. By this contract the defendant Cobb agreed to commence the work of building in 15 days from the date of the execution of said contract, and to prosecute the same with such force and means as would, in the opinion of the chief or assistant engineers of the plaintiff, insure the completion of the eight miles of road by or before the 1st day of November, 1910; said work to be at all times open to the inspection of the chief or assistant engineers of the plaintiff, and to conform to the rules and general specifications annexed to said contract. The defendant Cobb agreed not to assign or transfer said contract, or re-

let any of said work, without the written assent of the plaintiff or its chief engineer, and that he should constantly superintend said work in person. The defendant Cobb agreed to progress with said work at such time or times and at such particular points, on the line of said work, as said chief or assistant engineers should direct. It was mutually agreed by said parties to said contract that if the defendant Cobb, in the opinion of the plaintiff or its chief engineer, should fail or refuse to comply with any of the stipulations contained in said contract to be performed by him, the plaintiff should have a right to cancel said contract and declare the same void, in which event said Cobb should have no claim whatever on the plaintiff for damages, compensation, or percentage retained by the plaintiff, as hereinafter stated, either for material or work, but the plaintiff should have a right to take possession of and hold said material and work absolutely, and should be absolved as entirely and completely from said contract as if the same had never been made. Said contract further provided that, if the defendant Cobb should at any time neglect or refuse to progress with said work as fast as, in the opinion of said chief engineer of the plaintiff (communicated in writing to said defendant Cobb), it should be necessary for the completion by the time specified therefor by said contract, then the plaintiff might declare said contract abandoned, and the amount which was to be retained at the time out of the monthly estimates, which was to become due at the completion of the contract, should be forfeited to the plaintiff, or the plaintiff should have the right, at its option, to employ other parties to execute any part of said work, and charge the cost of the same to the defendant Cobb, to be deducted out of such retained percentage, or out of any payment that should have become due on any former estimate, or that should become due on any subsequent estimate. Said contract further provided that whenever, in the opinion of the plaintiff, it should be necessary to stop any of the work, or to diminish the force employed, the plaintiff should have the right to do so, and the defendant Cobb should have no claim for damages, but should immediately stop the work or diminish the force, as the plaintiff should direct. Said contract provided, also, that the location of any portions of said road, as also the slopes of excavation and embankments, the lengths of sections, the grades, or the width of the roadbeds, might be altered whenever said chief engineer should consider such alteration necessary or expedient, but such alteration should not be allowed as a reason for any claim for extra compensation, and it was expressly agreed by the parties to said contract that the price to be paid per yard should cover the risk of any such changes that might operate to the disad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

vantage of the defendant Cobb, and that he should have the benefit of any alteration that should operate in his favor. It was further agreed by the parties to said contract that the defendant Cobb should deposit all excavations upon the road in embankments, where embankments are needed, within an extreme haul of 1,000 feet, according to the direction of the plaintiff, or said chief or assistant engineers, and that Cobb should be paid in such cases for the excavation only. It was further agreed by said contract that the defendant Cobb should deposit all surplus excavations, not needed as embankments, in such place or places as the plaintiff or its chief or assistant engineers should direct. It was also provided by said contract that the defendant Cobb should take all borrowed earth for embankments from such place or places as the plaintiff or its chief or assistant engineers should direct, and that said material should be measured in embankment, and be paid for only at embankment prices. Said contract provided, also, that the decision of said chief engineer, on any point or matter touching said agreement should be final and conclusive between the parties thereto, and each of the parties to said contract thereby waived any and all right of action, suit, or suits, or other remedy in law, or otherwise, under said contract, or arising out of the same. Said contract provided, also, that in consideration of the performance of all the stipulations contained in said contract by the defendant Cobb to be by him fulfilled and performed, and whenever said work should have been, in the opinion of said chief engineer, completely finished in every respect and performed agreeably to the various stipulations and specifications of said agreement, and said chief engineer should have furnished to the plaintiff a certificate of the fact under his hand, with his estimate of the quantities of the various kinds of work done by the defendant Cobb under said contract, which estimate should be final and conclusive between the parties to said contract, the plaintiff would pay to the defendant Cobb the sums that should be due under said contract at the rates specified in said contract. Said contract provided, also, that the plaintiff should furnish the defendant Cobb, at the locations where the same was to be used, all lumber, iron, and piling to be used in building said road. Said contract provided, also, that the defendant Cobb should pay the plaintiff the sum of \$100 per day for every day that should elapse after the 1st day of November, 1910, until the completion of the conditions of said contract and the work thereunder. Said contract provided, also, that in the event of any delay in the delivery of material of any description by the plaintiff, which should retard the progress of the work and hinder the defendant Cobb from completing the work within the time stipulated for the completion of the work, the plaintiff's engineer should decide as

to whether, under the circumstances, any premium or penalty should be imposed or exacted, and, if so, how much.

The defendant Cobb and the Pacific Surety Company executed to the plaintiff a bond, dated July 7, 1910, in the sum of \$20,000, conditioned that, if the defendant Cobb should faithfully perform the said contract for the building of said eight miles of railroad on his part, according to the terms, covenants, and conditions thereof (except as provided in said bond), then said obligation should be null and void, otherwise to remain in full force and effect. Said bond contained the following conditions, to wit:

"(1) Notwithstanding that said contract is hereby referred to, this bond is nevertheless issued subject to the following express conditions, which shall be conditions precedent to the right of the 'owner' (the plaintiff) to recover hereunder.

"(2) The 'owner' (the plaintiff) shall keep, do and perform each and every, all and singular, the matters and things set forth and specified in said contract to be by the 'owner' kept, done and performed exclusively at the times and in the manner, as in said contract specified.

"(3) Provided, that said 'surety' shall be immediately notified of any breach of said contract by said 'principal' or of any act on the part of the said 'principal,' or his agent or employes, which may involve a loss for which the said 'surety' may be liable hereunder, immediately after the occurrence of such act shall have come to the knowledge of said 'owner' or of his duly authorized representative or representatives who shall have the supervision of the completion of the said contract; said notification must be given in writing to the president of said 'surety' at its principal office in San Francisco, California."

The amended complaint sets up said contract, for the construction of said eight miles of railroad, and also the said bond, executed by both of the defendants, and then alleges *inter alia*, in substance, that the plaintiff duly performed all the conditions on its part to be performed under said contract with the defendant Cobb for the construction of said eight miles of railroad, but that the defendant S. A. Cobb has failed to perform the conditions of said contract on his part to be performed, in that on the 12th day of October, 1910, the defendant S. A. Cobb abandoned said contract and ceased operations thereunder, and notified the plaintiff, in writing, that he had, on that date, abandoned said contract and would cease operations thereunder. The amended complaint alleges, also, in substance, that on said 12th day of October, 1910, the plaintiff, in writing, notified the defendant the Pacific Surety Company, as provided for in said contract, of the abandonment of said contract, and of the ceasing of work thereunder by the said

S. A. Cobb, and notified said defendant to at once exercise its option to assume said contract and complete the same. The amended complaint alleges, also, in substance that the Pacific Surety Company failed to assume said contract and to complete the same, and that the plaintiff had been compelled to assume and complete said contract as provided for therein, and had notified the defendant company thereof, and that the plaintiff would hold the defendant company liable for any amount over and above the contract price, provided for in said Cobb contract, which the plaintiff might be compelled to pay, in compensation with the assumption and completion of said contract. The amended complaint alleges, in substance, that the plaintiff had now fully completed said contract, and all the things to be done and performed thereunder, and that, in the completion of the same, the plaintiff had been compelled to pay and expend, and had paid and expended, in the completion of said contract the sum of \$20,506.82, in excess of the contract price provided for by said contract, and that, in addition thereto, the plaintiff proceeded with due diligence in completing said contract, but that the same was not completed until the 13th day of May, 1911, a period of 194 days after the time prescribed in said Cobb contract, and that, under and pursuant to the terms of said contract, the defendants became and are liable to the plaintiff in the sum of \$100 per day for each day after the 1st day of November, 1910, until the completion of said contract, to wit, the sum of \$19,400. As the bond sued on is only for \$20,000, the plaintiff demands judgment for only that sum.

The defendant company, by its answer, denied that the plaintiff had performed the terms and conditions of the said Cobb contract on its part, and admits that Cobb failed to perform his part of said contract, and that the plaintiff on October 12, 1910, notified the defendant company of that fact, but denies on information and belief, paragraphs VII, VIII, and IX of the amended complaint, with a few exceptions. The answer of the defendant company sets up two defenses. The first defense is, in substance, that the bond sued on provided, as a condition precedent to a right of the plaintiff to recover thereon from the defendant company, that the plaintiff (referred to in said bond as the "owner") shall keep, do, and perform each and every, all and singular, the matters and things set forth and specified in said (Cobb) contract to be by the plaintiff kept, done, and performed exclusively at the times and in the manner as in said contract specified, and said defendant alleged that the condition precedent of said bond was not complied with, in that under the terms of the contract set forth in paragraph III of said complaint (the Cobb contract) it was the duty of the plaintiff to furnish the defendant Cobb with

all lumber, iron, and piling needed in the performance and completion of the work contemplated in said contract at the location where the same was to be used, and at such time or times as it was required by said Cobb in order to properly carry out his contract; but, notwithstanding this duty and requirement on the part of the plaintiff, the said lumber and iron and piling were not delivered there in the quantity or within the time required, in order to carry out the said contract by the said Cobb, although the said Cobb frequently requested the said plaintiff herein to conform to the requirements of the contract aforesaid in that respect, and the defendants allege that the said default in conforming to said contract was a breach of said contract, and was a good and sufficient reason for the failure of the defendant Cobb to complete the said contract before the time required for its said completion, and made such completion within said time impossible of performance, and this failure to conform to the aforesaid requirements, as hereinabove set forth, was a failure to comply with the condition precedent of the said bond set forth in the complaint, in paragraph IV, requiring the plaintiff to perform each and every, all and singular, the matters set forth and specified in said contract. The other affirmative matter set forth in said answer is too lengthy to be set out here in full, but the substance of it is that, by the provisions of the bond sued on, the plaintiff was required to notify the defendant company at its San Francisco office of any act or default on the part of Cobb or his agents or employes which may involve a loss for which the defendant may be liable hereunder, immediately after the occurrence of such act shall have come to the knowledge of the plaintiff, or of its duly authorized representatives, who shall have the supervision of the completion of said contract, which notification was required by said bond to be in writing, and sent to the president of the defendant company at its San Francisco office. Said answer alleges, also, that compliance with said provision so to give notice is made a condition precedent to the plaintiff's right to recover upon said bond, but that, notwithstanding said condition precedent, the defendants aver that the plaintiff did not comply with said condition, in that on the 26th day of July, 1910, the defendant Cobb, with the knowledge and consent of the plaintiff, entered into a contract with Wilson, Rector, and Daley, copartners, by which said firm agreed to do the grading, excavating, cutting, filling, and all the other work described in said last-named contract, a copy of which is annexed to said answer, and agreed to do the same in conformity with the terms and specifications of the Cobb contract, and they further agreed to procure such force, means, men, implements, etc., as were necessary to complete said contract, within the time prescribed therein; but, not-

withstanding this obligation, the said firm failed and refused, although requested to do so by Cobb, to carry out the terms of said contract, and said firm failed and neglected to procure the force, teams, means, men, etc., required for the completion of said contract within the time specified, viz., on or before November 1, 1910, and the work done by said firm was not satisfactory to the chief engineer of the plaintiff, as said work did not conform to the general rules and specifications which were furnished and which became a part of the said contract with said firm, and said firm failed in every respect to conform to said contract and provisions of said contract, and was in default, to the knowledge of the plaintiff and its chief engineer, W. S. Fortiner, and said Cobb had relied on said firm, as his subcontractors and subagents, to carry out the terms and conditions of his said contract with the plaintiff. Said answer states, also, in substance, that the plaintiff and its chief engineer had knowledge of their own shortcomings respecting the furnishing of all lumber, iron, and piling required, as set forth in said Cobb contract, and that all of the foregoing stated facts, were known to the plaintiff and its engineer and agent Fortiner on September 2, 1910, and before that date, to wit, on August 16, 1910, and at other times prior to the last-named date, up to and including September 2, 1910, and thereafter up to and including October 12, 1910; that, notwithstanding said knowledge of said breaches of said contracts (said Cobb contract and the contract with said firm), and of all the acts and omissions above referred to on the part of said Cobb and on the part of said firm, involving loss for which the defendant company might be liable, the plaintiff and its chief engineer, Fortiner, failed, neglected, and refused to notify the company defendant of any of said breaches and violations of said contract, or of the said contract with said firm on the part of said S. A. Cobb, and his said subcontractors and agents aforesaid (said firm), until October 12, 1910, and the plaintiff thereby failed to comply with the condition precedent above referred to, in said bond, set out in paragraph IV of the amended complaint, etc.

The defendant Cobb filed a separate answer, denying much of the amended complaint, and alleging that the plaintiff failed to furnish him with the lumber, iron, and piling substantially as pleaded in the answer of the defendant company.

The plaintiff filed replies, denying parts of the answers, mentioned supra, but admitting that it agreed to furnish Cobb all lumber, iron, and piling at the locations where it was to be used, but alleging that the contract did not specify any time for the delivery of said lumber, iron, or piles, and admitting that there was some slight delay in the delivery of the lumber and pilings at the times re-

quired by S. A. Cobb, claiming, however, that such delays were not sufficient to prevent Cobb's completing his contract by November 1, 1910, etc. The case was tried by a jury, and resulted in a verdict and judgment for the defendants. The plaintiff appeals, and claims that the trial court erred in the admission of evidence, in giving certain instructions, and in refusing to give others.

The record shows that there were two main issues tried in the court below. The first was whether the plaintiff failed to comply with its part of the contract with the defendant S. A. Cobb for the construction of the eight miles of railroad. Said contract contains the following provision: "It is understood that all lumber, iron, and piling is to be furnished by the first party, at location same is to be used." It is claimed that the plaintiff did not comply with its agreement to furnish that part of the material, and that delays and losses resulted, which are a bar to the plaintiff's right of action. The other main issue that was tried in the court below was whether the plaintiff had given the defendant surety company notice of the defaults in the performance of the contract on the part of Cobb and his subcontractors and agents, as required by the surety bond sued on.

[1] The bond sued on contained, *inter alia*, the following provisions:

"Notwithstanding that said contract [the Cobb contract] is hereby referred to, this bond is nevertheless issued *subject* to the following *express conditions*, which shall be *conditions precedent* to the right of the 'owner' [the plaintiff] to recover hereunder.

"(2) The 'owner' (the plaintiff) shall keep and perform each and every, all and singular, the matters and things set forth and specified, in said contract to be by the 'owner' kept, done, and performed exclusively at the times and in the manner as in said contract [the Cobb contract] specified.

"(3) Provided, that said 'surety' shall be immediately notified of any breach of said contract by said principal (Cobb), or of any act on the part of the said principal, or his agents, or employes which may involve a loss for which the surety (defendant company) may be liable hereunder, immediately after the occurrence of such act shall have come to the knowledge of said 'owner,' or of his duly authorized representative or representatives who shall have supervision of the completion of the said contract; said notification must be given in writing to the president of said surety at its principal office in San Francisco, California."

By the provisions of said bond cited supra, the performance of all of the conditions of the Cobb contract on its part by the plaintiff, and the giving of notice to the defendant company by the plaintiff of the defaults made by Cobb, or his agents or employes, in the performance of the Cobb contract, is made a

condition precedent to a right of action upon said bond by the plaintiff. Such being the meaning of said bond, the plaintiff had no right of recovery thereon, unless it had performed said condition precedent.

7 Am. & Eng. Ency. L. (2d Ed.) p. 121, says: "Failure to perform a condition precedent is a breach of the contract. It involves the one so failing in all the consequences of a breach, deprives him of his remedies under the contract, releases the other party from liability to perform, and affords the latter a right of action against him."

4 Ency. Pleading & Practice, p. 627, says: "A condition precedent calls for the performance of some act or the happening of some event, after the terms of the contract have been agreed upon before the contract shall take effect; that is to say, the contract is made in form, but does not become operative as a contract until some future act is performed or some subsequent event occurs."

If the plaintiff performed all of the conditions of the Cobb contract and of the bond sued upon on its part, it was entitled to recover; otherwise not.

[2] The bond required the plaintiff to give immediate notice to the defendant company of any default or breach of the contract by Cobb or his agents or employees. The plaintiff, by his amended complaint, alleges that on October 12, 1910, Cobb had failed to perform the conditions of the contract on his part, and at that time it notified the defendant company of Cobb's failure to keep his contract; but the plaintiff does not claim, in its pleadings or in its brief, that it gave the defendant company any notice of a breach of contract on the part of Cobb until October 12, 1910, and it does not claim that it, at any time, notified said defendant of any default on the part of Cobb's subcontractors, Wilson, Rector & Daley. The plaintiff says in its brief that: "Very soon after entering into this contract, Cobb sublet practically all of the work. The grading, excavating, and filling was sublet to Wilson, Rector & Daley. The bridge and trestle work was sublet to J. B. Tillotson, and there were various other subcontractors, called stationmen. This subletting was with the consent of the plaintiff." The plaintiff admits that practically all of the work was sublet with its consent. The plaintiff in its brief says, also, that: "Wilson, Rector & Daley went about their work of grading, excavating, and filling *with a small force of men*. This matter [of the small force of men] was brought to the attention of Cobb, who repeatedly promised to increase the force and equipment to *the proper strength*. Cobb on September 3, 1910, put Wilson, Rector & Daley off the work and took it over himself." Thus it appears from the plaintiff's brief that Cobb's attention was called to the inadequacy of the force of men on the work, and that he repeatedly promised to increase the force and equipment "to the proper strength." It is ad-

mitted that the plaintiff knew that the force of men on the work was not sufficient. The attention of Cobb was called to it "repeatedly", but it is not claimed, we believe, that the defendant company was notified of any default in the performance of the contract until October 12, 1910. In fact no notice appears to have been given the defendant company of any breach of said contract until Cobb abandoned the contract and notified the plaintiff thereof on October 12, 1910. Cobb sublet practically all of the work of constructing the road, and most of the work that was done he did *by these subcontractors*. Legally, the failure of these subcontractors to put a sufficient force on the work, to comply with the contract for the construction of the road, was Cobb's failure, as he remained liable for the performance of the work under the contract. On August 16, 1910, Walter S. Fortiner, chief engineer of the plaintiff, wrote S. A. Cobb as follows: "You will please accept this as a formal notice to proceed forthwith to place a sufficient grading outfit on the line of the Astoria Southern Railroad Company's R. R. to insure completion of the grade within the time specified, as, if the work is not adequately covered by the 20th of August, the company will, under the terms of its contract with you, proceed to perform this work at your cost." There was abundant evidence to require the trial court to instruct the jury that the defendant company was entitled to notice of the breaches of the contract by Cobb and by his subcontractors, working under his personal supervision.

[3] The other point of the defense was that the plaintiff failed to furnish Cobb and his subcontractors all the lumber, iron, and piling at the points where they were needed, and *when* they were needed, as required by the contract. The plaintiff contends that the contract did not state *when* this material was to be furnished, and hence that it was not in default. But as this material was to be used by Cobb in building the road, the latter and his subcontractors were entitled to have it delivered when it was needed as the work progressed. It was the plaintiff's duty so to deliver it. The plaintiff admitted that there was some slight delay in delivering the material. The defendants were entitled to instructions that it was the duty of the plaintiff to deliver said material when it was needed as the work progressed.

The instructions given to the jury by the trial court cover 17 pages of the printed record. They cover fully and fairly every issue made by the pleadings. We have read them carefully several times, and are satisfied that all questions at issue were fairly submitted to the jury. In one or two charges we think that the rule was stated a little more favorably to the *appellant* than it should have been. We are sure that the *appellant* has no right to complain of the instructions as a whole.

The following are the charges given by the court to which the plaintiff excepted:

"And the first question for your determination in this case is, Who breached the contract? Was it breached by the railroad company in failing to furnish the iron, lumber, and piling, or was it breached by Mr. Cobb? That is the first inquiry for you in this case—that is the first inquiry which arises in this case under the statement made in the complaint that the railroad company has complied with all the conditions on its part to be complied with. Your first inquiry will be, Who breached this contract?

"Now, before there can be a recovery against the defendants, the railroad company must show upon its part it complied with all the conditions of this contract. If it has shown here that it furnished this iron, material, lumber, and piling within a reasonable time—that is, the time required—there is no time mentioned in this contract when this material is to be furnished, but the law says and reads into a contract that it is to be furnished within a reasonable time—if it was furnished within a reasonable time, why, the railroad company complied with this contract in that respect.

"Now, a reasonable time means such a time as an ordinarily prudent person would have furnished that material to Mr. Cobb along the line of the work as it progressed, and if it was furnished within a reasonable time, the railroad company complied with its contract. And if it was not furnished within a reasonable time, and as a result Mr. Cobb was prevented from completing his contract, then there was a breach on the part of the railroad company here.

"It cannot, however, be against the surety company yet, because it was necessary for you to take one step further. Was there upon the part of the railroad company, or its representatives, a failure to notify the home office at San Francisco, Cal., of a breach of the contract on the part of Wilson, Rector & Daley, or of a breach of the contract upon its own part, or a failure to furnish the iron, lumber and piling? In order to answer this question, you must consider in this case that the defendant is a compensated surety company; that it is entitled to rely upon breaches of the contract, but they must be substantial breaches and not technical breaches. They must be such breaches as would work a pecuniary discharge to the defendant, or deprive it of the protection or privilege given to it in this bond. With that in view you take this case and place yourselves mentally as near as you can about that line of work as it appeared at the time when the company became acquainted with the fact that there had been a breach in the contract of Wilson, Rector & Daley, when this notice to Mr. Walter S. Fortiner, who was the chief engineer of the railroad company, and you ask yourselves as between man and man—take all of the things into consideration and say, Would

a prudent man, an ordinarily prudent man, situated as the railroad company was, have notified the surety company of the breach of Wilson, Rector & Daley, or of any other breach they knew of? Did its failure to do so work any harm to the Pacific Surety Company, or did it deprive the Pacific Surety Company of any protection or of any privilege reserved to it in the bond? If your answer is, 'Yes, those men who represented the railway company were bound to notify the surety company of the failure of Wilson, Rector & Daley to complete this part of the contract, because it must have known that the failure of Wilson, Rector & Daley to comply with that contract which it made with Mr. Cobb would prevent Mr. Cobb from doing his work, and if the company was notified or had been notified, they might have protected themselves by something they could have done, or by the failure to give them such notice in addition they were deprived of its pecuniary effect.'

"Now, upon this other point, the defective notice, if a reasonably prudent man taking into consideration the contract, and all of these things, as well as the bond, would for the protection of the surety company have notified it of the breach of the contract by Wilson, Rector & Daley, as well as its own breach, if there was any breach, then it was the duty of the railroad company to give that notice."

[4] The charges given by the trial court and set out supra were excepted to by the plaintiff. The court's instructions were given orally, and some of the sentences were not as carefully formed as they might have been. The charges excepted to were taken from the lengthy instructions given, and they should not be construed apart from the whole charge, of which they are only small parts. The instructions as a whole cover all the issues properly, and submitted the case to the jury fairly for the plaintiff.

In his work on Charging the Jury, Thompson says, at pages 173, 174: "The charge is entitled to a reasonable interpretation. It is considered and construed as a whole in the same connected way in which it was given, upon the presumption that the jury did not overlook any portion, but gave due weight to it as a whole; and this is so although it consists of clauses originating with different counsel and applicable to different phases of the evidence. And if, when so construed, it appears probable that the jury were not misled by it, the judgment will not be reversed, although its parts may be in some respects slightly repugnant to each other, or because some one of them, taken abstractly, may have been erroneous. If, therefore, a single instruction is found which states the law incorrectly and yet it is qualified by others in such a manner that the jury were probably not misled by it, it will not be ground for reversing the judgment."

We think that, taking the charge as a whole, it states the rule in regard to the giving of notice to the defendant company of breaches of the Cobb contract a little more favorably to the plaintiff than it should have stated it.

Part of the breaches of the Cobb contract, on his part, occurred when his subcontractors Wilson, Rector & Daley were attempting to perform the contract. Their defaults were legally his. Cobb was doing the work by his subcontractors. The contract provided that he should not assign said contract or sublet any of the work without the written consent of the plaintiff. Said contract provided, also, that Cobb should constantly superintend, in person, all of said work. The plaintiff expressly consented to the subletting of said work to Wilson, Rector & Daley and other parties. As the plaintiff admits that practically all of the work was sublet with its express consent, it is obvious that the defendant company was entitled to notice of all material breaches of the contract, whether made personally by Cobb, or by his subcontractors working under his personal supervision.

[5] We hold that there was no reversible error in the instructions that were given, and that as the charges given covered properly all questions at issue, the court had a right to refuse to give the charges requested by the plaintiff. A trial judge has a right to instruct the jury in his own language, and, where his charge properly covers all the points at issue, he can, without error, refuse to give requested charges that state the law correctly. We think that part of the charges requested did not state the law correctly.

[6] The evidence that was admitted over the objections of the plaintiff was given to show that some of the delay in the work was caused by the acts or omissions of the plaintiff, and as there was a straight verdict for the defendants, it appears that it could not have affected the verdict. The charge of the court did not mention or refer to said evidence, and it is clear from the charge of the court that the matters referred to in said evidence were not submitted to the jury, and that the jury could not have considered them. It is not necessary to pass on the admissibility of said evidence. It was harmless.

Section 556, L. O. L., provides that cases shall be reversed only for errors substantially affecting the rights of the appellant.

We find no reversible error in the proceedings of the court below.

The judgment of the court below is affirmed.

BEAN, BURNETT, and McNARY, JJ., concur. BURNETT and RAMSEY, JJ., sat on the trial of this case by special assignment.

GIBSON v. KAY, State Treasurer.

(Supreme Court of Oregon. Jan. 13, 1914.)

1. MANDAMUS (§ 160*) — REQUISITES OF WRIT — LEGAL CONCLUSIONS.

In mandamus to compel the payment of a warrant for services rendered for the corporation commissioner, a statement in the writ of the duties of the corporation commissioner as defined by Gen. Laws 1913, p. 668, consisting of excerpts therefrom or legal conclusions therefrom, was superfluous, as the court takes judicial notice of the laws enacted by the Legislature.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.*]

2. ATTORNEY GENERAL (§ 1*) — POWERS AND DUTIES.

Under Const. art. 7, § 17, as it first existed, providing for the election of prosecuting attorneys, to be the law officers of the state, and article 7, § 2, as amended, directing that the judicial system remain as at present constituted until otherwise provided by law, and L. O. L. §§ 2666-2672, creating the office and prescribing the duties of the Attorney General, the powers of the Attorney General at common law are by statute and the Constitution vested either in that officer or in the district attorneys.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. STATES (§ 68*) — OFFICERS — RIGHT TO EMPLOY COUNSEL — CORPORATION COMMISSIONER.

So far as they concern litigation for the state or in which the state is interested, the duties for which an attorney was employed by the corporation commissioner might be performed by either the Attorney General or the district attorneys, and the corporation commissioner had no right to substitute an appointee of his own to perform these duties.

[Ed. Note.—For other cases, see States, Cent. Dig. § 70; Dec. Dig. § 68.*]

4. STATES (§ 68*) — OFFICERS — RIGHT TO EMPLOY COUNSEL — "CLERKS, STENOGRAPHERS, AND ASSISTANTS."

The corporation commissioner cannot, at the expense of the state, employ as an assistant an attorney to ascertain facts and the means of proving them, or to give legal counsel and advice; the terms "clerks, stenographers, and assistants," in Gen. Laws 1913, p. 670, § 6, authorizing the commissioner to appoint such clerks, stenographers, and assistants as may be necessary, not being comprehensive enough to include attorneys.

[Ed. Note.—For other cases, see States, Cent. Dig. § 70; Dec. Dig. § 68.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1224-1229.]

5. OFFICERS (§ 30*) — ELIGIBILITY — HOLDING MORE THAN ONE OFFICE.

The Legislature may prescribe a new meaning for the term "office," as used in Const. art. 2, § 10, prohibiting the holding of more than one lucrative office at a time, or apply it to a position not hitherto within its scope.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 37-43; Dec. Dig. § 30.*]

6. OFFICERS (§ 30*) — ELIGIBILITY — HOLDING MORE THAN ONE OFFICE — "OFFICE."

Under Gen. Laws 1913, p. 670, § 6, authorizing the corporation commissioner to appoint assistants necessary to properly discharge the duties of his office, and section 7, requiring the commissioner and other employees to take oath to discharge the duties of their respective offices, one of the appointees holds an "office" within Const. art. 2, § 10, forbidding

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

one from holding more than one lucrative office at a time.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 37-43; Dec. Dig. § 30.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 4921-4931; vol. 8, p. 7736.]

7. OFFICERS (§ 30*)—ELIGIBILITY—HOLDING MORE THAN ONE OFFICE.

An appointee of the corporation commissioner, pursuant to Gen. Laws 1913, p. 688, by which the commissioner was authorized to make the appointment, is within Const. art. 4, § 30, providing that no senator or representative shall, during the time for which he may have been elected, be appointed to any civil office of profit which shall have been created during his term.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 37-43; Dec. Dig. § 30.*]

8. CONSTITUTIONAL LAW (§ 50*)—DISTRIBUTION OF GOVERNMENTAL POWERS—EXECUTIVE POWER—ENCROACHMENT BY MEMBER OF LEGISLATURE.

The functions of the corporation commissioner and his assistants pertain to the administrative department of the government, in which a member of the legislative department is forbidden to participate by Const. art. 8, § 1, providing that the powers of the government shall be divided into three separate departments, the legislative, executive, and judicial, and that no person charged with duties in one shall exercise functions of another department, except as expressly provided in the Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 48, 49; Dec. Dig. § 50.*]

9. STATES (§ 139*)—WARRANTS—CONCLUSIVENESS.

The audit of the secretary of state and the drawing of his warrant in pursuance thereof for the compensation of an appointee of the corporation commissioner do not bind the state treasurer.

[Ed. Note.—For other cases, see *States*, Dec. Dig. § 139.*]

In Banc. Original proceeding by V. L. Gibson for mandamus to Thomas Kay, State Treasurer. Writ dismissed.

Alfred A. Hampson, of Portland (R. A. Watson, of Salem, on the brief), for petitioner. A. M. Crawford, Atty. Gen. (James W. Crawford and J. A. Benjamin, both of Salem, on the brief), for defendant.

BURNETT, J. [1] Invoking the original jurisdiction of this court in such cases, the petitioner sued out a writ of mandamus against the defendant to compel him to pay a warrant issued by the Secretary of State for services alleged to have been performed by Claude McColloch, under appointment by the corporation commissioner, and afterwards assigned to the plaintiff. After reciting the official character of the corporation commissioner and of the defendant, as state treasurer, the writ proceeds with a prolix statement of the duties of the corporation commissioner as defined by chapter 341 of the General Laws of Oregon for 1913. These consist either of excerpts from that statute

or legal conclusions to be drawn therefrom. All of these are superfluous and unnecessary, for, without pleading them, the court takes judicial notice of the laws enacted by the legislative branch of the government. In addition thereto, the writ declares that: "The performance and proper discharge of said duties above particularly described during all the times herein mentioned necessitated a vast amount of work and labor, and made it actually necessary for said corporation commissioner to have the assistance in the performance and discharge thereof of some one experienced in current business methods, and particularly in corporate and partnership methods of organization and transaction of business, and skilled and read in the rules and precedents of the common law, and statutes and decisions of the courts of this and other states and of the United States; that during all the times herein mentioned one Claude McColloch possessed the experience, skill, knowledge, and all the qualifications particularly above described in paragraph 7, and on the 10th day of November, 1913, said corporation commissioner employed and appointed said Claude McColloch to render him assistance in the performance and discharge of said duties hereinabove particularly described, and promised and agreed to pay him therefor at the sum and rate of \$125 per month, or proportionate parts thereof, payments to be made out of the corporation fund, as the same is created and described in and by said chapter 341, General Laws for 1913; that said Claude McColloch accepted said employment and appointment, and on said day duly qualified therefor as provided by said chapter 341, General Laws for 1913, and inclusive of said day, and thereafter during said month of November, 1913, rendered such assistance to said corporation commissioner pursuant to said terms of employment; and there became due and owing to said Claude McColloch therefor out of said fund the sum of \$87.50." The remainder of the document consists of a history of making a verified claim for the services, and an audit thereof by the Secretary of State, and his drawing a warrant, the payment of which was refused by the defendant, the state treasurer. By denials and allegations the return contends that the services mentioned therein were those incumbent upon the Attorney General and district attorneys of the state, for whom the corporation commissioner could not substitute an appointee of his own; further, that the claimant at all the times mentioned was a state senator representing Baker county in the Legislature, whose term would not expire until November, 1914, under which condition he is forbidden by the Constitution to hold at the same time the other lucrative office of assistant to the corporation commissioner; and, finally, that a law creating the corporation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—55

commissioner, and authorizing him to make the appointment under which McColloch was acting, was passed by the legislative assembly of which the latter was a member, on account of which he was prohibited from being appointed thereto, the position having been created during his term as such senator. The official character of the appointee as senator, and his participation as a legislator in the enactment of the law, were admitted by the reply.

[2] Under section 17 of article 7 of the state Constitution, as it first existed, it was provided that "there shall be elected by districts comprised of one or more counties, a sufficient number of prosecuting attorneys, who shall be the law officers of the state, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of law and general police as the legislative assembly may direct."

Section 2 of the amended article 7 directs that "the courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law."

No law changing the duties and authority of district attorneys having been enacted, they yet remain as defined by the original Constitution. The office of Attorney General was created and his duties prescribed by sections 2666 to 2672, L. O. L. His general functions are defined in section 2670, as follows: "The Attorney General, at the request of the Governor, secretary of state, treasurer, superintendent of public instruction, or any of the said parties, shall, upon the breach thereof, prosecute any official bond or contract in which the state is interested. He shall, when requested to do so, by either of said officers, give his opinion in writing upon any question submitted to him in which the state of Oregon may have an interest; and he shall, when requested, give legal advice to any of the above officers, or to the superintendent of the state insane asylum or superintendent of the state penitentiary in all matters relating to their official business, and shall, when requested, give his written opinion upon any question of law to either house of the Legislature. He shall, when requested so to do, prepare contracts, bonds, forms, and other writings which may be requested, for the use of the state or any department or officer thereof. He shall appear, prosecute, or defend for the state all suits, causes, or proceedings in the Supreme Court in which the state is a party or interested; and he shall when requested by any state board or board of trustees, or by the Governor or the Secretary of State or the state treasurer, appear, prosecute, or defend any action, suit matter, cause, or proceeding in any court in which the state is a party or interested; and he shall, when requested, con-

sult and advise with the district attorneys in all matters pertaining to their official duties. He shall keep in proper books copies of all his opinions, and a record of all his official proceedings, and shall deliver the same to his successor."

[3, 4] It is said, in *State v. Guglielmo*, 46 Or. 250, 257, 79 Pac. 577, 580 (69 L. R. A. 466, 7 Ann. Cas. 976), Mr. Justice Moore speaking for the court, that "the discretionary power vested in and exercised by the Attorney General at common law devolves, in this country, in the absence of any statutory regulations, on the district attorneys." The powers of the Attorney General at common law are preserved to this day in some form or other, and in this state are vested by statute and the Constitution either in that officer or in the district attorneys. *State v. Guglielmo*, supra; *State v. Millis*, 61 Or. 245, 119 Pac. 763; *State ex rel. v. Duniway*, 83 Or. 555, 128 Pac. 853. So far as they concern litigation for the state, or in which the state is interested, the duties for which the claimant was appointed were germane to and might well be performed by either the Attorney General or the district attorneys; and, the state having provided such officers charged with such duties, the corporation commissioner could not substitute an appointee of his own to perform those duties. As said by the Court of Appeals of New York, deciding *In re Robinson*, 103 N. E. 160: "The duty of an attorney for a person or corporation may require him, personally or otherwise, to interview all of the witnesses to a transaction or occurrence, whether such witnesses are favorable to the claimant or not, for the purpose of ascertaining so far as possible the extent of the liability of his client, if any, by reason of such transaction or occurrence." The work laid out for the appointee under whom the plaintiff claims, and which it is said the former accomplished, appertains to the duty of an attorney in its essential scope and meaning, for no attorney can efficiently serve his client without ascertaining the facts and the means of proving them. This he may do, of course, either in person or by any other lawful means; but in the end he must acquire personal familiarity with such data, or he falls short of performing his duty towards his client. So far as the appointment involved counsel and legal advice to the commissioner, it may be said that, if that officer was not well enough versed in the law governing his position to perform its requirements, he cannot expect the state to incur the expense of educating him thereto further than may be implied from the functions of its regular law officers. If he desires independent legal advice, he may, at his own cost, secure it. He cannot supersede the regular law officers of the state. The terms "clerks, stenographers, and assistants" are not comprehensive enough to include attorneys, or to work a repeal or

amendment by implication of the laws providing legal advisers for the state and in its interest.

[5, 6] It is also contended that by accepting the appointment mentioned, and qualifying therefor, as stated in the writ, the appointee was attempting to hold two lucrative offices at the same time within the inhibition of the Constitution. Section 10, art. 2. It is contended that the appointment did not constitute an office within the meaning of *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174, and *State v. George*, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586. In the first of those cases the Legislature appointed a water committee to establish and take charge of a water system for the city of Portland. In the latter a commission was appointed to superintend the construction of bridges across the Willamette river at Portland. The court held in the first of the cases, and the rule is followed in the second, that the appointees were mere agents of the municipalities involved, and were not officers within the meaning of the Constitution. It is competent, however, for the Legislature to prescribe a new meaning of the term "office," or to apply it to a position not hitherto within its scope. *Ex parte Case*, 135 Pac. 881.

It is said in section 6 of the act providing for a corporation commissioner that "he shall appoint such clerks, stenographers, and assistants as may be actually necessary from time to time to properly discharge the duties of his office." Section 7 says that, "before entering upon the duties of the offices to which they have been appointed, the corporation commissioner and the other employes of the department shall subscribe to an oath that they will faithfully and impartially discharge the duties of their respective offices."

The legislative assembly, in which the claimant was a senator at the time, designated the situation which he afterwards filled as an office, and, inasmuch as the same act provides for the compensation of such officer, it becomes a lucrative office within the meaning of the Constitution, and brings him within the rule that he cannot hold two lucrative offices at the same time.

[7] By a parity of reasoning the senator is within the terms of section 30, art. 4, which says that "no senator or representative shall, during the time for which he may have been elected, * * * be appointed to any civil office of profit which shall have been created, or the emoluments of which shall have been

increased during said term. * * *" The fact that the legislative assembly itself has designated these positions as offices requiring an official oath, and has provided that they shall be filled by appointment rather than by employment, distinguishes the case in hand from the cases of *David v. Portland Water Committee*, and *State v. George*, supra. The Legislature itself having designated the positions as offices, we cannot gainsay its definition, nor be wiser than the law in question.

[8] There is a further reason for not upholding the claimant in the situation involved. It is said in section 1, art. 3, of the state Constitution that the powers of the government shall be divided into three separate departments, the legislative, executive, including the administrative, and the judicial; and no person charged with official duties in one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided. In any view of the case the functions of the corporation commissioner and his assistants, including stenographers and clerks, pertain to the administrative department of the government in which a member of the legislative department is forbidden to participate.

[9] The audit of the Secretary of State and the drawing of his warrant in pursuance thereof do not bind the defendant state treasurer. It was held, in the case of *State v. Brown*, 10 Or. 215, that "the presentation of a claim against the state and its allowance by the secretary do not constitute an account stated so as to preclude an inquiry as to its correctness, in an action at law, brought by the state for a sum of money alleged to have been unlawfully allowed in said account, and paid through mistake." It is also laid down in *Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758, that, "since a warrant is not conclusive evidence of an indebtedness, it is the duty of the state treasurer to refuse payment, unless it represents a claim authorized by law."

For the reasons stated, the claimant was not authorized to accept the appointment, or perform the duties mentioned in the writ. He could not, therefore, properly or lawfully claim the compensation annexed to that appointment. The warrant of the Secretary of State issued in payment thereof is not binding upon the state treasurer, who, under the conditions appearing in the record, was justified in refusing to pay the same.

The conclusion is that the writ should be dismissed, and it is so ordered.

In re SCARRY'S ESTATE†
SCARRY v. EPLER.

(Supreme Court of Arizona. Jan. 14, 1914.)

1. JUDGMENT (§ 713*)—RES JUDICATA—PROBATE PROCEEDINGS.

A judgment on an application for the appointment of an administrator, that decedent was a resident of the county at the time of his death, and left property within the territory, was res judicata on such question in a subsequent action for specific performance of a contract executed by the decedent, as to a party who appeared and contested the appointment of the administrator on the specific ground that deceased was a nonresident, and owned no property in the territory.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS—EVIDENCE.

Findings on conflicting evidence will not be disturbed on appeal in the absence of some prejudicial error in rulings on evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

3. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error complaining merely that the court erred in admitting evidence over objection, and in rejecting evidence offered, and that the judgment is contrary to the law and the evidence, not being in conformity with Supreme Court Rule 8, subd. 1 (126 Pac. xi), requiring that assignments distinctly specify each ground of error relied on and the particular ruling complained of, were insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.*]

Appeal from Superior Court, Yuma County; Frank Baxter, Judge.

Action by S. E. Epler against the administrator of the estate of Joseph M. Scarry, deceased, for a specific performance, wherein William H. Scarry appeared and contested. From judgment for plaintiff, William H. Scarry appeals. Remanded, with directions.

Fred L. Ingraham and Clement H. Coleman, both of Yuma, for appellant. Kibbey, Bennett & Bennett, of Phoenix, for appellee.

ROSS, J. Action by appellee, Epler, against the administrator of the estate of Joseph M. Scarry, deceased. It is an action for specific performance of a contract of sale of land situate in Yuma county, Ariz., and is prosecuted by appellee under the provisions of chapter 9, title 17, R. S. Arizona 1901, which provide for the administrator's carrying out, under orders and decrees of the probate court, the contracts in writing of the deceased to convey real estate. At the hearing in the probate court, Wm. H. Scarry, appellant, brother of the deceased, appeared and contested the petition of appellee. The probate court entered judgment directing the administrator to execute proper conveyance of land to appellee. From this judgment, an appeal was prosecuted to

the superior court of Yuma county. In that court appellant filed pleadings in which he objected to the jurisdiction of the probate court, for the reason that Joseph M. Scarry, at the time of his death, was not a resident of Yuma county, and left no property within the territory of Arizona; objected to the enforcement of the contract on the grounds of inadequacy of price, and as being grossly unfair, unjust, and inequitable, for indefinite and unintelligible description, mental incompetency of deceased; and further alleged that Joseph M. Scarry, during his lifetime, had conveyed by warranty deed all of said real estate to appellant.

[1] The question of jurisdiction was finally settled and determined, in our opinion, in another case which arose on the appointment of the administrator. Upon the hearing of the application for the appointment of the administrator, the appellant appeared and contested the appointment on the specific grounds that deceased, at the time of his death, was a nonresident, and owned no property in the territory. The probate court found against him, and he appealed to the district court of Yuma county, which court affirmed the judgment of the probate court. That judgment was not appealed from, and became final. It is res adjudicata of that question.

[2] The court found all the other issues raised by appellant against him, and ordered the administrator to convey land to appellee upon the latter's performing the conditions of the contract of sale. Unless the court committed some prejudicial error in the admission or rejection of material evidence the findings being based upon conflicting evidence, we do not feel that we should disturb the findings.

The rule is that this court will presume that trial court correctly found the facts where there was "substantial legal evidence upon which it may be seen that the findings of fact in question, aided by every reasonable inference, could, with reason, have been based." 3 Cyc. 308.

[3] While appellant contends that error was committed in the admission and rejection of evidence, he has wholly failed to properly assign such errors. His assignments in that regard are: (1) That the court erred in admitting evidence offered by petitioner over objection of appellant; (2) the court erred in rejecting evidence offered by appellant; (3) that the judgment is contrary to the law; and (4) that the judgment is contrary to the evidence.

These assignments do not conform with rule 8, subd. 1, of this court (126 Pac. xi) in failing "distinctly to specify each ground of error relied upon, and the particular ruling complained of." This court has frequently held such assignments insufficient. *Main v. Main*, 7 Ariz. 149, 60 Pac. 883; *Wis-*

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

er v. Lawler, 7 Ariz. 163, 62 Pac. 695; Ward v. Sherman, 7 Ariz. 277, 64 Pac. 434; Char-bouveau v. Shields, 9 Ariz. 73, 76 Pac. 821.

The other assignments question the sufficiency of the evidence to support the findings, and as above stated we will not disturb the findings of the trial court.

The judgment of the trial court was that the administrator execute a deed of premises containing 150 acres, more or less, upon the payment by appellee to said administrator of the sum of \$25 per acre of said lands.

The judgment should have been that appellee pay to the administrator \$3,750—that is to say, \$300, without interest, \$1,150, with 7 per cent. interest from August 1, 1908, for two years, \$1,150, with like interest from August 1, 1908, for three years, and \$1,150, with like interest for four years from August 1, 1908—and, upon the payment and receipt of all such sums, the administrator execute his deed as such administrator to the appellee; the appellee failing to make such payment within 30 days from entry of judgment, his contract of option to be held for naught and canceled.

Remanded, with directions to enter judgment in accordance herewith.

FRANKLIN, C. J., and CUNNINGHAM, J., concur.

OCCIDENTAL LIFE INS. CO. v. JACOBSON.

(Supreme Court of Arizona. Jan. 14, 1914.)

1. INSURANCE (§ 360*)—PAYMENT OF PREMIUMS—PREMIUM NOTES.

If the policy or notes provide for forfeiture for nonpayment of premium notes, and such provision is not waived, the giving of a note does not operate as a payment of the premium, but merely postpones the time for payment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 913, 916-922, 924; Dec. Dig. § 360.*]

2. INSURANCE (§ 392*)—FORFEITURE FOR NON-PAYMENT—WAIVER OF FORFEITURE.

Where a policy provided that upon failure to pay a premium note when due, the policy should become void without action by the company, the company, by accepting a payment of interest after a premium note was due, and also a payment of one-half of the principal of the note, waived the provision for forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.*]

3. WORDS AND PHRASES—"WAIVER."

"Waiver" occurs when one having a right conferred by law or contract, with full knowledge of the material facts, does, or forbears to do, something inconsistent with the existence of the right, or of his intention to rely on it.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7375-7381, 7831, 7832.]

4. INSURANCE (§ 372*)—FORFEITURE FOR NON-PAYMENT—WAIVER.

A forfeiture clause in an insurance policy for nonpayment of premiums may be waived by the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.*]

5. INSURANCE (§ 388*)—FORFEITURES—POLICY OF LAW.

The law does not favor forfeitures, and courts readily seize upon the opportunity to bring about a waiver of a forfeiture provision in an insurance policy by placing a liberal construction upon the acts of the insurer, if such construction is demanded by justice, and not repugnant to law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1026, 1027, 1030, 1035, 1040, 1057; Dec. Dig. § 388.*]

Appeal from Superior Court, Maricopa County; J. C. Phillips, Judge.

Action by Alberta Jacobson against the Occidental Life Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Alonzo B. McMillan and Chalmers & Kent, all of Phoenix, for appellant. Chas. Woolf, of Tempe, for appellee.

FRANKLIN, C. J. The plaintiff is the beneficiary under a policy of life insurance issued by the defendant on the life of her husband, Chris Jacobson, who died on April 11, 1912. By the terms of the policy the deceased was required to pay a premium in the sum of \$155.50 in advance for one year's insurance, from the 2d day of November, 1909, and the further payment of a like amount on or before the 2d day of November of each year until 20 annual premiums had been paid. The policy further provided that upon failure to pay a premium on or before the date when due, or upon the failure to pay any premium note when due, the policy should become null and void, without any action or notice by the company. The policy also recites that 30 days' grace will be allowed for the payment of a renewal premium, on which interest will be charged at the rate of five per cent. per annum, for the time during which the premium remains due and unpaid. The first and second annual premiums were duly paid by the deceased. A promissory note was made and delivered by the deceased to the defendant company in words and figures as follows: "\$155.50. Phoenix, Ariz., October 31, 1911. On the second day of February, 1912, without grace, I promise to pay to the order of the Occidental Life Insurance Company, of Albuquerque, N. M., at its office in Albuquerque, N. M., the sum of one hundred fifty-five and 50-100 dollars with interest at the rate of eight per cent per annum from December 2d, 1911. This note is given for the annual premium due November 2d, 1911, on policy No. 1708, issued by the Occidental Life Insurance Company on the life of Chris Jacobson. [Signed] Chris Jacobson. Address R. F. D. No. 1, Tempe, Arizona." After said note became due and payable, and on the 6th day of February, 1912, the deceased paid to the insurance company the sum of \$79.80 on account of the interest and principal. This sum was credited on the note by the com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Ne. Series & Rep'r Indexes

pany as follows: "Credited 2.05 interest to Feb. 2, 1912. Paid \$77.75 on principal." No other amount whatever had been paid on account of the note when the insured died on April 11, 1912. The lower court rendered its judgment on the pleadings, and we have culled the foregoing facts from the pleadings as pertinent to a decision of the cause.

We have examined other criticisms made by appellant, but their application, in our opinion, would result in giving weight to the shadow rather than the substance of the case, and we shall confine ourselves to a solution of those questions only upon which the merits of the case must be ultimately decided, and the judgment of the lower court affirmed or reversed.

It is argued by defendant that the note did not constitute a payment of the premium, and, the payment of the premium being in arrears at the time the insured died, that by the terms of the policy it became null and void, and was therefore not in force and effect. The plaintiff contends that the note was a payment of the annual premium due on the 2d day of November, 1911, but, granting that the note did not constitute such payment, that the defendant company, by accepting a partial payment on the note after it became due and the forfeiture provision of the policy was in force, thereby waived such forfeiture provision of the policy, and so the policy was in full force at the time of the death of the insured.

[1] Where a forfeiture for the nonpayment of premium notes is provided for, either in the policy or the note, and the facts do not show any subsequent agreement or conduct which amount to a waiver of such provision by the insurer, the giving of the note must be regarded as merely postponing the time for the payment, and not as a payment of the premium. *Thompson v. Insurance Co.*, 104 U. S. 259, 26 L. Ed. 765; *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct. 126, 47 L. Ed. 204; *Leeper v. Franklin Life Ins. Co.*, 93 Mo. App. 602, 67 S. W. 941; *Union Cent. Life Ins. Co. v. Wilkes*, 92 Tex. 468, 49 S. W. 1038; *Fidelity Mut. Life Ins. Co. v. Price*, 117 Ky. 25, 77 S. W. 384; 25 Cyc. 826.

[2] Under the facts of this case the note cannot be regarded as a payment of the premium. But what took place after the maturity of the note? The day for its payment came and went, and the condition upon which the policy "shall become null and void without any action or notice by the company, and all rights shall be forfeited to the company, except as to the options herein stat-

ed" occurred. While such forfeiture clause of the policy was in force by reason of a failure to pay the premium note, the insured paid, and the company accepted, \$2.05 in payment of the interest to February 2, 1912, and \$77.75 on account of the principal, the amount paid being one-half of the principal of the note and a part of the interest.

[3] "Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it." *Smiley v. Barker*, 83 Fed. 684, 28 C. C. A. 9.

But, says the defendant, there is nothing inconsistent with accepting this payment on the note and insisting on the right of forfeiture; that it could well have been the intention of the parties at the time such payment was made that the insured should renew the policy under the 30-day option clause. But the answer to this is that the facts disclose that the payment was not accepted under the renewal clause, or for any purpose other than a payment on account of the premium note. The payment was so accepted and credited by the company, and no act or word of the insurer indicated anything else.

[4] A forfeiture clause may be waived because "a party always has the option to waive a condition or stipulation made in his own favor." *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689.

We think the conduct of the defendant clearly indicated an intention upon its part not to insist upon the forfeiture provision in the policy, and that the insured at the time he made the payment on the note was led to believe that the company did waive the same, so it is estopped from claiming a forfeiture now.

[5] Forfeitures are not favorites of the law. Courts are not slow in causes of this character to seize upon an opportunity whereby a liberal construction placed upon the acts of the insurer will bring about a waiver of a forfeiture provision placed in the contract of insurance for its benefit, if such a construction is demanded by the justice of the case, and is not repugnant to the law. The justice of this case does demand that we declare the forfeiture provision was waived by the insurer. The policy was therefore in force when the insured died, and the appellee was entitled to recover the amount due thereon.

Judgment affirmed.

CUNNINGHAM and ROSS, JJ., concur.

SHANK et al. v. HOLMES.†

(Supreme Court of Arizona. Jan. 14, 1914.)

1. APPEAL AND ERROR (§ 767*)—STRIKING BRIEFS—EFFECT.

Though appellant's opening brief be stricken from the record, the record would still have to be considered for manifest and fundamental error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3102; Dec. Dig. § 767.*]

2. PLEADING (§ 182*)—ADMISSION.

New matter alleged in the cross-complaint which was not denied is deemed admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 387, 388; Dec. Dig. § 182.*]

3. PUBLIC LANDS (§ 106*)—RULE OF DECISIONS—DECISIONS OF GENERAL LAND OFFICE.

The decision of the General Land Office canceling an entry of public lands is binding upon the courts when it becomes final.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302; Dec. Dig. § 106.*]

4. MINES AND MINERALS (§ 40*)—ENTRY OF MINING LANDS—SURVEY.

The official survey of land entered as a mining claim may serve for a second application after the cancellation of the first entry; the cancellation of the first entry in which the survey was a part not affecting it, or prohibiting the use of a copy in a subsequent application for a patent for the same premises.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 115; Dec. Dig. § 40.*]

5. MINES AND MINERALS (§ 40*)—CANCELLATION OF ENTRY—EFFECT.

A cancellation by the General Land Office of an entry for a mining claim is conclusive that the entryman failed to comply with all the conditions of entry, such as furnishing a proper affidavit of continuous posting of notice as required by Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 115; Dec. Dig. § 40.*]

6. MINES AND MINERALS (§ 40*)—CANCELLATION OF ENTRY.

The cancellation of a mineral entry by the General Land Office determines that the entryman obtained no title by his entry, and the fact that money sufficient to purchase the land remained on deposit after cancellation would not give the entryman any equitable rights in the land, nor would he acquire any title by procuring an official survey thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 115; Dec. Dig. § 40.*]

7. MINES AND MINERALS (§ 40*)—CANCELLATION OF ENTRY—SUBSEQUENT APPLICATION.

Defendant, by making an application for a patent to mineral lands after cancellation of a former entry by him, accepted and acquiesced in the decision of the General Land Office canceling his former entry; his right to the land after such cancellation depending upon location made under the laws.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 115; Dec. Dig. § 40.*]

8. MINES AND MINERALS (§§ 24, 25*)—MINERAL CLAIMS—"ABANDONMENT"—"FORFEITURE."

An "abandonment" of mining claims held by location takes place where the locator voluntarily leaves his claim to be appropriated by another, without any intention of again claiming it in the future; while a "forfeiture" occurs by operation of law, without regard to

the appropriator's intention, when he fails to comply with the statutory conditions.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 60; Dec. Dig. §§ 24, 25.*]

For other definitions, see Words and Phrases, vol. 1, pp. 4-13; vol. 8, p. 7559; vol. 3, pp. 2893-2899; vol. 8, p. 7665.]

9. MINES AND MINERALS (§ 27*)—MINERAL CLAIMS—PATENTS—PERFORMANCE OF CONDITION.

One who entered the mineral lands as a locator, by failing to make the expenditure for the year 1911, forfeited his claim thereto where another entered a claim thereto in 1912, and completed his location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 64, 65; Dec. Dig. § 27.*]

Appeal from Superior Court, Mohave County; Carl G. Krook, Judge.

Action by J. E. Shank and another against R. J. Holmes. From a judgment for defendant, plaintiffs appeal. Reversed and remanded, with directions to enter judgment for plaintiffs.

The appellee, R. J. Holmes, on March 21, 1912, made application to the local United States land office for a mineral patent for the land and premises embraced within the Homestake and Jack Pot lode mining claims situate in the San Francisco mining district, in Mohave county, state of Arizona. During the 60 days' period of the publication of the notice of such application, the appellants filed an adverse claim in the land office, claiming the exclusive right to the possession of the premises covered by the application under a mineral location initiated by them on February 23, 1913, as the locators of the Lucky Budge and Lucky Chance mining claims. Within 30 days after the adverse claim was filed in the land office, this action was commenced in the superior court of Mohave county in support thereof. The cause was tried to the court, without a jury, upon an agreed statement of facts in the form of a stipulation of counsel and a letter of the Assistant Commissioner of the General Land Office. Judgment was rendered for the defendant, from which plaintiffs appeal. Other facts are stated in the opinion.

Charles W. Herndon, of Kingman, for appellants. E. S. Clark, of Prescott, for appellee.

CUNNINGHAM, J. (after stating the facts as above). [1] The appellee moved to strike appellants' opening brief, for the reason the brief was not filed within the time stipulated. The abstract of the record was filed February 28, 1913. Appellants had until March 30, 1913, in which to file their brief under the rule, and by stipulation of counsel their time was extended for a period of 20 days additional, or until April 19, 1913. The brief was filed April 21, 1913. The prayer of the motion is that the brief be stricken and the appeal dismissed for the reason stated. The

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

brief of counsel in support of the motion discusses the question of the insufficiency of the assignments of error to raise any question for consideration by this court on the appeal. If the motion be considered one to strike the brief, for the reason it was not filed in time, as stated and prayed for in the motion, or if the motion be considered as going to the sufficiency of the assignments of error as discussed in the briefs of the parties, granting the motion would not work a dismissal of the appeal. The record would remain before this court for consideration as to manifest and fundamental error therein. *Kinney v. Nels*, 14 Ariz. —, 127 Pac. 719.

The assignments of error are too general to raise any question for consideration on this appeal, with the possible exception of the first, viz.: "The court erred in its findings of fact, contained in the judgment, as to paragraph 9 thereof, for the reason that the same is contrary to the stipulation of the facts; the said paragraph 9 of said findings of fact being contrary to the law, and to the stipulation as to the facts." Paragraph 9 of the findings of fact follows substantially the language of the stipulation of facts as to what the appellee would testify to if present. For that reason, it cannot be said that such finding is contrary to the stipulation, or contrary to the evidence. Upon the other hand, the finding is supported by the evidence.

If the judgment is responsive to the pleadings, and is supported by the findings of facts made and filed by the court, it must be affirmed.

The pleadings consist of the amended complaint, defendant's plea in abatement, general demurrer, and answer and a pleading designated a cross-complaint.

The amended complaint alleges in brief that plaintiff J. E. Shank is a citizen of the United States, and that plaintiff Charles Francen had declared his intention to become such citizen prior to February 23, 1912; that all the parties are residents of Mohave county; that on the 23d day of February, 1912, the plaintiffs entered upon the ground and premises formerly located as the Homestake and Jack Pot lode mining claims, situated in the San Francisco mining district, in Mohave county, Ariz., and located said premises as the Lucky Budge and Lucky Chance lode mining claims; that they discovered mineral therein, and duly performed all the necessary acts required by law within the time required by law to the due and complete location of such mining claims—the facts of location are sufficiently set forth in detail. It is then alleged that prior to December 8, 1910, the defendant made application for a patent for the Homestake and Jack Pot mining claims, and the ground covered by such application for patent is the same ground and premises covered by the Lucky Budge and Lucky Chance located by

plaintiffs, and none other; that on September 15, 1911, said mineral entry for the said Homestake and Jack Pot mining claims was canceled by the Commissioner of the General Land Office; that subsequent to the cancellation of said mineral entry on September 15, 1911, the said defendant failed and neglected to do the annual assessment work, or any work or labor whatever on the said Homestake or Jack Pot mining claims, or either of them during the year 1911, and failed and neglected to do the annual assessment work, or any work or labor upon either of said mining claims at any time during the year 1911, or at any time during the year 1912 prior to February 23, 1912; that on March 21, 1912, the defendant made a different application for a patent for the Homestake and Jack Pot mining claims; that during the 60 days' publication of the notice of such application, on May 17, 1912, plaintiffs filed their adverse claim to the area and premises covered thereby. It is alleged that defendant wrongfully withholds the possession from plaintiffs, to their damage in the sum of \$400, and this suit was commenced within 30 days after the filing of the adverse claim, and in support of such adverse claim. The usual prayer for relief follows.

The defendant answers by a plea in abatement, which attacks the right of plaintiff Charles Francen to maintain the action, for the reason he is not a citizen of the United States. This plea was not pursued, and no action seems to have been had on it. The record fails to disclose any action taken upon the general demurrer. It was evidently waived by defendant. The amended complaint sufficiently states a cause of action.

The defendant further answers, denying the plaintiffs' ownership and right to the possession of the lands described. He denies that plaintiffs *lawfully* entered upon such premises and located them as a mining claim, and thereby in any wise acquired any right, title, or interest therein under the laws of the United States, or otherwise. He denies that at the time of the attempted location the ground was open to mineral location, and alleges that the plaintiffs entered on said ground and made their pretended locations thereon as trespassers against this defendant, and not otherwise. He denies, upon information and belief, that the plaintiffs, within 90 days after February 23, 1912, or at any other time, performed the necessary location work on said claims; denies that on the 21st day of March, 1912, defendant *wrongfully* entered upon said mining claims, and alleges that the said ground has been lawfully held, possessed, and enjoyed by defendant as the Jack Pot and Homestake mining claims for more than 5 years prior to the commencement of plaintiffs' action, and that neither of the plaintiffs has ever had and has not yet any right, title, or interest thereto; denies any damage resulting to the plaintiffs.

As a cross-complaint defendant alleges his citizenship and residence; that he, for more than 5 years last past, with his predecessors in interest, has been the owner of, and entitled to the possession of, the Jack Pot and Homestake lode mining claims, giving the place of record of the location notices, book and page; alleges the location of the claims more than 5 years prior to the commencement of this action, by the entry upon the ground, the discovery of mineral in place; that the ground was open and unoccupied mineral land of the United States; that the required monuments were erected, notices posted and recorded showing a due and regular location of the mining claims in detail, and the due recording of the notices of location. It is then alleged: That ever since the date of location the cross-plaintiff or his predecessors in interest have performed upon each of said mining claims at least \$100 worth of work and improvements during each year following the year in which said locations were made, until and including the year 1910. That on December 1, 1909, cross-complaint filed his application in the United States land office at Phoenix designated as mineral application 07574, for said Homestake and Jack Pot lodes, the official survey of which claims was numbered 2670. That in due time thereafter the register of said United States land office at Phoenix issued his final certificate to cross-plaintiff for the purchase price of said Jack Pot and Homestake lode mining claims; but thereafter, on the 15th day of September, 1911, the General Land Office of the United States, at Washington, D. C., canceled said entry, for the sole and only reason that the application therefor had been made by an attorney in fact of said cross-plaintiff while said cross-plaintiff was an actual resident of Mohave county, Ariz. "That thereafter, in order to correct the mistake so made in application for patent of said cross-plaintiff on March 21, 1912, renewed his mineral application under number 016997 for the same lodes, the same being in all respects simply a continuation of the original application, and at all of the times since the said original application the cross-plaintiff had on deposit with the treasurer of the United States, and still has, the amount of money required by law to cover the purchase price of said lode mining claims, and each of them. That, under the laws and regulations pertaining to such matters, cross-plaintiff says that it was not required of him that he should perform any assessment work or annual labor upon said lodes, or either of them, subsequent to the time of making his application for patent, and paying in the purchase price to the register and receiver, and for that reason only the cross-plaintiff was advised, and believed that it was not required of him, that any assessment work or annual labor should be performed upon said claims, or either of them, for the year 1911, but that the title of said claims after payment by him of the said

purchase price was held in trust by the United States of America for his benefit, and that none of the ground comprising said claims was or has been since the date of paying in said money subject to location by any person or persons."

Prayer for establishing his title, and for the disallowing of the claim of plaintiffs' title, and for costs.

[2] It will be observed that the cross-complaint places in issue no fact asserted in the amended complaint. The only new matter of fact set forth in the cross-complaint is the allegation of the payment of the purchase price of the Homestake and Jack Pot, and that the money so paid remains in the United States Treasury. As that fact was not denied, it must be deemed admitted.

The facts found by the court are as follows:

"First. That the plaintiff J. E. Shank is now and on the 23d day of February, 1912, was a citizen of the United States, and that Charles Francen had, on the 23d day of February, 1912, declared his intention of becoming a citizen of the United States; that at all of the times herein mentioned the defendant, J. R. Holmes, was and now is a citizen of the United States.

"Second. That for a number of years prior to the 23d of February, 1912, the defendant J. R. Holmes and his predecessors in title had been the owners of, and in possession, and entitled to the possession as against all parties, save and except the United States of America, of those certain lode mining claims situate in San Francisco mining district, Mohave county, Arizona, known as the Jack Pot lode, the notice of location whereof is of record in Book S of Mines, at page 52, and the Homestake lode mining claim, the notice of location whereof is of record in Book T of Mines, at page 41, and that the location of said claims was in all respects in compliance with law, and that the annual labor upon them, and each of them, was performed by said J. R. Holmes and his predecessors in interest, for each and every year since the location thereof, until and including the year 1910; that no labor was performed on said claims, or either of them, by said J. R. Holmes or his predecessors in interest during the year 1911.

"Third. That on December 1, 1909, the said J. R. Holmes, by Charles W. Miller, Jr., his attorney in fact, made application for patent before the register and receiver of the United States land office at Phoenix for said Homestake and Jack Pot lodes, designated in said application as mineral survey No. 2670, and that on the 18th day of March, 1910, the register and receiver of said land office issued final certificate to said J. R. Holmes, No. 386218. That on the 15th day of December, 1911, the Commissioner of the General Land Office, at Washington, canceled the said entry, and rejected the said application, for the reason that said applica-

tion had been made in behalf of said J. R. Holmes, by an attorney in fact, at a time while the said applicant, J. R. Holmes, was a resident of the district in which said mining claims were and are located. That the purchase price of said claims remained upon deposit with the proper officials, and still so remains.

"Fourth. That on March 21, 1912, the said J. R. Holmes made mineral application No. 016997 for the same lodes, upon the same mineral survey, and under the same payment of purchase price.

"Fifth. Prior to the time of making said renewed application, that is to say, on the 23d day of February, 1912, the plaintiffs herein relocated all of the ground embraced in said Jack Pot and Homestake lodes under the name of the Lucky Budge and Lucky Chance lode claims, the notices of location whereof are of record as set forth in plaintiffs' complaint; and that within 90 days after the date of said location the plaintiffs performed the necessary location work, made discovery of mineral in place, and did every other act and thing required by law to be done in the matter of locating mineral claims, under the law of the United States, and the state of Arizona.

"Sixth. That the said plaintiffs, in making said location, based their right to do so upon the fact that no annual labor or assessment work had been done upon either of said claims by the said J. R. Holmes, or any one for him, for the year 1911, and that there had been no resumption of work by the said J. R. Holmes.

"Seventh. That on May 17, 1912, the plaintiffs herein duly filed in the United States land office at Phoenix their adverse claim and protest against said mineral application No. 016997 aforesaid, and brought their action in this court in support thereof within 30 days thereafter.

"Eighth. That after the location of said Lucky Chance and Lucky Budge mining claims, and prior to March 21, 1912, the plaintiffs notified defendant that they had located said claims.

"Ninth. That, for the greater part of the time since the attorney in fact for the defendant made his original application for patent, the defendant has been absent from Arizona, in northern California, and that the letters and notices sent out from the land office respecting said application have been sent to his said attorney in fact. For that reason, it has been in most cases many weeks before the defendant personally became aware of the situation, and particularly is this true of the letter of the Commissioner dated December 8, 1910, which defendant did not learn of until months thereafter, and the letter of September 15, 1911, canceling the entry. That the only reason defendant did not perform his assessment work for 1911 was that he in good faith believed that the defects in his application were only

technical, as he still believes, and that, after having paid in his money to the United States, he was wholly relieved, morally and legally, from any further expenditure on said claims, and that the legal title thereto was held for him in trust by the United States pending the issuance of patent."

The findings follow the stipulation of the facts in all material particulars. The date of the letter of the Assistant Commissioner of the General Land Office canceling the entry is given in the findings as of December 15, 1911, while the fact appears that such letter bears date of September 15, 1911. The mistake in the month is evidently a clerical error, and is not material. The defendant, in his cross-complaint, alleges that his former entry was canceled by the General Land Office on the 15th of September, 1911, "for the sole and only reason that the application therefor had been made by an attorney in fact of said cross-plaintiff while said cross-plaintiff was an actual resident of Mohave county, Arizona." The same language is used by the court in the findings of fact; while the evidence on that point as contained in the letter is that the entry was canceled for the reason "no proper affidavit of continuous posting has been furnished." The letter of the General Land Office discloses that the affidavit of continuous posting of the notice of the application for patent and the "charges and fees were sworn to by Charles W. Miller, Jr., as attorney in fact; whereas applicant stated in his affidavit of citizenship that he was a resident of Arizona, and therefore within the land district."

[3] The decision of the General Land Office canceling the entry of public lands is binding upon the courts when such decision has become final. *Smelting Co. v. Kemp*, 104 U. S. 636, 28 L. Ed. 875; *Knight v. United Land Association*, 142 U. S. 211, 12 Sup. Ct. 253, 35 L. Ed. 974.

The decision of cancellation was rendered September 15, 1911. Appellee contends that his renewed application for patent made on March 21, 1912, upon the same official survey and payment of the purchase price of the lands, was and is a continuation of his original application. The court properly finds that the application of March 21, 1912, was a "mineral application." Beyond question such application was an original application for a patent, which required the performance of every act and thing required by the laws to be performed in the same manner and to the same extent as if no former application had been made.

[4] The official survey of the premises may be made to serve for the two applications so far as the proceedings of the last application has progressed. The mere canceling of the entry, in which the official survey was a part, in no manner affected the plat and field notes of the survey, or prohibited their use or a copy of them to be used in a subsequent application for a patent for the same

premises. The purchase price of the land must be on deposit, and so remain until accepted by the Interior Department. The Interior Department has no right to accept the purchase price of public lands, and appropriate the same to the sale of any specific tract of public lands, until the purchaser has met all the conditions prescribed by law and the legal regulations made pursuant thereto which entitle him to the full legal right to become the purchaser.

[6] The decision of the land office in this case canceling the entry is conclusive that the entryman failed to meet all such conditions, viz.: He failed to furnish a proper "affidavit of continuous posting." Section 2325, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1429), requires of the claimant for a patent: " * * * At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, that where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits."

[6] The cancellation of the entry adjudicates the fact that the entryman obtained no title at all by his entry, and by such act of the land office the entryman is deprived of the ability to claim any right under his receipt. *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439.

The mere fact that the amount of money sufficient to purchase the ground remained on deposit after the entry was canceled could give appellee no equitable rights to the ground he wished to purchase therewith. Neither would the fact that appellee procured an official survey to be made of the ground alone create any title thereto in appellee.

The contention of appellee that the renewed application for patents was made by him on March 21, 1912, upon the same official survey and payment of the purchase price, is unsound. The application of March 21, 1912, was an original application for patent open to all attacks that may properly and legally be directed against such application, notwithstanding the former application

and the official survey, and money remaining on deposit.

[7] The appellee, in making the application for a patent on March 21, 1912, thereby accepted and acquiesced in the decision of the General Land Office canceling his former entry. From the date of cancellation, September 15, 1911, the appellee's right to the possession of the grounds located depended upon the locations and the rights arising therefrom under the laws pertaining thereto. *Adams v. Polglase*, 32 Land Dec. Dep. Int. 477; *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439; *McGowan v. Alps Consol. Min. Co.*, 23 Land Dec. Dep. Int. 113; *McKnight v. El Paso Brick Co.*, 16 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D, 1309; *Peoria & Colo. M. & M. Co. v. Turner*, 20 Colo. App. 474, 79 Pac. 915; *Martin's Mining Law*, p. 28, § 41.

The last authority says: "The cancellation of the entry—of the receiver's receipt—is, like its issuance, a mere incident in the proceedings prescribed for procuring title from the government. Although the receiver's receipt while it remains in force is evidence of compliance with preliminary patent conditions, yet its revocation, and nothing more, of itself, does not evidence either a forfeiture or relinquishment of the location or claim by the applicant. It has no necessary connection either with the segregation of the land from the public domain or its restoration thereto."

The question at issue in this appeal is whether the appellee's right to the possession of the lands was forfeited by his failure to perform the annual assessment work thereon for the year 1911. The trial court as a conclusion of law decided appellee had not abandoned the lands by such failure, or otherwise. The court failed to pass upon the question of forfeiture, although such was the question involved in the case.

[8] "Abandonment, as applied to mining claims held by location merely, takes place only when the locator voluntarily leaves his claim to be appropriated by the next comer, without any intention to retake or claim it again, and regardless of what may become of it in the future. A forfeiture takes place by operation of law, without regard to the intention of the appropriator, whenever he neglects to preserve his right by complying with the conditions imposed by law; that is, to make the required annual expenditures upon the claim within the time allowed. The former involves an inquiry of fact as to the intention as well as the act; in regard to the latter the inquiry is: Has the required expenditure been made as the law commands?" *McKay v. McDougall*, 25 Mont. 258, 262, 64 Pac. 669, 670, 87 Am. St. Rep. 395, 397, and note page 403.

[9] It is a conceded fact that the expenditure was not made for the year 1911. We have seen that on September 15, 1911, and thereafter, the appellee was holding the lands

on the petitions and several answers and cross-petitions, and the several replies of the parties hereto and the evidence, the court being fully advised in the premises does now find that said Crow creek is composed of North Crow creek, Middle Crow creek and South Crow creek; that said South Crow is composed of the North branch of South Crow creek, and the South branch of South Crow creek; that divers persons, parties hereto, have located ditches and appropriated water of these various streams, and that, in order to adjudicate as to the priorities of the rights of all the parties hereto, it is necessary for the court to adjudicate the rights growing out of each of the said streams as between themselves and the parties below them on the main stream. The court further finds that it is impossible at this time, in the uncertainty attendant upon irrigation and the incomplete experience of the persons appropriating water, to definitely ascertain and fix the amount of water in feet or inches to which each party defendant is entitled." Notwithstanding this recital, the court did proceed to fix the priorities and the amount to at least some of the parties who were before the court, including the defendant here and the plaintiff's predecessor in interest. We cannot assume that such recital did, in fact, nor was it intended by the trial court to, have the effect of vitiating the decree, or that part of the decree following those words. The court by its decree did fix the order of the priorities as a finality, and attempted to allot the amount of water to the parties, stating in figures the number of cubic feet of water per second of time allotted to each. As to the water rights of Cheyenne, the decree of adjudication recites:

"(1) The city of Cheyenne is entitled to have twelve thousand four hundred and eighty-one (12,481) cubic feet of water per second of time for the use of its inhabitants, of water of Crow creek proper. * * *

"(24a) The City of Cheyenne is entitled to sufficient of the waters of Crow creek to irrigate 60 acres of land not to exceed 4.5 cubic feet per second of time."

"XIV. The court finds that the city of Cheyenne as against each and every and all appropriators of water from the main Crow creek and its tributaries, and as against all other persons, is entitled by priority of right for the use of its inhabitants to twelve thousand four hundred and eighty-one cubic feet of water per second of time of the water of Crow creek; and the court finds that the said city of Cheyenne is entitled to an injunction against each and every appropriator of water from Crow creek or any of its tributaries enjoining him and them to permit sufficient water to flow down to the city ditch and city of Cheyenne pipe line to satisfy the said prior right of the said city and enjoining him and them from diverting water from said Crow creek or either of its tributaries

in such a manner or to such an extent as will in any wise interfere with the said prior right of the said city of Cheyenne."

[3] It is contended that the allowance to the defendant of "twelve thousand and four hundred and eighty-one (12,481) cubic feet of water per second of time for the use of its inhabitants of waters of Crow creek proper is void upon its face, of no effect and ambiguous, uncertain, unintelligible, and not capable of being enforced." We see nothing upon the face of the adjudication that would warrant us in sustaining this contention or either of them. Plaintiff does not base his argument upon anything unintelligible or ambiguous appearing on the face of the decree, but upon allegations allunde to the effect that in low water there was only 10 cubic feet of water, and in time of high water not to exceed 20 cubic feet in the source of supply and available for any purpose. The eighth paragraph of the petition is as follows, viz.: "Notwithstanding said pretended and void decrees, said city defendant at times pretends that it is entitled to twelve and $\frac{48}{100}$ cubic feet of water flowing per second of time from the said waters of Crow creek and its said tributaries and branches, and at other times pretends that it is entitled to all of said water, and plaintiff alleges that all of said pretenses and claims of said city defendant are and have always been false, vexatious, and void, and in direct, hostile, and flagrant disregard of this plaintiff and other owners of lands and water rights connected therewith on said Middle Crow creek." Taking these allegations as true, then the claim of the city has never at any time been to the extent of 12,481 cubic feet of water per second of time as fixed and allowed in the decree. It nowhere appears in the petition that in such adjudication the court found the amount of water available in the source of supply other than what might be implied from the allotments. Indeed the plaintiff in order to maintain his petition treats and regards the decree as void on its face, but the court which rendered such judgment and decree, admittedly having the parties before it and jurisdiction of the subject-matter, had jurisdiction to enter a decree. The decree entered must fall, if at all, for defects if any apparent on its face (23 Cyc. 1095, 1096, 1235), yet plaintiff goes outside of the decree and rests upon pleaded facts, so far as this demurrer is concerned, to avoid the decree. The distinction between a voidable decree and a void decree for the purpose of collateral attack is so well recognized that it needs but little discussion.

[4] It is the universal rule that a decree which is voidable only is not subject to collateral attack (23 Cyc. 1095, 1096), but may be subject to a direct attack. As stated by the United States Supreme Court: "The doctrine of this court and of all the courts of this country is finally established that if the

court in which the proceedings took place had jurisdiction to render the judgment which it did, no error in its proceedings which did not affect the jurisdiction will render the proceedings void, nor can such error be considered when the judgment is brought collaterally into question." *McGoon v. Scales*, 9 Wall. 23, 19 L. Ed. 545. A judgment or decree which is void upon its face (23 Cyc. 1059) may anywhere be treated and ignored as of no binding force or effect. 23 Cyc. 1055, 1070, 1073.

[5] Plaintiff says in his brief that the allowance to the city of such a large quantity of water as mentioned in the decree may be claimed to be "a clerical error, or a misprision of the clerk, but that matter cannot be altered or reformed now." Section 4650, Comp. St. 1910, provides that a district court may vacate or modify its own judgment or order, after the term at which the same was made, "for mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order," and section 4659 limits proceedings in such causes to three years. Both of these sections were enacted in 1886 by the Ninth Legislative Assembly of the territory of Wyoming as a part of chapter 60, S. L. 1886, being "An act to establish a code of Civil Procedure for Wyoming territory," and appear as sections 2701 and 2710, Rev. St. 1837, and as section 3795 and 3804, Rev. St. 1899. It is thus seen that the plaintiff's predecessor in interest and plaintiff, if he succeeded to his interest in time to do so, had three years after the entry of such decree within which to apply to the court in which it was rendered to modify it. No such application was made. The adjudication here is analogous to a judgment or verdict which is excessive in amount where a party through negligence has failed to take steps within the statutory period allowed to correct or modify such judgment. In such case the negligent party has lost his remedy. Counsel for plaintiff says: "The decree as it stands in its enormity cannot now be changed. Consequently it cannot now be enforced." In view of the statute we think, through the laches of the plaintiff or of his predecessor in interest or both, the decree cannot be corrected or reformed, but we are not prepared to say upon the face of the decree that it cannot be enforced. To do so we must take into consideration facts allunde pleaded in the petition and upon which plaintiff relies to avoid the decree. The decree, in effect, declared a first priority in favor of the city, and reserved to it as against all others a definite number of cubic feet of water from the source of supply per second of time. The decree was upon its face definite in time and amount. 1 Well on Water Rights, 726. It may be that such an amount of water as allotted to the city cannot be obtained from the source of supply, but that does not appear upon the face of the decree, and if the error was in writing

in the decree a greater number of cubic feet than the court actually or intended to allow, such error could have been corrected upon timely application, or, if the allowance of such an amount was intended by the court and was erroneous for any reason, then by proceedings in error within two years to the Supreme Court for correction in that respect; but the laches of the plaintiff in failing to do either would not operate as a forfeiture of the amount of water to which the city was entitled.

[6] 2. It is contended that the adjudication is at most interlocutory. It is not so in form. Upon the hearing the court stated the order of priorities and the city was allowed a specific amount of water. If the amount so allowed was excessive, it is at least definite in amount and was subject to correction for error within a limited time, and aside from this the other parties to such adjudication, including the plaintiff, were perpetually enjoined from interfering with the city's right as fixed by the adjudication.

[7] The plaintiff complained of the allowance to the city of 4.5 cubic feet of water per second of time for the irrigation of 60 acres of land. That part of the decree does not state where this land is or describe it, but the petition without any description alleges that it is outside the limits of the city. There is no allegation to the effect that the city has used, is using, or threatens to use the amount so allowed or any part thereof for irrigating such land. No damage done or threatened is shown with reference to this allowance.

3. It is alleged that the city, in pursuance of different contracts with the United States of America to which plaintiff nor his predecessors in interest were parties or ever assented, is furnishing water from its supply not necessary for the use of the city's inhabitants to Fort D. A. Russell Military Reservation and its inhabitants, which reservation is situate outside of and about three miles westerly from the city, to the damage of plaintiff. That originally the headgate of the city's ditch was situated about six miles from the city on Crow creek proper, lower down on said creek than plaintiff's land and above said military reservation. That such contracts were made, executed, and ratified prior to the matters complained of in plaintiff's petition. That the city obtained confirmation and ratification of these contracts by an act of the Eleventh State Legislature of the state of Wyoming, entitled, "An act empowering special charter cities having a population of not less than ten thousand inhabitants to enter into and perform contracts with the United States government, its departments or representatives, to supply water for the use of military posts, forts or stations of the United States adjoining such cities and validating such contracts heretofore made," approved February

16, 1911. That none of said agreements have ever been assented to, ratified, or acquiesced in by the plaintiff or any of his predecessors in title of in and to his said lands and premises, and the water, water rights, and appropriations of water connected therewith, nor has plaintiff and his said privies and predecessors in title ever assented to, acquiesced in, or ratified any of the uses of the said city defendant or said military post and its appurtenant reservation of any of the waters of said Crow creek. That the city has constructed two reservoirs in order to impound and store the waters of Middle Crow creek, viz.: The Granite Springs reservoir in section 16, township 14 north, of range 70 west, of Laramie county, and about eight miles westerly, higher up and above plaintiff's land, and the Crystal Lake reservoir also located about five miles westerly, higher up and above plaintiff's lands and premises on said Middle Crow creek, for the impounding and storage of the waters of said creek. That thereafter and in 1909 the city constructed a main pipe line from Crystal Lake reservoir easterly and lower down on said creek than said Granite Springs reservoir to said Fort D. A. Russell and to said city of Cheyenne for the purpose of carrying all the waters of said Middle Crow creek from both reservoirs to said fort and the city. That the taking of the water from said creek in so far as the change from the original point of diversion below to a place above plaintiff's land was a flagrant violation of plaintiff's rights, as by so doing all the water was impounded, taken into conduits or pipe lines, and conducted down by plaintiff's land and premises, thus depriving him of his water supply for irrigation, to the permanent injury to his land in the sum of \$9,000; the use of the water for his live stock for the years of 1910 and 1911 in the sum of \$2,000; the loss of his hay crop for the year 1910 in the sum of \$3,000, and the loss of his hay crop for the year 1911 in the sum of \$3,000; in all the sum of \$16,000, for which judgment is demanded with interest, and the further sum of \$10,000 exemplary damages. Taking these allegations as true, it is apparent that the respective rights of the parties must be measured by the decree made on April 18, 1888. If, as alleged in the petition, the city had bound itself by a contract with the United States to furnish water to Fort D. A. Russell, its inhabitants and appurtenant military reservation, which it cannot fulfill except by depriving the plaintiff of any benefit from and use of his appropriation, the answer is twofold:

[8] (1) The city's priority precedes plaintiff's appropriation, and (2) plaintiff is not in a position to complain of the city selling its property or right to use the water within the limits of its appropriation. The first proposition has been discussed. As to the second proposition, it was said by this court in *Edwards v. City of Cheyenne*, 19 Wyo.

110, 160: "It is well settled that a municipality may devote to other purposes that portion of its public property not required for public use without interfering with the public character of the property, or the right to acquire it, when the original or main purpose is that which the law authorizes." The original or main purpose of the city was to acquire a sufficient water supply for the wants and needs of its inhabitants, both for domestic purposes and protection from fire. The accomplishment of that purpose was within the scope of the incorporation powers of the city. It was so provided by the charter (Charter of Cheyenne, 7th subd. § 1378, [Comp. St. 1910]), which antedated the decree that the city in its corporate capacity was and is authorized and empowered to enact ordinances "to provide the city with water." Thereafter and in 1887, prior to the adjudication, the territorial Legislature by an enactment authorized the city to construct a water system and issue bonds and use the proceeds for the construction of such system and which appears as chapter 112, Comp. St. 1910. It will be observed that the plaintiff does not question but affirms the validity of such contracts, and alleges that the water covered by his appropriation is necessary to the city to fulfill its contract with the United States to supply Fort D. A. Russell, its inhabitants, and the military reservation with water. It will be further observed that the water so contracted to be supplied is within the limits of the appropriation as decreed to the city.

[9] The city was not limited in the amount of its appropriation to the needs of its citizens at the time of the adjudication. This court further held in *Edwards v. City of Cheyenne*, 19 Wyo. at page 167, 114 Pac. 677, 122 Pac. 900, that a municipal corporation may lawfully dispose of any excess of water supplied by its system for other than purely municipal uses. The right to the use of the water by the city having accrued in the amount of and as fixed by the decree, the city had the right to dispose of and apply its surplus water to a beneficial use up to the amount of its appropriation, even though by so doing it left no water in the creek for subsequent appropriators.

[10] The change of the headgate from its original place is a right which has been recognized by this court, provided such change does not injure other appropriators from the same source of supply. *Johnston v. Irrigating Co.*, 13 Wyo. 208, 79 Pac. 22, 70 L. R. A. 341, 110 Am. St. Rep. 986. At the time of the adjudication here complained of, the city was not limited by law to the appropriation of only the amount of water required or necessary for the inhabitants of the city, but might appropriate and acquire more than sufficient for those purposes as they then existed, and this was done. If the right to change the point of diversion were denied, such appropriation might be insufficient for

the city, as its needs and wants in that respect augmented by reason of increased population.

[11] 4. It is alleged that prior to and since the adjudication on April 18, 1888, hereinbefore referred to, the plaintiff acquired title to the use of the water by adverse user for the period of 24 years. We have no express statutory provision covering or conferring the right to acquire title to municipal property by adverse user as against the municipality, which property is held by it in trust for its inhabitants, and in such case the right is denied by the great weight of authority. It is said in 2 Ency. L. & P. at page 562, that: "The rule announced in a great majority of the decisions, in the absence of any express statutory provisions, that such corporations with regard to lands held for public use, act in a sovereign capacity and title to such lands cannot be acquired as against the municipality by adverse possession." The text is supported by a great many decisions cited in the footnotes, and by parity of reasoning the same rule would apply to other property held by the municipality in trust for its inhabitants. In *Norrell v. Augusta R., etc., Co.*, 116 Ga. 813, 42 S. E. 466, 59 L. R. A. 101, the court said: "After a careful consideration of the question, we are of opinion that the better view is that prescription does not run against a municipal corporation in regard to land held by it for the benefit of the whole public. While it may be entirely proper to apply the doctrine of adverse possession and prescription to a city in matters in which it is concerned in a capacity which is private rather than governmental in its nature, we think that adverse possession by an individual of property held by a city for the benefit and use of the whole public should not be allowed to ripen into a prescriptive title. The city is in some respects not a division of the state, but it is at least an agent of the state exercising, within certain limits, governmental functions and powers. If prescription does not run against the state, it should not run against a city in respect to rights which are intrusted to the city for the benefit of the public generally, and as to which it exercises governmental powers. A municipal corporation is intrusted with the care and control of its streets for the use and benefit, not of its own inhabitants merely, but of the whole public, and prescription, which does not run against the state, should not run against its trustee." Such, we think, is the better reasoning, and is supported by the great weight of authority and to which many courts have in later cases acceded, although a contrary doctrine had been announced in earlier decisions. The principle is applicable in the case before us, for it may with equal propriety be said that the city of Cheyenne, in the matter of acquiring and holding the

right to the use of water for the benefit of the whole public, acts as the agent of the state in exercising, within the provisions of its charter and the statutory law, governmental functions and powers, and as already stated the securing of water sufficient not alone for its present but such as may be necessary for its future inhabitants was and is within its governmental powers. Upon the facts alleged we are of the opinion that plaintiff's theory of title by adverse user is untenable.

It is apparent that in order for the plaintiff to recover damages for infringement upon his right to the use of the water here involved he must allege and show a superior right to the use of the water. His contention that the decree of April 18, 1888, was and is void is not sustained; at most it was erroneous and by laches of plaintiff he has lost his right to correct the same. Neither can his claim of title by adverse user for reasons hereinbefore stated be sustained. The judgment will be affirmed.

Affirmed.

BEARD, J., concurs. POTTER, J., did not sit.

UNION PAC. R. CO. v. GRACE.

(Supreme Court of Wyoming. Jan. 20, 1914.)

1. APPEAL AND ERROR (§ 770*)—BRIEFS—FILING.

The filing of a brief out of time is not jurisdictional and may be waived by the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 8106, 8107; Dec. Dig. § 770.*]

2. APPEAL AND ERROR (§ 765*)—BRIEFS—FILING—STIPULATION.

Parties may by stipulation extend the time for filing the briefs and waive the rules of court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3100; Dec. Dig. § 765.*]

3. APPEAL AND ERROR (§ 773*) — BRIEFS — FILING—DISMISSAL.

Where plaintiff in error did not file his brief within 60 days after filing his petition in error as required by court rule 15 (104 Pac. xiii), defendant in error cannot secure a dismissal of the writ, where he recognized the brief filed by an application for an extension of time to file a reply brief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104, 8108-8110; Dec. Dig. § 773.*]

Error to District Court, Laramie County; William C. Mentzer, Judge.

Action between Robert N. Grace and the Union Pacific Railroad Company, a corporation. There was a judgment for the former, and the latter brings error. On motion to dismiss. Motion denied.

Herbert V. Lacey and John W. Lacey, both of Cheyenne, for plaintiff in error. William B. Ross, of Cheyenne, for defendant in error.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—56

SCOTT, C. J. The defendant in error moves this court to dismiss this case upon the ground that plaintiff in error failed to file and serve its brief within 60 days after filing its petition in error, as provided by rule 15 of the rules of this court (104 Pac. xlii). The record discloses that the petition in error was filed on August 30, 1913, and plaintiff's brief was filed on November 13, 1913, or 75 days after the filing of the petition in error. No extension of time was applied for or granted within which to file such brief. On December 27, 1913, the defendant in error, by his attorney, without motion to strike plaintiff's brief or to dismiss the proceedings, filed in this court his application for an extension of time within which to file his brief. It will be observed that the defendant in error's application was filed 44 days after plaintiff in error's brief was filed, or 14 days after defendant in error's brief was due under the rule.

[1, 2] The filing of a brief out of time is not jurisdictional and may be waived by the parties. *Meade Plumbing, Heating & Lighting Co. v. Irvin*, 77 Neb. 391, 111 N. W. 636; *Hart v. Murdock et al.*, 80 Neb. 274, 114 N. W. 268. The parties may stipulate as to the extension of such time and by so doing bar themselves from invoking the rule. *Connor et al. v. Zachry*, 54 Tex. Civ. App. 188, 115 S. W. 867, 117 S. W. 177; *Wiseman v. Madrox* (Tex. Civ. App.) 135 S. W. 756.

[3] To entitle the defendant in error to a strict application of the rule, he must stand strictly within its provision. In other words, he must make his motion upon the noncompliance of his opponent with the rule and not recognize the brief which is filed out of time other than by motion to strike or to dismiss the proceeding in error. *Good v. Daland*, 119 N. Y. 153, 23 N. E. 474. In the case here the defendant in error made and filed his application to this court for an extension of time within which to file his answer brief to one which had been filed out of time, and by so doing waived his right to a dismissal of the petition in error. In principle this view is supported by numerous decisions. *Henry v. Travelers' Ins. Co.*, 16 Colo. 179, 26 Pac. 318, 319; *Houston v. Witherspoon*, 68 Miss. 188, 190, 8 South. 515, 516; *Jones v. Henderson*, 149 Ind. 458, 49 N. E. 443; *Mason v. Phelps*, 48 Mich. 126, 11 N. W. 413, 414, 837; *Lamet v. Miller*, 68 Cal. 521, 522, 9 Pac. 669; *Asch v. Wiley*, 16 Neb. 41, 20 N. W. 21, 22; *Yates v. Thompson*, 44 Ill. App. 145; *Barhem v. Livingston*, 11 La. Ann. 604; *Durfee v. McClurg*, 5 Mich. 532.

It follows that the motion must be, and it is hereby, denied. The defendant in error is granted 45 days from this date within which to file and serve his brief.

BEARD, J., concurs. **POTTER, J.**, did not sit.

MARTIN v. SPAULDING et ux.

(Supreme Court of Oklahoma. Dec. 16, 1913.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 112*)—DEFECTIVE TITLE—RIGHTS OF VENDEE.

The vendee, in a contract for the sale of real estate, is not bound to take a title which is not marketable. He may, however, accept a deed and look to the vendor upon his warranty for compensation for any loss he may sustain through inability to give him a perfect title; but he also has the right to abandon the contract and refuse to make the purchase.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 199, 200; Dec. Dig. § 112.*]

2. CONTRACTS (§ 352*)—ABANDONMENT.

Whether a contract is abandoned is a question of fact, to be determined by the court or jury from all the facts and circumstances of the particular case.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1200, 1828; Dec. Dig. § 352.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS OF COURT—CONCLUSIVENESS.

Where the testimony is oral and conflicting, and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

4. SPECIFIC PERFORMANCE (§ 121*)—CONTRACT—ABANDONMENT BY PURCHASER.

Evidence examined, and held sufficient to establish the abandonment of the contract herein involved.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 387-395; Dec. Dig. § 121.*]

5. SPECIFIC PERFORMANCE (§ 61*)—ELECTION TO RESCIND—CONDITIONS.

The rule that a vendor, when he elects to rescind a contract for the sale of real estate, "must restore to the other party everything of value which he has received from him under the contract" (section 986, Rev. Laws 1910) does not apply to the defendant in a suit for specific performance commenced by the vendee, where the vendor pleads an abandonment of the contract for the purpose merely of defeating the plaintiff's demand, and does not set up any affirmative equitable defense or claim any affirmative relief.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 183-187; Dec. Dig. § 61.*]

Error from District Court, Muskogee County; R. P. De Graffenried, Judge.

Action by Frank L. Martin against Homer B. Spaulding and wife. Judgment for defendants, and plaintiff brings error. Affirmed.

A. A. Davidson, Kline & Gotwals, and Geo. S. Ramsey, all of Muskogee, for plaintiff in error. Bailey, Wyand & Moon, of Muskogee, for defendants in error.

KANE, J. This was a suit for specific performance of a contract concerning real estate, commenced by the plaintiff in error,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff below, against the defendants in error, defendants below. Upon trial to the court, there was a general finding and decree in favor of the defendants, to reverse which this proceeding in error was commenced. It seems that the defendants, who were the owners of the real estate involved, entered into a written contract with the plaintiff, whereby, in consideration of \$1,900, to be paid by the plaintiff as follows: \$50 cash in hand; \$50 on the 4th day of February, 1905, and the balance on or before the 4th day of March, 1905; the defendants agree to execute and deliver to the plaintiff a good and sufficient warranty deed to said premises, the same to be free from all incumbrances whatsoever. For the purpose of this case, we may assume that the contract was fully performed up to the said 4th day of February, 1905. Upon that date, it is agreed, the defendants were unable to furnish a marketable title to the land on account of the pendency of what is known as the "Haskell suit," wherein the title thereto was involved. On the last-mentioned date the parties to the contract met by agreement at the City National Bank, and as to what transpired there, the defendant Homer B. Spaulding testified as follows: "I went in there [into the bank] with him, and Mr. Hogan came to the window with a sack of money, and said: 'I have some money here for you,' and Mr. Martin said, 'We want to tender you the money for these lots over there,' and I said, 'All right; I am willing to make you a deed to the lots and take your money,' and he said: 'But you can't make a good deed. Your deed would not be any good, because Mr. Haskell has a suit'—and I said I did not think it would amount to anything, and I would make a bond to fix the title, and he walked to the desk and had a little talk, and he said he would see me about it, and some time after that I went to see him about it. Q. What kind of a proposition did you make him about the bond? A. Told him I would make a bond, and give Walter Howard, and put up my home place on it. Q. What was your home place worth? A. Ten or fifteen thousand dollars. Q. What did he finally decide to do? A. That was about all and I met him again after that, and he asked me what kind of terms I would give him on the two lots if he accepted the bond for title. Q. The same lots? A. Yes, sir; and I said, if he would pay \$500 cash, I would sell him the lots for that and make the balance due in 6 and 12 and 18 months each, and he said he would see me about that. Q. How long was that after the transaction in the bank? A. Not very long; possibly a week or maybe a month. Q. Proceed. A. He seemed to think that would suit him, and the last talk I had, he said he would figure on it and if I would let him pay \$200 cash and divide the balance in 6 and 12 and 18 months, he would figure on it, and I told him that would not do me any good. Q. When was this conversation? A. It all happened in about a few months. Q. Did you have any

other conversation in regard to the matter? A. No, sir." In April, 1905, H. B. Spaulding sold the lots in controversy to his wife, Josie C. Spaulding. On the 6th day of February, 1909, nearly four years after the tender, the plaintiff commenced this suit. On the 30th day of October, 1909, prior to the trial of this cause, the "Haskell suit" was finally settled and dismissed, and the defendants were then able to convey a clear title to the plaintiff.

[3] The only question in the case of any seriousness is whether the evidence adduced at the trial reasonably tends to show that when it became apparent that the defendants could not perform the contract according to its terms and tenor, the plaintiff abandoned the same. The court below found there was an abandonment of the contract; and under the oft-repeated rule, if there is any evidence reasonably tending to support the findings of the court below, they will not be disturbed. "Where the testimony is oral and conflicting, and the finding of the court is general, such finding is a finding of every special thing necessary to be found to sustain the general finding, and is conclusive upon this court upon all doubtful and disputed questions of fact." *McCann v. McCann*, 24 Okl. 264, 103 Pac. 694. *Wat-Tah-Noh-Zhe et al. v. Moore*, 36 Okl. 631, 129 Pac. 877.

[1] It is well settled that a vendee in a contract for sale is not bound to take a title which is not marketable. The plaintiff herein doubtless had a right to accept the deed at the time he tendered the balance of the purchase price and look to the defendants upon their warranty for compensation for any loss he might sustain through their inability to give him a perfect title; but he also had a right to refuse to make the purchase upon the same ground. *Riley v. Allen*, 71 Kan. 625, 81 Pac. 186; *Milmoe v. Murphy*, 65 N. J. Eq. 767, 56 Atl. 292; *Bennet v. Giles*, 220 Ill. 393, 77 N. E. 214; *Peters v. Van Horn*, 37 Wash. 550, 79 Pac. 1110.

[2] In *Riley v. Allen*, supra, Mr. Justice Mason, in discussing the rights of the parties in circumstances somewhat similar, says: "Assuming that a valid contract had been made for the conveyance of the land, without reservation, the plaintiff doubtless had a right to accept the deed and look to the defendant upon her warranty for compensation for any loss he might sustain through not being able to obtain immediate possession, or he might have demanded an abatement in the purchase price in an amount suitable for that purpose; but he also had a right to refuse to make the purchase at all, owing to the defendant's inability to carry out his part of the contract. In refusing with a full knowledge of the facts to accept the only title it was possible for the defendant to convey, he in effect elected to avail himself of the right to decline to carry out the agreement, and thereby abandoned the right to require such performance as the defendant was able to make, with compensation, and could not be restored to it by a

change of policy, made upon reconsideration of the matter after the deed had been withdrawn from the bank. A mere delay for a reasonable time to complete the transaction pending negotiations for an adjustment of the difference that had arisen would not have had this effect, but the finding of the court means more than this. It fairly implies a definite and final refusal on the part of the plaintiff to accept anything less than the very thing contracted for—a full and absolute title." Counsel for plaintiff in error attempt to distinguish the Riley Case from the case at bar, but we believe it is very strongly in point in principle. The principal points of difference between the two cases relied upon by counsel are: (1) In the Riley Case the plaintiff was not in position to pay the consideration and accept the title, assigning as reason therefor that the defendant was not in a position to make a clear title, whilst in the case at bar the plaintiff went to the defendant and made a tender of the money, coupling his tender with a demand for a clear title to the property. (2) In the Riley Case the contract was wholly executory, while in the case at bar it had been partially performed.

Of the first proposition they say: "The only evidence of abandonment is the alleged refusal of Martin to take the defective title, which refusal, to have any effect at all, would have to be considered as independent of the act accompanying it, viz., the tender of \$1,800 and the declared purpose of Martin in making it. His declaration of this purpose destroyed the effect of the refusal as an act of abandonment.

[4] We cannot agree with counsel on either proposition. The positive refusal on the part of Martin to accept anything different from his contract, his subsequent conduct in negotiating for a purchase of the property upon a different basis, and the long time he allowed to transpire before commencing his suit for specific performance, were facts from which an intention to abandon the original contract might reasonably be inferred. Whilst the tender may be entitled to some weight as an evidential fact, tending to establish an intention to rely upon the original contract, it was only a circumstance to be weighed by the court as any other testimony. This court is of the opinion that the evidence of the tender is not entitled to the weight counsel seek to attach to it. At the time Martin made the tender, he knew that the title to the land was involved in the "Haskell suit," and that he would not accept such title as it was possible for the defendants to convey. Under such circumstances, the tender was a vain and useless act, and to our mind not at all indicative of a desire on the part of the plaintiff to acquire title to the property, especially in the face of his failure to accept the same upon the very fair and more advantageous terms offered by the defendants. Of the second proposition, counsel say: "This cause is distin-

guished from the Riley Case, and other cases cited, by the fact that part payment of the contract price was made * * * which has never been returned to the plaintiff by the defendant." This was also a circumstance tending to show the intentions of the parties to be weighed by the court as other evidence. Counsel for the defendant contends that his failure to return, or offer to return, the money paid is not only evidence that Spaulding did not consider their contract rescinded, but also precludes the defendants from rescinding the contract, or treating it as rescinded, and cites in support of the latter proposition section 393, Pomeroy on Contracts, as follows: "American cases hold that the vendor must also, when he elects to rescind the contract on this account (meaning failure of the purchaser to pay), repay or tender the purchase money received, and return the collateral securities given to him by the vendee."

[5] In the case at bar, however, the defendants are not praying for affirmative relief. In note 4 to section 393, 1 Pomeroy on Equity Jurisprudence (3d Ed.), it is said that the principle invoked by counsel "applies to a defendant who sets up an affirmative equitable defense, claiming some affirmative relief, since he is then in exactly the same position as a plaintiff. See *Tongue v. Nutwell*, 31 Md. 302. This must be the true limitation of the principle in its application to defendants; it certainly does not and cannot apply to defendants generally, who merely seek to defeat the plaintiff's demand, and ask no affirmative relief for themselves, either directly or indirectly."

On the third proposition, counsel seem to admit that delay in bringing a suit, if unexplained, amounts to evidence of a prior abandonment; but they say the delay in bringing suit has no effect, because it is fully explained, and was due to the fault of the defendants, to wit, their inability to convey the title contracted for. To our mind, the only significance that can be attached to the action of the plaintiff in bringing this suit at the time he did is that he had changed his mind, and was then willing to accept a title that he had rejected some four years before. His suit was not really a suit for specific performance. The contract could be no more specifically performed at that time than it could have been on the date the contract by its terms was to be performed. The "Haskell suit" was still pending, and the commencement of the suit by the plaintiff was tantamount to saying: "I am willing now to accept such title as it is possible for the defendants to convey." Specific performance was still impossible. We believe there is ample evidence in the record tending to establish the abandonment of the contract by the plaintiff, and to support the general finding of the court below in favor of the defendants.

The judgment of the court below is therefore affirmed. All the Justices concur.

SHAW v. LORD.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. ASSAULT AND BATTERY (§ 13*)—SELF-DEFENSE—INJURY TO BYSTANDER—LIABILITY.

It is error to instruct the jury in effect that one who, in his lawful self-defense, at close range shoots at an assailant, and, missing him, accidentally wounds a bystander, who, at the time, is to one side of the line of true aim at such assailant, and a few feet away from him, is, in an action for damages, liable to such bystander if he knew or is chargeable with knowledge of the presence of such bystander, as if this, of itself, constituted want of due care, and therefore was, per se, actionable negligence.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 11; Dec. Dig. § 13.*]

2. ASSAULT AND BATTERY (§§ 13, 42*)—SELF-DEFENSE—INJURY TO BYSTANDER—LIABILITY—QUESTION FOR JURY.

Ordinarily, where a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence; and the question of negligence is for the jury.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 11, 56; Dec. Dig. §§ 13, 42.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Le Flore County; Malcolm E. Rosser, Judge.

Action by Anna Lord against John Shaw. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Andrews & Day, of McAlester, for plaintiff in error. J. E. Whitehead and C. R. Barry, both of McAlester, for defendant in error.

THACKER, C. Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On July 1, 1906, defendant, a deputy United States marshal, and Bert True, a possessor, having a warrant duly authorizing them to do so, undertook the arrest of Joseph Smith, who was a fugitive from justice, charged with a felony, and who was believed by defendant to be so dangerous that he might kill an officer trying to arrest him, unless he realized the latter had a clear advantage of him, and that resistance would be futile.

True resided in Wilburton, Okla. (then Indian Territory). Defendant, in response to a phone call from True, who then had possession of the warrant, came to Wilburton about 5 o'clock in the afternoon, had Smith pointed out to him on a street by some one, and thereafter, between 5 and 6 o'clock in the afternoon, with True, for the purpose of arresting Smith, went to a hotel in Wilburton, where Smith was eating supper, and where he had spent the preceding night. Upon arrival at the hotel, defendant request-

ed and caused a lady, who was in the hall leading from the front door, on the north, to the door of the dining room, on the south, to request Dave Nowland, a boarder at the hotel, who was an ex-officer, and well known to defendant, to come from the dining room to the front porch, on the north of the hotel, where, according to the undisputed testimony of defendant, of True, and of Nowland, defendant ascertained from Nowland that Smith was then eating supper in the dining room, informed Nowland of the purpose of himself and True to arrest Smith, and requested Nowland to follow Smith from the dining room into said hall, and there seize him from behind so as to prevent him from drawing any weapon, while they effected the arrest; and, although Nowland testified he did not intend to "arrest" Smith, nor to exactly comply with defendant's request, when he left the table with Smith, he further testified, in effect, that he started to follow Smith out to see what might occur, and render such assistance as he could; and it appears to be uncontradicted that Nowland assented to defendant's plan for the arrest, and that defendant, with good reason, believed that Nowland would follow and seize Smith so that his arrest might be safely effected. When Smith left the supper table, it appears that Nowland also left it, and went as far as the door of exit from the dining room into the hall, but met and turned back with a fellow boarder to seats at the table, perhaps abandoning his purpose to assist defendant.

It appears that Smith knew defendant, but it does not appear whether the defendant knew or suspected this, nor whether in fact Smith knew he was an officer; and it appears that True, if not the defendant, saw Smith step from the dining room into the hall, then step back into the dining room, and then, at once, come forth into the hall, when the shooting occurred, but it does not appear whether Smith saw or knew True before his final exit from the dining room.

Smith and one Thurston, the latter in front, entered the hall about the same time immediately preceding the shooting, and defendant, who was in waiting with True on the front porch, hearing them, if no one else approaching, either immediately before or immediately after Smith made his final exit from the dining room, advanced to the front door and looked into the hall from the porch, and, evidently to his surprise, discovered that Smith, after making his final exit from the dining room, was approaching without any one holding or in position to seize him, whereupon, when Smith had gotten half or two-thirds the way along the hall, a shooting combat at close range occurred between defendant and True, on one side, and Smith, on the other side.

The evidence is very conflicting, and the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

facts not fully developed as to some of the features of the combat; but it seems reasonably certain that Smith, in a crouching position, and with his hand on his pistol in his hip pocket, was approaching defendant before defendant fired at him, and perhaps before defendant drew or commenced to draw his pistol (one of plaintiff's witnesses, Mr. Thurston, in a measure, corroborates defendant on this point, and it is undisputed). It also seems certain that both defendant and True, the former first, fired at Smith from their position in the front door, at the north end of the hall, and that Smith, after defendant fired, fired and struck the door stop so close to True's head as to cause splinters therefrom to strike his cheek. It also appears reasonably certain, notwithstanding the testimony of one witness to more, that only one shot was fired by defendant and one by True before Smith, who also probably fired only one shot, got out to the steps in front of the hotel.

Plaintiff, then a girl of 15 years old engaged in work at the hotel, without notice of the impending danger, stepped in to the hall, from a washroom, within a few feet of but, it appears, to the east of Smith, and there received a wound in her right side when the shooting commenced; and, although both defendant and True testified in effect that the shot fired by the latter was the one that struck her, and plaintiff so stated soon after she was shot, we must assume, in deference to the verdict and her testimony to that effect, that defendant's shot, which was the first one fired, was the one that struck her. It appears that the ball entered in front, at about the eighth rib, and made its exit about six inches back, without penetrating the cavity of her body; and, besides being confined to her bed for about two weeks, with the suffering incident to such case, she has since suffered occasional soreness at the places of entrance and exit of ball and, during cold weather, pain in her shoulder, "just like [she] did when [she] was shot." It is alleged in plaintiff's petition that defendant entered the hotel "excitedly, and drew a pistol from his pocket, and began firing the same rapidly and excitedly, and in a very careless manner; that one bullet from the pistol penetrated the body of plaintiff; * * * that said shooting by said defendant was wholly without cause; * * * that, by reason of said wrongful and negligent act of the said defendant in shooting this plaintiff, as aforesaid, she has been damaged," etc.

The defendant's answer, besides a general denial, especially denies that he fired the shot which wounded plaintiff, and shows that he was authorized to arrest Smith, that the shot he fired was in necessary self-defense while lawfully and properly endeavoring to arrest Smith, so that, if, by chance, the shot fired by him struck plaintiff, he is not liable for damages for such accident.

[1] The trial court instructed the jury that defendant had the right to fire at Smith when he did; but further instructed in effect that defendant would be liable to plaintiff for damages if he was guilty of negligence in shooting at Smith without due regard for the safety of bystanders, and, still further, as if this, of itself, constituted want of due care, and therefore was, *per se*, actionable negligence, that "if, at the beginning of the difficulty, Shaw saw this woman, or should have seen her, and began firing, knowing she was there, and a ball from his pistol struck her, then he would be responsible."

In *Crocker on Sheriffs* (2d Ed.) § 62, it is said: "The arrest may be made in any place, for no place affords protection to a criminal, not even the church or the churchyard." To the same effect, see *Murfree on Sheriffs*, §§ 161, 162; *New England Sheriffs and Constables* (Hitchcock) § 167; *Am. & Eng. Enc. Law* (2d Ed.) 855.

There can be no doubt of defendant's right, and under the evidence we must assume it was his duty, to effect the arrest of Smith at the hotel; but, of course, this does not relieve him of the duty to exercise such care to avoid injury to other persons as a person of ordinary prudence would usually exercise in doing so under like circumstances, or, which, in the present case, is its equivalent differently stated in respect to criteria, such care as persons of ordinary prudence usually exercise about their own affairs of great importance, and, in this aspect, great care.

[2] In *Morris v. Platt*, 32 Conn. 75, it is held: "Where a person in lawful self-defense fires a pistol at an assailant, and, missing him, wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence." To the same effect, see *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615. These, which are the only cases we find deciding this precise point, appear to be in accord with the general rule that, "where an act is lawful in itself, injury resulting therefrom is not actionable, unless the act is done at a time, or in a manner, or under circumstances indicative of a want of proper regard for the rights of others." *Boynton v. Rees*, 26 Mass. (9 Pick.) 528; *Howland v. Vincent*, 51 Mass. (10 Metc.) 371, 43 Am. Dec. 442; *Tourtellot v. Rosebrook*, 52 Mass. (11 Metc.) 460; *Brown v. Kendall*, 60 Mass. (8 Cush.) 292; *Rockwood v. Wilson*, 65 Mass. (12 Cush.) 221; *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522; *Norfolk & W. Ry. Co. v. Gee*, 104 Va. 806, 52 S. E. 572, 3 L. R. A. (N. S.) 111; *Pickens v. Coal River Boom & Timber Co.*, 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819. And the two cases, *Morris v. Platt* and *Paxton v. Boyer*, *supra*, also appear to be but concrete applications of the rule that there is no liability for the results of an accident, unless the person causing same is guilty of negligence. See 1 *Am. & Eng. Enc. Law* (2d Ed.) 273. The rule as announced in the cases of

Morris v. Platt and *Faxton v. Boyer*, *supra*, is stated in *Hale on Damages* (2d Ed.) § 5, p. 19, citing, besides said two cases, *Scott v. Shepherd*, 2 W. Bl. 892, which is reported in 96 Eng. Rep. (Full Reprint) 525, and is instructive.

Ordinarily, and so far as appears in this case, this must be the correct rule; and the only qualification thereof that in any case would seem to commend itself is that, where such self-defense is obviously dangerous to others, and the necessity thereof may be avoided by withdrawing from the combat, or, in other words, by "retreating to the wall," we apprehend it would be for the jury to say whether due care for the safety of bystanders would not require such avoidance.

The instruction that "if, at the beginning of the difficulty, defendant saw plaintiff, or should have seen her, and began firing, knowing she was there, and a ball from his pistol struck her, then he would be responsible," appears to be error.

If, as affecting only Smith's rights in this regard, defendant had the right to shoot at Smith when he did, the mere fact that he may or should have seen or known that plaintiff was near Smith, but to one side of the line of a true aim would not necessarily render him liable for the accident, certainly not if in gun used, in aim taken, and in manner and means of firing he exercised that degree of care which a person of ordinary prudence would usually exercise.

Although defendant may be chargeable with knowledge as to where plaintiff was when he began to fire, the question as to whether he was negligent was for the jury; and, for aught that appears, she may have been so far to one side of a line of true aim as to have reasonably presented to him the appearance of safety, if he saw her—he being close to Smith when he fired.

In anticipation of a new trial in this case, we should, perhaps, state that, if there should be evidence tending to show that, without greater risk of the escape of Smith, the arrest might within the knowledge of or chargeable to defendant have been effected elsewhere, or in a different manner, or by different means than it was, with less danger of resistance by Smith, or less danger of injury to bystanders as a result of such resistance, the defendant being informed and believing that Smith was dangerous to the extent hereinbefore stated, it would not be improper to submit to the jury the question as to whether defendant was in that respect guilty of actionable negligence in failing to exercise due care for the safety of bystanders, which was a proximate cause of the injury inflicted upon the plaintiff, as well as to whether he was guilty of such negligence in the manner or means of his lawful self-defense, if the same was lawful. And, in this connection, it may be observed that, although

Smith, in an assault upon defendant, may have been guilty of a wrong making self-defense necessary to defendant, and thus proximately causing the injury to plaintiff, and therefore liable to her in an action for damages, this would not necessarily relieve defendant of liability if he were guilty of a wrong in failing to exercise due care for the safety of bystanders, which was also a proximate cause of the same.

For the reasons stated, this case should be reversed, and a new trial granted.

PER CURIAM. Adopted in whole.

STITCH v. STATE.

(Criminal Court of Appeals of Oklahoma.
Dec. 23, 1913.)

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 406*)—EVIDENCE—ADMISSIONS—PLEADING IN CIVIL ACTION.

Where a defendant is upon trial charged with selling whisky or having whisky in his possession with intent to sell the same, it is competent for the state to show, either by direct evidence or by his own admissions, that he was engaged in the business of selling whisky.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.*]

2. INTOXICATING LIQUORS (§ 146*)—PROSECUTION—DEFENSE.

The fact that a defendant represents a whisky house in another state and delivers whisky on commission to customers in Oklahoma is no defense to a charge for selling such whisky, or having said whisky in his possession with intent to sell same. *Landrum v. State*, 9 Okl. Cr. —, 132 Pac. 830, reaffirmed. The idea that this court is or ever has been unfriendly to prosecutions for violations of the prohibitory liquor law is absolutely without support in fact, and does great violence to the truth.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.*]

Appeal from Payne County Court; W. H. Wilcox, Judge.

M. A. Stitch was convicted of crime, and appeals and moves for rehearing. Denied.

J. M. Springer, of Stillwater, for plaintiff in error. C. J. Davenport, Asst. Atty. Gen., for the State.

FURMAN, J. On account of sickness the writer did not participate in the consideration and determination of this cause when it was first decided; but he has carefully examined the record since the motion for rehearing was filed, and finds that the motion is not only without merit, but is surprised that it should have ever been filed.

The evidence shows conclusively that appellant is guilty of the crime of which he was convicted. Only one alleged error is relied upon in the motion for a rehearing, and that is that the trial court erred in ad-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mitting in evidence the pleadings in a certain civil suit which had been pending in the county court of Payne county, and in which Danciger Bros., of Kansas City, Mo., were plaintiffs, and M. A. Stitch and L. R. Doolin were defendants, and in which the plaintiffs endeavored to recover from defendants the sum of \$143.75, alleged to be due and unpaid on certain brands of whisky sold by the plaintiffs to defendants. The total amount of whisky sold by plaintiffs to defendants being alleged to be of the value of \$2,101.88, for which they had received payment with the exception of the said \$143.75. The answer of the defendants to this suit was also offered in evidence. It was sworn to by appellant. Attached to this answer was an itemized statement as to all of the whisky received by defendants from the plaintiffs, and the payments made thereon by defendants, in which the defendants claim that they had overpaid plaintiffs for the whisky received the sum of \$762.75, and sought a judgment against the plaintiffs for this amount upon a cross-petition. This was an admission of record by appellant, so far as this case is concerned, of all of the material facts stated in the pleadings received in evidence.

[1] It is contended by counsel for appellant that this evidence was not admissible and, in support of this contention, the case of *Spear v. State*, 7 Okl. Cr. 379, 123 Pac. 852, is cited. It is true that in the *Spear* Case it was held that it was error for the trial court to permit the introduction against the defendant of a petition filed in the district court of Jackson county, Okl., in which it was sought to obtain an injunction against a number of persons prohibiting the sale of liquors in a certain house; but there was nothing in the record which in any manner connected *Spear* with the petition admitted in evidence, except the naked allegations therein contained. It was therefore hearsay, pure and simple, so far as the defendant was concerned. We adhere to the ruling in the *Spear* Case, but we are amazed that counsel should rely upon the *Spear* Case as an authority in his favor, when, as a matter of fact, it is the strongest kind of authority against him. In the *Spear* Case it was expressly stated: "If this petition had been prepared by authority of appellant, it would have been competent evidence against him, as an admission of the statements therein made." In the case at bar the answer introduced in evidence was not only prepared by authority of appellant, but it was sworn to by him. It admitted that he had purchased the whisky as alleged in the complaint, and claimed that he had overpaid the plaintiffs in the sum of \$762.75 therefor, and by cross-petition defendants sought to recover this amount from plaintiffs. This answer established the fact that appellant was doing a wholesale whisky business in the town of Stillwater, Okl.

[2] It is true he claimed that this whisky had been sold and handled by him upon a commission, but this in no manner mitigated his offense. See *Landrum v. State*, 9 Okl. Cr. —, 132 Pac. 830. Men cannot resort to such subterfuges as this in violating the prohibitory law, and escape punishment. The only way in which we can understand how counsel for appellant could have conceived the idea that such a defense would for one moment be tolerated by this court is that he did so upon the hypothesis that this court was unfriendly to prosecutions for violations of the prohibitory liquor law. Such an idea is absolutely without support in fact, and does great violence to the truth. This court has never hesitated to go to the limit of the law in sustaining convictions in such cases. If counsel had examined the opinions of this court, he would never have filed this motion for a rehearing.

From the record in this case, appellant should have received the extreme limit of the law, and it is fortunate indeed for him that the law making such an offense a felony had not been adopted at the time of the commission of this offense. The motion for rehearing is overruled.

The mandate will issue without further delay.

ARMSTRONG, P. J., and DOYLE, J., concur.

POMEROY v. GORDAN.

(Supreme Court of Idaho. Nov. 29, 1913. Rehearing Denied Jan. 17, 1914.)

1. APPEAL AND ERROR (§ 1001*)—FINDINGS—EVIDENCE.

Where appellant cross-examined respondent at length upon items of account in both the bill of particulars and account books, this court will not disturb the finding as to the balance due.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

2. APPEAL AND ERROR (§ 1001*)—VERDICT—EVIDENCE.

Where there is substantial evidence to support the findings of the court or verdict of the jury, they will not be set aside on the ground of insufficiency of the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by E. G. Pomeroy against Ed. J. Gordan. From a judgment for plaintiff, defendant appeals. Affirmed.

McFadden & Brodhead, of Halley, for appellant. Sullivan, Sullivan & Baker, of Halley, for respondent.

STEVENS, District Judge. This action was commenced in the district court of the Fourth judicial district, in and for the coun-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

ty of Blaine, for the collection of \$2,424.24, alleged to be due on an account for labor, goods, wares, merchandise, and supplies furnished and money advanced by plaintiff to defendant.

Appellant makes four assignments of error: The first and second as to the admission of certain testimony; the third, upon the denial of defendant's motion for a new trial; and the fourth, that the evidence is insufficient to justify the verdict of the jury.

The principal objections urged by appellant upon his first and second assignments of error are the refusal of the trial court to sustain appellant's objections to the question asked of the respondent in what sum appellant was indebted to him, and the refusal of the court to strike out the testimony as to the amount claimed to be due to him from appellant.

[1] Appellant's counsel contends that the proof does not show the balance due upon such account. At his request plaintiff furnished a bill of particulars setting forth the various items which go to make up the account, and this together with the books of account of the plaintiff were introduced in the lower court. Counsel for appellant cross-examined plaintiff at length upon the various items, and in response to such inquiry, plaintiff stated that the difference between such debits and credit was the amount of his claim. The appellant's counsel had not only the bill of particulars, but the account books covering the whole transaction in court at the trial, and he had the right to cross-examine plaintiff from both to ascertain the true facts; and, if there was error in this regard, it was cured by the examination and admission of such testimony.

Appellant also raised the question of a variance between the pleadings and the proof. This question does not seem to have been raised in the trial court. This court, in the case of *Maw v. Coast Lumber Co.*, 19 Idaho, 396, 114 Pac. 9, said, "We are of the opinion that if the defendant found during the trial, or at the conclusion of the trial, that it had been misled by the allegations of the complaint, it should have advised the court at the time, * * * and the court was empowered to afford the relief; * * * and if the court denied the relief, saved his exception, then the defendant would have been in a position to present the same on appeal." This question has been passed upon in several cases by this court, but in the case now before the court the question cannot be relied upon successfully.

The third assignment of error was not presented nor argued in this court.

[2] As to the fourth assignment of error, that the evidence is insufficient to support the verdict, the contention of the appellant that defendant should not be held liable personally cannot avail, for there is a substan-

tial conflict in the evidence as to the contract or agreement under which operations were carried on between plaintiff and defendant, and this court has held in so many cases that, where there is substantial evidence to support the findings of the court or verdict of the jury, they will not be set aside on the ground of insufficiency of the evidence. 41 Cases Ida. Dig. (A. & S. pp. 49 to 53); *Church & White Co. v. Van Housen*, 15 Idaho, 249, 97 Pac. 36; *McCallum v. McClarren*, 15 Idaho, 374, 98 Pac. 200; *Just v. Idaho Canal, etc., Co.*, 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140; *Eaves v. Sheppard*, 17 Idaho, 268, 105 Pac. 407, 134 Am. St. Rep. 256; *Edmundson v. Taylor*, 17 Idaho, 618, 106 Pac. 991; *Tomsche v. Hummel*, 18 Idaho, 23, 108 Pac. 343; *Flynn Group, etc., Co. v. Murphy*, 18 Idaho, 266, 109 Pac. 851, 138 Am. St. Rep. 201; *Western Moline, etc., Co. v. Caldwell*, 18 Idaho, 468, 110 Pac. 533; *Penninger, etc., Co. v. Clark*, 20 Idaho, 166, 117 Pac. 764; *Thomason v. Lane-Potter, etc., Co.*, 20 Idaho, 771, 119 Pac. 875; *Friedrick v. Donahue*, 20 Idaho, 92, 116 Pac. 1029; *Blackfoot St. Bank v. Crisler*, 20 Idaho, 379, 118 Pac. 775; *Weeter L. Co. v. Fales*, 20 Idaho, 255, 118 Pac. 289, Ann. Cas. 1913A, 403; *Salisbury v. Spofford*, 22 Idaho, 393, 126 Pac. 400; *Brinton v. Steele*, 23 Idaho, 615, 131 Pac. 662.

The law and the equity of the case seem to be as determined by the district court, and the judgment of the lower court is affirmed. Costs awarded to respondent.

AILSHIE, C. J., and STEWART, J., concur.

GAISER et al. v. STEELE, District Judge. (Supreme Court of Idaho. Jan. 10, 1914.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 39*)—SEGREGATION OF DISTRICT—APPEAL—PRACTICE.

Where a board of county commissioners dismissed a petition for the segregation of a common school district from a rural high school, upon the ground that the law authorizing such action had been repealed, and the petitioners appealed from such order to the district court, and the district court held and decided that the board of commissioners erred in dismissing the petition, and in holding that the law authorizing such petition had been repealed, there was no further issue to try "anew," and the district court properly remanded the petition to the board of commissioners for a hearing on the merits thereof.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 68, 69; Dec. Dig. § 39.*]

2. COUNTIES (§ 58*)—WORDS AND PHRASES—APPEAL FROM BOARD OF COMMISSIONERS—"ANew"—"DE NOVO."

To try a case "anew" or "de novo" implies that the case has been heard before, and, where no issue has been tried, there is no issue to try "anew."

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 76-80; Dec. Dig. § 58.*]

For other definitions, see *Words and Phrases*, vol. 1, p. 395; vol. 2, p. 1852.]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. SCHOOLS AND SCHOOL DISTRICTS (§ 37*)—SEGREGATION OF DISTRICT—PROCEEDINGS BEFORE COMMISSIONERS.

Under the provisions of section 141, c. 159, p. 538, Sess. Laws 1911, it is the duty of the board of commissioners to hear the facts upon which a petition is presented to such board, and determine whether or not "it is to the best interests of the * * * school district to be segregated from the rural high school to which said * * * district is joined," and, "if they unanimously agree," they may grant the petition, and segregate the district so petitioning. Under this statute the petition and the facts upon which it is presented should be heard by the board of commissioners, and by them passed upon.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 60-65, 67; Dec. Dig. § 37.*]

Original application for mandamus by William Gaiser and others against Edgar C. Steele, District Judge. Writ denied, and petition dismissed.

Daniel Needham and Delos J. Needham, both of Lewiston, for plaintiffs. Alex Kasberg, of Lewiston, for defendant.

AILSHIE, C. J. This is an application on citation and notice for a peremptory writ of mandate against Hon. Edgar C. Steele, judge of the Second judicial district.

It appears that the plaintiff herein, William Gaiser, on June 16, 1913, filed a petition with the county school superintendent of Nez Perce county, praying that school district No. 63 of Nez Perce county be segregated and withdraw from rural high school district No. 1 of that county, as authorized by section 141, c. 159, of the 1911 Session Laws (Sess. Laws, 1911, p. 538). This petition was subsequently filed with the board of county commissioners, and set for hearing on the 29th day of July, 1913, upon which date the petition came on for hearing, and the representatives of rural high school district No. 1 moved that the petition be dismissed, on the ground that section 141, c. 159, of the 1911 Session Laws had been repealed by section 18, c. 115, of the 1913 Session Laws. The commissioners granted the motion, and dismissed the petition, and thereupon entered an order denying the prayer of the plaintiff's petition. The plaintiff, as petitioner before the board, thereupon appealed to the district court in and for Nez Perce county on questions of both law and fact. The appeal came on before the judge of the district court on the 24th day of October, 1913, and, after hearing arguments of counsel upon a motion to dismiss the petition and appeal, the court overruled the same, holding that section 141, c. 159, of the 1911 Session Laws had not been repealed, and thereupon set the case for hearing on November 18th. Thereafter, when the case was called, the plaintiffs offered and requested to be permitted to introduce their proofs, and try the case upon the facts, to which counsel for the board of commissioners and rural dis-

trict No. 1 objected, and thereupon the court sustained the objection, and made an order remanding the case to the board of county commissioners for hearing upon its merits. Counsel for the petitioners thereupon prepared their application to this court for a peremptory writ of mandate, directed to the judge of the district court, and served notice of the time and place of application, and the case has been filed and submitted upon briefs for consideration and determination by this court.

[1, 3] The only question presented to us is whether the trial court, after determining the question of law, should have proceeded to try the case *de novo*, or properly remanded the case to the board of commissioners for a hearing before the board.

[2] Section 1953 of the Revised Codes provides that on an appeal from an order of the board of county commissioners the matter must be "heard anew." To try a matter anew or a case anew or *de novo* is to try it again, another time, or try it over.

In *Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho, 681, 95 Pac. 825, this court, in considering the provisions of section 4840 of the Revised Codes, providing for a trial anew on appeal from a justice's court, said: "A trial *de novo* as provided for by section 4840, Rev. Stat., implies and signifies the trying anew of an issue that has been previously tried. Where no issue has been previously raised, there is no issue to try anew." The doctrine of that case was affirmed by this court in *Smith v. Clyne*, 15 Idaho, 254, 97 Pac. 40, and again in *Smith v. Clyne*, 16 Idaho, 466, 101 Pac. 819. The same language is used in section 1953 that is employed in section 4840. The one statute says that the case shall be "tried anew," and in the other statute it says that it shall be "heard anew." It would seem that a case which has never been tried on the facts could not be tried "anew" or "*de novo*" on the facts of the case until there had first been a trial.

It is also important, however, in order to satisfactorily determine this question, to examine the statute under which this petition was filed with the board, and under which the board was required to consider it. Section 141 of chapter 159 of the 1911 Session Laws (page 538) provides as follows: "When two-thirds of those who are heads of families and residents of any regularly organized school district joined to a rural high school district shall present a petition to the board of county commissioners showing that it is to the best interests of the said regularly organized school district to be segregated from the rural high school to which said regularly organized district is joined, it shall be lawful for the said board, if they unanimously agree, to segregate said petitioning subdistrict from said rural high school district."

It will be seen from an analysis of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

foregoing provision of the statute that the board have to determine the question as to whether it would be "to the best interests of the said regularly organized school district to be segregated from the rural high school to which said regularly organized district is joined," and, after that is determined, it seems necessary for the board to "unanimously agree to segregate said petitioning subdistrict from said rural high school district." The facts must consequently be heard and passed upon by the board of commissioners.

The trial court properly remanded the case to the board of commissioners for hearing on the merits. Writ is denied, and petition dismissed. Costs awarded in favor of defendant.

SULLIVAN, J., concurs.

SWANSON v. KOENINGER.

(Supreme Court of Idaho. Dec. 24, 1913.)

1. MINES AND MINERALS (§ 18*)—EXTENT OF MINING CLAIM—NOTICE OF LOCATION.

The locator of a mining claim cannot maintain ownership to a greater length in either direction along the ledge or lode than is called for in his notice of location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 29-36; Dec. Dig. § 18.*]

2. MINES AND MINERALS (§ 19*)—EXTENT OF MINING CLAIM—CONFLICT BETWEEN NOTICE AND BOUNDARIES.

The general principle that, in case of conflict between the location notice and the boundaries of a mining claim, as marked by the stakes on the ground, the stakes control applies so far as there is no substantial variance between such stakes and the description in the notice of location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37-39; Dec. Dig. § 19.*]

3. MINES AND MINERALS (§ 18*)—LOCATION OF MINING CLAIMS—MONUMENTS.

The rule that, in the location of mining claims, monuments should control the courses and distances is recognized only in cases in which the monuments are clearly ascertainable and can be definitely located.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 29-36; Dec. Dig. § 18.*]

4. MINES AND MINERALS (§ 18*)—EXTENT OF MINING CLAIM—EXCESSIVENESS.

It is contrary to the policy and spirit of the mining laws to permit a mining claim of excessive size to be staked, thereby affording an opportunity for the stakes to be shifted by the locator so as to include ground proved to be rich in mineral through the development of adjoining ore bodies.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 29-36; Dec. Dig. § 18.*]

5. MINES AND MINERALS (§ 19*)—DESCRIPTION OF MINING CLAIM—VARIANCE BETWEEN NOTICE AND BOUNDARIES.

Where the call in a location notice is as follows: "Claiming from this discovery notice and cut or shaft 1,000 feet in a southeasterly

direction and 500 feet in a northwesterly direction"—while from a map on file it appears that the lode line runs almost due north 780 feet from the discovery and 620 feet in a southeasterly direction to the southerly end line of the claim, the description given is so erroneous as to be delusive and misleading, inasmuch as the description in the notice and the markings upon the ground do not even approximately agree, and there is a fatal divergence between such description and the markings of the claim upon the ground.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 37-39; Dec. Dig. § 19.*]

Appeal from District Court, Blaine County; Edward A. Walters, Judge.

Action by Charles Swanson against Robert Koeninger to quiet title to mining property. From judgment for defendant, plaintiff appeals. Reversed.

Edwin Snow, of Boise, and J. G. Hedrick, of Hailey, for appellant. Sullivan & Sullivan, of Boise, and Frank Reeves, of Wenatchee, for respondent.

STEVENS, District Judge. This is a suit adverse to the mineral patent of the defendant's mining claim, called the "True Friend." Upon the filing of the map and field notes of the survey of this claim for patent, the plaintiff Swanson filed suit, setting up his claim to two certain areas thereof, respectively, in conflict with defendant's claim, the Silver Bullion and Silver Bullion No. 2. The Silver Bullion is admittedly a senior location to the True Friend, while the Silver Bullion No. 2 is admittedly a junior location. Upon the trial of this cause without a jury before the district court of the Fourth judicial district, in and for Blaine county, the court awarded to the plaintiff the area in conflict between the Silver Bullion and the True Friend, evidently on the ground of the seniority of the former. But, with respect to the second and larger area in conflict between plaintiff's claim Silver Bullion No. 2, and the True Friend claim of the defendant, the court decided that title to such area should be quieted in the defendant, evidently also upon the ground of the seniority of the location. From this portion of the judgment the plaintiff appeals.

Stated generally, the errors assigned are:

(1) That the court erred in not holding and deciding that appellant was the owner of and entitled to the possession of that portion of the True Friend mining claim in conflict with the Silver Bullion No. 2. (2) That the court erred in holding and deciding that the respondent was entitled to a patent to that portion of the True Friend mining claim in conflict with said Silver Bullion No. 2. (3) That the court erred in not holding and deciding that the patent survey of the True Friend mining claim, so far as it included the area in conflict with said Silver Bullion No. 2, did not correctly represent

and include the True Friend mining claim as located.

It is stipulated that there are three claims involved in this action, the Silver Bullion and Silver Bullion No. 2, owned by the plaintiff, and the True Friend, owned by the defendant. To avoid proving the locations of these three claims, the stipulation covered certain facts, such as that the locators were citizens of the United States; that they discovered a vein or lode of quartz or other valuable rock, in place bearing gold, silver, lead, etc.; that the land located was unoccupied mineral land of the United States (except the areas in conflict, which was to be determined by the evidence), the actual staking of the claims (except the points where the stakes were set), the size and markings of the posts, the posting of notices of location and their contents, the recording of the notices; that assessment work had been done at all times since the location thereof, and the stakes kept up in accordance with the law (except as to the location of the points where they were kept up); that the respective parties were the owners of the different claims as alleged and had had possession of their claim or claims since the location thereof (except the areas in dispute, which was to be determined from the evidence).

The location notice of the True Friend claim is in part as follows: "Claiming from this discovery notice and cut or shaft 1,000 feet in a southeasterly direction and 500 feet in a northwesterly direction * * * adjoining on the northerly end the Independence and the Silver Bullion lodes, situated in the Warm Springs Creek Mining District, Alturas county, Idaho Territory."

The real question before the court, stripped of verbiage, is the locality of the True Friend location, in so far as there is a conflict with the Silver Bullion No. 2 claim; the claim of respondent being that the location of the stakes upon this claim should govern the calls in the notice. Appellant quotes at length and seems to rely upon the case of *Flynn Min. Co. v. Murphy*, 18 Idaho, 266, 109 Pac. 851, 138 Am. St. Rep. 201, which seems to be in point in this case, although going to the extreme limit to which the court is inclined at this time to go upon that question. In that case the court said: "In the location notice of said Snowdrift lode it is stated that said claim extends in a northwesterly direction along the lode 700 feet and in a southeasterly direction along the lode 800 feet. That notice fixes the distance along the lode that said claim extends from the point of discovery. The ground beyond the 800 feet southeasterly from the discovery was not included in said claim, even though the stakes marking the northeasterly and southeasterly corners of said claim were placed beyond the 800 feet. Any locator had a right to go to the point of discovery of the Snowdrift claim and measure the ground from the discovery

point 800 feet in a southeasterly direction along the lode and, if there was any unlocated ground beyond the 800 feet, locate it, regardless of the fact that the easterly end stakes had been established beyond the 800 feet." And again, upon rehearing, the court said: "Under the law, a locator should not be permitted to hold an excess of ground with a single location, and, when his notice provides that his mining claim extends a certain number of feet in a certain direction from the discovery, subsequent locators may be governed by the statement in the notice and not by stakes that include within their boundary an excess of surface ground." Again the court says in the same case: "There is no contention made in the case at bar that the excess in the Snowdrift location, if there was any, was the result of fraudulent intent, but we think it is conceded that such excess, if there was any, was the result of innocent error."

[1] After a careful consideration of the decision in *Flynn Group Min. Co. v. Murphy*, we cannot escape the conclusion that it is based on the fact that a locator cannot claim a greater length in either direction along the ledge or lode than is called for in his notice of location. In that case, as in the case at bar, the location notice was posted at the discovery and not upon either of the end stakes, and the court said: "Under that notice, he was only entitled to 800 feet in a southeasterly direction from the discovery point."

The location notice calls for 500 feet in a northwesterly direction from the discovery. The claim as surveyed for patent swings the northerly part from an angle of about 45 degrees to a straight northerly direction from the discovery point, so that the location notice is misleading with respect to the adjoining claims on the north, the extent of ground claimed northerly from the discovery and with respect to the course of the vein, as well as the direction from discovery. All these points together show that the location notice, instead of performing the function designed by law (that is to say, informing the public of the precise ground claimed thereunder), misleads in every particular when it is made the basis of a claim to the ground included in the patent survey.

[2] The general principle that, in case of conflict between the location notice and the boundaries of a claim as marked by the stakes, the stakes should control applies only so far as there is no substantial variance between such stakes and the notice of location. There is no doubt that this rule should apply where the stakes can be definitely located; but in the case at bar there seems to be much uncertainty as to the original location of the stakes.

In *Treadwell v. Marrs*, 9 Ariz. 333, 83 Pac. 350, the court says: "The well-settled rule in that respect is that where the monuments are

found upon the ground, or their position or location can be determined with certainty, the monuments govern, rather than the location certificate; but, where the course and distances are not with certainty defined by monuments or stakes, the calls in the location notice must govern and control."

[3] The rule applied to the location of mining claims that monuments should control courses and distances is recognized only in cases in which the monuments are clearly ascertained. If there is a doubt as to the monuments, there can be no reason for holding that the monuments should prevail. *Thallman v. Thomas* (C. C.) 102 Fed. 935.

In *Copper Globe Min. Co. v. Allman*, 23 Utah, 410, 64 Pac. 1019, we find: "The boundaries so marked should conform substantially to the location indicated by the discovery monument and the notice of location."

"The object of the law in requiring the location" of a mining claim "to be marked upon the ground is to fix the claim, to prevent floating or swinging, so that those who in good faith are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue." *Gleeson v. Mining Co.*, 13 Nev. 442; *Book v. Justice Min. Co.* (C. C.) 58 Fed. 108; *Daggett v. Yreka Min. & Mill. Co.*, 149 Cal. 357, 86 Pac. 968.

[4] The wisdom of the rule laid down in these cases cannot be questioned, as it is contrary to the policy and spirit of the mining laws to permit a mining claim of excessive size to be staked and then afford the opportunity for the stakes to be shifted at the locator's pleasure to include ground proved to be rich in mineral through the development of other ore bodies.

In *Leveridge v. Hennessy* (Mont.) 135 Pac. 906, we find this language referring to the notice: "Such a statute, it is true, does not require that the declaratory statement contain a description by metes and bounds (*Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654), but it does require that, taking the discovery as the initial point, the boundaries be so definite and certain as that they can be readily traced (*Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714), and that the declaratory statement contain directions which, taken with the markings, will enable a person of reasonable intelligence to find the claim and run its lines (*Lindley on Mines*, § 381; *Gamer v. Glenn*, *supra*; *Bramlett v. Flick*, 23

Mont. 95, 57 Pac. 969). While neither mathematical precision as to measurements nor technical accuracy of expression is expected, the degree of accuracy that is required is indicated by the fact that the locator, after his discovery, had 30 days in which to definitely ascertain the course of the vein and mark his boundaries and 30 days more in which to file his declaratory statement describing his claim so that it could be identified. *Sanders v. Noble*, 22 Mont. 110, 55 Pac. 1037. That degree of accuracy is not met if the description given is so erroneous as to be delusive and misleading, as when the declaratory statement and the markings upon the ground do not even approximately agree as to the general shape of the claim or as to any point, direction, or distance. *Dillon v. Bayliss*, 11 Mont. 171, 27 Pac. 725."

[5] Recurring, then, to the location notice of the True Friend claim, we observe that its call is, "Claiming from this discovery notice and cut or shaft 1,000 feet in a southeasterly direction and 500 feet in a northwesterly direction," while in truth, from a map on file, we find the lode line runs almost due north 780 feet from the discovery and 620 feet in a southeasterly direction to the southerly end line of the claim.

The description in the notice suggests that the claim is in the form of a parallelogram, and that one finding the corners at the end lines might proceed at right angles to find the other stakes. As a matter of fact, if he did so he would have missed the northerly end stakes by several hundred feet. It is a rational inference that much difficulty might be expected in an attempt to find the lines and corners with the aid of the location notice, and certainly no one would suppose the True Friend as marked, and the True Friend described in the location notice to be one and the same, and this point must be determined by the criterion upon which it is assailed, viz., a fatal divergence between the location notice as filed and the markings of the claim upon the ground.

We are of the opinion, after a careful consideration of all the facts herein and the authorities, that, in so far as there is a conflict between the True Friend location and the Silver Bullion No. 2, the True Friend location is void, and the title to the area in dispute should be quieted in the appellant.

Judgment reversed. Costs awarded to appellant.

AILSHIE, C. J., and STEWART, J., concur.

JOHNSON v. SPOKANE INTERNATIONAL RY. CO.

(Supreme Court of Idaho. Dec. 31, 1913.)

1. PUBLIC LANDS (§ 92*)—RAILROADS—GRANT OF RIGHT OF WAY.

A railway company that has complied with Act Cong. March 3, 1875, c. 171, 18 Stat. 509, in regard to right of way over the public lands, is made a grantee by the actual construction of the road, although a profile map of the road has not been filed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

2. PUBLIC LANDS (§ 35*)—RIGHTS OF HOMESTEADER—RAILWAY GRANT.

Held, under the facts of this case, that, the railroad company having located its right of way across the land in question, and cleared such right of way of timber thereon, and graded its railway across such land, before a homesteader makes his homestead entry, the homesteader takes such land subject to said railway right of way.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

3. PUBLIC LANDS (§ 35*)—RIGHTS OF HOMESTEADER—RAILWAY GRANT.

Held, under the facts of this case, that the grant of said right of way under Act Cong. March 3, 1875, c. 171, 18 Stat. 509, became definitely fixed before said homestead entry was made.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 72-77; Dec. Dig. § 35.*]

Appeal from District Court, Bonner County; John M. Flynn, Judge.

Action by John F. Johnson against the Spokane International Railway Company to recover damages for a railway right of way. From judgment for plaintiff, defendant appeals. Reversed.

Allen & Allen, of Spokane, Wash., and H. H. Taylor, of Sandpoint, for appellant. G. H. Martin, of Sandpoint, for respondent.

SULLIVAN, J. This action was brought to recover damages alleged to have been sustained by reason of the appellant railway company locating and constructing its line of railroad across 160 acres of land claimed by the respondent, situated in section 18, township 60 N., range 1 E., Boise Meridian, in Bonner county.

It is alleged in the complaint that the respondent made his homestead entry on said land on April 16, 1906, and submitted his final proof in July, 1911, and obtained his patent for said land on November 20, 1911; that, after respondent had made his homestead entry, the railway company, without his consent, entered upon his land, and constructed its railroad across the same, and since its construction has been operating its trains over said line of road.

The complaint and amended complaint were not verified, and the answer of the defendant denies generally the allegations of the complaint, and by way of affirmative defense avers that it filed with the Secretary of

the Interior a certified copy of its articles of incorporation, and made due proof of its organization on May 3, 1905, as provided by the Right of Way Act of Congress, approved March 3, 1875, and that in the fall of 1905, and before the plaintiff had made entry of said land as a homestead, and while said land was government land, the defendant entered upon said land, clearing its right of way to the extent of 100 feet wide, and fully graded and constructed its road thereon, all of which was done and completed prior to the 16th day of April, 1906, the date respondent made his homestead entry for said land, that, when respondent filed his homestead entry upon said land, the defendant was in actual possession of said strip of land, and was using the same for railroad purposes, and that appellant took possession of the right of way across said land, definitely surveyed and located its right of way thereon, cut and removed the timber from the right of way, and constructed its road thereon prior to the 16th day of April, 1906; and also sets up the statute of limitations.

On the issues thus made the action was tried by the court, with a jury, and a verdict was rendered by the jury in favor of the respondent for \$501.55, on which verdict a judgment was entered. A motion for a new trial was denied by the court, and the appeal is from the order denying the new trial.

[1] Several errors are assigned; but the real question at issue is, Did the appellant corporation acquire a right of way over said land under the provisions of the act of Congress of March 3, 1875, before the respondent made his said homestead entry for the land?

It clearly appears from the evidence that the railroad company had definitely located its right of way across said land in 1905, and in the fall of that year cleared its said right of way of timber; the same being quite heavily timbered. It is stipulated that the defendant is, and ever since the year 1903 has been, a corporation duly organized and existing under the laws of the state of Washington, for the construction of a standard gauge railroad, and for the common carriage of passengers from Spokane, Wash., through Bonner county, Idaho, to connect with the Canadian Pacific System at the state line, and that on the 3d day of June, 1905, it filed in the office of the Secretary of the Interior at Washington, D. C., a copy of its articles of incorporation and due proof of its organization, as required by said act of Congress, granting to railroads a right of way through the public lands of the United States.

[2, 3] The evidence shows that in the summer of 1905 the defendant surveyed and located the central line of its railway through and over said lands of the respondent, and that said land so remained public lands of the United States until the 16th of April, 1906, the date when plaintiff made his home-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stead entry, and that, between the time of making said survey and the said entry of plaintiff, the defendant entered upon said right of way through said land, and cleared the timber, brush, and other material therefrom to a width of 100 feet, being 50 feet on either side of the central line of its railroad, and that, between the date of its survey and the time of making the entry by the plaintiff, the defendant entered upon said right of way so cleared, and graded and constructed the roadbed for said railway, and that, between said date and the month of July, 1906, the defendant fully completed its railroad, and laid its track thereon, and has since used the same as a railroad.

It also appears from the evidence that, at the time plaintiff filed his said homestead entry upon said land, the plaintiff well knew that said railroad was being constructed upon said line and through said lands.

One of the contractors who graded said railroad through respondent's land, and who was in personal charge of the work, testified that he had the construction of 5 miles of said railroad at Summit Spur, which included the part of the road through respondent's land; that he commenced said construction in 1905, and finished the construction of said 5 miles on the 26th of April, 1906; that he went over the land now claimed by respondent when he took the contract, but did not go there to do any grading on said land until the 10th day of March, 1906; that he had then about 53 men at work; that he finished grading the main line through respondent's land about the 12th or 14th of April, 1906, the last 10 or 12 days of the work being surfacing of the roadbed, and making it in form to lay the ties on, but the main grade was finished through the land about the 12th or 14th of April; that the right of way was cleared of timber the last part of August, 1905; that on the 1st day of April the road was graded both north and south of respondent's land, except a big sand cut which was about 500 feet north of plaintiff's land; that he finished said cut about the 22d of April.

Respondent testified that he established his residence on said land on the 8th of October, 1906, about 6 months after he made the entry; that he knew the right of way was cleared of timber through said land, and was cleared before he saw the land; and that he knew that the graders were grading on both sides of his land for said railroad, and thinks they had been doing some work on his land at that time, but that he did not know that the railroad was going to be there when he filed on the land. While he claimed there had not been much grading done on his land, plaintiff testified as follows: "Q. You say they were grading some on your land at the time—you knew where the line was going that the grading was on, did you not—you knew where the line was that the grading was on? A. I could see; yes, sir."

A brother-in-law of the plaintiff testified on his behalf to the effect that the railroad was not constructed over the land until some time between the 16th of April and the 8th of October, 1906; but the contractor who constructed the roadbed testified positively that he completed the grade across the land in question by the 12th or 14th of April, and the record clearly shows that the track was laid some time in July of that year.

The contention of counsel for respondent seems to be that under said act of Congress a railroad company cannot acquire a right of way across public land until its railroad is completed, and in operation, where it has not filed a profile map as provided by the fourth section of said act. There appears to be no question but that the railroad company surveyed its right of way across this land in 1905, and cleared the right of way of comparatively heavy timber; that it was graded, or mostly graded, prior to the date respondent entered said land as a homestead. The railroad had possession of said right of way at the time the entry was made, and the respondent had full notice of that fact, and that it was proceeding with complete construction of railway.

In the case of *Jamestown & Northern Ry. Co. v. Jones*, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698, the Supreme Court held that under the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," where a railroad company has complied with the act by filing with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same, and where the railroad company has constructed a railroad over the land, that it obtains a full and complete right of way under that act without the necessity of filing a profile map as provided in section 4 of the act. The court, in that opinion, said: "This case establishes that the railroad company becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization under the same with the Secretary of the Interior. * * * But what constitutes a definite location of the right of way? Upon the answer to that question the present controversy hinges. The state courts decided, as we have seen, that the right of way only became definitely located by the filing of a profile map of the road. The contention of the plaintiff in error is that the right of way may be definitely located by the actual construction of the road. And this was the ruling of the Interior Department in *Dakota C. R. Co. v. Downey*, 8 Land Dec. Dep. Int. 115, and the ruling has been subsequently adhered to. * * * It follows from these views that the grant of the plaintiff in error by the act of 1875 became definitely fixed by the actual construction of its road, and that the entry of the defendant in error was subject thereto."

The only difference between that case and the one at bar is that in that case the road had been fully constructed, and the track laid upon it, and in operation, while in the case at bar the road had been surveyed, the right of way cleared of timber for 100 feet in width, and the road graded over the respondent's land, but the track was not yet laid. We think it is clear that the railroad company had actual possession, and was proceeding with diligence to complete the road by laying its track thereon, which it did in the month of July, 1906. This was notice, not only to the respondent, but to the world, that said land was in the possession of the railroad company for railroad purposes. The appellant company was a grantee under said act of Congress. As bearing upon this question, see *Stuart v. Union Pac. R. R. Co.*, 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. 535, decided February 24, 1913.

We think, under all the facts of this case, that the respondent acquired no interest whatever in said right of way, and took the same by his homestead entry and patent, subject to the rights of the railroad company that had possession of said land when said homestead entry was made, and has held possession of it ever since.

The judgment is reversed, and the cause remanded, with directions to the trial court to enter judgment in favor of appellant. Costs awarded to the appellant.

STEWART, J., concurs.

AILSHIE, C. J. (concurring specially). I think the equities of this case are with the appellant, but I doubt somewhat if the facts of this case bring appellant within the terms of the statute as embodied in the Act of Congress of March 3, 1875.

WILSON v. BAKER CLOTHING CO.

(Supreme Court of Idaho. Dec. 30, 1913.)

1. DEMURRER—DISMISSAL.

Held, that the court did not err in sustaining the demurrer to the complaint and entering a judgment of dismissal.

2. BANKS AND BANKING (§ 74*)—INSOLVENCY—WITHDRAWAL OF DEPOSIT—LIABILITY OF DEPOSITOR.

A depositor, who actually knows that a bank is insolvent and does nothing but draw his check and present it for payment and it is paid in the usual course of business, cannot be required to refund the amount so withdrawn.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 156; Dec. Dig. § 74.*]

3. CORPORATIONS (§ 542*) — TRANSFERS IN FRAUD OF CREDITORS.

A corporation, although insolvent, holds its assets just as a natural person holds his property, with the same power to dispose of it to secure or pay its debts, and neither a private person nor a corporation can fraudulently dis-

pose of his or its property to the injury or damage of his or its creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

4. CORPORATIONS (§ 544*)—PROPERTY—RIGHT TO DISTRIBUTE.

The property of a corporation, in one sense is a trust fund for the payment of its debts, but this only means that such property cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. § 544.*]

5. CORPORATIONS (§ 544*)—INSOLVENT CORPORATION—RIGHT TO PREFER CREDITORS.

An insolvent corporation is not prohibited by the statutes of this state from preferring certain creditors over others in the due course of business, where such preference is not collusively or fraudulently made.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. § 544.*]

6. PLEADING (§ 8*)—CONCLUSIONS—FRAUD.

Merely alleging that an act was collusive and fraudulent is not sufficient. The facts constituting the collusion or fraud must be alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

7. BANKS AND BANKING (§ 74*)—INSOLVENCY—PREFERENCES—RIGHT TO SET ASIDE.

Preferences that are made by a bank through conspiracy or fraud with the creditor may be set aside on proper application.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 156; Dec. Dig. § 74.*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by L. C. Wilson, receiver, against the Baker Clothing Company, to recover the amount of a deposit checked out of an insolvent bank by defendant. Demurrer to the complaint sustained, and judgment of dismissal entered, and plaintiff appeals. Affirmed.

James E. Babb, of Lewiston, and J. H. Wourms, of Wallace, for appellant. J. E. Gyde, of Wallace, for respondent.

SULLIVAN, J. This is an appeal from a judgment of dismissal entered on an order sustaining the respondent's demurrer to the appellant's amended complaint. The action was brought by the receiver of the State Bank of Commerce of Wallace against the defendant corporation, the Baker Clothing Company, to recover the sum of \$2,000, which the amended complaint alleges was fraudulently withdrawn from said bank by the respondent in contemplation of said bank's insolvency, and for the purpose and with the intent of securing to the defendant corporation a preference over other creditors and depositors of said bank. The allegations of the amended complaint set forth the organization of said State Bank, and alleges that it was transacting a general banking business at Wallace, Idaho, and that it continued to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

conduct a banking business for a number of years, and down to the 12th day of May, 1911, when it availed itself of the provisions of section 70 of chapter 124 of the Session Laws of 1911, by placing its affairs in the hands of the State Bank Commissioner. It is alleged that on the 12th day of May, 1911, and for a long time prior thereto, and particularly on the 10th and 11th days of May, 1911, said bank was hopelessly insolvent, and that it had not opened its doors for the transaction of business since the 12th of May, 1911. Then is alleged the appointment of a receiver, and that the liabilities of said bank on May 12th amounted approximately to \$450,000, while its assets did not exceed \$175,000, and that the assets are not sufficient to pay the depositors in full; that on May 11th the respondent corporation was a depositor in said bank, and had a credit balance in said bank; that on said 11th day of May, when said bank was insolvent, and during banking hours, one Baker, the president of the respondent corporation, went to the bank and presented his check on the defendant's account for \$2,000, but was advised by the cashier of said bank that the cash account was so low, and the bank's financial condition so unsound, that it would be impossible to cash such check, and refused to cash the same; that thereupon said Baker, for and on behalf of the respondent corporation, requested the cashier to lay aside the sum of \$2,000 with which to subsequently cash said check if the condition of the bank should improve, and that the cashier then placed in a separate drawer in the vault of said bank the sum of \$2,000, advising one of the bookkeepers who occupied the banking room as sleeping quarters that he had set aside said \$2,000 for the accommodation of Baker, but instructed the bookkeeper not to deliver the money to Baker except on his (the cashier's) instructions; that after business hours on May 11th, said Baker, accompanied by the president of said bank, went to the banking house at about midnight, and they, acting in collusion, gained admittance to said banking room, and attempted by threats and coercion to induce said bookkeeper to open the vault of said bank and give said Baker the \$2,000 which had been set aside by the cashier; that this effort failed; and that said Baker with the president of the bank returned about 2 o'clock of the same night and again attempted by threats and coercion to induce said bookkeeper to pay over said \$2,000 to Baker for the respondent Clothing Company, which the bookkeeper refused to do. It is also alleged that said two efforts were made to procure said \$2,000 to be paid over to the respondent whereby it would receive 100 cents on the dollar of its deposit, whereas the other depositors would receive only a ratable distribution of the bank's assets; that Baker must have known, and did know, at the time

of said efforts to procure the payment of said \$2,000 that said bank was hopelessly insolvent; that on the morning of the 12th day of May, 1911, said bank opened its doors for business at 9 o'clock a. m., and was forced to close its doors at 10 o'clock a. m., and that during the time said bank was open on that morning, said \$2,000 was paid over to Baker upon said check; that the respondent knew that said bank was insolvent, and that it intended, by procuring the payment of said \$2,000, to obtain a preference over other depositors of said bank, and thus hinder, delay, and defraud the creditors of said bank. A demurrer was filed to said amended complaint, based on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that it was uncertain in the particulars specified in the demurrer. Only one error is assigned, and that is that the court erred in sustaining the demurrer to the amended complaint.

[1, 2] It is first contended that, as the respondent corporation had full knowledge of the insolvency of said bank, it was liable to the receiver for the return of said \$2,000 that it checked out of said bank on the 12th day of May, 1911. Counsel cites in support of that contention the case of *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185. It appears from the facts stated in that case, that the defendant Battle was a brother-in-law of the president of the bank, and that the bank's funds were low, and for the purpose of bolstering up the credit of the bank, its president induced said Battle to put up \$7,000, ostensibly for the purpose of purchasing 70 shares of the stock of said bank; that some of the depositors had become suspicious of the solvency of the bank and made inquiries in regard thereto with a view to withdrawing their deposits, when the defendant Battle, in collusion with the president of the bank, made a public display of said \$7,000 for the purpose of deceiving the depositors, and, being so deceived by the display of said money, did not check their money out of the bank. That case is not parallel to the case at bar, but counsel relies on the statement in the opinion in that case, which is as follows: "If a bank is insolvent, but is still conducting its business and pays the check of a depositor in the usual course of business, and the depositor has no notice of the insolvency, the payment is good, and the depositor is protected notwithstanding the bank is actually insolvent." That decision is based upon the rule or proposition that a depositor who has knowledge of the insolvency of a bank in which he has money deposited cannot legally withdraw his money from the bank, but that one who has no such knowledge may legally withdraw his money from the bank. In the Georgia case the court cites section 1979 of the Civil Code of Georgia, and section 208 of the Penal Code of that state, and says: "The purpose of this

provision is to prevent the bank from preferring one of its creditors when the fact of insolvency is known to the creditor." As construed by that court, said statute prohibits the making of preferences by insolvent banks. The defendant Battle in that case was a pretended stockholder in the insolvent bank, and fraudulently assisted the bank in making a display of said \$7,000 (to recover which sum said action was brought), for the purpose of inducing depositors and creditors of the bank not to withdraw their deposits. This transaction was certainly a shady one; and under the facts of that case, even without the statute, we think the court would have been fully justified in deciding the case against Battle.

As appears from the allegations of the complaint in the case at bar, on the 11th day of May said bank was regularly engaged in banking business, and the respondent had money on deposit in the bank and drew a check upon such deposit for the sum of \$2,000. The bank had sufficient money on hand to pay it, but the cashier refused to pay the same when the check was presented, but laid that amount aside for the respondent company, and the cashier paid it over to the respondent company on the morning of the 12th of May after the bank had opened for business. There are no allegations in the complaint showing, or tending to show, that the officers of the respondent company used any undue influence upon the cashier, or made any fraudulent representations that induced him to pay said money on said check. In the Georgia case the court uses the following language: "A run on a bank is always produced by those who think they have reason to suspect that the bank is in a failing condition; and we are not prepared to hold, if a bank is still in operation, open during the usual hours of business, paying its checks in the order in which they are presented, according to the custom of bankers, that a depositor who merely had reason to suspect the solvency of the bank, this being the motive for his drawing a check, would be required to repay to the bank the amount so withdrawn. * * * Neither are we prepared to hold that one who actually knows that a bank is insolvent, but does nothing except to draw his check and present it and receive payment over the counter in the usual course of business, would be required to refund the amount so withdrawn, less his pro rata share, upon a final winding up of the affairs of the bank." As we understand that quotation from the opinion of the Supreme Court of Georgia, it does not support the contention of counsel for appellant to the effect that a depositor who has knowledge of the insolvency of a bank may not legally check out his deposit. No statute of this state has been called to our attention that prohibits a depositor from drawing his check on his deposit in a bank and receiving pay-

ment of such check in the due course of business, even though he knows that such bank is insolvent at the time he presents his check. If the Legislature should conclude that all payments made by a bank to its depositors after it becomes insolvent may be recovered by the receiver of such bank, it devolves upon the Legislature to enact such a law, and not on the courts to establish such a rule by decision.

[3, 4] It has been held in some jurisdictions that when a corporation becomes insolvent or ceases business, or determines to cease business, although no proceeding may have been instituted for winding up its affairs, its assets are so far a trust fund for the benefit of all its creditors ratably that it cannot, as a natural person may, prefer one or more of its creditors to the exclusion of others, by a voluntary conveyance, mortgage, pledge, assignment, confession of judgment, or otherwise, and that if it attempts to do so a court of equity will set aside such preference and distribute the assets pro rata among all the creditors. It is stated in 3 Clark & Marshall on Corporations, § 780, that this view, however, is contrary to the overwhelming weight of authority, and the author states as follows: "The late cases show that the assets of a corporation are not in any proper sense a trust fund for creditors, so long as no proceedings for a winding up have been instituted, even though it may be hopelessly insolvent, except to such an extent that they cannot be distributed among or withdrawn by stockholders to the prejudice of creditors; but, on the contrary, a corporation, although insolvent, holds its assets just as a natural person holds his property, with the same power to dispose of it to secure or pay debts. And in most jurisdictions, therefore, it is held that a corporation, although it may be hopelessly insolvent, and although it may be about to go into the hands of a receiver, or to assign for the benefit of creditors, or may be in the act of making an assignment, has the same power as a natural person to prefer one or more creditors to the exclusion of others, unless it is prevented from doing so by some express statutory provision." Said section is accompanied by a footnote, where the author has cited many decisions from both federal and state courts as supporting the doctrine laid down in said section. See, also, 7 Am. & Eng. Ency. of Law (2d Ed.) p. 742, where many cases are cited in support of the doctrine there laid down. The author states at page 743 that, by a decided weight of authority, an insolvent corporation cannot prefer debts due to its officers even where it is held that it has the right to prefer other creditors. It is undoubtedly true that the property of a corporation is in one sense a trust fund for the payment of its debts, but this means that the property of a corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the

legitimate business of the corporation, until its debts are paid.

In *Hills v. Stockwell & Darragh Furn. Co.* (C. C.) 23 Fed. 432, a mortgage had been given by an insolvent corporation to secure certain creditors, and the court said: "It does not affect the question if the company could never pay its debts in full; for the legal right of an insolvent debtor to secure one or more creditors in preference to others, where no fraud is intended, is settled in Michigan by many decisions." That case is quoted from with approval by the Supreme Court of Michigan in *Bank of Montreal v. Potts S. & L. Co.*, 90 Mich. 345, 51 N. W. 512.

[5] Where the transfer by the insolvent is made fraudulently, and with a view to hindering and delaying creditors, a court of equity upon proper application, will set aside such conveyance, and hold such property as a trust for pro rata distribution among all of the creditors. Insolvent corporations are not prohibited by statute in this state from preferring certain creditors over others in the due course of business, where such preferences are not collusively or fraudulently made.

[6] It is alleged in the complaint of the case at bar that the taking of said \$2,000 from said bank was with the intent on the part of the bank and its officers, and of the said defendant, to hinder, delay, and defraud the creditors of said bank, but it is not alleged how this would hinder, delay, and defraud creditors any more than would the payment of other checks drawn on said bank in the due course of business. It is alleged that the president of the respondent company and the president of the bank went to the bank at midnight and endeavored to have the bookkeeper pay said \$2,000 check, but that he refused to do so, and thereafter, when the bank opened for business on the morning of the 12th of May, 1911, said check was presented and paid by the cashier, who had declined to pay it the day before, but who had put aside \$2,000 for the purpose of paying said check. The facts alleged are not sufficient to show that there was collusion or fraud in the payment of said check. The law is well settled that a party who seeks to recover on the ground of collusion and fraud must plead the particular representations or facts constituting such collusion or fraud. Merely alleging that an act was collusive and fraudulent is not sufficient. *Kemmerer v. Pollard*, 15 Idaho, 34, 96 Pac. 206.

Under the law applicable to this case we are satisfied that the court did not err in sustaining said demurrer.

We are not inclined to lay down the rule in this state that a depositor who has suspicions, or knows that a bank in which he has a deposit is insolvent, may not legally draw out such deposit, and to hold that one

who has no knowledge of the insolvency of the bank may draw out his deposit and retain it, while the one who has knowledge must return the money he has drawn out to the receiver, to be distributed pro rata among the creditors of the bank. We are not in accord with the views of counsel for appellant who would draw a dividing line between the depositors who have knowledge of the insolvency of a bank and those who have not such knowledge.

[7] Preferences that are made by a bank through conspiracy and fraud with a creditor may be set aside. If the Legislature desires to do so, it has the authority to enact a law specifically declaring what are preferences in such cases and what are not.

The action of the court in sustaining said demurrer and entering a judgment of dismissal must therefore be sustained; and it is so ordered, with costs in favor of respondent.

AILSHIE, C. J., and STEWART, J., concur.

BABCOCK et al. v. CITY OF ROCKY FORD.

(Court of Appeals of Colorado. Dec. 8, 1913.
Rehearing Denied Jan. 12, 1914.)

1. BILLS AND NOTES (§ 404*)—CHECK—PRESENTATION.

Presentation of a check for payment at the bank on which it is drawn must be made within a reasonable time; such time depending on the situation of the parties with reference to one another and the bank, and on other material facts entering into the transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1091-1099, 1101-1103; Dec. Dig. § 404.*]

2. MUNICIPAL CORPORATIONS (§ 172*)—OFFICERS—CHECKS—DELAY IN PRESENTATION—LIABILITY.

A city treasurer receiving a check from the city clerk on December 30th, who was himself cashier of the bank on which it was drawn, and knew that it was having a hard time, but who failed to present the check the next day, upon the bank's failure after an intervening holiday, was liable for his failure to turn over the money to his successor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 396-398; Dec. Dig. § 172.*]

3. MUNICIPAL CORPORATIONS (§ 172*)—OFFICERS—LIABILITY FOR MONEY RECEIVED.

A city treasurer failing to present a check within a reasonable time, so that the money was lost through the failure of the bank on which it was drawn, was not thereby released from his obligation to turn over the money to his successor.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 396-398; Dec. Dig. § 172.*]

4. MUNICIPAL CORPORATIONS (§ 880*)—FUNDS—DEPOSITS—DEPOSITARY—"MAY."

Under Rev. St. 1908, § 6639, requiring a city treasurer to keep all money in such place of deposit as may be designated by ordinance, the word "may" is not equivalent to "must" or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"shall," and the city council may elect whether it will designate a depository for the treasurer, and thus take the risk of relieving him from liability in case the depository should fail, or hold him as an insurer, and decline to make such designation; the mere fact that the city, at the time the treasurer was chosen and thereafter, had large sums deposited in a certain bank in the form of special interest-bearing deposits not amounting to a designation of such bank as a depository for city funds requiring the treasurer to deposit all other funds there.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1862; Dec. Dig. § 880.*

For other definitions, see *Words and Phrases*, vol. 5, pp. 4418-4447; vol. 8, p. 7719.]

Appeal from District Court, Otero County; J. E. Rizer, Judge.

Action by the City of Rocky Ford against George Thorne Babcock and another. Judgment for plaintiff, and defendants appeal. Affirmed.

G. Q. Richmond, of Denver, for appellants.
H. M. Minor, of Rocky Ford, for appellee.

CUNNINGHAM, P. J. Babcock, the appellant, was elected treasurer of the city of Rocky Ford by the council of that city, and assumed the duties of his office on August 6, 1907. On August 15, 1908, he resigned from the office of city treasurer, and his successor was chosen. After his resignation, he failed to deliver to his successor money belonging to the city which had come into his (Babcock's) hands, to the amount of \$3,769.09, as contended by plaintiff, and, as admitted by defendant, he failed to turn over money that had come into his hands as treasurer, belonging to the city, to the amount of \$3,185.14. The difference between the amount alleged to have come into Babcock's hands and the amount admitted by him to have come into his hands grows out of a transaction whereby the city clerk gave to Babcock his check of \$583.95, which the city contends Babcock ought to have promptly presented to the bank on which it was drawn, but which he did not present, and, within a day or two after the city clerk had delivered this check to Babcock, the bank failed. The check in question was dated December 30, 1907, and was drawn upon the State Bank of Rocky Ford; it represented money which the city clerk had collected, and in this manner attempted to turn over to Babcock as treasurer. Babcock insists that the check was not delivered to him until the morning of December 31st, while the city clerk testified unequivocally that he delivered the check to Babcock in the afternoon of December 30th, the date it was drawn. The importance of the date of the delivery of the check grows out of the fact that the bank remained open and continued to receive deposits and transact business in the usual way throughout the entire day of December 31st. The following day, January 1st, was a holiday, and on

January 2d the bank failed to open, and went into the hands of a receiver. It is contended on behalf of appellants that Babcock, under the ordinary commercial rules and the authorities pertaining thereto, had all of the day following the day on which he received the check in which to present the same for payment, and therefore, if he received the check on the 31st, he ought not to be held responsible for his failure to present it.

[1, 2] 1. There is no hard and fast rule on this subject. As is well said in a recent opinion of the Supreme Court of West Virginia: "Presentation of the check for payment at the bank on which it is drawn must be made within a reasonable time, and what is a reasonable time depends upon the situation of the parties with reference to one another, and with reference to the bank, and all other material facts and circumstances entering into the transaction." *Lewis Co. v. Montgomery Co.*, 59 W. Va. 75, 52 S. E. 1017, 4 L. R. A. (N. S.) 135.

The facts in the case before us, as disclosed by the record, are: That Babcock, payee of the check and city treasurer, was an employé of the State Bank of Rocky Ford, on which it was drawn, and, according to his statement, the check was delivered to him in the forenoon of December 31st, while he was in the bank, back of the counter, presumably discharging his duties as assistant cashier. The bank was in a failing condition, and Babcock admits, on cross-examination, that he knew the bank was "having a hard time," and his only excuse for not promptly presenting the check for payment was, to use his own language, "Because I did not have time. I was working for the State Bank of Rocky Ford." He seems to have regarded his duty to the bank as paramount to his duty to the public. This contention cannot be allowed. Under the circumstances just related, and in view of the fact that the following day was a holiday, Babcock was derelict in his duty in not presenting the check on the day he received it, if he received it, as he says, in the morning of December 31st.

The case was tried to the court, without a jury. The findings were general, and in favor of the city. It may well be assumed that the trial court found from the evidence that the check was delivered to Babcock on December 30th, as testified by the city clerk, and, if the trial court did so find, the evidence to support such finding is ample. Our conclusion, therefore, is that, as to the liability of Babcock, no distinction can be drawn between the money represented by the check which Babcock ought to have presented and collected and the balance of the money which had been on deposit in the bank for some time prior to its failure.

[3] 2. Babcock seeks to escape liability for

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

his failure to turn over to his successor any of the money on the theory that he is relieved from this obligation by the failure of the bank. His contention in this behalf is contrary to the ruling in *Gartley v. People*, 24 Colo. 155, 49 Pac. 272, and reaffirmed by unanimous court in *Gartley v. People*, 28 Colo. 227, 64 Pac. 208. The liability of public officials for public money coming into their hands, and lost by bank failures, is very ably discussed by Chief Justice Hayt and Justice Goddard in a dissenting opinion in the first *Gartley* Case, and we shall make no attempt to review the authorities which are there so ably analyzed. It may not be amiss, however, to call attention to the fact that in the second *Gartley* Case Mr. Justice Garbert used this language: "The first decision was announced in this case in 1897. In 1893 this court, in *McClure v. La Plata County*, 19 Colo. 122, held that the liability of county treasurers for public funds collected was express and extraordinary. In the face of these decisions, the lawmaking power has not indicated by any act that the liability of a receiver of public money should not be as great as this court has declared. If the liability thus imposed is too onerous, relief must come from the Legislature. Courts can only declare the law as it now stands." The second *Gartley* Case was decided in January, 1901, and the Legislature has not yet seen fit, by any enactment, to relieve public officials from the express and extraordinary liability fixed upon them by the decisions of the Supreme Court of our state. Moreover, even under the dissenting opinion of Judge Goddard in the first *Gartley* Case (24 Colo. 174, 49 Pac. 278), it is only contended that a public official should be relieved from liability where "he exercises the strictest care in selecting a bank of unquestioned solvency in which to deposit the public money, and being guilty of no fault in leaving it there, and the money is lost through unexpected failure of the depositary."

There is no comfort for the appellants in the case before us in the rule which Judge Goddard contended for, since Babcock, by his own admission, knew that the bank in which he was employed, and in which he saw fit to deposit the public money, was, on the 31st day of December, and even prior to that time, to use his own language, "having a hard time."

[4] 3. It is further contended on behalf of appellants that under section 6639, Rev. St., it is made the duty of treasurers of towns and cities to keep all money in their hands belonging to the municipal corporation in such a place of deposit as may be designated by ordinance. It is not contended that the city of Rocky Ford had by ordinance designated any place of deposit for the city funds. Indeed, it is admitted by the pleadings that the council had not done so. We are not im-

pressed with appellant's contention that the word "may," in the aforesaid section, is equivalent to "must" or "shall." It is our opinion that under the statute the city council had the right of election as to whether it should designate the depositary for the treasurer, and thus take the risk of relieving him and his bondsmen from liability in case the depositary should fail, or of holding the treasurer as an insurer, and declining to make the designation. The mere fact, if it be a fact, as contended on behalf of appellants, that the city had, at the time Babcock was chosen treasurer, and continued thereafter to have, large sums of money deposited in the State Bank of Rocky Ford, in the form of special interest-bearing deposits, does not amount to a designation by the council of said city of said bank as a depositary for its funds, and imposed no duty upon the treasurer to deposit all other funds there. There is no attempt in this case to hold the city treasurer liable on account of these special deposits. The terms and conditions under which they were made are not disclosed by the abstract; but it is disclosed, as we have already pointed out, that no ordinance had been passed designating the bank as a city depositary.

The judgment of the trial court in favor of the city and against appellants is affirmed. Judgment affirmed.

BAXTER v. BECKWITH.

(Court of Appeals of Colorado. Dec. 8, 1913.
Rehearing Denied Jan. 12, 1914.)

1. LIMITATION OF ACTIONS (§ 66*)—DEMAND TO START STATUTE—DEMAND NOTE.

A note dated April 12, 1901, payable "..... after date" of a certain sum, with interest payable annually, to draw interest as principal, upon which no demand for payment was made until 1904, after which the maker made unqualified promises to pay, was a demand note not intended to become due or actionable until after demand for payment, and hence the statute did not commence to run until demand.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 353-375; Dec. Dig. § 66.*]

2. TRIAL (§ 344*)—VERDICT—IMPEACHMENT OF AFFIDAVITS OF JURORS.

It is not proper to attempt to test the correctness of a verdict or the scope of it by a resort to affidavits of individual jurors as to the method of reaching the verdict and the intention of the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 813; Dec. Dig. § 344.*]

3. USURY (§ 2*)—WHAT LAW GOVERNS.

Parties may legally stipulate for the payment of interest according to the laws of the state where an instrument is made, or according to the laws of the place of payment, and the rate so agreed on is recoverable, although illegal under the laws of the other state.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 2-15, 418; Dec. Dig. § 2.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. USURY (§ 2*)—WHAT LAW GOVERNS.

The validity of a note and its provision for interest is to be determined by the law of the state in which it was made and specifically made payable.

[Ed. Note.—For other cases, see *Usury*, Cent. Dig. §§ 2-15, 418; Dec. Dig. § 2.*]

5. EVIDENCE (§ 43*)—JUDICIAL NOTICE—DECISIONS OF OTHER STATES.

Where the laws of another state are involved, the courts may and should take notice of the decisions of the highest courts of such state construing such laws.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 62-65; Dec. Dig. § 43.*]

Appeal from District Court, Denver County; George W. Allen, Judge.

Action by Mrs. E. H. Beckwith against S. L. Baxter. Judgment for plaintiff, and defendant appeals. Affirmed.

James A. Harris, John F. Mail, and Paul De Laney, all of Denver, for appellant. Ewing Robinson, of Denver, and Spencer & Landis, of St. Joseph, Mo., for appellee.

BELL, J. This action was brought upon a promissory note, which was set forth at length in the pleadings, and reads as follows:

"\$1,300.00. Red Oak, Iowa, 4-12-1901.

"..... after date, for value received, we promise to pay to the order of Mrs. E. H. Beckwith the sum of thirteen hundred dollars, with 7 per cent. per annum interest from date. Interest payable annually, and to draw interest as principal. Payable at Red Oak National Bank, of Red Oak, Iowa. We further agree to pay a reasonable attorney's fee in case suit is brought on said note. Said fee to be taxed up as part of the cost of suit. And it is also agreed that a justice of the peace shall have jurisdiction hereon to an amount not exceeding three hundred dollars.

"[Signed] S. L. Baxter."

The appellant, defendant below, pleaded payment and the statute of limitations, and the appellee replied, denying the payment in whole or in part, and alleging that, in the latter part of 1904, March, 1905, and in August, 1906, the appellant made unqualified promises to her to pay said note. A trial was had to a jury in the district court of the city and county of Denver, resulting in a verdict in favor of the appellee in the sum of \$1,250, upon which judgment was duly entered.

The appellant urges that the note sued upon, being a demand note, became due immediately after delivery, and that therefore the statute of limitations operated from that date, and became effective before the suit was brought.

[1] We think it manifest, from the terms of the note and the evidence in support thereof, that it was not the intention of the

parties that the same should become immediately due. Provision was made in the note for annual interest, and for interest upon interest, and the evidence shows that no demand was made for payment until during the year 1904. We think that, under the circumstances attending the making of the note, the form thereof, and the conduct of the parties regarding the payment thereof, it falls within the purview of such demand notes as are not intended by the parties to become due or actionable until after demand for payment; hence the statute did not commence to run until demand was made in 1904. *Montellus et al. v. Charles*, 76 Ill. 303; *Yates v. Goodwing*, 96 Me. 90, 51 Atl. 804; 7 Cyc. 847, 849, 976; *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288; *Jameson v. Jameson*, 72 Mo. 640; *Leonard v. Olson*, 99 Iowa, 163, 68 N. W. 677, 35 L. R. A. 381, 61 Am. St. Rep. 230. See, also, 4 Am. & Eng. Encyc. of Law (2d Ed.) pp. 150, 151, b and bb; and 1 Daniel on Negotiable Instruments (4th Ed.) pp. 585-589, §§ 606, 607, 608, 609, and 610.

However, the evidence of appellant is wholly inconsistent with his plea of the statute of limitations, as he testified and showed that he made payments on the note from November, 1902, to 1906, and the jury must have allowed considerable credits upon the note, since the verdict is so much less than the principal and interest due thereon. The evidence supported neither the defense of full payment nor the defense of the statute of limitations.

[2] We find in the record affidavits of individual jurors as to the means used in reaching the verdict and the intention of the jury in the verdict so reached. It would be improper for us to attempt to test the correctness or incorrectness of this verdict, or the scope of it, by a resort to these affidavits. *Wray v. Carpenter*, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; *Johnson v. People*, 33 Colo. 224, 80 Pac. 133, 108 Am. St. Rep. 85.

The most serious question raised in the record involves the enforcement of that part of the demand note contracting for compound interest. If the laws of Colorado were to govern, the instruction of the court, to which exception is taken, directing the compounding of interest, as provided in the note itself, might be reversible error. *Fillmore et al. v. Reithman*, 6 Colo. 120, and authorities cited; *Denver B. & M. Co. v. McAllister*, 6 Colo. 268; *Beckwith v. Beckwith*, 11 Colo. 568, 19 Pac. 510; *Hochmark v. Richler*, 16 Colo. 265, 26 Pac. 818; *Wigton v. Elliott*, 49 Colo. 119, 111 Pac. 713.

[3] The parties may legally stipulate for the payment of interest according to the laws of the state where the instrument is made, or according to the laws of the place of payment, and the rate thus agreed upon

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may be recovered, although it may be illegal under the laws of the other state. *Ecclus v. Herrick*, 15 Colo. App. 350, 62 Pac. 1040; *McKay v. Belknap Sav. Bk.*, 27 Colo. 50, 59 Pac. 745.

[4] Ordinarily the validity of a contract is to be determined by the law of the place where made, and, the note before us having been made and specifically made payable in Iowa, its validity and the validity of its provision for interest is to be determined by the law of that state. *Cockburn v. Kinsley*, 135 Pac. 1112; *Wolf v. Burke*, 18 Colo. 264-268, 32 Pac. 427, 19 L. R. A. 792; *Richman v. So. Omaha Nat. Bk.*, 76 Ill. App. 637; *Bigelow v. Burnham*, 90 Iowa, 300, 57 N. W. 865, 48 Am. St. Rep. 442; *Stickney v. Jordan*, 58 Me. 106, 4 Am. Rep. 251; *Pine v. Smith*, 11 Gray (Mass.) 38; *Long v. Long*, 141 Mo. 352, 44 S. W. 841; *Coad v. Home Cattle Co.*, 32 Neb. 761, 49 N. W. 757, 29 Am. St. Rep. 465; *Curtis v. Leavitt*, 15 N. Y. 9, 230, 296; 22 Cyc. 1476, and other cases there cited.

[5] The decisions of the highest courts of the state of Iowa recognize the rights of the parties to contract therein for interest upon interest. *Mann v. Cross*, 9 Iowa, 327; *Preston v. Walker*, 26 Iowa, 205, 96 Am. Dec. 140; *Burrows v. Stryker*, 47 Iowa, 477; *White v. Savery*, 50 Iowa, 515; *Ragan v. Day*, 46 Iowa, 239; *Carter v. Carter*, 76 Iowa, 474, 41 N. W. 168; *Fockler v. Beach*, 32 Iowa, 187. And in the case of *Sullivan v. German Nat. Bk.*, 18 Colo. App. 99-104, 70 Pac. 162, 164, it is held that "the courts of a state, in cases where the laws of another state are involved, may and should take notice of the decisions of the highest courts in the latter jurisdiction on the law so involved."

The instrument sued upon being made and specifically made payable in the state of Iowa, and being valid thereunder, the decisions of the highest courts of that state should be held enforceable in this state.

We feel that substantial justice has been done, and find no reversible error in the record, and therefore the judgment is hereby affirmed.

MCCRACKEN v. MONTEZUMA WATER & LAND CO.

(Court of Appeals of Colorado. Oct. 14, 1913.
Rehearing Denied Jan. 12, 1914.)

1. PLEADING (§ 236*)—ANSWER—AMENDMENT.

Where, in an action to recover balance alleged to be due for water delivered to defendant for irrigation purposes, defendant moved to withdraw his original answer, and file in lieu thereof an amended answer, alleging that plaintiff asked the county commissioners to fix a maximum rate of compensation for water delivered, that the board heard the petition, and entered an order fixing the maximum rate, that the defendant paid the rate as fixed for all wa-

ter furnished for the time mentioned in the complaint, and that the proceedings of the board complied with Rev. St. 1908, §§ 3265-3268, it was error to refuse to allow the amended answer to be filed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

2. WATERS AND WATER COURSES (§ 257*)—IRRIGATION—CHARGES.

Under Const. art. 16, § 8, providing that the General Assembly shall provide by law that county commissioners in their respective counties shall have power, when application is made to them by any party interested, to establish reasonable maximum rates to be charged for the use of water, the Legislature cannot fix a maximum rate, nor can the county commissioners act of their own volition.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. § 257.*]

3. WATERS AND WATER COURSES (§ 257*)—IRRIGATION—CHARGES—ACTION OF COUNTY COMMISSIONER.

Under Const. art. 16, § 8, providing that the Legislature shall provide that county commissioners shall have power, on application, to establish reasonable maximum rates for water, and Rev. St. 1908, §§ 3265 and 3268, requiring the board to hear and consider all applications for the fixing of a maximum rate, and prohibiting them from changing a maximum rate so fixed within two years thereafter, unless upon good cause shown, the county board has exclusive power to fix the maximum rate, and, when one is fixed, it is binding upon all persons in the jurisdiction until annulled by some proper court.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. § 257.*]

4. WATERS AND WATER COURSES (§ 257*)—IRRIGATION—WATER RATES.

Where the board of county commissioners, under their statutory and constitutional power, fixed water rates for a district, it must be presumed that the rate fixed was supported by ample evidence and proofs adduced at the hearing, and it cannot be presumed that the finding was fraudulent because the rate fixed was the same as one previously enjoined.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 312; Dec. Dig. § 257.*]

5. INJUNCTION (§ 223*)—VIOLATION.

The district court in 1895 declared a water rate fixed by the board of county commissioners to be void, and enjoined the board from in any manner enforcing or attempting to enforce such rate. Thereafter, upon a new application to fix a maximum rate, the board in 1903 fixed the same rate as the old one. Held, that this action was not a violation of the injunction, because the board is not bound to enforce obedience with its rates; Rev. St. 1908, §§ 3273 and 3274, making it a misdemeanor to refuse to furnish water at the rate fixed, and providing in an action by the Attorney General, for the forfeiture of the charter of any company who refuses to deliver water.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 315-320; Dec. Dig. § 223.*]

6. WATERS AND WATER COURSES (§ 257*)—RATES—POWER OF COUNTY COMMISSIONERS.

In fixing the maximum rate to be charged for water, the board of county commissioners are acting within their statutory powers, and their action cannot be collaterally attacked, and hence, in an action for compensation for water furnished, proof that defendant had paid the full amount to which the plaintiff was entitled

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

under the rates fixed by the board of commissioners is a complete defense.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 312; Dec. Dig. § 257.*]

7. PLEADING (§ 236*)—AMENDMENTS—ALLOWANCE.

Where, six days before trial, defendant moved to file an amended answer, which set up a complete defense, the refusal of a court, without any showing of prejudice to plaintiff, to allow the answer to be filed is error. For greater latitude is allowed in filing amendments to the answer than to the complaint, and this rule is particularly applicable where defendant did not necessarily have knowledge of the defense until a few days before trial.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

Appeal from County Court, City and County of Denver; George W. Dunn, Judge.

Action by the Montezuma Water & Land Company, a corporation, against J. H. McCracken. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Melville, Sackett & Calvert, of Denver, for appellant. T. J. O'Donnell and J. W. Graham, both of Denver, for appellee.

HURLBUT, J. October 2, 1909, appellee, as plaintiff, filed its complaint in the county court of the city and county of Denver to recover from defendant (appellant) a judgment in the sum of \$933.32, with interest, for balance alleged to be due for and on account of water delivered to defendant for irrigation purposes during the years 1903, 1904, 1905, and 1906, respectively.

The complaint contains four causes of action, claiming in each the sum of \$333.33 for water delivered and services rendered in delivering the same for the year, alleging such sum to be the reasonable value thereof; admitting, however, a payment thereon of \$100 each year, or a total of \$400. Judgment by default was rendered against defendant for the sum demanded in the complaint, which was afterwards vacated by the court, and leave granted defendant to answer.

Thereafter, on December 24, 1909, defendant filed his answer, admitting plaintiff to be the owner of the ditch or canal mentioned in the complaint, and that the water was furnished by plaintiff at the request of defendant at the times specified in the complaint; but denying each and every other allegation therein, except those alleging payment by defendant of \$100 each of the years from 1903 to 1906 inclusive. The second, third, and fourth defenses of the answer are about the same, except as to dates. They each allege a written contract between plaintiff and defendant, made prior to the irrigation season of 1902, whereby plaintiff was to carry and deliver $1\frac{1}{2}$ cubic feet of water per second of time from the Dolores river to the lands owned by defendant for the sum of \$100, which defendant paid, and which contract price was not thereafter changed; that in the spring of

1903, 1904, 1905, and 1906, respectively, plaintiff's agent sent defendant a notice stating that \$100 was due plaintiff from defendant in advance for delivering to defendant $1\frac{1}{2}$ cubic feet of water for the irrigation season of that year; that defendant paid the same, and received from plaintiff a receipt therefor; that no further demand was made by plaintiff for furnishing water as aforesaid up to the time this action was brought.

Replication was filed, denying (with some slight admissions) all new matters pleaded. Plaintiff recovered judgment, founded upon an instructed verdict which the court ordered the jury to return.

[1] The first and second assignments of error relate to the action of the court in refusing to allow defendant to withdraw his original answer, and file in lieu thereof amended answers. The record shows that on March 5th the court denied a motion by defendant (supported by affidavits) to amend the answer. On March 10th the trial began, at which time defendant renewed his motion to file an amended answer substantially the same as that offered on March 5th, which was again denied by the court. Appellant insists that the refusal of the court to permit these amendments to be filed was reversible error.

Whether or not the county court abused its discretion in refusing defendant permission to file the amended answer depends largely upon the effect to be given to the proceedings before the county commissioners on February 26, 1903, wherein they fixed a maximum rate of \$90 per cubic foot per second of time for the irrigation season of each year. This proceeding defendant sought to plead as a defense to the action. If it constituted a good defense, its exclusion amounted to a denial of a trial of the cause on its merits. It was not a technical defense. The proposed amended answers allege in part that on January 6, 1903, the Montezuma Water & Land Company (appellee here) presented its verified petition to the board of county commissioners of Montezuma county, asking the board to fix a reasonable maximum rate of compensation for water delivered to consumers by its ditch or canal; that, on the filing of the petition, the board, by order, fixed February 24th as the date when it would hear all parties interested in the matter; that within ten days thereafter petitioner caused printed copies of such order to be securely posted in ten public places throughout the water district; that an affidavit of such posting was filed with the board; that on February 24th hearing on the petition was begun before the board; that such hearing was continued to the following day, and again continued to the succeeding day; that upon the last day, February 26th, and after the board had heard and examined all the testimony and proofs concerning the original cost and then present

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

value of the works and structures of petitioner's ditch, and the cost of maintaining and operating the same, it entered its order (duly recorded) fixing the maximum rate above mentioned; that no further proceedings were had by said board for fixing such maximum rate; and that defendant paid petitioner the rate so fixed by the board for all water furnished him for each year mentioned in the complaint. The entire proceedings of the board appear to have been in harmony with the requirements of sections 3265-3268, Revised Statutes 1908, which sections are the same as sections 1-4, found at pages 291-293, inclusive, of the Session Laws of 1887.

[2, 3] Section 8, art. 16, of the Constitution reads as follows: "The General Assembly shall provide by law that the board of county commissioners in their respective counties shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations."

In conformity with this section the Legislature enacted the four sections above cited, and therein provided a full procedure for establishing a reasonable maximum water rate by the board of commissioners. It is clear from the constitutional section quoted that neither the Legislature nor any court has power to fix a maximum rate to be charged for the delivery of water, and, further, the board itself cannot of its own volition fix such rate. Its action can only be invoked upon petition of an interested party. Both by the Constitution and statute the important duty of fixing a maximum rate is vested exclusively in the boards of county commissioners of the several counties. By said section 3265 the board is commanded each year at any regular or special session to hear and consider *all* applications by interested parties for fixing a reasonable maximum rate, and, if the affidavits presented by applicants show a reasonable cause therefor, proceed to fix such rate. By section 3268 the board is prohibited from changing any maximum rate so fixed by it within two years thereafter, unless upon good cause shown. It would seem to necessarily follow from the wording of this statute that at all times there exists in each water district a tribunal or public board, easy of access, which possesses ample power to fix a maximum rate for the delivery of water in such district. This power can be invoked by any one interested by filing a petition as provided by the statute. We think it immaterial in this case whether or not the board of county commissioners, acting under said statute, is deemed to be a judicial or a quasi judicial body. It has the exclusive power to fix the maximum rate, and it would seem that said rate, when so fixed, is binding upon all persons within its jurisdiction affected thereby until set aside or annulled by a decree or judgment of some proper court. There seems to have been pro-

vided no appeal from its decision in fixing such maximum rate, and for that reason we think, when such rate is once fixed by the board in accordance with the statute, the Legislature intended it should be observed and obeyed by all persons or corporations affected by it until annulled by some proper court. It appears from the record that the board fixed a maximum rate under this statute in 1895, which rate we think should be considered as remaining in full force and effect at least until 1902, when, it is said, the district court held the rate fixed in 1895 void; but the only evidence of which is found in a decision of the Supreme Court reported in 39 Colo. 166, 89 Pac. 794, to which our attention is directed by the brief of appellee. Such decision was not pleaded, and is not shown in the record.

[4-6] It further appears from the amended answers that, after the district court had rendered its decree, appellee, on January 6, 1903, proceeding under the statute quoted, filed its petition with the board of commissioners, asking it to fix a reasonable maximum rate; that the board in conformity to the statute thereupon proceeded to, and did, on February 26, 1903, fix the reasonable maximum rate to be charged for water furnished in that district at \$90 per cubic foot per second of time for the season of each year thereafter during which water was required by law to be run; that the board was engaged three days, to wit, February 24th, 25th, 26th, in hearing the application, and considering testimony and proofs offered by all parties interested, concerning the original cost, the then value of the works and structures of the ditch, cost and expense of maintaining and operating the same, and all other matters pertaining to the subject-matter under investigation. Assuming such allegations to be true, it would indicate that the board fully and fairly acted upon appellee's petition, and gave full consideration to all matters affecting the subject-matter of their investigation, and reached its conclusions and formulated its order solely upon the evidence and proofs adduced at such hearing, without reference to the district court decree or any other matters occurring prior to the time of such hearing; the record being silent as to whether or not the same conditions existed at the time the commissioners fixed the rate in 1903 as obtained at the time when the district court rendered its decree in 1902. It must be presumed that the rate fixed by the commissioners was supported by ample evidence and proofs adduced at the hearing, which warranted the rate fixed at that time. It is true that the rate was identical with that fixed by the commissioners in 1895, and which the district court declared to be void at the time it issued the injunction. Had appellee felt aggrieved at the rate fixed in 1903, it could have directly attacked the same in some proper court, just as it did when it challenged the rate fixed in 1895, or, had it be-

lieved that the commissioners in fixing such rate were actuated by a spirit of defiance of the court, rather than by an honest desire to perform their duties conscientiously under the statute, it could, by appropriate proceedings, have tested the good faith of the commissioners in the 1903 proceedings. Appellee did not adopt this course, but is now insisting on this appeal that the court should find, as a matter of fact, that in the proceedings of 1903 the commissioners were actuated solely by corrupt motives and a spirit of defiance of the injunctive order of the district court; and this without a scintilla of evidence to support such finding. However sincere appellee may be in its belief that the commissioners disregarded their sworn duty in that proceeding, and willfully denied it a fair hearing on the merits, we find nothing in the record that warrants such assumption.

Upon the question as to what was a proper rate for that district, the lower court exhausted its power in declaring the rate of 1895 void. It cannot be said that it had power to fix a maximum rate or any other rate for delivery of water. The decree of the court, however, went further than to declare the rate void. It enjoined the board from in any manner enforcing or attempting to enforce the maximum rate fixed by it. There is nothing in the Constitution or the statutes that we can find which charges the board of county commissioners with the duty of seeing that its order so fixing the maximum rate is obeyed and followed by carriers or those furnishing water in the district. Inferentially, at least, the Legislature appears to have relieved the commissioners from such duty, for in said sections 3273, 3274, it imposed a stringent and severe penalty upon any person or corporation refusing to deliver water at the maximum rate so fixed, and declared such refusal to be a misdemeanor, subjecting the offender to a maximum fine of \$5,000 and a maximum term of imprisonment of one year, or both. Section 3274 goes further, and provides that, if any corporation, in defiance or attempted evasion of the provisions of the act, shall refuse to deliver water to any consumer after tender of the compensation fixed, it shall be the duty of the Attorney General to institute proceedings in quo warranto for the forfeiture of its corporate rights and franchise, and also compel its obedience by mandamus or other proceedings.

Even if it be assumed that the decree of the district court was in force, notwithstanding the appeal taken therefrom (not necessary to decide), how can it be said that the commissioners were violating the injunctive feature of the decree in proceeding, in 1903, under their statutory powers and duty to fix a maximum rate? As above shown, the commissioners in that proceeding were engaged in hearing evidence and proofs for the purpose of ascertaining therefrom what a reasonable maximum rate should be in that wa-

ter district at that time. It is not pretended nor even intimated that they were attempting to compel the petitioner, the Montezuma Water & Land Company, or any one else, to supply water to consumers in the district at a rate not in excess of that previously fixed by them in 1895, viz., \$80 per cubic foot. Hence we are unable to see, upon anything in this record, how their action in that proceeding can be construed as a violation or defiance of the order of the district court or the injunctive feature thereof. In fixing the maximum rate the commissioners were acting within their statutory powers. The order made by them fixing the rate could not be assailed collaterally, and, not having been attacked by a direct proceeding in a competent court to set it aside, and there being no showing or claim that the order or proceeding is void for lack of jurisdiction, or clear excess of authority, the rate fixed became the existing, lawful, maximum rate for delivering water to consumers. *Northern Colo. Irr. Co. v. Poupirt*, 22 Colo. App. 563, 127 Pac. 125, and authorities cited. Any attempt by the carriers or others delivering water to charge or collect a higher rate was unlawful, and made them thereby liable to the punishments and penalties above mentioned. If defendant had been allowed to file his amended answer, and could have proven the allegations of the same, he would have established prima facie a complete defense to plaintiff's cause of action, for plaintiff admitted payment in full, by defendant, for all water delivered to him during each year, of a sum equal to the maximum rate fixed. Therefore we think the court erred in refusing to allow the same to be filed, and that defendant's rights were prejudiced by such ruling.

[7] The first motion to file an amended answer was not made until six days before the trial; but there is no showing by the record that the failure to apply at an earlier time for permission to file the same would have caused plaintiff any inconvenience or in any way prejudiced its rights, or would have deprived it of a full and fair hearing on the merits. Plaintiff would have had five full days before the trial in which to ascertain the truth or falsity of the allegations therein contained.

As to the duty of a court where a motion is made to amend pleadings, it is well settled that the granting or denying of such motion is generally left to the sound discretion of the court. However, it seems to be the usual practice for courts to indulge in more liberality in permitting amendments to answers than to complaints. The brief extracts from authorities next hereinafter cited will be sufficient to show the general views of our own appellate courts on the subject, viz.:

In *Miller v. Thorpe*, 4 Colo. App. 559, 36 Pac. 891, it is said: "The appellants are quite right in their claim that the power

which the Code gives to the court to permit amendments should be broadly and generously exercised to further the interests and protect the rights of litigants."

From *Sellar et al. v. Clelland et al.*, 2 Colo. 532, the following: "The great object of a trial is to secure justice to the parties engaged in the suit. Substantial rights should never be sacrificed to mere forms, and amendments should at all times be liberally allowed when they do not lead to surprise and injury."

The court says, in *Cartwright et al. v. Ruffin*, 43 Colo. 377, 96 Pac. 261: "From necessity, greater liberality exists in allowing amendments to answers than in amending complaints. Plaintiff may always, in the absence of a counterclaim, or cross-complaint, dismiss his action, and begin anew. * * * But the defendant is not so fortunate. If by mistake he pleads an ineffective or insufficient defense, to say that he may not, by amendment, bring in a good defense is to inflict a drastic penalty for his inadvertence or mistake. * * * Hence it is that, especially under Code Practice, the courts are more liberal in permitting the amendment of answers than in allowing the amendment of complaints."

Lewis v. Jerome et al., 44 Colo. 459, 99 Pac. 562, 130 Am. St. Rep. 131, was an action wherein judgment in damages was obtained by the heirs of Jerome, plaintiffs, against Lewis, for having (as claimed) deeded certain land to Kitty M. Jerome without authority or right for so doing. After judgment for plaintiff, motion for new trial was filed by defendant, who at the same time asked leave to file an amended answer, alleging an additional defense. The motion was supported by affidavit, which averred that the facts stated in the additional defense were not known to defendant at the time of filing his original answer, nor until the trial of the cause. The motion to amend was denied, as well as that for a new trial. The Supreme Court held that, if the allegations of the amended answer were true, it showed the additional defense therein stated to be material to defendant's rights. The Supreme Court in that case was apparently convinced from the record that the refusal of the trial court to permit the filing of the amended answer resulted in a hardship to defendant, which should be remedied if warranted by the application of sound, equitable principles. For failure of the trial court to permit the amendment, the Supreme Court reversed the judgment.

Other similar rulings could be cited from our own appellate courts, as well as those of other jurisdictions; but no good purpose could be served by extending the list.

The desideratum to be reached in all legal controversies is to correctly determine the substantial rights of the parties litigant,

and nisi prius courts can invoke no safer rule than to permit liberal amendments to pleadings, which tend to secure a full and fair trial upon the merits, when the same can be done without imposing undue hardships upon, or prejudicing the rights of, the party opposing such amendments. In the case at bar affidavits were filed in support of the motions to amend, which showed that defendant was a nonresident of Montezuma county in 1903, when the commissioners fixed the maximum rate, and had no knowledge of such proceedings until a few days before the trial, and before the motion to amend was interposed. We cannot see how plaintiff could have been surprised or prejudiced by allowing the amended answers to be filed, as appellee here was the petitioner in the proceedings before the commissioners in 1903, and must necessarily have had full knowledge of everything pertaining thereto. The only apparent reason given by plaintiff for opposing the motion to amend the answer was that it was not made in apt time. This was a strictly technical objection, and should not have prevailed over the substantial right of defendant to interpose the additional defense contained in said answers.

Whether or not the order of the board of commissioners was admissible in evidence without being pleaded need not be decided here, as it was offered and upon plaintiff's objection excluded. Our ruling that the plea should have been allowed carries with it the corollary that it is admissible when pleaded, unless defeated for reasons not appearing in the record now before us.

There are a number of other assignments of error relied upon by appellant, which have been ably discussed pro and con by counsel for both parties, which we deem unnecessary to notice, as the conclusions we have already reached are decisive of this appeal.

Entertaining the views above expressed, the judgment will be reversed, and cause remanded.

Reversed and remanded.

PERKINS v. RUSSELL.

(Supreme Court of Colorado. Nov. 3, 1913.)

1. BROKERS (§ 86*) — ACTIONS FOR COMMISSIONS—SUFFICIENCY OF EVIDENCE.

In a broker's action for commissions on a sale of sheep and other property, evidence held to show that prospective purchasers procured by the broker made an offer which the owner accepted, and that the failure to complete the sale was due to the owner's fault.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

2. BROKERS (§ 63*)—COMPENSATION—FAILURE TO COMPLETE CONTRACT.

Where a broker employed to represent an owner of property in a sale thereof for a specified commission procured prospective purchasers able, ready, and willing to pay the purchase price in cash, and to whom the owner agreed to sell the property, but the owner declined to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

carry out the agreement, presumably because he saw an opportunity to swell the price, the broker had earned his commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

3. NEW TRIAL (§ 40*)—VARIANCE BETWEEN ALLEGATIONS AND PROOF—WAIVER BY FAILURE TO OBJECT.

In a broker's action for commissions on a sale of property where the complaint alleged an agreement to pay the broker 5 per cent. commission on \$78,000, if a purchaser was procured at that price, while the evidence showed an agreement to pay 5 per cent. on the selling price, if a sale was effected on terms satisfactory to the owner, but no objection to testimony to establish the contract, or motion to strike it out, was made, there was no motion for a nonsuit or directed verdict, and no objection on this ground to the instructions, the variance could not be urged for the first time on a motion for a new trial, since, had the objection been urged in apt time, the complaint might have been amended to conform to the proof.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 62-66; Dec. Dig. § 40.*]

4. PLEADING (§ 397*) — ISSUES, PROOF AND VARIANCE.

In a broker's action for commissions, a variance between the complaint, which alleged a promise to pay 5 per cent. on \$78,000, if a purchaser were procured at that price, and the evidence, which showed an agreement to pay 5 per cent. of the selling price, on a sale on terms satisfactory to the owner, was immaterial, where the evidence showed that the owner agreed to sell the property to purchasers ready, able, and willing to take it for \$78,000, since the amount of recovery would be the same on either theory.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1337; Dec. Dig. § 397.*]

Error to District Court, Delta County; Sprigg Shackelford, Judge.

Action by Fred Russell against H. E. Perkins. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 21 Colo. App. 212, 121 Pac. 955.

Milton R. Welch and R. M. Logan, both of Delta, and Goudy & Twitchell, of Denver, for plaintiff in error. L. J. Stark, of Denver, for defendant in error.

BAILEY, J. Fred Russell, defendant in error, sued H. E. Perkins, plaintiff in error, to recover a commission which he claims to have earned through securing a purchaser on terms satisfactory to Perkins, for certain property belonging to the latter.

The complaint charges that Perkins, claiming to be the owner of six hundred acres of land near Madera in Gunnison county, also about 10,000 ewes, 6,000 sheep, 250 bucks and 8 horses, together with improvements, chattels and machinery on the land, did on September 15, 1909, employ plaintiff Russell to secure a purchaser for same at the price of \$78,000, and agreed to pay him five per cent. commission on that amount when he should procure such purchaser; that under the agreement Russell secured G. H. Moffett, Dallas Osborne and W. H. McCutchen, who, at Denver, in September, 1909, agreed with

Perkins to buy his said property and pay him \$78,000, in cash therefor, provided the property was as represented by defendant; that Moffett was to examine the property; that he did examine it and was then and there ready, able and willing to pay Perkins such sum of \$78,000, but that Perkins failed to carry out the contract of sale, wherefore Russell claimed he was entitled to the commission.

Perkins, in his answer, admits that he represented to Russell that he was the owner of the property mentioned, but denies all other allegations. And for a second and further defense alleges, in substance, that in July, 1909, he authorized Russell to sell his entire herd of sheep at \$6.00 per head, the horses, chattels, machinery and land to be thrown in, provided Russell could do so at once, or within a short time, and to allow Russell a commission of five per cent. of the sale price in case a sale was made; that Russell failed to secure such purchaser; and that in August, 1909, Perkins informed Russell that if the sale was made thereafter full allowance should be made for the expense of running the sheep and for the increased value by reason of the growth of wool, and for any addition of bucks that might be made to the flock, and for the increased value of the flock per head by reason of the sale of old ewes, wethers, inferior sheep culled therefrom of less value than \$6 per head, and that any deal Russell might make was to be modified and adjusted and the price fixed by Perkins. The replication denies all new matter set up in the answer. Plaintiff had judgment for \$4,286.00, being five per centum on \$78,000 with interest thereon from the date that sum was due to the time of the verdict, to review which the defendant brings the case here on error.

[1] It appears undisputed that Perkins desired to sell his property, and placed it with Russell for that purpose; that the latter introduced Moffett, Osborne and McCutchen to Perkins as prospective purchasers. On August 11th, 1909, Russell wrote Perkins, stating that he had a purchaser for his property, requesting him to come to Denver, to which Perkins answered that he would be in Denver in about ten days and would come and see him. Soon thereafter Perkins did go to Denver and there saw Russell, who then introduced him to Moffett. These two talked over the sheep business and matter of sale in the presence of Russell, and agreed to meet McCutchen in relation thereto on the following afternoon. At this time an agreement was made between Russell and Perkins relative to the commission to be paid, the former stating that he thought six or seven per cent. of the purchase price would be right, and the latter, objecting to that figure, agreed to pay him five per cent. of the sale price, upon any deal made on terms

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

satisfactory to him. Up to this time no sale had resulted from the services of Russell. He had produced a prospective purchaser, but the dealings as shown by the record were too general and indefinite to warrant a conclusion that Moffett was then a purchaser ready, able and willing to buy. Upon a meeting with McCutchen the following day the parties talked the matter over generally, and Perkins refused an option then requested, and the only outcome of that meeting was that Moffett and Osborne agreed to go to the ranch and look over the property. On October 18th next thereafter they did so. At that time, according to the testimony of defendant, they went over the proposition together at Madera, about four miles from the sheep camp, where a sketch of the range, lambing ground and land was drawn. A portion of the testimony of Moffett, fully supported by that of Osborne, witnesses for plaintiff, as to what passed between the parties at that time, is as follows:

"Q. When did you next see him? A. I seen him at his ranch on the eighteenth of the following month; we had talked it up and decided with Mr. Osborne that him and I would go over and look the proposition over, as he was in the sheep business and perfectly familiar with it; * * * we come over together and we come to Sapinero; we come here first and he wasn't here, then we went to Sapinero the following day, and we stayed all night there, and then got horses the next morning and rode up to his ranch about twelve miles, and we found him dipping sheep, but on the way up we met a great many of his herds and we asked the herders whose sheep they were; they said 'Perkins,' and we looked them over and seen they were fine sheep, as good as we expected, if not better; we could see the kind of range he had, and we went up to where we found him and we found him dipping; it was before noon; he took us up to dinner and we had dinner, and after noon we looked around and looked his sheep over all afternoon and ate supper; I think we ate supper, yes, I am pretty sure we did; then he took us after dark down to Madera, a little station about four miles further from there; we talked on the deal on the way down and didn't come to any understanding, and the next morning he said he would go down to Madera; he come down to Madera and we then went at the proposition; I tried to Jew him down; I offered to give him six dollars a head for all the sheep that he had, if he would deduct out a few six year olds he had and sell to me for the market price, which he said he wouldn't do; he said he wouldn't take less than \$6 a head right through for the thirteen thousand, or seventy eight thousand dollars for the whole outfit; I says 'knowing what my partner's feelings are,' or I decided that it was satisfactory to us, but I tried to beat him down; I says, 'Mr. Osborne, if this is satisfactory to you

I am satisfied to give this gentleman seventy eight thousand dollars'; he says 'Mr. Moffett, it is all right with me, perfectly satisfactory'; I says 'Mr. Perkins, we will concede and we will give you seventy eight thousand dollars for your outfit'; he says 'All right'; I reached by hand in my pocket, took out my check book and I says 'Mr. Perkins, let me write you a check on the First National Bank of Denver'; he says 'No, my word is as good as my bond,' and he says 'I know you gentlemen mean it'; he says 'I don't need the money and you needn't bother'; well I says 'What is the matter with you coming down to Denver with us and straighten this matter up'; he says 'I would, only I have got a lot of men over there that I have got to see to'; he says 'I will not be later than next Thursday or Friday, I will come down and close the deal up with you'; we bid him good day and left without any more talk to amount to anything dealing on the case."

Perkins did not go to Denver as agreed because, by his own testimony, he was too busy. A few days later Moffett telephoned him, asking why he had not come to Denver, or when he would come, but he was still too busy and could not say just when he would do so. About two weeks after the meeting at Madera, Perkins wrote Moffett a letter, stating an entirely new basis for the proposed purchase and sale. That letter is as follows:

"Delta, Colo., 30th Oct. 09.

"Mr. G. L. Moffett, Denver, Colo.

"Dear Sir: Since talking to you over the phone, I find that my business is so lined up that I cannot possibly get away at present, and if you really want to do business you had better jump on the cars and come over here. The time which has lapsed since I first quoted these sheep to you has incurred an expenditure of some fifteen hundred dollars per month, for six weeks, and in the meantime the wool has been growing which is all in your favor; in fact there is six months' growth of wool on the sheep now, for which I get no return. Apart from that I have shipped out the wether lambs and the old ewes, about 2800 head in all, which has added materially in increasing the value of the flock, besides throwing in \$1,600, worth of fresh bucks.

"These various items come to several thousand dollars, and while I don't wish to go back on my word as regards the original price, my business has gone on as usual, which has incurred the aforesaid expenditure, and in conclusion, if you think you can make good said expenditure, you can come over here, and I will try to close out the stock to you at the original price, plus the cost of the various items mentioned.

"Yours truly, H. E. Perkins."

Beyond peradventure, this letter itself shows that some understanding had been reached between the parties and a definite price fixed, for Perkins says "I don't wish

to go back on my word as regards the original price." The testimony further shows that shortly after the receipt of this letter Moffett again visited Perkins at the ranch, and made a flat offer of \$80,000, for the property, which Perkins declined, demanding at that time \$83,000, as the purchase price. It will be noted that the agreement of purchase and sale was not reached until October 19th, at which time Moffett and Osborne desired to have Perkins accompany them at once to Denver to close the deal, and he promised to be there in two or three days. All of the outlay and expense to which Perkins refers in his letter of October 30th had been incurred prior to October 19th, and were of necessity eliminated from consideration by the express agreement then made. All delay after that date is shown by the evidence to have been occasioned through the failure of Perkins to go to Denver as agreed.

[2] The contention of defendant is that the contract with Russell, if any, for commission was specifically conditioned upon his actually effecting a sale. The trial court, following well defined principles of law, instructed, in substance, that if the plaintiff secured a purchaser who was ready, able and willing to purchase the property upon terms and conditions which defendant Perkins accepted and agreed to, then Russell's part of the contract was complete and he was entitled to recover the agreed commission, although no sale was in fact concluded, if the failure to effect one was the fault of the principal. Upon a careful reading of the instructions given we are satisfied that, under the facts of this case, the law was fairly stated. The instructions do not substantially vary from, nor are they inconsistent with, the pleadings and proof. In any event, we are so strongly impressed from the whole record with Russell's right to recover, that we think it safe to declare that Perkins could not upon any theory have been prejudiced by the instructions given. The testimony clearly establishes that Russell was employed to represent Perkins in a sale of this property; that the contract was for a commission of five per cent. of the sale price, when effected upon terms satisfactory to Perkins; that a sale was in fact agreed upon for \$78,000, and that Russell was the efficient agent or procuring cause of the agreement of sale; that the prospective purchasers were abundantly able, ready and willing to pay the purchase price in cash; and that Perkins withdrew from this agreement and declined to carry it out, presumably because he thought he saw an opportunity to swell the price. Upon all the authorities which we have examined, under conditions such as are above set out, the broker had earned his commission. *Babcock v. Merritt*, 1 Colo. App. 84, 27 Pac. 882; *Cole v. Thornburg*, 4 Colo. App. 95, 34 Pac. 1013; *Anderson v. Smythe*, 1 Colo. App. 253, 28 Pac. 478; *Colburn v. Seymour*, 32 Colo. 430, 78 Pac. 1058, 2 Ann.

Cas. 182; *Fox v. Denargo Land Co.*, 37 Colo. 207, 86 Pac. 344; *Ross v. Smiley*, 18 Colo. App. 204, 70 Pac. 766; and *King Powder Co. v. Dillon*, 42 Colo. 316, 96 Pac. 439.

The evidence clearly establishes that the minds of the parties met in agreement of purchase and sale. While details are in the main absent, still it is plain that there was an offer to pay \$78,000 by Moffett and associates, and an acceptance thereof by Perkins, for the property in question. It is also manifest from the record that the sale would have been completed had Perkins kept his promise to meet the would-be purchasers in Denver. Indeed, it may fairly be presumed that but for his failure to keep his appointment and formally close the transaction, an execution of the contract would have resulted. It is fundamental that one cannot defeat the right of his broker under contract for commission, where the latter has produced a purchaser ready, able and willing to buy on terms satisfactory to the principal, and to which he has agreed, simply by thereafter backing out and refusing to execute the contract. *Finnerty et al. v. Fritz*, 5 Colo. 174; *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486; *Millett v. Barth*, 18 Colo. 112, 31 Pac. 769; and 19 Cyc. 247.

[3] It is claimed on behalf of defendant that there is a variance between the allegations of the complaint and the proof, since the testimony seems to establish that Russell's commission was to be five per cent. of the sale price, the sale to be effected upon terms satisfactory to Perkins. Technically this may be true. However, the record fails to show that any objection for this reason was made to any testimony offered to establish the contract. There was no motion on this ground to strike out the testimony offered to establish the contract. Indeed, the attention of the trial court was not directed to this point. There was no motion for a nonsuit, nor was there any motion for a directed verdict. Neither was there any specific objection for this reason to the instructions. The proposition is suggested for the first time in the motion for a new trial, and came too late. Had the objection been urged in apt time plaintiff would have had opportunity to amend his complaint, which could have readily been done, to conform to the proof. A defendant will not be permitted to try a case upon a given theory, remaining silent upon the question of variance between the proof and the allegations of the complaint, and after he has been defeated then for the first time urge such objection. *Colorado Mortgage Co. v. Rees*, 21 Colo. 435, 42 Pac. 42; *Hurlburt v. Dusenberry*, 26 Colo. 247, 57 Pac. 860; *Tew v. Powar*, 37 Colo. 292, 86 Pac. 342; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, 37 Am. St. Rep. 191; and 31 Cyc. 717.

[4] In any event, it clearly appears that the defendant could not have been misled by such variance, nor does it appear that it did

or could have prejudiced his rights. The proofs show, and the jury must have so found, that Perkins agreed to sell this property to purchasers produced by Russell, who were ready, able and willing to take it at the price of \$78,000, and when that agreement was established Russell was entitled to five per cent. commission thereon, as the failure to consummate the deal is shown to have been due entirely to the conduct of Perkins, and this is the precise sum which Russell sought to recover by his complaint. The supposed variance between the contract as alleged and as established by the proofs is therefore plainly immaterial, because upon either theory, the amount of recovery would have been the same. In *Wells v. Crawford et al.*, 23 Colo. App. 103, 127 Pac. 914, the complaint alleged an agreed compensation, while the proofs tended to establish a reasonable value for the service, and the court held that such variance must be disregarded, if it appears that defendant was not misled thereby and substantial justice resulted. *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817, and *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369.

The jury, guided by a substantially correct statement of the law, certainly at least by instructions which could not have misled them, found, upon abundant evidence, the facts against the defendant. His legal rights were fully protected, and the finding should not be disturbed. Plaintiff was clearly entitled to recover his commission, substantial justice has been done, and the judgment is affirmed.

Judgment affirmed.

MUSSER, C. J., and WHITE, J., concur.

HAKES INV. CO. v. LYONS. (L. A. 3,212.)
(Supreme Court of California. Dec. 16, 1913.)

1. INFANTS (§ 26*)—CONVEYANCES—AVOIDANCE—NECESSITY.

Civ. Code, § 33, provides that a minor cannot give a delegation of power, nor under the age of 18 make a contract relating to real property, or any interest therein, or to personal property not in his immediate possession or control. Section 34 provides that a minor may make any other contract than as above specified, subject only to his power of disaffirmance. Section 35 provides that in all cases other than those specified in sections 36 and 37, which relate to contracts to pay for necessities and contracts expressly authorized by statute, the contract of a minor made while under the age of 18 may be disaffirmed, either before his majority or within a reasonable time afterwards. *Held*, that the contracts specified in section 33 are absolutely void, and the provisions of section 35 do not apply thereto; and hence a deed by a minor under 18 conveyed no interest whatever, and the grantor could assert title to the land, notwithstanding his failure to disaffirm within a reasonable time after attaining his majority.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 27-34; Dec. Dig. § 26.*]

2. INFANTS (§ 30*)—CONVEYANCES—RATIFICATION.

A conveyance of land by a minor under 18 being absolutely void, the doctrine of ratification has no application thereto, and to bind the grantor there must be some act equivalent to the execution of a new contract, or something operating as an estoppel, since ratification only prevents disaffirmance of contracts which, except for the disaffirmance, would be binding; and, where a contract is not binding in any event, but is utterly void from the beginning, it cannot be validated by ratification.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 41-49, 54, 55; Dec. Dig. § 30.*]

3. INFANTS (§ 29*)—CONVEYANCE—ESTOPPEL—VOID DEED.

A deed to land by a minor under 18 being wholly void, neither the deed nor the fact that it is recorded creates an estoppel, nor can it be validated by an estoppel.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 37-40; Dec. Dig. § 29.*]

4. INFANTS (§ 29*)—CONVEYANCE—ESTOPPEL.

Where a minor 14 years old conveyed land, and about 14 years later filed a petition to be adjudged an insolvent debtor, in which he declared that he had no real property of any character, he was not thereby estopped to claim title to the land conveyed as against persons who did not purchase in reliance on, or with knowledge of, the filing of such petition, or any other act of such person, especially where it was not shown that he then had any knowledge of the existence of the deed or the record thereof, and he denied having sold or conveyed the land, or that he ever signed the deed, as it could not be conclusively presumed that he recollected the making of the deed when only 14 years old.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 37-40; Dec. Dig. § 29.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by the Hakes Investment Company against Andrew Jackson Lyons. Judgment for plaintiff, and defendant appeals. Reversed for new trial.

M. R. Thorp and Riley & Hubbell, all of San Diego, for appellant. Mills & O'Farrell, of San Diego, for respondent.

SHAW, J. The defendant appeals from the judgment. The appeal was taken within 60 days after the judgment was entered. The evidence taken at the trial is presented in a bill of exceptions.

The complaint sets forth a cause of action to quiet plaintiff's title to 46 blocks of land in Bates' addition to the city of San Diego. Lyons answered, averring that he was the owner in fee of an undivided one-half of the land described in the complaint. The finding was that the plaintiff was the owner in fee of the land, and that Lyons had no right, title, or interest therein. It is claimed that this finding is contrary to the law and the evidence.

[1] Bates' addition was a subdivision of a tract of 160 acres of land known as pueblo lot numbered 1786 on the map of the pueblo lands of the city of San Diego. On the 1st

day of December, 1875, Henry B. Bates and the defendant Lyons were the owners in fee of pueblo lot 1786, each having an undivided one-half thereof. On December 9, 1875, Lyons signed, acknowledged, and delivered to Bates a deed purporting to convey to Bates an undivided one-half of said pueblo lot. This deed was duly recorded on the same day. The consideration expressed therein was \$1. Thereafter Bates subdivided the pueblo lot into blocks, among which are those here in controversy. By a series of mesne conveyances the plaintiff has succeeded to all the title and interest of Bates in said blocks.

Lyons, at the time he made the deed to Bates of his undivided half interest in the pueblo lot, was a minor only a little over 14 years of age. He then resided in San Diego, and has ever since resided there. After his majority he went into the grocery business, and has ever since been engaged in that business. On July 25, 1889, he filed in the superior court of San Diego county his petition and schedules asking to be adjudged an insolvent debtor, under the insolvent act of 1880 (Stats. 1880, p. 82). He declared therein that he had no real property of any character. He never, at any time, disaffirmed or offered or attempted to disaffirm or repudiate the conveyance to Bates, except so far as he may be deemed to have done so by the filing of his answer herein on September 15, 1910. /It thus appears that the title of the plaintiff as the successor of Bates, depends upon the question whether or not, under the law, Lyons was required to disaffirm his deed within a reasonable time after becoming of age, in order to render it ineffectual and avoid the title of the plaintiff. It is, of course, conceded that 28 years after minority would not be a reasonable time. This question depends upon the meaning and effect of sections 33, 34, and 35 of the Civil Code as amended in 1874 (St. 1873-74, p. 182). They have remained unchanged since that time. They read as follows:

"Sec. 33. A minor cannot give a delegation of power, nor, under the age of eighteen, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control.

"Sec. 34. A minor may make any other contract than as above specified, in the same manner as an adult, subject only to his power of disaffirmance under the provisions of this title, and subject to the provisions of the titles on Marriage, and on Master and Servant.

"Sec. 35. In all cases other than those specified in sections thirty-six and thirty-seven, the contract of a minor, if made whilst he is under the age of eighteen, may be disaffirmed by the minor himself, either before his majority or within a reasonable time afterwards; or, in case of his death within that period, by his heirs or personal repre-

sentatives; and if the contract be made by the minor whilst he is over the age of eighteen, it may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent."

These sections, as above stated, are the sections as amended in 1874. Section 33, as originally enacted in the Code of 1872, was as follows: "A minor cannot give a delegation of power." In determining the effect and intent of the section as amended in 1874, this is significant. At common law there was some divergence in the cases upon the questions whether some classes of contracts of an infant were absolutely void and others voidable only, or whether all were merely voidable. In those cases where the contracts were only voidable, it was held to be necessary for the minor to disaffirm them within a reasonable time after coming of age; otherwise he would be bound by them. But where they were void absolutely, no disaffirmance was required and obviously such contracts could be entirely disregarded by the minor. There were a number of decisions laying down the positive rule that all contracts of infants purporting to constitute a delegation of power or authority to another to act for him were absolutely void, and not merely voidable. There were also many decisions to the contrary. See monograph of Mr. Freeman on the subject in a note to *Craig v. Von Bebbler*, 100 Mo. 584, 13 S. W. 906, in 18 Am. St. Rep. at page 629. /In *Hastings v. Dollarhide*, 24 Cal. 195, decided in 1864, this court held that the cases to the contrary were correct, and that "an infant may execute a promissory note by agent." With this standing as the rule in this state, it is obvious that the intention of the Legislature in framing section 33 of the Civil Code, was to change it and declare the rule that an infant could not execute contracts through an agent having only a delegated authority executed by the infant. This purpose is indicated by the fact that the authors of that Code, in their annotated edition thereof, append to that section a note citing the cases which declare the rule that such delegation of power is absolutely void. It is to be presumed that in adopting this rule all its incidents as then established were adopted with it, and consequently that such contracts could be absolutely disregarded, and that no disaffirmance was required in order to vacate them or prevent their binding force. It seems to be equally obvious that when the Legislature, in amending the section in 1874, included other classes of contracts in the same category, declaring their invalidity by the use of the same words, it was intended that these contracts also should be deemed absolutely void, with no necessity to disaffirm them to avoid their apparent effect. It logically follows that the provisions of section 35 concerning the disaffirmance of contracts entered into by a

minor whilst he is under 18 are to be understood as intended to refer solely to contracts other than those described in section 33, and that it was not the purpose thereby to make a disaffirmance necessary to avoid a contract of a minor under that age relating to real property, or to personal property not in his immediate possession or control, or delegating a power. This was the view taken by Mr. Freeman in the elaborate note on the subject above referred to. After stating that the contracts described in section 33 are made absolutely void thereby, while all other contracts of minors are merely voidable, and speaking of the provisions of section 35 in their relation to section 33, he says, on page 693: "So far as the foregoing section [35] speaks of contracts made under the age of 18, it must have reference only to the latter, and not to those which are absolutely void, since these cannot be disaffirmed, in the proper sense of the word." The deed of Lyons was therefore void from the beginning, it conveyed no interest in the land whatever, and no disaffirmance was necessary to enable him to assert and maintain his right thereto in any appropriate manner, in a judicial proceeding or otherwise.

The plaintiff made no attempt to show title by adverse possession, but claimed solely by virtue of the deed to Bates in 1875.

It does not appear what was the result of the petition in insolvency filed by Lyons in 1889. No part of the record was introduced other than the petition and accompanying schedules. Whether it is still pending, or ended in the discharge of Lyons from his debts, or was dismissed without any adjudication, we cannot determine. For this reason we cannot apply the doctrine of *Rued v. Cooper*, 109 Cal. 687, 34 Pac. 98, that by reason of the adjudication in insolvency the title of the insolvent passes to the assignee.

[2] As this deed was absolutely void, the doctrine of ratification has no application. The effect of a ratification is to prevent the party from afterwards disaffirming the contract. This, of course, necessarily implies that but for the disaffirmance the contract would be binding. Where the contract is not binding in any event, but is utterly void from the beginning, no ratification can make it valid. There must be some act which is the equivalent of the execution of a new contract, or something which operates as an estoppel. See the discussion of Mr. Freeman on this subject in the monographic note above mentioned, 18 Am. St. Rep. at page 699; *Martin v. Zellerbach*, 38 Cal. 311, 99 Am. Dec. 365.

[3, 4] The deed being wholly void, it cannot of its own force operate as an estoppel. Nor can the fact that it was duly recorded create an estoppel. An estoppel would not validate the void deed. *Colby v. Title, etc., Co.*, 160 Cal. 644, 117 Pac. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515. The evidence does not

sustain the conclusion that Lyons was otherwise estopped to claim title to his half interest. It does not appear that the plaintiff, or any one under whom he claims, was led to purchase the property in reliance on the fact that Lyons had filed the petition in insolvency, or in reliance on any other act of Lyons, nor that any purchaser bought with knowledge of that petition, or of any act tending to show that Lyons had disclaimed any interest. The mere disclaimer set forth in the petition and schedules would not of itself divest his title, or create an estoppel against him in favor of one who had no knowledge of it. Lyons testified that at the time he signed the schedules he did not think he had any property of that character. He also denied having sold or conveyed the land, and that he ever signed the deed. It was not shown that he had any knowledge of the existence of the deed, or of the record thereof, until a short time before the action was begun. It cannot be conclusively presumed that he recollected the making of a deed signed when he was only 14 years old, even if it be true that he did in fact go through the form of executing it. Under these circumstances, there is no estoppel against him. The judgment for the plaintiff is unsupported by the evidence, so far as Lyons is concerned.

The judgment is reversed for a new trial.

We concur: ANGELLOTTI, J; SLOSS, J.

MERCANTILE TRUST CO. OF SAN FRANCISCO v. MILLER et al. (S. F. 6,475.)

(Supreme Court of California. Dec. 17, 1913.
Rehearing Denied Jan. 15, 1914.)

1. APPEAL AND ERROR (§ 460*)—STAY PENDING APPEAL—"STATE OFFICER"—SUPERINTENDENT OF BANKS—EXEMPTION FROM SECURITY—STATUTES.

Code Civ. Proc. § 1058, provides that, in any civil action or proceeding, wherein the state or any state officer is plaintiff or defendant, no bond or security can be required, but, on complying with the other provisions of the Code, such officer acting in his official capacity has the same rights, remedies, and benefits as if security had been given. *Held* that, where the state superintendent of banks in the performance of the duties of his office appealed from a judgment in proceedings to foreclose a mortgage securing a bond issue, part of which was owned by a bank in which the superintendent was in charge, he was acting as a state officer in his official capacity within such section, and was not required to give a bond on appeal to stay execution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2226, 2245, 2246; Dec. Dig. § 460.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6635-6638; vol. 8, p. 7804.]

2. APPEAL AND ERROR (§ 460*)—STAY PENDING APPEAL—STATE OFFICER—SUPERINTENDENT OF BANKS—EXEMPTION FROM SECURITY—STATUTES.

The superintendent, while conducting such proceedings, was acting in "another's right," and was therefore not required to give such

security under Code Civ. Proc. § 946, providing that the court, in its discretion, may dispense with or limit the security required on appeal when the appellant is an executor, administrator, trustee, or other person acting in another's right.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2217-2226, 2245, 2246; Dec. Dig. § 460.*]

3. BANKS AND BANKING (§ 77*)—INSOLVENCY — LIQUIDATION BY SUPERINTENDENT OF BANKS—CAPACITY OF OFFICER.

The superintendent of banks, when acting as an officer, liquidating the assets of the bank, and distributing the same to its creditors, is a "trustee" first to pay debts, and then to deliver any overplus to the stockholders.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

4. APPEAL AND ERROR (§ 150*) — INTEREST — RIGHT TO APPEAL.

Where a bank, whose assets were in the hands of the state superintendent of banks for administration, owned a part of a corporation's bond issue, and claimed that the bonds it owned were the only valid bonds secured by the mortgage, the state superintendent had a sufficient interest, in proceedings to foreclose the mortgage, to appeal from a judgment denying such claim, and order a sale of the mortgaged property for the payment of all the bonds issued.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934-946; Dec. Dig. § 150.*]

5. BANKS AND BANKING (§ 77*)—INSOLVENCY — STATE SUPERINTENDENT—AUTHORITY—LITIGATION—PROPER PARTY.

Where a bank's assets were in the hands of a state superintendent for liquidation, and consisted in part of bonds of a corporation, and the bank claimed that the bonds held by it were the only valid bonds secured by the mortgage, the superintendent of banks was a proper party to a suit to foreclose the mortgage for the benefit of the holders of all the bonds issued.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

6. BANKS AND BANKING (§ 77*)—INSOLVENCY — SUPERINTENDENT OF BANKS—AUTHORITY.

The superintendent of banks, in closing up the affairs of an insolvent bank in his possession, is not required to consult its officers, or co-operate with them, but acts on his own initiative.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

7. BANKS AND BANKING (§ 73*)—INSOLVENCY — LIQUIDATION — TERMINATION OF FRANCHISE.

On liquidation of a bank's affairs by the state superintendent of banks, the franchise of the corporation to do business is terminated, and it cannot be again acquired except by reorganization as a new corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 154, 155; Dec. Dig. § 73.*]

8. BANKS AND BANKING (§ 77*)—INSOLVENCY — LIQUIDATION BY STATE OFFICER—"TRUSTEE."

The state superintendent of banks, while in possession of the bank's assets for liquidation, holds as "trustee" of an express trust created and imposed on him by statute, and is therefore authorized by Code Civ. Proc. § 369, to sue in his official name and character in any action necessary for the performance of the

trust, and is also a proper party defendant in any action by a third person affecting the property.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7128-7133, 7822.]

In Bank. Application by the Mercantile Trust Company of San Francisco for a writ of mandate against I. S. Miller and others. Denied.

A. E. Shaw and Morrison, Dunne & Brobeck, all of San Francisco, for plaintiff. McNab & Hershall, as amicus curiae. Denman & Arnold, of San Francisco, for respondents.

SHAW, J. This is an application to this court for a writ of mandate to compel the superior court of Kern county to order, and I. S. Miller, as county clerk of said county, to issue, a writ of execution upon a decree of foreclosure entered by said court in an action wherein the Mercantile Trust Company of San Francisco is plaintiff, and Sunset Road Oil Company and others are defendants. The following are the facts and circumstances upon which the application is made:

In 1905 the Sunset Road Oil Company executed to the Mercantile Trust Company of San Francisco a mortgage or deed of trust to secure an issue of its bonds amounting to something over \$1,500,000. The Kern Valley Bank purchased these bonds to the amount of \$459,400, and W. S. Tevis, C. N. Beal, and H. A. Blodgett claimed to have purchased \$1,000,000 thereof and over. Thereafter the Sunset Road Oil Company failed to pay the interest on the bonds and the Trust Company thereupon began an action in the superior court of Kern county to foreclose said deed of trust for the benefit of the bondholders. The deed of trust provided that, in case of a sale under foreclosure of said deed of trust, any holder of bonds might bid for the property at such sale, and that, upon settling with the officer making the sale for the payment of the purchase money thereat, he should be entitled to a credit on such price for the amount which his bonds would be entitled to on a division of the proceeds. In said action the Kern Valley Bank filed an answer and cross-complaint, alleging that none of the bonds alleged in the complaint to have been issued was legally issued or a valid claim against the property except those issued to itself. The superintendent of banks had also by leave of court filed a complaint in intervention on behalf of said bank, also alleging that the bonds issued to said bank were the only bonds outstanding under said deed of trust which were valid. Upon these allegations issue was taken. The court, in its judgment, declared that the bonds so as aforesaid issued to Tevis, Beal, and Blodgett were valid bonds, and entitled to have their proportional shares credited on the purchase

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

money in case they should bid at the foreclosure sale. At the time of filing said cross-complaint the Kern Valley Bank was insolvent, and because of said insolvency the state superintendent of banks had taken possession of its affairs and assets for the purpose of liquidating the same under the banking act of 1909. Stats. 1909, p. 87. This judgment was entered on November 25, 1912. On December 23, 1912, the superior court of Kern county made an order in said action, reciting that the state superintendent of banks was about to take an appeal to the Supreme Court from the judgment in said cause, and directing that upon such appeal such superintendent of banks should have a stay of proceedings without executing any undertaking for that purpose. Thereupon on December 26, 1912, appeals were taken from said judgment by the Kern Valley Bank by said W. R. Williams as state superintendent of banks, and by W. R. Williams, state superintendent of banks, for and on behalf of said Kern Valley Bank. Prior to the making of said orders and the taking of said appeals an execution had been issued upon said judgment. Upon the taking of said appeals the superior court made an order recalling said execution. Thereafter the plaintiff moved the court to vacate its order dispensing with an undertaking to stay execution on appeal by said state superintendent of banks, and to vacate the order recalling said execution. This motion was denied. The plaintiff then demanded of the defendant Miller, as such clerk, to issue a new execution upon said judgment, which Miller then refused to do. Thereupon plaintiff applied to the superior court for an order directing Miller as such clerk to issue such execution, which application the court denied. The plaintiff claims that the court below had no power to make the order excusing the state superintendent of banks from giving an undertaking on appeal in order to stay execution on the judgment appealed from, and that no stay can be had upon such a judgment after appeal, unless a stay bond is given as in other cases. There is also a claim that the state superintendent of banks has no interest in the judgment sufficient to entitle him to appeal.

[1] The banking act of 1909 (section 136) provides that, when the superintendent of banks has reason to conclude that any bank is in an unsound or unsafe condition to transact business, or that it is unsafe or inexpedient for it to continue business, he may take possession of the property and business of the bank, and retain such possession until the bank shall either resume business or its affairs be finally liquidated, and that upon so doing he shall have authority to collect moneys due the bank, "and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof." It further provides that he shall collect all debts due and claims be-

longing to the bank, and may employ such counsel as may be necessary in the liquidation and distribution of its assets. He is made an officer of the state (section 120), and his powers and duties extend throughout the state, and apply to all banks coming within the scope of the provisions of the act. Section 1058 of the Code of Civil Procedure provides that: "In any civil action or proceeding wherein the state, or the people of the state, is a party plaintiff, or any state officer, in his official capacity, or on behalf of the state, * * * is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the state, or the people thereof, or any officer thereof; * * * but on complying with the other provisions of this Code the state, or the people thereof, or any state officer acting in his official capacity, have the same rights, remedies, and benefits, as if the bond, undertaking, or security were given and approved as required by this Code." It seems clear to us that the state superintendent of banks, when performing the duties of his office required of him by the statute in taking possession of and proceeding to liquidate the assets of a banking corporation, is acting as a state officer in his official capacity within the meaning of this section, and that the effect of the section is to exempt him from the obligation to give an undertaking on appeal, for a stay of execution when, as such officer, he takes an appeal from any judgment in which, as such superintendent of banks, he is interested on behalf of any bank under his control, and of whose assets he has taken possession. He is not acting under appointment from the court or by authority of the court, but by authority of the statute which creates his office, authorizes his appointment, and enjoins upon him the duties which he is at that time performing. The effect of this statute is to justify the court in its refusal to order the execution.

[2] Such refusal is also justified by the provisions of section 946 of the Code of Civil Procedure. This section provides that, when an appeal is perfected as provided in the preceding sections, it stays all proceedings in the court below upon the judgment appealed from and matters embraced therein. The preceding sections require the giving of certain undertakings in order to procure such stay of proceedings; but section 946 further provides as follows: "And the court below may, in his discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right." We think that, even if the provisions of section 1058 did not apply to the office of state superintendent of banks, the provisions of section 946 would be applicable to him when acting as he is doing in this case. The superior court was evidently of this opinion, and the order it made dispensing with an undertaking on appeal was advisedly made in pursuance of the provision we have quoted.

[3] The superintendent of banks, when acting as an officer liquidating the assets of a bank, and distributing the same to its creditors, is clearly a trustee. He is also a person acting in "another's right." Under either designation he comes within the terms of the provision quoted. It is unnecessary to hold that the phrase "trustee, or other person acting in another's right," would authorize the court to dispense with a stay bond where a private trustee is the appellant. The plaintiff argues that, inasmuch as the provision begins with the words "executor, administrator," the subsequent designations must be construed to mean persons acting in similar capacities and under similar authority, such as trustees or guardians appointed by and acting under the supervision of some court. We do not think the provision requires a construction so narrow as this. Whether it includes private trustees or not, its obvious purpose was to excuse a stay bond when the court below, in its discretion, shall so order, where the appellant is a trustee acting under and by virtue of some official authority, whether by appointment of the court or by appointment under a statute as an officer of the state. This section also we think justifies the order of the superior court.

[4] Upon the argument the plaintiff apparently abandoned the claim that the Kern Valley Bank and the superintendent of banks acting on its behalf had no interest sufficient to authorize it to appeal from the judgment. The bank occupied the position of a lienholder under the deed of trust. The payment of its debt depended upon the adequacy of the security covered by the deed of trust. If, as it claims, the \$1,000,000 of bonds issued to Tevis and others are wholly invalid, the result would be that its own bonds would be practically the only debt secured by the property. There are sufficient facts appearing in the petition and admitted by the parties to indicate that the adequacy of the security is at least questionable. The bank, therefore, has a direct interest in the question as to the validity of the bonds held by the other parties. It also has an interest because of the fact that, if the other bonds are invalid, its own share of the proceeds will be much larger, and, in case it should bid for the property at the foreclosure sale, the amount of the price which it could pay by applying its share of such proceeds would be larger than it would be if the other bonds are valid.

[5-8] The superintendent of banks was a proper party to the action. The act imposes upon him duties in the liquidation of such banks which will often require him to maintain or defend actions concerning them. He

must collect the moneys of the bank, and do all other acts necessary to conserve and liquidate its assets. When he takes possession he supersedes the bank officials in the management and control of its property and business. Its franchise to do business as a bank is thereupon suspended. In closing up its affairs he is not required to consult its officers, or co-operate with them, but acts upon his own initiative, and independent of them. Upon complete liquidation and final settlement, the residue, if any, must be transferred and delivered by him to the stockholders, not to the corporation. Thereupon the franchise of the corporation to do business as a bank is terminated, and it cannot be again acquired except by compliance with the provisions of the act in the same manner as a new corporation must comply. Thus, apparently, the title to the property passes to him for the purpose of the trust, and through him to the stockholders. While engaged in the process of liquidation and settlement, he holds the property as trustee, to dispose of it as the statute directs. It is an express trust created and imposed upon him by the statute. Being the trustee of this express trust, he is authorized by section 369 of the Code of Civil Procedure to sue in his official name and character in any action necessary for the performance of the trust. Likewise, since he is the person lawfully in possession and control of the property, he is a proper party defendant in any action by a third person affecting such property.

Our conclusion is that he is entitled to maintain this appeal in his official name and capacity, and that such appeal stays the execution of the judgment without the filing of any undertaking for that purpose.

It is ordered that the application be denied.

We concur: SLOSS, J.; HENSHAW, J.

LORIGAN, J. (concurring). I concur in the order denying the writ of mandate, and place my concurrence solely on the ground that the giving of an undertaking on appeal by the superintendent of banks is dispensed with by the provisions of section 1058 of the Code of Civil Procedure, as pointed out in the opinion of Justice SHAW. I am not prepared to agree with the construction of section 946 as stated in that opinion. In my opinion a consideration of that section is not necessary to the decision of this case, and I express no opinion as to its meaning or effect as applied to this proceeding.

I concur: MELVIN, J.

PEOPLE v. LEE NAM CHIN. (Cr. 1,781.)
(Supreme Court of California. Dec. 17, 1913.)

1. CRIMINAL LAW (§ 822*)—TRIAL—INSTRUCTIONS—FLIGHT.

In a prosecution for homicide, the court charged that flight immediately after a crime has been committed with which he is charged is a circumstance tending to prove a consciousness of guilt, and entitled to more or less weight, that evidence of flight is received as indicative of a guilty mind, and, if the jury found that deceased was killed as charged, and also found beyond a reasonable doubt that immediately after the killing defendant fled from the place, it was a circumstance to be weighed, but was not sufficient of itself to establish guilt, and must be considered with all the facts in the case. *Held* that, since the jury, under the evidence and the charge as a whole, could not convict without finding that accused actually killed deceased, the instruction was not fatally defective, because it did not further require that the jury, before considering evidence of flight, must find that defendant, at the time he fled, knew that deceased had been killed, and that he was charged with the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

2. CRIMINAL LAW (§ 438*)—EVIDENCE—PHOTOGRAPHS OF DEAD BODY.

In a prosecution for homicide, photographs of the body of deceased showing the entrance and exit of the bullet by which he was killed were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.*]

In Bank. Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

Lee Nam Chin was convicted of murder, and he appeals. Affirmed.

Lafayette J. Smallpage and Gordon A. Stewart, of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LORIGAN, J. Appellant was convicted in the superior court of San Joaquin county of murder, sentenced to death, and, from the judgment and the order denying him a new trial, appeals.

The deceased, Kim Yuen, and defendant, both Coreans, were employed on a potato ranch in San Joaquin county, managed by a Chinaman, and, some serious difficulty, inaugurated by defendant, occurring between them, the manager discharged the defendant. The next day—September 26, 1912—about noon, deceased and a number of Chinamen started in a wagon from the ranch to go to Walnut Grove, and the defendant accompanied them. After they had proceeded a short distance defendant left the wagon, claiming he had a headache which the riding aggravated, and that he would walk into town, a distance of about four miles. The others left him in the road, and proceeded to Walnut Grove, from whence, about 3 o'clock, they started to return in the wagon to the ranch. While proceeding homeward two

shots, one of which killed the deceased, were fired from a clump of bushes at the side of the road some seven or eight feet from the wagon, on the bed of which deceased was seated. Two of the Chinamen who were riding in the wagon with the deceased when the shots were fired testified that defendant did the shooting.

There was evidence tending to show that about 4 o'clock in the afternoon, not long after the shooting, defendant reached the Eagle Tree ranch, not far from the scene of the shooting, and employed some men engaged in operating a dredger to take him across the river in a boat to Tyler Island where he remained until about 6 o'clock in the evening, when he walked into Walnut Grove. About 10 o'clock that night he was arrested, while proceeding to take a river boat for Sacramento. It further appeared that the route taken by defendant to reach Walnut Grove was more indirect and roundabout than had he proceeded along the road taken by the wagon; the latter was much shorter than the one taken by him across the river and through the fields, and would have brought him into Walnut Grove several hours earlier than he arrived. Defendant, as a witness in his own behalf, denied that he killed the deceased, or had any knowledge of his death until he was arrested and charged with it in Walnut Grove; that after he left the wagon he continued along the road it had taken for some distance; that, in looking back as he proceeded, he recognized a Chinaman coming along who had worked with him on the potato ranch, and had the reputation of being a dangerous man; that he was fearful this Chinaman might attempt to rob him, and hence he left the road, and took his way across the river and through the fields; that it was a longer route to Walnut Grove than by the road, and, as he had a headache and walked slowly, he did not reach the latter place earlier than 6 o'clock in the evening.

Appellant does not question the sufficiency of the evidence to sustain the verdict against him, and we only make a general recital of it to present the situation under which the only points made by him are to be examined, namely: That the court erred in an instruction to the jury, and likewise erred in ruling on the admission of certain exhibits.

[1] The instruction complained of was one on the subject of "flight," regarding which the court charged as follows: "The flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and entitled to more or less weight according to the circumstances of the particular case. Evidence of flight is received, not as a part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind;

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and if you find, from the evidence in this case, that Kim Yuen was killed as charged in the information, and further find from the evidence beyond a reasonable doubt that, immediately after such killing, the defendant fled and escaped from the place and vicinity of the killing, it is a circumstance to be weighed by you, gentlemen of the jury, as tending in some degree to prove consciousness of guilt. It is not sufficient of itself to establish the guilt of the defendant; but the weight to which that circumstance of flight, if you find it to have occurred, is entitled is a matter for you to determine in connection with all the facts and circumstances proven in the case."

In the recent cases of *People v. Jones*, 160 Cal. 358, 117 Pac. 176, and *People v. Sainz*, 162 Cal. 242, 121 Pac. 922, this court admonished against the giving of any instructions on the subject of flight, as an invasion of the province of the jury to weigh the evidence. But while we have discountenanced it for this reason, still we will not reverse a case solely because such an instruction has been given, unless it appears that the defendant has been prejudiced thereby.

Such prejudice is claimed to appear here; it being insisted that, as a matter of law, this instruction was erroneous, because it failed to inform the jury that, before they could take into consideration any of the circumstances with reference to said flight on the part of defendant, they must first find that the defendant knew that the deceased had been killed, and, further, that he was charged with having done it, and that the instruction in question does not contain a statement of these qualifications.

It is true, as asserted by the appellant, that an instruction on flight should contain these qualifications in order that it be legally sufficient. *People v. Jones*, supra. But it does not follow that prejudicial error is committed simply because the instruction is lacking in a specific direction to the jury on that subject. Notwithstanding the instruction may be defective because it omits to expressly declare the qualifications under which evidence of flight may be considered, still, if it appears that, under the evidence in the case which, by the terms of the instruction, they were to take into consideration, the jury must necessarily have found these qualifications as to the knowledge of the defendant in connection with the claim of flight, then the omission to directly charge respecting them cannot be said to have been prejudicial to the defendant. That they must here have so found we think apparent. It will be observed that, while under the challenged instruction the jury were told that they might take into consideration evidence of flight, they were, however, expressly instructed that this evidence was not of itself sufficient to establish the guilt of the defendant; it was but a circumstance to be taken into consider-

ation with all the facts and circumstances proven in the case. As the jury could not convict on evidence of flight alone, they were required, under this instruction itself, to consider other evidence in the case which must so connect the defendant with the killing of the deceased as to make a consideration of the evidence of flight proper. The other evidence in the case tended to show that the defendant fired the shots that killed the deceased. The jury would not have been warranted in convicting the defendant, unless they found that he had actually done the shooting. This being true, the jury must necessarily have found that the defendant, at the time he is claimed to have fled, had that knowledge of the killing of the deceased, and that he was charged with it, which would entitle them to consider the evidence of his flight. Hence, although the instruction omitted to expressly enjoin on the jury the necessity of a preliminary finding by them of such knowledge on the part of the defendant before the circumstance of his flight might be considered, still, as the jury, under the evidence, and within the terms of the instruction, necessarily must have found such knowledge, the omission could not have prejudiced the defendant.

[2] The only other error claimed is as to the admission in evidence of certain exhibits consisting of photographs of the body of the deceased showing the entrance and exit of the bullet by which he was killed. They were introduced by the prosecution in its case in chief as illustrating how the deceased was killed, and were competent evidence for that purpose.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

SLOSS, J. (concurring). I concur in the judgment.

I do not assent to the doctrine that evidence of flight cannot be considered unless there be a showing that the defendant knew, when he fled, that he was charged with the crime. Immediate flight, in the absence of any accusation—in advance, perhaps, of the possibility of an accusation, formal or informal—may afford very persuasive evidence of a consciousness of guilt. *Wig. Ev.* § 276.

With regard to the other qualification referred to in the foregoing opinion, it is no doubt true that a mere departure from the vicinity of the alleged crime would have no logical tendency to prove guilt if the defendant, at the time of taking his departure, did not know that a crime had been committed. It would seem proper, therefore, to qualify the charge, if one is to be given at all, by telling the jury that flight is to be considered only where there is other evidence showing such knowledge on the part of the defendant. But this is almost necessarily implied in an

instruction which tells the jury that evidence of flight is received only as "indicative of a guilty mind," and as "tending to prove a consciousness of guilt." It is hardly to be supposed that a jury so instructed will find that a consciousness of guilt has been indicated by any act done by one not shown to have been aware of the commission of the offense. In other words, the giving of the instruction in the form in which it was here given would not ordinarily work substantial prejudice to a defendant.

At any rate a reading of the record in this case has brought me to the opinion that the alleged error has not resulted in a miscarriage of justice, and that this court would not, therefore, in view of the provisions of section 4½ of article 6 of the Constitution, be justified in ordering a reversal.

We concur: ANGELLOTTI, J.; SHAW, J.

FAXON v. ALL PERSONS, ETC., et al.
(S. F. 5,984.)

(Supreme Court of California. Dec. 23, 1913.)

1. PLEADING (§ 406*)—OBJECTIONS—WAIVER.

A defect in the affidavit of plaintiff, suing to quiet title, arising from the fact that it did not aver that he was or had been in actual possession, as required by the McEnerney act (St. 1906 [Ex. Sess.] p. 78), was waived by defendant voluntarily appearing and answering and submitting his claim for adjudication, where the complaint, as an ordinary complaint to quiet title, was not defective, except for its failure to allege any adverse claim, and which defect was supplied by the answer; the court, by virtue of Const. art. 6, § 5, having jurisdiction of the subject-matter, though the proceeding was entitled as a proceeding under the act against all persons, and though the complaint was framed under the act, and though jurisdiction as to all persons was attempted to be obtained as provided by the act.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359, 1361-1365, 1367-1374, 1386; Dec. Dig. § 406.*]

2. APPEAL AND ERROR (§ 877*)—QUESTIONS REVIEWABLE—PARTY ENTITLED TO COMPLAIN.

A defendant, in a suit to quiet title, may not complain of the judgment in so far as it concerns third persons only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

3. APPEARANCE (§ 22*)—EFFECT—JURISDICTION.

Where a controversy is shown by the pleadings of the parties and the court has, under the law, jurisdiction of the subject-matter of the controversy, and both parties voluntarily appear and go to trial, the defeated party may not complain of any want of jurisdiction for defect in the preliminary proceedings by which the cause was in court.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 103-110; Dec. Dig. § 22.*]

4. LIMITATION OF ACTIONS (§ 170*)—EFFECT OF BAR—REMEDY—POWER OF SALE IN MORTGAGE.

Under Civ. Code, §§ 858, 2877, 2911, 2932, providing that a power of sale given in a mortgage is deemed a part of the security, and de-

claring that a mortgage lien is extinguished by the lapse of time within which an action can be brought on the debt secured, etc., a power of sale conferred on a mortgagee as a means of enforcing the lien securing a debt is a mere incident of the mortgage lien, and where a note and mortgage with power of sale are barred by limitations, the power of sale is extinguished.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 656; Dec. Dig. § 170.*]

5. CONSTITUTIONAL LAW (§ 92*)—VESTED RIGHTS—CONTRACTS—STATUTORY PROVISIONS.

A mortgage must be read in the light of the statutes in existence at the time of its execution, and in the absence of anything to indicate that the parties did not intend that the statutes should govern, they do not deprive them of any vested right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 207, 225-227, 237; Dec. Dig. § 92.*]

6. LIMITATION OF ACTIONS (§ 167*)—EFFECT OF BAR—DEBT AND SECURITY—PAYMENT OF MORTGAGE.

Though the lien of a mortgage is extinguished by the barring of the debt secured by limitations, the mortgagor cannot, without paying the debt, quiet his title against the mortgagee, or maintain ejectment against the mortgagee in possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651-653; Dec. Dig. § 167.*]

7. MORTGAGES (§ 216*)—MORTGAGEE IN POSSESSION—WHO IS.

Ordinarily a mortgagee in possession is one who has been placed in possession by the mortgagor or his successor in interest, or who has gone into possession with the express or implied consent of the mortgagor or his successor, and a mortgagee who, while the mortgage is subsisting, obtains in any lawful manner the possession, may retain possession and defend it against the mortgagor or his successor, and the mortgagor's only remedy is the equitable suit for redemption.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 462, 554-558; Dec. Dig. § 216.*]

8. MORTGAGES (§ 213*)—MORTGAGEE IN POSSESSION—WHO IS.

A mortgagee entering into possession pursuant to proceedings for the enforcement of the mortgage lien instituted after the extinguishment of the lien by limitations is not a mortgagee in possession.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 482-491, 1576; Dec. Dig. § 213.*]

9. LIMITATION OF ACTIONS (§ 167*)—EFFECT—MORTGAGE—DEBT BARRED BY LIMITATIONS.

A purchaser of real estate, while the records show that a mortgage lien has become extinguished by limitations, may maintain a suit to quiet title without paying the mortgage debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651-653; Dec. Dig. § 167.*]

10. QUIETING TITLE (§ 54*)—COSTS—STATUTORY PROVISIONS.

The provisions of Code of Civil Procedure, relating to costs, are applicable to proceedings to quiet title under the McEnerney act, as against persons contesting the claim of plaintiff.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 105; Dec. Dig. § 54.*]

11. QUIETING TITLE (§ 54*)—COSTS—STATUTORY PROVISIONS.

Under Code Civ. Proc. § 1022, allowing costs of course to plaintiff in enumerated cases, the court in a suit under the McEnerney act

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to quiet title may, in awarding relief to plaintiff, tax the costs against defendant contesting plaintiff's claim.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 105; Dec. Dig. § 54.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Annie Montgomery Faxon against the Hibernia Savings & Loan Society and others. From a judgment for plaintiff, defendant named appeals. Affirmed.

Tobin & Tobin and George A. Clough, all of San Francisco, for appellant. Charles W. Slack and Chauncey S. Goodrich, both of San Francisco, for respondent.

PER CURIAM. A hearing in bank was ordered after judgment in department 1. The court was, and still is, entirely satisfied with the disposition by the department of every point, save one, arising on the appeals. The hearing in bank was ordered to enable the court to give further consideration to the one question which it regarded as doubtful, viz., whether the plaintiff, under the facts, was precluded from obtaining a decree quieting her title against the outlawed mortgage of the defendant bank, without offering to pay the amount of such mortgage. Except for its discussion of this question, and so much of the judgment as rests on such discussion, the following opinion adopts the precise terms of the department opinion, which was prepared by Mr. Justice ANGELLOTTI:

Plaintiff, on October 1, 1907, commenced this action under the provisions of the act of June 16, 1906, generally known as the McEnerney act, to establish and quiet her title as against all persons to a parcel of real property in the city and county of San Francisco, fronting 50 feet on Mission street, 170 feet on Fourth street, and 125 feet on Minna street. In her complaint, verified by herself, she alleged that she owned an estate of inheritance in said property, and that her estate, title, and interest therein is the ownership thereof in fee simple absolute. She further alleged herself to be in the actual and peaceable possession of all of said property. She filed with the complaint her affidavit sufficiently stating the matters required to be stated in an affidavit to be filed with the complaint by section 5 of said act, with the single exception that there was no statement in terms therein that she was or ever had been in actual possession of any of said property. Publication of summons was had in the manner required by the act. No one appeared to contest the claim of plaintiff except defendant Hibernia Savings & Loan Society, hereinafter referred to as the defendant. Defendant by its answer filed in January, 1908, resisted the claim of plaintiff only as to a portion of the property described in the complaint, viz., a lot fronting 25 feet on Minna street by 70 feet in depth. As to this it de-

nied that plaintiff was the owner of any interest whatever. It alleged a mortgage lien thereon by virtue of a mortgage given on August 24, 1888, by Charles O'Neill and Elizabeth O'Neill, predecessors in title of plaintiff, to secure the payment of their promissory note of the same date for \$1,400 and interest, due one year after its date, which mortgage was duly recorded September 4, 1888, on which note no part of the principal had been paid, and none of the interest from April 24, 1893. It was asked that the mortgage be restored and re-established of record, and that the decree declare that any interest in said property found to be in plaintiff is subject to the lien thereof. In its amended and supplemental answer filed in March, 1908, it omitted its previous allegations as to the mortgage constituting a lien on the premises, and set up title in fee simple absolute in itself, by virtue of a sale by itself as mortgagee on March 14, 1908, to one John A. Grennan for \$3,240, under a power of sale contained in said mortgage, and a transfer by said Grennan to it on the same day. It further alleged that on the same day, it entered into possession of said property, and ever since has been and now is the owner in fee simple absolute thereof, in the actual physical possession of the same. It therefore asked that it be decreed to be such owner, and that its title as such be restored, as well as for such other relief as to the court might seem just.

The findings of the trial court upon the ultimate facts of ownership and want of interest on the part of defendant were in favor of plaintiff, but the probative matters alleged in the answer, including possession since March 14, 1908, were found to be as alleged. Judgment was given thereon awarding plaintiff the relief sought by her, and declaring that defendant has no right, title, claim or interest in or to the property claimed by it, or any part thereof, or any right to the possession of the same. It was further ordered thereby that plaintiff "have and recover from the said defendant her costs incurred herein, amounting to the sum of \$——." Judgment was given March 17th and entered May 9, 1910. On March 21st, plaintiff filed a memorandum of costs, amounting to \$28.25. A motion was made by defendant to tax the costs at \$5 only, and on April 18, 1910, this motion was denied. We find in the record no notice of appeal from the order denying defendant's motion to retax the costs, but it appears to be conceded by the stipulation of the parties attached to the transcript that such an appeal was taken. There is an appeal by the defendant from the judgment in so far as it affects the portion of the property described in the mortgage, and also in so far as it adjudges that plaintiff recover from defendant her costs, and there is also an appeal by defendant from the order denying its motion for a new trial.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1,2] It is claimed preliminarily that by reason of defects in the affidavit filed with the complaint the trial court never acquired jurisdiction of the subject-matter of the action, and that the judgment must therefore be declared null and void. Neither of the alleged defects was ever suggested in the lower court, and the point was made for the first time in defendant's opening brief in this court. So far as defendant possibly could waive such an objection, it has undoubtedly done so, voluntarily appearing and answering and submitting its own claim in relation to the property to the trial court for adjudication. As we have before stated, we are satisfied that the affidavit sufficiently complied with the requirements of the law except in the single matter of a showing of possession. It may well be contended that the affidavit taken by itself alone failed to affirmatively show actual possession of the property by plaintiff, as is required by section 5 of the McEnerney act (St. 1906, [Ex. Sess.] p. 80). *Soher v. Cabaniss*, 161 Cal. 548, 551, 119 Pac. 911; *Lofstad v. Murasky*, 152 Cal. 70, 91 Pac. 1008. It may be noted that it did not show want of actual possession, as in *Lofstad v. Murasky*, *supra*, and that the verified complaint did show such actual possession. Assuming that the affidavit was fatally defective in this regard, we nevertheless are satisfied that it should be held that in so far as the defendant is concerned the trial court had jurisdiction to give the judgment it did. Whether or not the judgment is good as against any person other than the defendant is a matter of no concern to it, and one as to which it may not be heard to complain. The defendant, as we have seen, voluntarily appeared and submitted itself to the jurisdiction of the court, thus disposing of any question as to jurisdiction of the person. The determination of the issues made by the pleadings of the plaintiff and defendant was in no way dependent upon any claim of any possible third party. As between these parties, by reason of the issues made by the pleadings, the proceeding was, in substance and effect, one to quiet title to real property. In no respect was the complaint defective as an ordinary complaint to quiet title, except that it failed to allege any adverse claim, and any defect in this respect was fully supplied by the answer. The superior court has original jurisdiction in "all cases in equity, and in all cases at law which involve the title or possession of real property." Const. § 5, art. 6. The lower court therefore had jurisdiction of the subject-matter of the controversy *between these parties*. It can make no difference here that the proceeding was entitled as a proceeding under the McEnerney act against "All Persons," etc., or that the complaint was framed as a complaint under said act, or that jurisdiction as to all persons was attempted to be obtained in the manner provided by said act. The same court has original jurisdiction both in

proceedings under the McEnerney act and ordinary actions to quiet title to real property. That the lower court had the essential jurisdiction of the subject-matter of the controversy between the parties to enable it, the defendant voluntarily appearing and submitting itself and its claim to the jurisdiction of the court, to determine the controversy between them and to give the judgment it did in so far as the same affects defendant, notwithstanding that the proceeding was avowedly one under the McEnerney act, is fully established by the views expressed in the following cases, viz.: *City of Santa Barbara v. Eldred*, 95 Cal. 378, 30 Pac. 562; *In re Thompson*, 101 Cal. 349, 353, 35 Pac. 991, 36 Pac. 98, 508; *In re De Leon*, 102 Cal. 537, 541, 36 Pac. 864; *Estate of Wells*, 140 Cal. 349, 352, 73 Pac. 1065; *King v. Pauly*, 159 Cal. 549, 553, 115 Pac. 210, Ann. Cas. 1912C, 1244.

[3] Under the views so expressed it is sufficient in so far as any claim of want of jurisdiction is concerned that we have a controversy between these two parties fully and definitely shown by their pleadings, one in which no other person is interested, presented by such parties to the court having, under the law, jurisdiction of the subject-matter of such controversies, and determined by such court. To use the language of *Allen v. Belcher*, 3 Gilman (Ill.) 594, quoted approvingly in the *City of Santa Barbara v. Eldred*, *supra*: "It would be trifling with courts, and the rights of parties, to permit suitors, after voluntarily appearing and going to trial, to avail themselves of an objection to the preliminary proceedings by which the cause of the parties was in court."

As, in view of what we have said, the question of the effectiveness of the judgment as one against all persons under the McEnerney act is not involved, we express no opinion thereon.

[4] Defendant's claim of title, as we have noted, was based upon its attempted exercise of the power of sale contained in its mortgage, and the deed made to it by the grantee at the sale made thereunder. The mortgage given to defendant by Charles and Elizabeth O'Neill on August 24, 1888, to secure the payment of their promissory note for \$1,400 of the same date, and due one year after its date, contained, after the provision for ordinary foreclosure by suit, the following: "And the mortgagors hereby empower the mortgagee to sell and convey said mortgaged property at any time after default made in the payment of said promissory note, or the interest thereon, or after the breach of any obligation for which this mortgage is security. Any such sale may be public or private, at the option of the mortgagee, and may be made after such notice and for such price and on such terms as to payment or otherwise as the mortgagee may deem proper. At any such sale the mortgagee, in its own name, or in the name of any person, shall

have the right to purchase, and any recitals contained in any conveyance of the mortgaged property which may be made by the mortgagee must be deemed conclusive evidence of the facts recited. The proceeds of such sale must be applied to the payment, in whole or in part, of the expenses of the sale, and of the amount due to the mortgagee upon this mortgage, and upon said promissory note, and upon any such sale counsel fees shall be allowed as a part of the expenses, at the rate of two per cent. upon the amount of the debt, and the mortgagors and mortgaged property are hereby made liable to the mortgagee for such counsel fees." The property then stood in the name of Elizabeth O'Neill, to whom it had been conveyed on April 7, 1889, by James and Lizzie Wainwright by deed of grant, bargain, and sale. It was subject to a homestead duly declared by the O'Neills on November 7, 1874. Mrs. O'Neill died intestate on March 24, 1890. Her estate was regularly probated, and in the probate proceedings, the property in question was set apart to Charles O'Neill, the surviving husband, as a homestead regularly selected during the lifetime of the spouses. Although due notice to her creditors was given in said probate proceedings, defendant never presented to the administrator any claim on said note or on said mortgage. Said Charles O'Neill continued to occupy the property as a homestead until his own death on January 18, 1894. He left a will, which was admitted to probate on March 27, 1894, and one R. S. Thornton was appointed executor. Thornton immediately qualified as executor, and continued to act as such until after April 22, 1901, to which time he was in actual possession of this property. In the meantime, namely, on August 24, 1892, defendant sued said Charles O'Neill on said note, and obtained personal judgment against him thereon on February 5, 1894. Thornton, as executor, was substituted as defendant on the death of O'Neill, and appealed from the judgment to the Supreme Court. This judgment was reversed. 109 Cal. 427, 42 Pac. 447, 50 Am. St. Rep. 52. On the return of the case to the lower court, judgment was given for defendant on the pleadings, and this judgment was reversed by the Supreme Court. 117 Cal. 481, 49 Pac. 573. The action was again tried, and the superior court gave judgment for the foreclosure of the mortgage. This judgment was reversed by the Supreme Court. 123 Cal. 62, 55 Pac. 702. On the next trial, judgment of nonsuit was given, and this judgment was affirmed February 16, 1900, and the action terminated. 127 Cal. 575, 60 Pac. 37. No claim on said note or mortgage was ever presented to the executor, the only claim regularly presented being one on the judgment of February 5, 1894, which was subsequently reversed. No subsequent effort to enforce the mortgage appears to have been made by defendant until its attempted sale

under the power in 1908. In April, 1901, Thornton as executor sold said property to Margaret English for \$4,425, and on April 22, 1901, this sale was confirmed by the superior court and a conveyance directed. Such a conveyance was made on the same day, transferring to the grantee all the right, title, interest, and estate of said Charles O'Neill in said property at the time of his death, and all that his estate had since acquired. This conveyance was at once recorded, and Margaret English on the next day received possession of the property. She immediately conveyed the property to plaintiff, who at once went into actual possession and continued in such actual possession until dispossessed by defendant on March 14, 1908. The evidence was of such a nature as to sufficiently support the finding to the effect that defendant on March 14, 1908, cut the fence on Minna street in front of the property, and thereupon entered upon and took possession of the property. There is no pretense that plaintiff in any way authorized any such taking of possession by defendant, or that defendant acquired possession in any other way than by simply taking it in the absence of the owner, under the sale made in pursuance of the power contained in the mortgage.

From what we have said it is obvious that at the time defendant attempted to execute the power of sale, not only were both the mortgagors dead, but the debt, note, and mortgage had many years prior thereto become barred by our statute of limitations, and any lien created by the mortgage had been extinguished, section 2911 of the Civil Code providing that "a lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." By section 2877 of the Civil Code, contracts of mortgage are expressly made subject to the provisions of this section, as well as all other sections of the chapter relative to liens. A similar situation to that here presented was before the District Court of Appeal for the first district in *Goldwater v. Hibernia Savings & Loan Society*, 19 Cal. App. 511, 126 Pac. 861, decided by that court July 22, 1912. The defendant there was proceeding to execute by sale a similar power contained in a mortgage given by the plaintiff's predecessor upon her homestead. As is true here, it had previously attempted to foreclose its mortgage by suit, but had failed therein because it had never presented its claim on the note secured by the mortgage on a homestead to the administrator of the estate of the deceased mortgagor. The debt, note, and mortgage were barred by the statute of limitations at the time of the attempt to execute the power of sale. The plaintiff brought his action to enjoin the threatened sale, and prevailed in the lower court. The District Court of Appeal in affirming the judgment held that under our statutory pro-

visions the power of sale was nothing more than a lien imposed upon the mortgaged land to secure the payment of the debt, and that it was therefore extinguished by the lapse of the time within which, under our statute of limitations, an action could be brought upon the note the payment of which it was given to secure. In denying a petition for a rehearing in this court, we said that the decision of the District Court of Appeal was correct, "regardless of the question whether a power of sale included in a mortgage is, or is not, technically a lien," and that by reason of the fact that the debt, note, and mortgage had become barred, the lien of the mortgage was extinguished, and the mortgagee, as holder of the power, was without any interest whatever in the land, as lienholder, or at all, and that, consequently, on well-settled principles, the interest once coupled with it had then ceased to exist, it had become a naked power, and, the mortgagor being dead, the power had terminated with the extinction of the interest. 128 Pac. 863. This, of course, was tantamount to saying that the only possible interest coupled with the power of sale was such interest as was essential to the enforcement of the lien of the mortgage by the execution of the power, and that such interest, together with the remaining naked power, necessarily terminated with the extinguishment of the mortgage lien. As was shown by the opinion of the District Court of Appeal, while such a power of sale is authorized in a mortgage by the terms of section 2932, it is, by the terms of section 858, Civil Code, "to be deemed a part of the security." It is a mere incident or appurtenance of the mortgage lien, agreed upon by the parties solely as a means of enforcing such lien, and can have no vitality or force when the lien itself no longer exists. In view of our statutory provisions bearing upon the question, provisions differing materially from those of many other states, as is shown by the District Court of Appeal opinion in the Goldwater Case, we are satisfied that the power of sale terminated with the extinguishment of the mortgage lien.

[5] There is nothing in the suggestion that this conclusion as to the effect of section 2911, Civil Code, renders the section one depriving defendant of "rights vested under contract." The contract of mortgage must be read in the light of the sections to which we have referred, including said section 2911, all of which existed in their present form at the time the mortgage was given, and there being nothing in the language used in the contract to indicate that the parties intended that the power of sale should outlast the time prescribed by law for the existence of the mortgage lien, if any inference can be indulged in, it, as suggested by counsel for plaintiff, must be the inference that the parties had section 2911, Civil Code, in mind, and contracted with reference to it. There-

fore no question is presented as to any interference with contract rights.

It follows from what we have said, that the attempted sale under the power was ineffectual for any purpose, and that defendant acquired no interest in the property by its deed from the purchaser at such sale.

[6] Defendant claims that, even if it did not obtain title to the property by reason of such sale, and the conveyance from the purchaser, yet by virtue of its entry into actual possession thereunder it has become a mortgagee in possession, and is entitled to retain such possession until the debt of plaintiff's predecessors in title, the O'Neills, is satisfied by payment. No rule is more firmly established in this state than the one to the effect that, notwithstanding "the lien of a mortgage is 'extinguished' by the barring of the debt by the statute of limitations, the mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee, or maintain ejectment against his mortgagee in possession." See Puckhaber v. Henry, 152 Cal. 423, 93 Pac. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844, and cases there cited.

[7] We are satisfied, however, that defendant cannot reasonably be held to be a "mortgagee in possession" within the meaning of these words as used in the rule. Ordinarily the mortgagee in possession must be one who has been placed in possession by the mortgagor or his successor in interest, or has gone into possession with the consent, express or implied, of such party. This is so because under such statutes as we have in California the mortgage is purely a lien, and does not entitle the mortgagee to possession. But it is established in this state that under certain circumstances a mortgagee who has acquired possession without the consent, express or implied, of the mortgagor, may be held to be within the term "mortgagee in possession." This matter was discussed at some length in Burns v. Hiatt, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157, a case strongly relied on by defendant, and such a person was there held to be "a mortgagee in possession." This case was followed and approved in Raggio v. Palmtag, 155 Cal. 797, 103 Pac. 312. In the former of these cases, foreclosure proceedings regularly and in due season instituted on the defendant's mortgage resulted in a decree of foreclosure and sale, and the defendant purchased the property at the sale, received his deed, and entered into possession peaceably and in good faith. Plaintiff was a grantee of the property from the mortgagor by conveyance subsequent to the mortgage. The proceedings were ineffectual as against him solely because he was not made a party defendant therein. It was said by this court that the rule relating to a mortgagee in possession was one based solely upon equitable considerations, and that, so considered, it was settled by the authorities that it was not always essential to a right to possession in the mortgagee that the mortgagor should

have assented thereto. This conclusion was based upon certain views expressed by Professor Pomeroy in his *Equity Jurisprudence*, and certain decisions in line therewith. The settled doctrine, as stated by Professor Pomeroy, and shown by the opinion, was substantially that while the mortgagee is declared to have no legal estate, and is unable to recover possession against an unwilling mortgagor or owner of the fee subject to the mortgage, yet if the mortgagee, while the mortgage is still subsisting, does "in any lawful manner" obtain the possession, his interest under the mortgage enables him to retain such possession, and to defend it against the mortgagor or those succeeding to his title. Further, that if through the mortgagor's consent, or "any other lawful means," the mortgagee has been permitted to obtain possession of the land, the mortgagor's only remedy is the equitable suit for a redemption. It was said by this court that "the true rule would appear to be that where the mortgagee has, under color of the mortgage or legal proceedings based thereon, acquired possession without resort to force, fraud, or any other unlawful or wrongful means upon which he would be estopped to found a right, and under such circumstances as not to make it inequitable that he should retain such possession as security, he will be regarded as a mortgagee in possession"; it being further settled, as shown by the authorities, that where for any reason foreclosure proceedings are void, the mortgage continues alive for the benefit of the mortgagee or purchaser at the foreclosure sale, as his assignee, and also that if the person entitled to the benefit of the mortgage peaceably and in good faith, under color of such foreclosure proceedings, enters into possession, he does obtain possession in a lawful manner and is a mortgagee in possession. This was the full extent of the ruling in *Burns v. Hiatt*, supra.

In *Raggio v. Palmtag*, supra, the taking possession was by a mortgagee who had presented against the estate of the mortgagor what purported to be her claim on note and mortgage, the same had been allowed by the administrator and approved by the judge of the court, and the mortgaged property was subsequently sold in the probate proceedings to the mortgagee for \$218 in excess of the amount of her claim; the mortgage debt being credited on the purchase price as allowed by the law. It was claimed that the claim presented against the estate was fatally defective in certain respects, and that as the property was homestead property, the lien of the mortgage was forever lost. One of the grounds of the decision was that if the claim presented was defective, nevertheless the mortgagee was a mortgagee in possession. Practically, her entry was under proceedings by the mortgagee for the enforcement of her mortgage, commenced by the attempted filing of a claim during the life of the mortgage. There is absolutely nothing in either of these

cases, or in any case that we have seen, that gives countenance to the claim that any such result can follow an attempt to enforce a mortgage lien begun after such lien has been effectually "extinguished," and is no longer in existence as a subsisting lien. As we have seen, Mr. Pomeroy states as one of the elements essential to the application of the rule the fact that the mortgage "is still subsisting." This requirement would probably be held to be satisfied where the entry was made after the lapse of the time within which an action could be brought upon the principal obligation, provided the proceeding upon which it was based was initiated prior to the lapse of such time, but in none of the cases cited does it appear that the entry was in fact after the lapse of such time.

[8] However this may be, it appears clear to us that no such claim can properly be made upon an entry based upon proceedings for the enforcement of the lien instituted after the lien has been extinguished. The lien, together with all its incidents and appurtenances, being absolutely at an end, can no longer serve as a sufficient basis for the institution of any proceeding looking to its enforcement, or for the conclusion that one entering under any such proceeding entered "under color of the mortgage" within the meaning of those words as used in *Burns v. Hiatt*, supra. To confer any right of possession under the rule, the proceeding must at least have been based upon an existing mortgage, not upon one that is dead and no longer a foundation for any enforceable right. We are satisfied that the defendant cannot be held to be a mortgagee in possession.

[9] It is however claimed that, even if defendant is not a mortgagee in possession, nevertheless, under the rule we have referred to, plaintiff should not have been allowed to obtain a judgment quieting title against the mortgage, so long as the debt to secure the payment of which it was given remains unpaid. The judgment given does so quiet the plaintiff's title against the mortgage, and it is urged that a reversal must be had for this reason. As is said in an earlier part of this opinion, it is the settled rule that, notwithstanding the lien of a mortgage is extinguished by the barring of the debt by limitation, the mortgagor cannot, without paying his debt, quiet his title against the mortgagee. *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225; *De Cazara v. Orena*, 80 Cal. 132, 22 Pac. 74; *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203, 13 L. R. A. 137, 22 Am. St. Rep. 314; *Brandt v. Thompson*, 91 Cal. 458, 27 Pac. 763; *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157. The doctrine rests upon purely equitable principles.

In *Booth v. Hoskins*, supra, the court says: "Common honesty requires a debtor to pay his just debts if he is able to do so, and the courts, when called upon, always enforce such payments if they can. The fact that a

debt is barred by the statute of limitations in no way releases the debtor from his moral obligation to pay it. Moreover, one of the maxims which courts of equity should always act upon is * * * that he who seeks equity must do equity."

In *Spect v. Spect*, supra, the basis of the rule is thus stated: "Whenever a mortgagor seeks a remedy against his mortgagee which appears to the court to be inequitable, whether it be to cancel the mortgage as a cloud upon his title, or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he shall do that which is consonant with equity."

The respondent contends, and we think rightly, that the rule in question should not be extended to a case in which a liability to pay the debt does not, in morals and equity, rest upon the plaintiff or his property. Where the plaintiff is himself the debtor, the applicability of the rule is apparent. No different situation is presented where the plaintiff has bought the land before the right to foreclose the mortgage has become barred. In such case he acquired the property subject to a valid existing lien, which was, presumably, taken into account in fixing the purchase price. Such property, when he acquired it, was bound by the debt, and it would be as inequitable to relieve him of the burden without payment as it would be to thus free the original debtor.

In the present case, however, the plaintiff acquired the land by purchase for a consideration after the lapse of the time within which an action to foreclose the mortgage could have been brought—after, indeed, it had been decided in this court that there was no right of foreclosure. The plaintiff was not personally liable for the debt, and was under no moral obligation to discharge it. When she bought the land, the records showed that the lien of the mortgage had become extinguished. Civ. Code, § 2911. It is difficult to see, therefore, how the land itself, so bought, was bound, legally or equitably, by the debt. There seems to be no good reason for refusing to quiet the title of an owner in the situation of the plaintiff here. To apply the rule contended for by appellant to such a case would be equivalent to holding that the owner of the property could never have his title quieted against an unpaid mortgage not satisfied of record, however long the lapse of time since the maturity of the debt, and however numerous the transfers since the expiration of the right to foreclose. To so hold would result in perpetuating

clouds upon titles, where no substantial equity demands that the merchantability of real property be thus hampered.

None of the decisions in this state, or elsewhere, so far as we are advised, has denied relief to a plaintiff seeking to quiet his title against an outlawed mortgage by which neither he, nor his land, was equitably bound. On the other hand *Kingman v. Sinclair*, 80 Mich. 427, 45 N. W. 187, 20 Am. St. Rep. 522, may be cited as an authority supporting the respondent's contention.

[10] We are of the opinion that the general provisions of our Code of Civil Procedure relative to costs are applicable to proceedings under the *McEnerney* act as against persons contesting the plaintiff's claim.

[11] It is unnecessary in this case to determine whether such a proceeding is governed by the provisions of section 1022 of the Code of Civil Procedure, allowing costs of course to the plaintiff in certain cases, or by section 1025 of the Code of Civil Procedure, which provides that in other actions than those mentioned in section 1022, costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides, in the discretion of the court. Assuming the last-named section to be the one applicable, there was no abuse of discretion on the part of the trial court in awarding as against defendant the costs claimed by plaintiff. In the case at bar there was but one parcel of land described in the complaint and summons, and only one party, this defendant, made opposition to the relief sought. As we have said, the action in substance and effect became a simple action to quiet title between plaintiff and defendant, and no costs in addition to those that would have been recoverable by plaintiff in such an action appear to be included in the memorandum of costs. It is not disputed that expense incurred in the publication of summons is in general properly taxable as costs, and the amount charged therefor in this case was no greater than it would have been had the description of land therein included only the portion of the parcel described which was claimed by defendant. The court did not err in refusing to grant the motion of defendant to retax costs.

There was no merit in defendant's motion for a new trial on the ground of newly discovered evidence.

The judgment is affirmed. The orders denying a new trial and the motion to retax costs are affirmed.

BEATTY, C. J., does not participate in the foregoing.

IRELAND et al. v. SHORE.

(Supreme Court of Kansas. Jan. 10, 1914.)

*(Syllabus by the Court.)*1. **BILLS AND NOTES (§ 497*)—HOLDER IN DUE COURSE—DEFECTIVE TITLE—BURDEN OF PROOF.**

The plaintiffs, as indorsees of the payees, sued the defendant as the maker of certain promissory notes. The defenses were breach of contract on the part of the payees, failure of consideration, that the plaintiffs were not innocent purchasers, and defective title in the payees on account of fraud in obtaining the instruments. *Held*, instructions to the jury that the possession of a negotiable instrument properly indorsed is prima facie evidence that the holder is a holder in due course, and that, when the title of a person negotiating such an instrument is shown to be defective, the burden is on the holder to prove that he is a holder in due course (Negotiable Instruments Law [Gen. St. 1909, § 5312] § 66), were necessary and proper, and were not inconsistent with each other.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1448, 1675-1681, 1683-1687; Dec. Dig. § 497.*]

2. **BILLS AND NOTES (§ 525*)—HOLDER IN DUE COURSE—PROOF.**

When proof of defective title in a person negotiating an instrument (Negotiable Instruments Law [Gen. St. 1909, § 5308] § 62) has been made, and the burden is thereby cast upon the holder to show that he is a holder in due course (Negotiable Instruments Law [Gen. St. 1909, § 5305] § 59), production of the instrument properly indorsed can prove no more than that the instrument is complete and regular on its face. Other elements of the definition of a holder in due course must be proved by evidence aliunde.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1832-1839; Dec. Dig. § 525.*]

3. **BILLS AND NOTES (§ 523*) — PURCHASE OF NOTES—SUFFICIENCY OF EVIDENCE.**

The evidence examined, and *held* sufficient to sustain a special finding of the jury that the plaintiffs did not purchase the notes sued on.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825; Dec. Dig. § 523.*]

*(Additional Syllabus by Editorial Staff.)*4. **EVIDENCE (§ 78*)—PRESUMPTION—REFUSAL TO PRODUCE DOCUMENTARY EVIDENCE.**

Where one plaintiff, testifying by deposition in an action on promissory notes, stated that he had an agreement relative to the manner in which he was to handle the notes sued on, but on the advice of counsel refused to produce such agreement on request, the legitimate inference was that such evidence, if produced, would be detrimental to plaintiff's case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 98, 100; Dec. Dig. § 78.*]

Appeal from District Court, Barber County.

Action by Frank N. Ireland and another, partners, against E. Shore. From judgment for defendant, plaintiffs appeal. Affirmed.

Seward I. Field, of Medicine Lodge, and R. M. Barnes and J. H. Magoon, of Lacon, Ill., for appellants. Noble & Tincher, of Medicine Lodge, for appellee.

BURCH, J. The plaintiffs, Frank N. Ireland and Charles H. Ireland, are partners dealing in commercial paper under the firm name of Frank N. Ireland & Son. They reside at Washburn, Ill. Robert Burgess and Charles H. Burgess are partners dealing in horses under the firm name of Robert Burgess & Son. They reside at Wenona, Ill. The defendant, E. Shore, resides at Coates, Kan. On February 20, 1907, the defendant purchased of Robert Burgess & Son a stallion which they were exhibiting at a horse show held at Wichita. In payment of the price the defendant executed and delivered to the vendors two promissory notes, each for the sum of \$800, with interest at the rate of 8 per cent. per annum, one due September 20, 1908, and the other due September 20, 1909. On September 3, 1910, the plaintiffs sued the defendant on these notes.

The petition was in the usual form. The answer put in issue the written indorsement on the back of the notes, which reads as follows: "For value received, I hereby guarantee payment of the within note, and waive demand and notice of protest on same when due. Robt. Burgess & Son."

The answer further pleaded that the notes were procured through false and fraudulent representations concerning the stallion, which died soon after the sale, that the plaintiffs were aware of the fraud, and that they were suing on the notes, pretending to be innocent purchasers, in order to aid the scheme of Robert Burgess & Son to defraud the defendant. Other defenses were breach of the terms of the contract of sale and want of consideration for the notes. The reply was a general denial.

The evidence on the part of the plaintiffs was that Frank N. Ireland, representing his firm, purchased the notes of Charles H. Burgess, representing his firm, on April 30, 1908; that the consideration paid was the face of the notes, with interest to April 30, 1908, less 2 per cent.; that the notes were duly indorsed and delivered at the time of the purchase; that all this was done in the usual course of business; that the plaintiffs had ever since owned the notes; and that Robert Burgess & Son had no interest in them.

The evidence on the part of the defendant established the fraud by which the payee obtained the notes. Besides this, facts were shown tending to impeach the plaintiffs' claim that they were purchasers in good faith. This proof was aided by the cross-examination of the plaintiffs' witnesses, and neither of the plaintiffs testified in rebuttal that when they purchased they had no notice of the defect in the title of Robert Burgess & Son.

The court instructed the jury as follows:

"(7) Every holder of negotiable paper is deemed prima facie to be a holder in the due course of business; but, when it is shown

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

that the title of the person who has negotiated the instrument was defective, the burden is upon the holder to prove that he is the holder in due course of business.

"(8) The notes in question are what is known in law as negotiable instruments, and in this connection I say to you that the possession of a negotiable instrument, payable to order, and properly indorsed, is prima facie evidence that the holder is the owner thereof, that he acquired the same in good faith, for full value, in the usual course of business, before maturity, without notice of any circumstance which would impeach its validity, and that he is entitled to recover upon it, and this prima facie case is not overthrown by matters which at best do no more than create a suspicion; and in an action of this kind upon negotiable promissory notes claimed to have been transferred by the payee before maturity, without notice of any defense thereto, the burden of proof is upon the defendant maker of the notes where he admits their execution to prove that they were not so transferred.

"(8½) The title of a person who negotiates an instrument is defective within the meaning of the law when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an alleged consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

The jury found specially that the plaintiffs did not purchase the notes, and returned a general verdict for the defendant. The plaintiffs appeal.

[1] The instructions are criticized as inconsistent and incorrect. The argument seems to be that the instruction placing the burden on the holders to show that they were holders in due course, after proof of defective title in Robert Burgess & Son had been made, is not consistent with the instruction that the possession of a negotiable instrument, properly indorsed, is prima facie proof that the indorsee is a holder in due course, because if, by producing the paper properly indorsed, the holder makes a prima facie case that he is a holder in due course, no further burden rests on him, but the burden of showing the contrary rests on the makers. The fault in this argument lies in the assumption that the holder may rest on the prima facie case made by producing the paper when defective title in the negotiator is proved, the same as he may do when a defense is made lacking the element of fraud, duress, illegality, or breach of faith.

Suppose the defense to a note be simple breach of warranty. By producing the note, properly indorsed, the indorsee establishes prima facie that he is a holder in due course; that is, among other things, that he took the note without notice of any infirmity. This prima facie case is not affected by proof of the breach of warranty. The burden rests on

the maker to go further and show notice of infirmity. The rule is otherwise when the defense is defective title, which is defined by the Negotiable Instruments Law as follows:

"Sec. 62. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Gen. St. 1909, § 5308.

While every holder is given the benefit of the presumption that he is a holder in due course, when a defective title is shown against him he must assume the burden of proving as a fact that he is a holder in due course.

[2] "Sec. 66. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to acquisition of such defective title." Gen. St. 1909, § 5312.

The term "holder in due course" is defined by the Negotiable Instruments Law as follows:

"Sec. 59. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Gen. St. 1909, § 5305.

When defective title is the defense, the first element of this definition alone can be proved by producing the instrument. The others must be established by proof aliunde.

Instruction No. 8 was properly given for the benefit of the plaintiffs should the jury conclude that Robert Burgess & Son were not guilty of fraud, but had broken the contract of sale. Instructions 7 and 8½ were properly given for the benefit of the defendant should the jury conclude that the title of Robert Burgess & Son was vitiated by fraud. Probably the general rule should have been stated first, and then the rules relating to the particular defense of defective title.

It is said that the portion of the eighth instruction relating to the evidence necessary to overthrow the prima facie case for the holder made by producing the instrument properly indorsed is erroneous because it did not embrace the substance of section 63 of the Negotiable Instruments Law, which reads as follows:

"Sec. 63. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Gen. St. 1909, § 5309.

The instruction merely undertook to deal generally with all the matters included in the definition of a holder in due course. It was unimpeachable as far as it extended, and consequently is not open to the exception taken to it. A further instruction calling attention to the particular subject of what it takes to constitute notice of defective title doubtless would have been given had the plaintiffs so desired and so requested. The matter is of no importance, however, since the jury found that the plaintiffs did not purchase the notes at all.

[3] The plaintiffs urge that the special finding of the jury just referred to is not supported by the evidence.

[4] In the spring of 1907, almost a year before the notes were indorsed to the plaintiffs, the defendant notified Robert Burgess & Son of the death of the horse, and demanded that the notes be returned to him. When the notes were indorsed to the plaintiffs, interest on them was due and unpaid, and Frank N. Ireland observed the fact. Frank N. Ireland testified by deposition that he had an agreement in the form of a letter outlining the way in which the plaintiffs were to handle the paper of Robert Burgess & Son. When the deposition was taken, this agreement was in the Washburn bank, an institution run by Charles H. Ireland and others, and only a block away from the office where the deposition was taken. When asked to produce the agreement, the witness refused to do so on the advice of counsel. The legitimate inference was that, if produced, it would be detrimental to the plaintiffs' case, and of benefit to the defendant. *Belknap v. Sleeth*, 77 Kan. 164, 93 Pac. 580. The taking of depositions on behalf of the plaintiffs was not arranged for by the plaintiffs, but by Robert Burgess & Son. A few days before the time arrived Charles H. Burgess called Frank N. Ireland by telephone and asked him to be sure to be in Washburn, as they wanted to take his deposition in the case of *Ireland v. Shore*. The attorneys for the plaintiffs were not employed by the plaintiffs, but by Robert Burgess & Son. These attorneys came to Washburn on the day the depositions were taken in company with Charles H. Burgess, and in his automobile. The defendant undertook to take the deposition of a witness named Douglas at the time and place fixed by the plaintiffs for taking their depositions. Douglas had audited the books of Robert Burgess & Son, and had made a report to them concerning the condition of their notes. He produced the bills receivable

book of that firm, containing a record of the defendant's notes, and while under examination concerning the book Charles H. Burgess seized it, gave vent to some profanity, carried the book from the room, and kept it away for half an hour. When the book was brought back, Douglas read the entries relating to the defendant's notes; but the defendant's attorney was not allowed to see the entries. The record is entirely barren of any testimony on the part of the plaintiffs that, when they purchased the notes, they had no notice of the fraud practiced on the defendant. Testimony of this character was indispensable to sustain the burden cast upon the plaintiffs by section 66 of the Negotiable Instruments Law, and failure to supply it warranted an inference unfavorable to the plaintiffs. *Fowler v. Enzenperger*, 77 Kan. 406, 410, 94 Pac. 995, 15 L. R. A. (N. S.) 784. The conclusion drawn by the jury from all the facts and circumstances, that the plaintiffs were not owners but were merely assisting Robert Burgess & Son to realize on the paper, was not unreasonable.

Certain testimony induced by cross-examination of one of the defendant's witnesses is not regarded as of sufficient moment to overturn the verdict, even if erroneously admitted, and the refusal of the court to require the jury to answer certain special questions propounded to them is not important, in view of the special finding that the plaintiffs did not purchase the notes.

The judgment of the district court is affirmed. All the Justices concurring.

PEOPLE'S STATE BANK OF WELLSVILLE v. DRYDEN et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. BILLS AND NOTES (§ 527*)—ACTION ON NOTE—PAYMENT—SUFFICIENCY OF EVIDENCE.

The evidence examined, and held not to support a finding that an extension of the time of payment of a note was made upon a new consideration, or a finding that the note sued upon had been paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.*]

(Additional Syllabus by Editorial Staff.)

2. PRINCIPAL AND SURETY (§ 108*)—RELEASE OF SURETIES—EXTENSION OF TIME.

A memorandum indorsed on a note, and purporting to extend the time of payment thereof, does not import a consideration under Gen. St. 1909, § 1644, when not signed; and hence, in the absence of evidence of a valid consideration, it must be regarded as a mere voluntary promise which will not release the sureties on the note.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 213-218; Dec. Dig. § 108.*]

Appeal from District Court, Johnson County.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the People's State Bank of Wellsville against Charles Dryden and others. From judgment for defendants, plaintiff appeals. Reversed.

John T. Little and C. L. Randall, both of Olathe, for appellant. J. W. Parker and S. D. Scott, both of Olathe, for appellees.

MASON, J. The People's State Bank of Wellsville brought action against S. S. Larrick and H. S. Dryden, upon a note for \$180.32. The defendants pleaded that the note had been paid, and also that they were sureties, and had been released by an extension of time granted without their knowledge to the principal, Charles Dryden. A jury returned a general verdict for the defendants, and also made a separate special finding in their favor upon each defense. The plaintiff appeals.

[1] The note was due upon its face October 20, 1910. While it was in the possession of the plaintiff bank, its assistant cashier placed a memorandum upon it to the effect that it was "extended 60 days," and later mailed notices to the defendants stating that it would be due at the expiration of that time. The oral evidence on the subject tended to show an agreement that the note should be paid at about that time, no precise date being specified; but the writings referred to doubtless justified the jury in finding, as they did, that a 60-day extension was made. The jury were asked, "Was there anything paid or promised to be paid for the extension of time?" They answered, "We believe there was." All persons having any personal connection with the transaction testified fully concerning it, and there was nothing whatever in the testimony to indicate any new consideration for the extension of the time of payment.

[2] The memorandum on the note was not signed, and was therefore not such a written contract as under the statute (Gen. St. 1909, § 1644) to import a consideration. We think there was no evidence to support the finding that there was a valid consideration for the agreement to extend the time of payment, which must consequently be regarded as merely a voluntary promise to forbear action, which did not release the sureties.

The note sued on, with another for \$113.50, was given originally to the Wellsville Bank, and the question whether it was paid depends upon whether a transaction which took place at the time of their maturity amounted to a payment of the notes by Charles Dryden with money borrowed by him for the purpose from the plaintiff, or to a purchase of them from the payee, by the plaintiff, acting through the agency of Charles Dryden. The following facts bearing upon the matter may be regarded as established, being either admitted or shown by evidence which is not seriously questioned:

Charles Dryden was the principal, and S. S. Larrick and H. S. Dryden the sureties,

upon both notes. When they came due they were still held by the Wellsville Bank, the payee. Charles Dryden went to the plaintiff bank, stated the situation, and indicated his desire to have the notes taken care of. The plaintiff gave him a combined passbook and checkbook upon which it entered a credit of the amount due upon the two notes—\$293.82. He drew a check on the plaintiff for that amount, and gave it to the Wellsville Bank, which in return gave him the notes, with the indorsement: "October 21st, 1910. Pay to the order of Charles Dryden without recourse. Wellsville Bank, by J. T. Preshaw, Cashier." He at once delivered the notes to the plaintiff.

Officers of the plaintiff testified that they directed Charles Dryden to buy the notes for the bank; that one of them telephoned to the Wellsville Bank, explaining that to be their purpose. The testimony of Charles Dryden was entirely consistent with this. He apparently had no very clear idea as to the proper form of words to be used to describe the transaction in its legal effect, but he plainly understood that the notes were to be kept alive as the property of the plaintiff, and therefore his real intention must be deemed to have been to buy the notes for the plaintiff.

The cashier of the Wellsville Bank testified that he called up the plaintiff on the telephone to inquire whether Dryden's check was good, but that nothing was said about the purchase of the notes; that Dryden said he was ready to pay them, but added that Mr. Reed, the cashier of the plaintiff bank, did not want them canceled; that the witness responded by saying that Mr. Reed did not have anything to do with it, but upon reflection concluded to place upon the notes the indorsement already described, and did so.

The decision of the jury must be deemed to have resolved all conflict of evidence or inference in favor of the defendants. The conversation over the telephone must therefore be regarded as eliminated. The question for determination is whether the undisputed facts, coupled with the evidence given by the cashier of the Wellsville Bank, justify a finding that the transaction referred to amounted to a payment of the notes. Although that witness said that he had no intention of selling the notes to the plaintiff, he knew the plaintiff's cashier had requested that the notes should not be canceled, and he made the indorsements because of that request. He testified: "At that time I didn't think as to what the object might be not to have them stamped [canceled]; I just thought I would indorse the notes, pay to Mr. Charles Dryden without recourse, and did so." He was asked: "If you understood at the time * * * that the notes were paid why was it that you indorsed them as you did?" He answered: "Simply because Mr. Dryden didn't want them stamped paid and with the notes going out of our posses-

sion into the possession of Mr. Dryden, I wanted something to indicate that the Wellsville Bank was through with these notes." Another witness called by the defendants testified that the cashier of the Wellsville Bank asked Dryden what Mr. Reed's idea was in not having the notes stamped paid, and that Dryden said he did not know.

This court concludes that the fair inference from all the testimony is that the transaction amounted to a sale of the notes; that the Wellsville Bank was concerned only with the question of its own liability, and, while having no specific purpose to sell the notes, in order to get its money acquiesced in the request that they be not canceled, and thereby consented that they should be kept alive. Charles Dryden of course could not become the holder of the notes "in his own right" without effecting their discharge (Gen. St. 1909, § 5372, subd. 5), but upon all the evidence, if he bought the notes at all, he bought them for the plaintiff.

The jury seem to have attached some importance to the fact that at the time Charles Dryden made his arrangement with the plaintiff for the payment of his check to the Wellsville Bank, there was already on deposit with the plaintiff the sum of \$150 subject to his check. All the evidence concerning this deposit, however, was to the effect that it did not in fact belong to him, and was not used by him. It, therefore, does not affect the matter.

There is no reason to suppose that the facts in the case were not fully developed; and, as the court is of the opinion that they constitute no defense to the note, the judgment is reversed and the cause remanded, with directions to render judgment for the plaintiff. All the Justices concurring.

PHILLIPS COUNTY BANK v. LOWE.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

PLEADING (§ 237*)—RIGHT TO AMEND—JUDGMENT—FINDINGS.

Where, in an action of replevin, the plaintiff alleges the ownership and right of possession in himself under a chattel mortgage and on the trial the court finds, upon sufficient evidence, that the defendant has acquired the possession of the property as the agent and trustee of the plaintiff, and, in substance, that the plaintiff has the superior right to the possession of the property, although not under the chattel mortgage declared upon, *held*, that the motion of the plaintiff to amend its petition to conform to the facts proven and for judgment in its favor upon the findings should have been sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 603-619; Dec. Dig. § 237.*]

Appeal from District Court, Phillips County.

Action by the Phillips County Bank against J. O. Lowe. From judgment for defendant,

plaintiff appeals. Reversed and remanded, with directions.

C. M. Mills, of Phillipsburg, and S. N. Hawkes, of Topeka, for appellant. Mahin, Mahin & Mahin, of Smith Center, and Ernest E. Sprague, of Phillipsburg, for appellee.

SMITH, J. This was an action in replevin to recover the possession of a newspaper press and implements and outfit connected therewith. Appellant brought the action and alleged that it was the owner of the property by virtue of a chattel mortgage, a copy of which was attached to the petition; that the property was of the value of about \$1,000. The appellee answered by general denial, admitted the execution of the chattel mortgage attached to the petition, but alleged that it was void at the time of bringing the action, for the reason that it had not been renewed as required by statute; also alleged certain transfers of the property made by the parties executing the mortgage sued on by appellant, and finally the execution of a mortgage by the last transferee of the property to himself, under which he had taken possession of the property, and attached a copy of his mortgage. The case was tried without a jury. The court made extended findings of fact and conclusions of law, in substance, as follows: On October 28, 1907, one C. E. Nelson and E. J. Lowe, the wife of the appellee, were copartners, and as such were the owners and in possession of the property in question; that on that date the said firm was indebted to appellant in the sum of \$1,010, and interest, upon three promissory notes aggregating that amount, and executed a chattel mortgage thereon to the appellant to secure such indebtedness; that the appellee signed the promissory notes as surety, but did not sign the mortgage; that small payments had been made upon the notes, but at the time of the trial \$1,160 was due thereon; that at all times the appellee acted as the agent of his wife, and transacted business for her as long as she owned an interest in the property; that on October 28, 1909, the appellee bought the interest of his wife therein; that on December 30, 1907, C. E. Nelson was adjudged a bankrupt, and was thereafter discharged; that a referee and trustee in bankruptcy were appointed and elected, and the trustee took possession of the Nelson estate, including the property in controversy; that on the 28th day of October, 1909, being the same day upon which he purchased his wife's interest in the property, the appellee bought the Nelson interest in the property for \$10, subject to all existing liens; that on the same day the cashier and other officers of the appellant authorized the appellee to dispose of the property as he thought best, using his own judgment in the matter as to the price of the property, and to take care of the in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

terests of the appellant in the matter; that on the same day the firm of Stapp & Birkholz was informed by the president of the appellant bank that it had a lien on the property, but the matter was in the hands of the appellee; that they could do business with him, and he would take care of the interests of the bank; that on the same day the appellee sold the property to said firm, and received therefor \$200 in cash and promissory notes signed by the members of the firm individually, and by their wives, for \$1,000, and also secured a chattel mortgage on the property, signed by the same parties, to secure the payment of the notes; that afterwards, and before the commencement of this action, the appellee took possession of the property under the mortgage with the consent of the firm, and holds possession and claims ownership and right of possession thereof; that the property is of the value of \$1,000, and the appellant, before the commencement of the action, demanded possession thereof from the appellee, and the demand was refused; that the sheriff of the county took possession of the property under the writ of replevin and delivered it to the appellant, the appellee having failed to give a redelivery bond therefor; that the appellee had full knowledge of the claim and lien of the appellant on the property during all the times referred to, and at the time of the purchase of the property by him from his wife and the trustee in bankruptcy.

The conclusions of law are, in substance, as follows: That in purchasing the interests of his wife and Nelson, appellee was not an innocent purchaser, but bought the property subject to the mortgage lien of appellant; that appellee acted as the agent and trustee of the appellant in the sale of the property to Stapp & Birkholz; that Stapp & Birkholz bought the property free and clear of the appellant's mortgage lien and received full title thereto as against the claim of appellant; that the appellee in selling the property to Stapp & Birkholz received payment therefor in money and notes in trust for the appellant to the extent of its claim and lien and in taking possession of the property from said firm, under the chattel mortgage executed by them, did so in pursuance of the authority vested in him by the appellant, and holds the same as trustee thereof to the extent of appellant's interest; that in making the appellee agent and trustee of the property, the appellant waived its rights to the possession of the property under the mortgage set out in its petition. Thereupon the court rendered judgment that the appellant take nothing in the action by virtue of the mortgage sued on, and that the appellee recover his costs and have judgment against the appellant for the return of the property or, in case a return cannot be had, for the sum of \$1,000.

The appellant then filed successive motions

as follows: For a new trial; for leave to amend its petition to conform to the facts proven, and to vacate the judgment rendered, and for judgment in its favor; also, a motion to vacate the findings of fact, included in No. 10, which are to the effect that appellant's officers on October 28, 1908, authorized appellee to sell the property and to take care of the bank's interest in the matter and also the notice given by the bank officers to Stapp & Birkholz of their interest in the property; that the matter was in the hands of the appellee, that if they wished they could purchase the property of him; that he would take care of the interests of the bank; and also the findings in regard to the sale of the property from the appellee to the firm, the recovery of the consideration therefor and the retaking of the property on the chattel mortgage executed by the firm. This motion also asked judgment for appellant on all other findings. Thereupon the appellant filed its motion for judgment on the findings as made by the court. Each of these motions was overruled. The bank appeals.

It is apparent, as contended, that the court found the real issues in this case in favor of the appellant; and, in furtherance of justice, even after making its findings of fact and conclusions of law, the motion to amend the petition to conform to the facts proven should have been allowed (section 5733 of the General Statutes of 1909 [Code Civ. Proc. § 140]), and judgment should have been rendered in favor of the appellant.

On the authority of *Kennett v. Peters*, 54 Kan. 119, 37 Pac. 999, 45 Am. St. Rep. 274, and *Ward v. Ryba*, 58 Kan. 741, 51 Pac. 223, it is urged that, as appellant claimed full ownership of the property, while at most it had only a lien thereon, it cannot recover. In the petition it was also alleged that plaintiff was the owner under a certain chattel mortgage. The basis of the claim of ownership was thereby disclosed, and the defendant could not be misled.

The judgment is reversed, and the case is remanded, with instructions to render judgment in favor of the appellant. All the Justices concurring.

SINGER v. TAYLOR et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. WILLS (§ 707*)—PROCEEDINGS TO CONSTRUCT—COSTS—APPORTIONMENT—DISCRETION.

In an action other than for the recovery of money only or for the recovery of specific real or personal property, the court, in its discretion, may tax costs and apportion the same between the parties as, in its discretion, it may think right and equitable.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1684-1686; Dec. Dig. § 707.*]

2. WILLS (§ 707*)—PROCEEDINGS TO CONSTRUCT—COSTS—ATTORNEYS' FEES.

Where there is ambiguity in the provisions of a will and a real controversy as to its construction, it is competent for the court to allow reasonable attorneys' fees out of the estate to the defeated as well as the successful party.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1684-1686; Dec. Dig. § 707.*]

Appeal from District Court, Crawford County.

Action by Sallie C. Singer against J. Luther Taylor and others. Judgment for defendants, and plaintiff appealed. On motion for allowance of costs and attorneys' fees. Motion allowed.

F. B. Wheeler and C. S. Denison, both of Pittsburg, G. L. Dunn, of Onaga, O. T. Boaz, of Pittsburg, L. W. Johnson, of Kansas City, R. W. Blair, of Topeka, B. W. Scandrett, of Omaha, Neb., and C. A. Magaw, of Topeka, for appellant. Nelson Case, of Oswego, J. J. Campbell, of Pittsburg, and B. S. Gaitskill, of Girard, for appellees.

JOHNSTON, C. J. This motion involves the question of whether costs and attorneys' fees shall be allowed to the unsuccessful party out of the estate of the testator. In this case the will of Joseph I. Taylor, which disposed of a large estate, was held to be valid, and one of its provisions was construed. A daughter, Sallie C. Singer, contested the validity of the will on the ground that it was the result of undue influence. She also alleged that a certain provision in it was ineffectual to transfer a large part of the estate, and, at least, that part of the property must be divided according to the laws of descents and distributions. In defendants' answer they denied the averments that undue influence had been exercised upon the testator and then asked for an interpretation of the will and a determination that it disposed of the entire estate of the testator. On these issues a trial was had, and the contentions of the defendants were sustained. *Singer v. Taylor*, 90 Kan. 285, 133 Pac. 841.

[1] The greater part of the testimony in the case related to the contest of the will, but there was a substantial controversy between the parties as to the interpretation of one of its important provisions, and in both courts serious consideration was given to this controversy. As the action is not one for the recovery of money only or specific real and personal property, costs are not allowed as of course to the prevailing party; but the court may assess the costs as, in its discretion, it may think right and equitable. Code Civ. Proc. §§ 613, 615 (Gen. St. 1909, §§ 6208, 6210). An equitable proceeding for the construction of a will is peculiarly a case that appeals to the discretion of a court, and, where there is an ambiguity in the will and a real question of interpretation, the court is justified in not only assessing the costs of

the litigation against the estate, but also in allowing reasonable attorneys' fees payable out of the estate to the defeated, as well as the successful party. *Moore v. Alden*, 80 Me. 301, 14 Atl. 199, 6 Am. St. Rep. 203; *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681; *Missionary Society et al. v. Mead et al.*, 131 Ill. 33, 23 N. E. 603; *Ingraham v. Ingraham*, 169 Ill. 432, 48 N. E. 561, 49 N. E. 320; 40 Cyc. 1868; Page on Wills, § 813.

[2] Here the estate was large, it being estimated at a quarter of a million dollars, and the daughter, who was defeated, was only given outright \$500, and to that was added the income to be derived from \$10,000. All the remainder of the estate was given to her brother. We cannot say that the application to the court to construe the will, in which both parties joined, was not made in good faith, and therefore it is a case in which the court may justly exercise its discretion in awarding costs and also in the allowance of attorneys' fees out of the estate. The parties may be able to agree as to the amount of attorneys' fees to be allowed to the plaintiff; but, in the event that they are not, the district court may determine as to the extent of the work done by attorneys in the branch of the case relating to the construction of the will and the value of the services rendered in the district court as well as in the Supreme Court and make an allowance for attorneys' fees payable out of the estate. All of the costs in the Supreme Court will be taxed against the estate. All the Justices concurring.

STATE ex rel. ISE, Co. Atty., v. CLINE et al. (Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 229*)—STATUTES (§ 70*)—TAXATION (§ 859*)—UNIFORMITY—EQUAL PROTECTION.

Chapter 248 of the Laws of 1909, commonly called the "Inheritance Tax Law," does not violate the clause in the Bill of Rights declaring that free governments are instituted for the equal protection and benefit of the people, nor does it violate the constitutional provisions respecting uniformity in the operation of general laws and uniformity and equality in the rate of assessment and taxation. The act is therefore *held* valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229;* Statutes, Cent. Dig. §§ 71-76; Dec. Dig. § 70;* Taxation, Cent. Dig. § 1674; Dec. Dig. § 859.*]

Appeal from District Court, Montgomery County.

Action by the State, on relation of Chas. D. Ise, County Attorney, against Hattie M. Cline, administratrix, and others. From a judgment sustaining demurrers to the petition, plaintiff appeals. Reversed and remanded.

Jno. S. Dawson, Atty. Gen., Chas. D. Ise, of Coffeyville, and J. W. Holdren, of Independence, for appellant. S. J. Osborn, of Coffeyville, for appellees.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

BENSON, J. The sole question upon this appeal is whether an inheritance tax law of this state is valid. The statute was enacted in the year 1909, being chapter 248 of the Laws of 1909. Although repealed at the Legislative session of 1913 (Laws 1913, c. 330), it nevertheless governs the controversy.

The constitutionality of the law is challenged on two grounds: First, that it violates section 2 of the Bill of Rights, declaring that free governments are instituted for the equal protection and benefit of the people; and, second, that it does not have uniform operation throughout the state, as required by section 17 of article 2 of the Constitution. Incidentally section 1 of article 11, requiring a uniform rate of taxation, will also be considered.

The statute in terms provides that all property not covered by certain specified exemptions, which passes by will, intestate succession or gift, or by grant or deed in contemplation of death to take effect in possession after death, shall be subject to a tax. The rates of taxation are graduated according to a classification of persons who receive the property, and progressive in rates according to the amount received. In these respects our statute follows the general scheme of the statutes in other states upon this subject and follows closely the Massachusetts law on this subject. The following table prepared by the State Tax Commission for the information of local officers shows the practical operation of the statute:

Inheritance tax laws have long been in force in England and in the countries of continental Europe and for a considerable time in many states of this Union. In a note in volume 41 Am. St. Rep. p. 580, it is said: "Taxes upon legacies and inheritances have been approved generally by writers upon political economy, and systems of taxation, and no tax can be less burdensome and interfere less with the productive and industrial agencies of society. * * *" The learned annotator cites many adjudicated cases supporting these propositions. It is not necessary to quote from the multitude of opinions, for they speak with substantial uniformity in sustaining such taxation, which began in this country in Pennsylvania in the year 1826 and has been gradually adopted in other states, until, at the National Conference on Taxation in the year 1911, it was shown that this means of revenue had been provided by statute in 38 states. State and Local Taxation, Fifth National Conference 1911, p. 307.

While our statute, like many others, refers to the succession or transfer as property subject to the tax, there is practical uniformity in the decision in states having statutes containing similar phraseology that this is not a property tax but a tax upon the right of succession, upon the right to receive and not upon the property nor upon the right of disposal. *Scholey v. Rew*, 23 Wall. (90 U. S.) 331, 23 L. Ed. 99; *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 969; *State v. Vinsonhaler*, 74 Neb. 675, 105 N. W. 472;

Indication of Relationship.		RATES APPLICABLE.				
		On amounts up to and including \$25,000.	On amounts from \$25,000 to \$50,000.	On amounts from \$50,000 to \$100,000.	On amounts from \$100,000 to \$500,000.	On amounts in excess of \$500,000.
		Per cent.	Per cent.	Per cent.	Per cent.	Per cent.
Class A. { Husband, wife, lineal ancestor, lineal descendant, adopted child, lineal descendant of any adopted child, wife or widow of a son, or husband of a daughter.		1	2	3	4	5
Class B. { Brother, sister, nephew, or niece.		3	5	7½	10	12½
Persons in other degrees of collateral consanguinity, strangers or others not included in Class A and B.		5	7½	10	12½	15

NOTES.

1. As to Class A, the law does not become operative until the legacy or succession exceeds \$5,000, when the legatee, devisee or beneficiary is the husband, wife, father, mother, child or adopted child of the deceased.
2. As to Class B, the law does not become operative until the legacy or succession exceeds \$1,000.
3. As to all persons not included in the exceptions stated in Note 1 and Note 2 above, the law becomes operative as to all legacies and successions, no matter how small.

Blakemore & Bancroft, Inheritance Taxes, 7. Many decisions declaring this principle are cited in a note in 33 L. R. A. (N. S.) 606, 610. Even in jurisdictions where it is held that the right to take property by will or inheritance is a natural right which Legislatures cannot take away, it is held that such taxes may be lawfully imposed under the power to make reasonable regulations for the devolution of property upon the death of the owner. *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711; *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259. It was said in *Mager v. Grima et al.*, 49 U. S. (8 How.) 490, 493, 12 L. Ed. 1168: "Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and term upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it." The principle that the state may absolutely control the descent of property is adopted in *Kansas* (*Hannon v. Taylor*, 57 Kan. 1, 45 Pac. 51) and is supported by the great weight of authority (note in 9 L. R. A. [N. S.] 121).

An inheritance tax is in the nature of an excise upon the transfer rather than a property tax, and the constitutional rule requiring uniformity in the rate of assessment of property prevailing in this and other states does not apply. *Burroughs on Taxation*, § 54; *Sedgwick on Stat. and Const. Law*, 504-507. It is analogous to a license or occupation tax. In *City of Newton v. Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486, it was held that a graduated occupation tax was not violative of the constitutional rule of uniformity, and this view prevails generally. It was said in *Pacific Express Co. v. Seibert*, 142 U. S. 339, page 351, 12 Sup. Ct. 250, page 253 (35 L. Ed. 1035), that: "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms. * * *"

The foregoing language was quoted and applied to an inheritance tax law of Illinois in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, where that law was upheld against an attack based upon a supposed conflict with the provisions of the federal Constitution, securing to citizens the equal protection of the law. It was also held that the classification and progressive features of the Illinois statute did not transgress any requirement of uniformity in taxation.

Passing to the specific objection that the statute is in violation of that provision of the Bill of Rights declaring that all free governments are founded for the equal pro-

tection and benefit of the people, the appellant relies upon *State of Ohio ex rel. v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218, wherein an Ohio statute providing for inheritance taxes was held to be in contravention of a similar provision in the Constitution of that state. In the statute there under consideration estates not exceeding \$20,000 in value were exempted from its operation. The court, in harmony with others already referred to, held that the tax was not upon property but upon the right to receive property. It was also said that the power of taxation, being unlimited by the Constitution, included authority to tax rights, privileges, and franchises, which were not covered by the clause requiring uniformity in taxation. It was held, however, that the exemption clause was in violation of the declaration of the Bill of Rights that government is instituted for the equal protection and benefit of the people. It was said that the privilege of receiving the first \$20,000 of an estate, not exceeding that sum, is protected from taxation, while the right to receive the first \$20,000 of an estate exceeding that sum was taxed \$200, and that this was not equal protection.

It was held in *Black v. State*, 113 Wis. 205, 89 N. W. 522, 90 Am. St. Rep. 853, that the exemption of estates under \$10,000 in value, provided for in a Wisconsin statute, conflicted with the constitutional guaranty of equal protection of the law. It was not decided whether the statute also violated the rule of uniformity, although that matter was commented on, and the court said that it was difficult to distinguish without undue refinement between a tax upon a succession and a property tax. In the same opinion, however, it was stated that, if the Wisconsin law, like the New York law, had simply levied a tax of 5 per centum on collateral inheritances or transfers exceeding \$500 in amount, there would be no difficulty in sustaining it. Turning to the New York inheritance tax law of 1885, referred to in that opinion, as it is cited and construed in the decisions in New York, it is found that it authorized taxes upon devises to collateral relations only when the estate devised to them exceeded \$500 in value. *Matter of Cager*, 111 N. Y. 343, 18 N. E. 866.

The New York statute (chapter 483, Laws of New York 1885) contained a proviso that an estate passing by will or inheritance "valued at a less sum than five hundred dollars shall not be subject to such duty or tax." This \$500 limitation was held to apply to the property passing to a legatee and not to the whole estate. *Matter of Howe*, 112 N. Y. 100, 19 N. E. 513, 2 L. R. A. 825. These decisions were reviewed and confirmed in *Matter of Hoffman*, 143 N. Y. 327, 38 N. E. 311, where a revision of the act of 1885 was under consideration. The similarity of the New York

proviso, as construed by courts of that state and that of our own statute providing that it shall not be operative unless the legacy or succession exceeds the sum specified in each class, will be readily noticed. Yet the New York law was held to be valid, and, as observed by Judge Winslow in the Black Case, a like provision would have been held valid in Wisconsin.

In Massachusetts a statute providing for a similar exemption to that in Wisconsin referred to in the Black Case was held valid in *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259. A later revision of the Massachusetts statute contains provisions for exemptions substantially like our own, only the amount is larger where the succession is to the husband, wife, or lineal heirs. Mass. Sup. Rev. Laws, 1902-08, p. 241; Acts Mass. 1909, pp. 647, 791; Ross on Inheritance Taxation, 517.

Other courts have held in harmony with those of New York, that no constitutional guaranty is violated by provisos exempting from taxation successions or legacies below a certain amount in value. It is held in Vermont that a succession tax is not a tax upon property transmitted but upon its transmission and is not obnoxious to the rule of uniformity and equality although estates of less than a specified value are exempted from its operation. In *re Hickok*, 78 Vt. 259, 62 Atl. 724, 6 Ann. Cas. 578. In Montana the same result was declared concerning a proviso exempting estates below a certain amount in value. It was held that the proviso did not deny to any one the equal protection of the law nor violate the rule of uniformity. *Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170. In a vigorous opinion giving the history of inheritance taxes and reviewing the various objections to their validity, the Supreme Court of Tennessee sustained the validity of a statute exempting estates under \$250 in value from its operations. *State v. Alston*, 94 Tenn. 674, 30 S. W. 750, 28 L. R. A. 178. In Iowa estates above \$1,000 in value passing by will or inheritance to collateral heirs or strangers are subjected to a tax, and it is held that, when an estate exceeds that sum, there is no exemption. *Herriott v. Bacon*, 110 Iowa, 342, 81 N. W. 701; *Gilbertson v. McAuley*, 117 Iowa, 522, 91 N. W. 788. The validity of the Iowa statute was upheld in *Ferry v. Campbell*, 110 Iowa, 290, 81 N. W. 604, 50 L. R. A. 92, but it does not appear that the exemption feature was discussed.

In the great case of *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. 747, 44 L. Ed. 939, the court, in an opinion by Mr. Justice White, sustained the validity of an act of Congress providing for a succession tax upon legacies or distributive shares in personal property in excess of \$10,000 passing by death. The court held that the amount specified referred to each share received and not to the

whole estate, and upheld the act against all arguments assailing its validity based upon objections to classification and progression in rate and against other objections similar to those urged here. The decision in *State of Ohio ex rel. v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218, was referred to in that opinion as maintaining a contrary doctrine but was not approved. Concluding the opinion covering over 50 pages, the court said: "The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences, which it is asserted must arise in the future if the right to levy a progressive tax be recognized, involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function." 178 U. S. 109, 20 Sup. Ct. 774, 44 L. Ed. 939.

In the earlier case in the same court, reviewing a judgment of the Supreme Court of Illinois, upholding an inheritance tax law of that state, the following principles were declared: "(1) An inheritance tax is not one on property but one on the succession. (2) The right to take property by devise or descent is the creature of the law and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state Constitutions requiring uniformity and equality of taxation." *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288, 18 Sup. Ct. 594, 42 L. Ed. 1037.

Referring again more directly to exemptions it appears from a note to the report of *Booth's Ex'r v. Commonwealth ex rel. Jefferson County Atty.*, 130 Ky. 88, 113 S. W. 61, in 33 L. R. A. (N. S.) 595, a case quite pertinent upon this inquiry, that exemptions, although differing in details, some being taken from the whole estate, others from the specific share transferred, and still others only where the property does not exceed a certain sum in value, are generally held not to invalidate the law in which they are contained.

In Ross on Inheritance Taxation, § 133, it is affirmed that laws exempting transmissions of property where the value does not exceed a specified amount are not subject to constitutional objections.

It is concluded that the inheritance tax law does not violate that clause in the Bill of Rights declaring that free governments are instituted for equal protection and benefit, and is not in conflict with the constitutional provisions respecting uniformity in the operation of general laws and uniformity and equality in the rates of assessment and taxation. No other constitutional objections to the statute are presented in the argument or discussed. The statute is therefore held valid.

The scope of section 2 of the Bill of Rights was stated in *Atchison Street Ry. Co. v. Mo. Pac. Ry. Co.*, 31 Kan. 680, 3 Pac. 284, and section 1 was considered in the recent case of *Schaaake v. Dolley*, 85 Kan. 598, 600-603, 118 Pac. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913A, 254. These decisions, so far as pertinent to this case, are in harmony with the conclusions reached.

The district court, holding the statute unconstitutional, sustained demurrers to the petition. This judgment is reversed, and the cause is remanded for further proceedings. All the Justices concur.

CHILSON v. ROGERS et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

WILLS (§ 11*)—REVOCATION OF CONSENT—HUSBAND AND WIFE.

A written consent that his wife might devise or bequeath away from him more than one-half of her property was freely and fairly executed by the husband in strict compliance with the statute authorizing such consent after reading the will and learning the disposition which his wife intended to make of her property. Later, and before the death of his wife, he gave her written notice that he had revoked the consent previously given, and after her death he claimed that he was entitled to one-half of the property of which she died possessed. *Held*, that the husband did not have the right to revoke the consent so given and was not entitled to a share of his wife's property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 28-31; Dec. Dig. § 11.*]

Appeal from District Court, Shawnee County.

Action by John G. Chilson against Lula A. Rogers and others. From judgment for defendants, plaintiff appeals. Affirmed.

Stone & McDermott, of Topeka, for appellant. Hazen & Gaw, of Topeka, for appellees.

JOHNSTON, C. J. In this action begun by the appellant, John G. Chilson, to set aside the will of his wife, Cynthia A. Chilson, the question involved is: Can a consent, given by him in pursuance of the statute that his wife may will from him more than one-half of her property, be revoked? The case was submitted on an agreed statement of facts which shows that the appellant was 63 years of age and Cynthia A. Chilson 64

years of age at the time of their marriage on March 1, 1903. Mrs. Chilson was the owner of some property which came to her from a former marriage. No children were born to them of their marriage, but from a former marriage each had living adult children. On March 30, 1911, and when at the age of 72 years, Cynthia A. Chilson executed her last will and testament leaving all her property to her own children and grandchildren. This was done with the written consent of her husband, which he executed in the presence of two witnesses on March 30, 1911. In a letter written on May 1, 1911, and delivered the following day, to his wife, Chilson undertook to revoke the consent previously given. It appears that appellant had no property of substantial value at the time of his marriage with Cynthia A. Chilson; that he received a pension of \$12 a month from the government which was later increased to \$15 a month; that he cared for the property of Cynthia A. Chilson as much as his impaired health would permit; and that his pension, together with his other earnings, were contributed towards the support of himself and wife. No change in the property rights of either party was made after the will and consent were executed, nor was any change made in the will of Mrs. Chilson before her death, which occurred on October 6, 1912. At that time she was possessed of property of the approximate value of \$2,953. On the trial the court, on the pleadings and agreed facts, decided in favor of the appellees, holding that the consent given by appellant was still binding upon him. He appeals, and contends that his consent to the will was effectually revoked by his letter of May 1, 1911, and that he is therefore entitled to one-half of the property of Cynthia A. Chilson.

The right to take property either by devise or descent is derived solely from the state and is wholly within the control of the Legislature. The husband can only receive a share of a deceased wife's estate or the wife of a deceased husband's estate either by will or inheritance where the statute of the state authorizes it, and then only in the measure and according to the rules which the statute prescribes. *Hannon v. Taylor*, 57 Kan. 1, 45 Pac. 51; *State ex rel. v. Cline*, 137 Pac. 932, and cases cited.

The statute provides that the wife may take one-half of her deceased husband's estate and the husband may take the same share of his deceased wife's estate, and it is further enacted that: "No man while married shall bequeath away from his wife more than one-half of his property, nor shall any woman while married bequeath away from her husband more than one-half of her property. But either may consent in writing, executed in the presence of two witnesses, that the other may bequeath more than one-half of his or her property from the one so con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sending." Gen. Stat. 1909, § 9811. This section not only authorizes the giving of consent but specifically provides the form and manner in which it shall be given. There is no requirement that it shall be attached to or be regarded as a part of the will, and it is not necessary that it shall designate the will to which it applies. *Keeler v. Lauer*, 73 Kan. 388, 85 Pac. 541. It is enough that a writing freely, fairly, and legally made shall express the consent of the husband or wife that the other may bequeath or devise more than one-half of his or her property away from the one consenting. The one to whom it is given is then at liberty to give the share so legally surrendered to whomsoever he may will. It is not necessary that the one consenting shall be given property by the will of the other, nor that there shall be any consideration for the consent. *Hanson v. Hanson*, 81 Kan. 305, 308, 105 Pac. 444. When such written consent is made in accordance with the statute and delivered to the other spouse, it is a binding disposition of a property right unless some statutory authority can be found for revoking or setting it aside. Although definite provisions have been made for executing this consent, none can be found providing for revoking it. Careful provisions have been made for revoking wills, and it is a fair inference that, if it had been the legislative intent that a formal written consent could be revoked, provisions would have been made for that purpose as to the time and manner in which it could be done. If the statutory written consent can be set aside at the option of the maker, as contended for by appellant, then it would seem that a mere oral revocation would be effective, and it would be well-nigh impossible to meet a fraudulent claim of a surviving spouse that a withdrawal of consent had been orally made. The question of the right of the consenting party to revoke his consent in a case like this has not been directly considered, but it was held in *Keeler v. Lauer*, supra, where the husband after the death of his wife undertook to nullify a consent previously given, that it was not then within his power to revoke it. In deciding the case it was said: "With this consent Mrs. Hellbrun had a complete right to dispose of all her property by will." 73 Kan. 396, 85 Pac. 544.

In the absence of statutory authority to do so, there is no more warrant for revoking such a consent before than after the death of a spouse. It has also been determined that a consent cannot be repudiated or set aside because of a subsequent discovery that the estate is larger than the consenting party had supposed; she having been fully inform-

ed as to her rights and having given her unconstrained consent. *Pirtle v. Pirtle*, 84 Kan. 782, 115 Pac. 543. Of course a written consent, like other instruments, will not be valid if it is obtained by deception, undue influence, or fraud of any kind. *Weisner v. Weisner*, 89 Kan. 352, 131 Pac. 608. It is argued that, as a will may be revoked at the option of the maker, a consent to the making of that will should be equally open to revocation, at least until the will became operative. The consent, as we have seen, is no part of the will and, being a creature of the statute, cannot be annulled or recalled unless provision to do so is made by statute. As it is an independent provision of statute, the common-law rules as to marital agreements and relations or as to the mutual wills of husband and wife are not applicable, neither can any aid to the interpretation of our statute be derived from the decisions of the courts of other states upon statutes not like ours. The Legislatures of Massachusetts and Colorado enacted laws of similar purport, but no interpretation of the provision in question by the courts of either state has been brought to our attention. The consent provided for is akin to the provision that a widow may elect to take under the law instead of under the will of her husband. Gen. Stat. 1909, § 9818. In *Hanson v. Hanson*, supra, it was held that, where the wife had consented that her husband might dispose of all his property as if unmarried, it was not necessary for her, if called upon after his death, to make an election under the provision giving her that right. The election, like the consent, is provided for by statute, and no authority is given by statute to recall or revoke such election. It is held that an election freely and intelligently made is a finality which effectually concludes and estops the widow from setting aside her decision or reclaiming the relinquished right. *Buchanan v. Gibbs*, 28 Kan. 277; *Reville v. Dubach*, 60 Kan. 572, 57 Pac. 522; *Ashelford v. Chapman*, 81 Kan. 312, 105 Pac. 534.

It appears that the consent of appellant was formally, freely, and intelligently given after he had read the written relinquishment as well as the proposed will and had thus learned the disposition which his wife intended to make of her property in pursuance of his consent. The consent was made in strict compliance with the law, and there is no claim that there was overpersuasion, misrepresentation, or fraud practiced in procuring it. No legal ground for setting aside the consent has been suggested.

The judgment of the district court will therefore be affirmed. All the Justices concurring.

GAGE v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

RAILROADS (§ 327*)—CROSSING ACCIDENT—
COLLISION WITH AUTOMOBILE—CONTRIBUTORY
NEGLIGENCE.

An automobile driver approaching a railway crossing was driving his car at a speed of something less than ten miles an hour when he was within 15 feet of the railway track. The highway on which he was driving was wet, and his vision was so obscured by rain and snow that he could see only about 300 feet. He was fully conscious of the conditions, and was familiar with the management of an automobile. When 15 feet from the track he saw an approaching train about 300 feet away. He then used all appliances for stopping his car, but it "skidded" on the slippery ground until it went upon the railway track, where the engine of the car stopped, and it was struck by the train. *Held*, he was guilty of negligence contributing to the injury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1043-1066; Dec. Dig. § 327.*]

Appeal from District Court, Reno County.
Action by G. R. Gage against the Atchison, Topeka & Santa Fé Railway Company. From judgment for plaintiff, defendant appeals. Reversed.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Prigg & Williams, of Hutchinson, for appellee.

BURCH, J. The plaintiff sued for damages for injury to his automobile occasioned by a collision with one of the defendant's trains at a highway crossing near the city of Hutchinson. The petition charged that the defendant was guilty of negligence in failing to sound the locomotive whistle at the place and in the manner required by statute. One of the defenses was contributory negligence on the part of the plaintiff. The plaintiff recovered, and the defendant appeals.

The highway, which is a country road, but is known as Lorraine street, extends north and south across the railway company's tracks. Approaching from the south, the first track to be encountered is a switch track to a mill. Fifty and one-half feet north of this track is the main track. A short distance beyond is a side track, and still farther north is a switch track to a salt plant. The mill track is approached on a slight grade of 1 foot and 4 inches in 50 feet, and the main track is 1 foot and 5 inches higher than the mill track. Six hundred and twenty-two feet east of the center of Lorraine street the main track crosses the track of the Chicago, Rock Island & Pacific Railway. At this point there is a signal tower and a semaphore. When a Santa Fé train approaches the railway crossing from the east, the engineer notifies the signal man in the tower by one blast of the whistle. The signal man then adjusts the mechanism which operates the semaphore. The engineer then gives two blasts of the whistle to indi-

cate that he understands the semaphore signal, and, if the way be clear, he proceeds over the crossing. The train which struck the plaintiff's automobile came from the east on the main track and gave these signals in their order. The engineer of the train testified that, besides the railway crossing signals, he also gave the usual statutory signal for the highway crossing, consisting of two long and two short blasts of the whistle, but the jury disregarded the evidence. The collision occurred between 4 and 5 o'clock in the afternoon of a stormy day. The plaintiff was driving his automobile northward on the highway toward the defendant's tracks. He was familiar with the crossing, knew the main track was the track of the defendant's main line, and knew that numerous trains were operated upon it. Before turning into Lorraine street he heard, indistinctly, one blast of a locomotive whistle, but none after that. He testified that he was driving at the rate of from 10 to 15 miles per hour. As he went upon the mill track he slowed down to something less than 10 miles per hour. How much less he could not say, and the jury did not say. In a written statement made to the railway company before suit was brought, he said he was driving at the rate of about 10 or 15 miles an hour. He looked and listened for a train without stopping and drove on without any intention of stopping unless he saw or heard something indicating the approach of a train. He testified that the mill track and the main track are probably 15 or 20 feet apart, and that when within about 15 feet of the main track he saw the train, which was then about 300 feet away. He instantly used all the appliances to stop his car, but it "skidded" on the wet and slippery road, until the front wheels were over the south rail of the track. He could not back because his engine had stopped, and he saved himself by leaping from the car.

The jury returned, among others, the following findings of fact: "Q. Did the engineer, in giving the signal to the tower man and in answering the signal from the tower man at the Rock Island crossing, blow the whistle three times? A. Yes, one long blast and two short blasts; blown at two separate times as signals to the tower man. Q. If you answer the above question 'Yes,' then state how far from the Lorraine street crossing the engine was when said whistles were blown. A. One long blast blown 3,150 feet from Lorraine street crossing. Two short blasts blown between 850 and 1,050 feet of the Lorraine street crossing. Q. If you find from the evidence that the defendant railway company was negligent, then state in what the negligence consisted, and what employé of the railway company was negligent. A. The whistle was not blown in accordance with the statutes of the state of Kansas. Q. How fast was plaintiff, G. R. Gage, driving his automobile when he reach-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed a point within 15 feet of the crossing? A. Less than 10 miles an hour. Q. Did the plaintiff, G. R. Gage, on approaching the railway tracks with his automobile, try to stop the same at any time before he saw defendant's railway train approach from the east? A. No. Q. When plaintiff, G. R. Gage, first saw the approaching train, how far was he (Gage) from the railway track on which his machine was struck? A. Fifteen feet. Q. Was there any obstruction to plaintiff's view when he arrived at or near the railway tracks going north with his automobile? A. Yes, rain and snow. Q. If you answer the above question in the affirmative, then state the nature and extent of such obstruction. A. Rain and snow. Q. If you find that the plaintiff's view was obstructed, then state whether or not plaintiff knew that his view was obstructed and was fully cognizant of that fact when he attempted to make the crossing. A. Yes. Q. Did the plaintiff, Gage, attempt to stop his machine by putting on the emergency brake after he saw the train approaching from the east? A. Yes. Q. If you answer the last question in the affirmative, then state why the automobile was not stopped before it got on the track where it was struck. A. Slippery road and automobile skidded. Q. At or shortly before the time of the accident, was the ground wet, and did this fact cause the automobile to slide or skid? A. Yes. Q. If you answer the foregoing question in the affirmative, then state whether or not the plaintiff, Gage, knew the condition of the ground at that time. A. Yes. Q. Was the plaintiff, Gage, familiar with the handling of an automobile, and had he been running an automobile for about two years before the accident? A. Yes. Q. State whether at any time the engine of the automobile went dead, and, if so, where the automobile was at the time? A. Engine of the automobile went dead while automobile was on main track of Santa Fé. Q. Did the plaintiff look for the train before going onto the track, where he was struck, when he was 30 feet away? A. Yes. Q. If you answer the last question in the affirmative, then state what prevented him seeing the train. A. Rain and snow. Q. How far could the plaintiff, Gage, have seen the approaching engine and train on defendant's railway had he looked when his automobile was 15 to 25 feet from the place of collision? A. Plaintiff did look; could see about 300 feet. Q. If the plaintiff had stopped, looked, and listened when he was 30 feet south of the railway tracks, could he have avoided the accident? A. Plaintiff exercised reasonable care."

The defendant argues that the signals to the tower man substantially complied with the statute which requires three blasts of the whistle to be given not less than 80 rods from a highway crossing (Gen. Stat. 1909, § 1770), and that the failure to give the statutory signal could not be the proximate cause

of the injury, since three proved blasts of the whistle, one of them heard by the defendant and the other two given approximately 80 rods from the crossing, seem to have been impotent as a warning. The question of the defendant's negligence may be passed by, since the plaintiff was guilty of contributory negligence as a matter of law.

The railway tracks were themselves warnings of danger. Besides this, the plaintiff had heard a locomotive whistle and knew a train was in the vicinity. When he reached the tracks he heard no sound indicating that a train was near, and consequently was dependent upon sight for his safety. The range of his vision was so limited by rain and snow that he could not see a railway locomotive beyond a distance of 300 feet, and he was fully conscious of the limitation. He knew the wet condition of the road and knew how to handle an automobile. He was in a place of safety when he saw the train, had he been in control of his car, but he was driving at such speed that, when he applied the brakes, the momentum of the car carried it up the slight incline and upon the railway track before it stopped. Ordinary prudence required him to control his car so that he could use his faculty of sight near the track where it would be of most benefit to him, and so that he could stop before going on the track if a train should appear within the distance he was able to see.

In the case of *Corley v. Railway Co.*, 90 Kan. 70, at page 73, 133 Pac. 555, 556, the action was brought for damages resulting from the death of an occupant of an automobile who was not the automobile driver. The approaching train could have been seen when the automobile was 20 feet from the track. In the opinion it was said: "The defendant further maintains that a judgment in its favor on the issue of contributory negligence is required by the findings. These show that at a distance of 20 feet from the track the train could have been seen by the deceased. This would doubtless preclude a recovery if he had been managing the automobile. Reasonable prudence required the driver to approach the crossing with his car under control, to look for the train as soon as he was in a position to see it, and to stop as soon as he knew of its approach."

In this case the thick curtain of rain and snow made the latest opportunity for observation before going on the track the best, and the duty to look and to keep the car under such control that it could be stopped continued until it was on the point of going upon the railway track.

The distinction between this case and the case of *Smith v. Railway Co.*, 91 Kan. 31, 136 Pac. 930, decided at the last sitting, is that Smith's view of the track was virtually obscured until he passed the hedge. When he had done this, moving at the slow pace of three miles per hour, the front portion of his automobile was in danger from the ap-

proaching railway car which was then only 50 feet away.

The special finding of the jury that the plaintiff exercised reasonable care, evidently made to evade answering the question to which it was appended, avails nothing because the other findings of fact quoted show that it is contrary to law.

The judgment of the district court is reversed, and the cause is remanded, with direction to enter judgment for the defendant on the findings of fact. All the Justices concurring.

EWING v. WICHITA R. & LIGHT CO.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. TRIAL (§ 94*)—EVIDENCE—REFUSAL TO STRIKE.

The overruling of a motion to strike out testimony, to the admission of which no objection was made, and where the grounds of the motion to strike are not stated, is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 247; Dec. Dig. § 94.*]

2. CARRIERS (§ 347*)—ALIGHTING STREET CAR PASSENGER—CONTRIBUTORY NEGLIGENCE.

It is not negligence per se for a passenger to alight from a street car while it is in motion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.*]

3. CARRIERS (§§ 298, 316*)—INJURY TO ALIGHTING PASSENGER—NEGLIGENCE—PRESUMPTION.

The mere fact that a passenger is upset by the motion in starting an electric car does not establish negligence in those operating it, as the movement may be one that is usual and incident to that means of transportation, but proof of an injury received by a passenger from the sudden and violent starting of a car as he was alighting therefrom is ground for an inference of negligence against the railway company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206, 1261, 1262, 1283, 1285-1294; Dec. Dig. §§ 298, 316.*]

(Additional Syllabus by Editorial Staff.)

4. EVIDENCE (§ 477*)—COMPETENCY—OPINION—EVIDENCE.

That a witness is not an expert does not necessarily render him incompetent to testify as to the bodily condition and health of persons.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.*]

Appeal from District Court, Sedgwick County.

Action by Ella R. Ewing against the Wichita Railroad & Light Company. From judgment for plaintiff, defendant appeals. Affirmed.

Kos Harris and V. Harris, both of Wichita, for appellant. Gardiner & Buckley, of Wichita, for appellee.

JOHNSTON, C. J. This action was begun by the appellee, Ella R. Ewing, to recover damages from the appellant, the Wichita Railroad & Light Company, for injuries sus-

tained by her when alighting from one of the appellant's cars which it operated in the city of Wichita. On January 30, 1912, at about 6:30 p. m., the appellee became a passenger thereon by boarding the car on Pattie avenue to go to Elm and Main streets. When about the middle of the block south of Elm street, she pressed the button signaling the motor-man to stop the car to let her off at Elm street. As the car slowed down, she arose from her seat and proceeded toward the door at the rear end of the car. In her arms she carried two bundles and a fur muff. She testified that it was the custom for the cars to stop on the near crossing, but that the car on which she was continued to the middle of the street before stopping; that just as soon as it did stop she stepped out on the platform and proceeded to alight; and that just as she was about to step upon the ground the car gave a sudden lurch, throwing her violently to the ground, from which she sustained bruises and sprains and serious internal injuries. She further testified that, when she proceeded to alight from the car, the conductor was not on the rear platform but was inside the car talking to some other street car employes. At the trial of the case the jury found for the appellee and fixed the amount of her recovery at \$300. Overruling a motion for a new trial made by appellant, the court gave judgment upon the verdict, and the company appeals, alleging error in the admission of evidence, in the instructions given to the jury, and in the rulings upon the special findings of the jury.

[1] One witness, in answer to a question as to whether the appellee moved about or was able to wait on herself, said, "No, not very much; it was agony every time she moved." To another question as to her condition at a stated time, the witness said appellee seemed to be weak and to suffer "untold agony." Appellant asked that the answers be stricken out, but did not state the ground of its request. No objections were made when the questions were asked, nor were any specific objections made to the answers given. The trial court did not know whether the objection was that the witness was not competent nor in a position to know of the condition of appellee, or, if it should be assumed that she was competent, whether her statement that the appellee was in great pain or agony was derived from appearances or exclamations made at the time spoken of.

[4] Witnesses, who are not expert but have an opportunity to know, may testify as to the bodily condition and health of persons in certain cases, and their knowledge may be gained from appearances, exclamations, or conduct. *Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627, 15 Ann. Cas. 796. In the absence of a specific objection, the trial court could not know the ground of appel-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lant's motion, and this court can only review rulings brought to the consideration of that court; but in no view could the admission of the testimony have been prejudicial error. *Smith v. Morrill*, 39 Kan. 665, 18 Pac. 915; *Howard v. Howard*, 52 Kan. 469, 34 Pac. 1114. The objection that the averments of the petition did not warrant testimony as to the injury to the internal organs of the appellee resulting from the injury is not substantial.

There was testimony offered that the appellee signaled the car to stop at a crossing, and that after the car had stopped, and while she was in the act of alighting, the car was suddenly and violently started without warning, throwing her upon the pavement and causing the injury for which the action was brought. No evidence to the contrary is before us, as that given in behalf of the appellant has not been abstracted. The court, however, appears to have instructed the jury upon the theory that there was some testimony upon which a claim might be made that appellee had undertaken to alight when the car was in motion. After defining ordinary and contributory negligence, the court instructed the jury that: "If you find that the plaintiff alighted from the defendant's street car while it was in motion, you are instructed it is not contributory negligence 'per se' (that is, in and of itself) for her to have so alighted from the car; but the question as to whether this act on her part constituted contributory negligence depends upon whether the danger in alighting was so obvious that a prudent person under the circumstances would have done so, and it is to be determined by you upon a consideration of the rate of speed at which the car was moving, the conduct of those in charge of the car, the conduct of the plaintiff, the fact that she was carrying packages, and all the circumstances connected with her act of alighting from the car."

[2] The appellant asked the court to instruct the jury that, if appellee got off the car while it was in motion, she could not recover. This request was properly refused, as it has been determined that: "A passenger is not chargeable with negligence, as a matter of law, merely because he alights from a street car at a regular stopping place after it has been practically stopped for that purpose." *Finger v. Railroad Co.*, 85 Kan. 172, 175, 116 Pac. 366. See, also, *A. T. & S. F. Rld. Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919; *Railroad Co. v. Burrows*, 62 Kan. 89, 61 Pac. 439; *Railway Co. v. Loewe*, 69 Kan. 843, 74 Pac. 234; *Railway Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31.

[3] Although complaint is made of the refusal of the court to give an instruction to the effect that, if appellee was on the platform or step of the car and was thrown off by a motion of the car, that was not unusual,

no recovery could be had. An instruction upon this subject was given by the court, and it is one of which at least the appellant has no reason to complain. It was: "You are further instructed that, if you find from the evidence that the plaintiff got on the step of the car while the car was moving and was thrown off the car by reason of a jerk or lurch of the car, and such jerk or lurch was only such as was ordinarily incident to the running of the car, she cannot recover, and your verdict should be for the defendant."

Those accustomed to ride on cars operated by electric power know that there is more or less of a jerk or sudden movement in starting them which has a tendency to disturb the poise of standing passengers. Movements which are usual and incident to that method of travel are anticipated, and passengers ordinarily careful guard themselves against their effect. The mere fact that a passenger is upset by a movement or jerk of a car in starting does not necessarily establish negligence in those operating it. An unusually sudden or violent jerk or lurch a passenger has no reason to expect, and proof of an injury received by a passenger from the sudden or violent starting of a car as she was alighting is ground for an inference that the carrier was negligent. Here there is testimony that the car stopped before appellee undertook to alight, and that, while stepping on the ground, the car suddenly and violently started in a manner which indicated either a defect in the car or in its operation. The instruction given to the jury on the subject is as favorable to appellant as it had a right to ask.

There is some complaint as to the instruction regarding the burden of proof, but we think no prejudice could have resulted from it; neither is there any good ground to complain of the special findings.

The judgment will be affirmed. All the Justices concur.

WALSH v. KANSAS FUEL CO. et al.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. MINES AND MINERALS (§ 55*)—SURFACE ESTATE—RIGHT TO SUBJACENT SUPPORT.

When the estate in minerals in situ is severed from the estate in the surface, the owner of the latter estate has the right of subjacent support for the surface.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 163-165; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 55*)—SURFACE ESTATE—RIGHT OF SUBJACENT SUPPORT—WAIVER.

Where the owner of land retains the surface estate and conveys the estate in minerals thereunder, he may convey or waive the right of subjacent support for the surface, but such conveyance or waiver should not be implied unless the language of the instrument of conveyance is appropriate therefor and clearly in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dicates such to be the intention of the parties to the conveyance.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-166; Dec. Dig. § 55.*]

3. TRIAL (§ 139*)—DEMURRER TO EVIDENCE.

Upon the trial of an action, a demurrer to the evidence produced by the plaintiff should not be sustained unless such evidence clearly disproves the plaintiff's right of recovery or, by fair interpretation and full credence being given thereto, it fails to establish a cause of action in favor of the plaintiff.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

Appeal from District Court, Cherokee County.

Action by J. J. Walsh against the Kansas Fuel Company and another. From judgment for defendants, plaintiff appeals. Reversed and remanded.

McNeill & McNeill and J. N. Dunbar, all of Columbus, for appellant. A. F. Williams and Skidmore & Walker, all of Columbus, and W. R. Thurmond, of Kansas City, Mo., for appellees.

SMITH, J. The appellant was the owner of an 80-acre tract of land in Cherokee county and on August 1, 1903, entered into a written contract with the appellee Barrett, by the terms of which he leased to Barrett, his heirs and assigns, the coal underlying the tract of land, except a strip of land 200 by 900 feet, particularly described therein. The lease granted the further use of the surface for the working and management of the mine. By its terms the lease was to continue until the coal was worked out, unless sooner terminated by reason of the nonperformance of some of the conditions therein stipulated. The lease also contained, among others, the following provisions:

"Said second party agrees to work and mine said coal in a good, careful and workmanlike manner, and not leave unnecessarily any coal which should be and can be mined with safety to the mine and miners, but said second party shall not be required to work low places or rolls which cannot be mined except at a loss."

"The consideration of the lease and leasing of said coal and surface rights as hereinbefore described shall be a royalty of 10 cents per ton of two thousand (2,000) pounds on all coal mined and removed from said land, except what coal is necessarily used in operating said mine, upon which no royalty is to be paid."

The other provisions of the lease are deemed immaterial for the purposes of this decision. The lease was assigned by Barrett to C. Newlands and C. F. Spencer and by the latter to the Kansas Fuel Company and Barrett under some arrangement not disclosed.

The appellant, in his petition, claimed a large amount of damages by reason of the

alleged fact that the appellees had removed so much of the coal that they took away the subjacent support of the surface and caused the surface to fall and cave in.

The appellees answered separately and admitted the execution of the lease and the assignments thereof and set up defenses to plaintiff's cause of action which we need not consider by reason of the fact that no trial was had thereon. Among other defenses, the appellees pleaded the two-year statute of limitations, but it is not contended that the appellant's evidence showed that the action was barred.

[3] Upon the trial the plaintiff introduced evidence tending to show that the value of the surface had been greatly injured by the removal of the subjacent support, and that the appellees had recognized their liability by employing the appellant and others to fill up a large number of cave-ins which had occurred, and that all the coal was mined to which the lease conveyed any right, and a large number of pits of various sizes and depths remained, making the land practically worthless for either pasturage or farming purposes. At the close of appellant's evidence the appellees severally demurred to the appellant's evidence, the demurrers were sustained by the court, and judgment was rendered against the appellant for costs.

[1, 2] It is conceded by the appellees, in substance, that as a matter of common right, when the estate in minerals in situ is severed from the estate in the surface, the owner of the latter estate has the right of subjacent support for the surface. On the other hand, it is conceded by appellant that the right to such support may be waived or conveyed by the owner of the surface estate to the owner of the mineral estate.

Appellees cite *Griffin v. Fairmont Coal Co.*, 59 W. Va. 490, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, in which it is said: "Where a deed conveys the coal under a tract of land, together with the right to enter upon and under said land and to mine, excavate, and remove all of it, there is no implied reservation in such an instrument that the grantee must leave enough coal to support the surface in its original position." Several other authorities are cited by appellees which in some measure tend to support their contention in the case, but the above case seems to be the strongest and most closely analogous to the case at bar. That decision, however, is criticised in an editorial note, appended, in which it is claimed that the rule is not correctly stated and numerous authorities are collated. That the right to subjacent support to the surface will not be deemed to have been waived, conveyed by, or lost to the owner of the surface, unless such clearly appears, from the language used in the conveyance, to have been the intention of the parties, is sustained by numerous authori-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ties, among which are the following cases: Gumbert v. Kilgore, 4 Sadler (Pa.) 84, 6 Atl. 771; Nelson v. Hoch, 14 Phil. 655; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Horner v. Watson, 79 Pa. 242, 21 Am. Rep. 55; Coleman v. Chadwick, 80 Pa. 81, 21 Am. Rep. 93; Carlin v. Chappel, 101 Pa. 348, 47 Am. Rep. 722; Pringle v. Vesta Coal Co., 172 Pa. 438, 33 Atl. 690; Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Wilms v. Jess, 94 Ill. 464, 34 Am. Rep. 242; Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335; Mickle & Co. v. Douglas, 75 Iowa, 78, 39 N. W. 198; Burgner v. Humphrey, 41 Ohio St. 340; Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109; Marvin v. Brewster Iron Mining Co., 55 N. Y. 538, 14 Am. Rep. 322.

The contract in this case is not ambiguous in the usual sense. The only question is the legal effect of the language used therein, and, as we have seen, it does not clearly appear that the right to subjacent support of the surface was intended to be waived or conveyed by appellant. Rettiger v. Dannelly, 91 Kan. 61, 136 Pac. 942.

The judgment is reversed, and the case is remanded for a new trial. All the Justices concur.

SLATER v. ATCHISON, T. & S. F. RY. CO.
et al.†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. LIMITATION OF ACTIONS (§ 30*)—PERSONAL INJURIES—VIOLATION OF FACTORY ACT.

The Factory Act (Laws 1903, c. 356; Gen. St. 1909, §§ 4676-4683) is not a purely penal statute; on the contrary, it is in part penal and in part remedial. While the public derives a benefit from the enforcement of the law, the immediate purpose of the statute, so far as it allows the injured party to recover, is to afford compensation, and this part of the statute is purely compensatory. Therefore an action in favor of a person injured by a violation of its provisions is not an action for a "penalty or forfeiture," but is an action "for injury to the rights of another not arising on contract," and is controlled by the two-year statute of limitations. A. T. & S. F. Rld. Co. v. King, 31 Kan. 708, 3 Pac. 565.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 141; Dec. Dig. § 30.*]

2. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—FACTORY ACT.

Where the evidence tended to show that the plaintiff's injuries were directly caused by the failure of the defendant to furnish a guard for the revolving knives of a planer, in compliance with the provisions of section 4 of the Factory Act (Gen. St. 1909, § 4679), and it was shown that the machine was designed and intended to be provided with a device known as a "shavings exhaust," consisting in part of an iron hood placed directly over the knives, and that this device was not on the machine when the plaintiff was injured but was installed shortly afterwards, held, that the purpose for which the device was designed and used was immaterial, since it conclusively appeared that when in place it served as a guard, and that

if it had been in place it would have covered the knives so that the accident could not have occurred.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

3. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—FACTORY ACT—SUFFICIENCY OF EVIDENCE.

Upon the facts stated in the opinion, it is held that there was sufficient evidence to show that it was practicable to guard the knives in the manner suggested in the preceding paragraph, as well as by other methods and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 972, 977; Dec. Dig. § 278.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—FACTORY ACT—SUBMISSION OF ISSUES—CONTRIBUTORY NEGLIGENCE.

Since contributory negligence is not a defense under the Factory Act (Caspar v. Lewin, 82 Kan. 604, 109 Pac. 657), it is held that the trial court properly refused to submit to the jury the question whether the plaintiff was negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.*]

Appeal from District Court, Franklin County.

Action by John H. Slater against the Atchison, Topeka & Santa Fé Railway Company and another. Judgment for plaintiff, and defendant Albert O. Battelle appeals. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, J. W. Deford and F. M. Harris, both of Ottawa, and J. C. Rosenberger and K. C. Reed, both of Kansas City, Mo., for appellant. W. J. Costigan and E. H. Gamble, both of Ottawa, for appellee.

PORTER, J. In this action the servant recovered judgment for injuries caused by the failure of the master to comply with the provisions of the Factory Act, requiring the guarding of dangerous machinery.

[1] The main question raised by the defendant's appeal is whether the act is barred by the one year's statute of limitations, which provides that "an action upon a statute for penalty or forfeiture, except where the statute imposing it prescribes a different limitation," shall be barred within one year. Code, § 17, subd. 4 (Gen. St. 1909, § 5610). The answer depends upon whether the cause of action provided for by the Factory Act is one for the recovery of a penalty or forfeiture; in other words, whether the act itself is penal.

The defendant calls attention to the case of Caspar v. Lewin, 82 Kan. 604, 109 Pac. 657, where it was held that neither contributory negligence nor assumed risk are defenses available to the master in an action to recover under the statute. Our attention is challenged particularly to certain expressions in the opinion in that case where it was said that the act is a "police regulation

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

adopted to reform the inhumanity of factory methods"; that the Legislature, instead of attempting to enforce the act by means of a criminal prosecution, saw fit to provide "a civil remedy in damages"; and that the statute was adopted "as a means of enforcing a positive duty enjoined by law in the interest of public welfare." Because of these statements in the opinion, and particularly because we there construed the act so as to permit an employé to recover for injuries sustained by a violation of its provisions, even though he himself was negligent, it is contended that the court has committed itself to the proposition that the act is penal in its nature. Counsel strenuously insist that the statements referred to were made in the opinion in *Caspar v. Lewin* as grounds for upholding the constitutionality of the act; and it is intimated that, having so ruled in order to save the act from the charge of unconstitutionality, we cannot now, "without bending the law to suit the exigencies of each particular case," do otherwise than declare the act to be penal.

In the briefs it is said: "Counsel for appellee are asking this court to put itself in the abominable position of saying that this statute is a penalty to save it from unconstitutionality as it did say in *Caspar v. Lewin*, while at the same time saying in the case at bar that it is not a penalty in order to save this case from the bar of the statute of limitations."

It may be remarked, in passing, that some of the arguments advanced in this case, like the arguments leveled against the power of the state to enact the factory law at all, would have carried far more persuasive force 30 or 40 years ago than in this year of grace, not because there has been any change in the principals of law which control in the construction of statutes, nor because the police power of the state has been enlarged. The state has always possessed the power to enact such a law. *Balch v. Glenn*, 85 Kan. 735, 119 Pac. 67, 43 L. R. A. (N. S.) 1080, Ann. Cas. 1913A, 406.

The police power inherent in all government was just as broad 40 years ago as it is to-day; but laws of this character were absent from the statute books because at that time public sentiment had not crystallized into a demand for their enactment. For instance, it is altogether probable that, if Congress had attempted 40 years ago to enact the stringent provisions of the Safety Appliance Law requiring interstate railways to equip their trains with safety devices for the protection of the lives and limbs of their employes, the law would have been declared unconstitutional. Yet only the other day the law was again upheld and at the same time construed as intended by Congress to permit an employé, who was injured by a failure to comply with its provisions, the right to recover damages regardless of the ancient doctrine of "assumed risk," and not-

withstanding his injuries were occasioned by his "contributory negligence." *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061. And see, *Brinkmeier v. Railway Co.*, 81 Kan. 101, 105 Pac. 221.

Society has made rapid progress in recent years in the development of humanitarian ideas and in a broader realization of the power of the state and the obligations resting upon it to enact laws to prevent the frightful toll of death and disability in hazardous occupations and in the use of dangerous machinery. Legislation has followed with somewhat halting steps; and the courts have quite generally responded to the awakened public conscience, albeit their progress has naturally been slower than that of Legislatures. We find no difficulty in determining that the statute is so far remedial in its character, notwithstanding some of its provisions, that the cause of action is not for the recovery of a penalty or forfeiture. And this we shall undertake to demonstrate, confident that it can be accomplished without embarrassment to the court and, we trust, without bending the law to suit any supposed exigencies of this or any particular case.

It may be conceded that there is a conflict of authority in the various states as to whether such statutes should be regarded as penal; but it is not believed there is any conflict in the decisions of this court. Actions to recover on statutes, which allow double or treble damages, as for cutting or carrying away timber (*Gen. St. 1909, § 9692*), are held to be controlled by the one-year statute. In *Sullivan v. Davis*, 29 Kan. 28, 34, it was said: "Where more than actual compensation is asked, it is by virtue of some express statute, and the excess is by such statute given in the way of penalty."

Actions brought under the statutes for failure to comply with a proper demand for the release of mortgages are barred by the one-year limitation, because the plaintiff in such a case is permitted to recover the sum of \$100 and attorney's fees without regard to whether he has been damaged at all. The right to recovery under such statutes has been held penal and not in any sense compensatory (*Hall v. Hurd*, 40 Kan. 374, 19 Pac. 802; *Joyce v. Means*, 41 Kan. 234, 20 Pac. 853; *Wey v. Schofield*, 53 Kan. 248, 36 Pac. 333), and so the statute providing for amercing a sheriff for failure to execute process (*Gen. St. 1909, § 6339*; *Code Civ. Proc. § 743*) has been held penal and not compensatory, for the reason that the delinquent official may be amerced in a sum not exceeding \$1,000, in addition to being liable for any injuries sustained by the aggrieved person. See, also, *Beadle v. K. C., Ft. S. & M. Rld. Co.*, 48 Kan. 379, 29 Pac. 696, where judgment against the plaintiff on a demurrer to his petition was affirmed on the ground that his action was barred by the one-year

statute; the action being to recover a forfeiture of three times the actual damages sustained. It was a penalty allowed against a railroad for charging one person more than it charged others for the same service. In *Milling Co. v. Railway Co.*, 82 Kan. 256, 108 Pac. 137, the one year's statute was applied to an action under the demurrage statute, which provides that a person injured by the failure of a railway company to furnish cars may recover as exemplary damages the sum of \$5 per day for each car. The statute was held not merely compensatory but penal. This court has uniformly refused to enforce wrongful death statutes of other states providing for a fixed recovery or nothing, regardless of actual damages. *Hamilton v. H. & St. J. Rld. Co.* (1888) 39 Kan. 56, 18 Pac. 57; *Dale v. Railroad Co.* (1897) 57 Kan. 601, 47 Pac. 521; *Matheson v. Railroad Co.* (1900) 61 Kan. 667, 60 Pac. 747; *Rochester v. Express Co.* (1912) 87 Kan. 164, 123 Pac. 729, 40 L. R. A. (N. S.) 1095.

In *Frame v. Ashley*, 59 Kan. 477, 478, 53 Pac. 474, 475, the three years' statute of limitation was held to apply to an action against a bank officer for receiving deposits in an insolvent bank where the purpose of the action was for recovery of the deposit. The sole question there was whether the action was upon a "liability created by statute" or "upon a statute for penalty or forfeiture." In the opinion was said: "The general rule is that a statutory obligation to pay damages which the common law does not give is 'a liability created by statute,' where the damages awarded are limited to compensation, limited to an amount which merely makes the injured person whole. The general rule also is that a statutory obligation to pay an amount beyond compensation, to submit to more than the simple redress of the wrong done, to pay not merely in respect of the deserts of the injured person but as punishment for the wrong done, is a penalty. Tested by these simple rules the case is easy of solution." Referring to the statute giving a mortgagor the right to recover \$100 for failure to release a satisfied mortgage, the opinion said: "There is no analogy between these statutes and the one under consideration. The latter gives compensation, nothing more, and permits nothing less. The former gives a fixed sum, irrespective of the damages actually sustained. Damages from failure to enter satisfaction of a mortgage may be very great. It may be that none whatever occur. Whether great or small, or none at all, the amount recoverable is fixed arbitrarily at \$100." 59 Kan. 480, 481, 53 Pac. 475. The conclusion reached was that the statute imposed a liability for compensation only; that it was remedial, and therefore not barred by the one-year statute.

The court quite recently had before it the question whether a Colorado statute was

penal in the international sense, so that it could not be enforced here. *Machinery Co. v. Smith*, 87 Kan. 331, 124 Pac. 414, 41 L. R. A. (N. S.) 379. The statute imposed a liability upon stockholders of a Colorado corporation, and it was sought to maintain an action in the courts of Kansas to recover thereon. Notwithstanding the fact that the Colorado courts had already declared the statute to be penal in the sense that it was barred by a statute of limitations similar to the one involved in this case, we held that the action might be maintained for the reason that the statute authorized an individual, who had sustained a loss by its violation, to recover compensation. The opinion was placed squarely upon the well-recognized distinction between a statute entirely penal and one which is in part remedial. In the opinion it was said: "The statute is beyond doubt penal in a certain sense. And it has often been broadly stated that a penal statute has no extraterritorial force and will not be executed by the courts of another state or country. A distinction has been made, however, between statutes which are entirely penal, their sole purpose being to punish a violation of the law for the public benefit, and those which are in part compensatory, the violator being required to make good to an individual a possible loss having some connection with his default. It is universally held that statutes of the former character can be executed only by the sovereignty enacting them. But by the weight of later authority, and as we think by the better reason, actions may be maintained anywhere to enforce the liability to an individual, created by statutes of the latter kind. Cases on both sides of the question are collected in 1 *Cook on Corporations* (6th Ed.) § 223, pp. 586-588, and in 3 *Clark & Marshall on Private Corporations*, § 833." 87 Kan. 332, 333, 124 Pac. 414, 41 L. R. A. (N. S.) 379. The opinion cites, as the leading case on the subject, *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, and quotes from the opinion in that case where it was said, referring to statutes which are in part compensatory: "As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country." 87 Kan. 334, 124 Pac. 415, 41 L. R. A. (N. S.) 379.

In *State v. Pfeifferle*, 33 Kan. 718, 7 Pac.

597, suit was brought under section 4373, General Statutes 1909, to recover a fine and costs taxed as a lien upon real estate where the owner had unlawfully permitted the sale of intoxicating liquors. The trial court held the action barred by the one-year statute. The judgment was reversed, and it was held that the action was upon "a liability created by statute" and not an action for a penalty or forfeiture. Other Kansas cases to the same general effect are *Durein v. Pontious*, 34 Kan. 353, 8 Pac. 428; *State v. Snyder*, 34 Kan. 425, 8 Pac. 860; *Snyder v. State*, 40 Kan. 543, 20 Pac. 122; *State v. Alexander*, 84 Kan. 393, 114 Pac. 241. The *Durein* Case was a suit under section 4370, General Statutes 1909, by minor children to recover damages on account of liquor sold to their father. The judgment was reversed upon another point; but in the opinion the court ruled that the action was not one for a forfeiture or penalty, and was therefore not controlled by the one-year statute. Cases from other courts directly in point are *Coy v. Jones*, 30 Neb. 798, 47 N. W. 208, 10 L. R. A. 658; *State v. A. C. L. R. Co.*, 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639; *Woolverton et al. v. Taylor et al.*, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521; *Bell v. Farwell*, 176 Ill. 489, 52 N. E. 346, 42 L. R. A. 804, 68 Am. St. Rep. 194; *Gardner v. N. Y. & N. E. R. R. Co.*, 17 R. I. 790, 24 Atl. 831; *Hornor v. Henning et al.*, 93 U. S. 228, 23 L. Ed. 879. See, also, *Sutherland on Stat. Const.* § 208, and cases cited.

In *Caspar v. Lewin* the court was not considering the question of limitations, and there was no intention in any of the language there used to declare that a cause of action under the Factory Act is for the recovery of a penalty or forfeiture. While the public derives a benefit from the enforcement of the law, the immediate purpose of the statute, so far as it allows the injured party to recover, is to afford compensation. Under the authority of *A., T. & S. F. Rld. Co. v. King*, 31 Kan. 708, 3 Pac. 565, the action is controlled by the third subdivision of section 17 of the Code (section 5610, Gen. Stat. 1909) and must be brought within two years, being an action "for injury to the rights of another not arising on contract," and not enumerated in the subsequent clauses of the section.

The verdict of the jury was in favor of the defendant railway company, and against the defendant A. C. Battelle, and he is the only appellant. As against him, the action was brought within less than two years from the time it accrued, excluding the periods during which he was absent from the state.

[2] There remain for consideration some complaints of error in the admission of evidence and in the instructions, and the further contention that on the undisputed evidence a verdict should have been directed for the defendant. We deem it unnecessary to enter into a minute description of the ma-

chine at which the plaintiff was injured. It was a new machine of the latest and most modern type of construction and had only been installed about two weeks. It was known as a "20-12 Boss planer"; the figures indicating that it was designed to plane a timber with the maximum thickness of 20 inches by 12 inches. The knives were on "cylinder heads" located inside the external frame work on the bed of the machine, and moved at the rate of 3,000 revolutions a minute. The timber was fed into the machine from one end automatically, so that a person was in no danger of coming in contact with the knives while feeding the machine. Under the cylinder heads there was a spiral trough into which the shavings were thrown by the current of air created by the revolving knives, and the shavings would be discharged at one side of the machine.

The plaintiff was 37 years of age, had worked in different shops, and had been working at this plant about seven months. He was in sole charge of the machine and of the men who were assisting him. On the day of the accident a pile of shavings on the floor was permitted to grow to such dimensions that the shavings did not escape from the trough and the machine became clogged. The plaintiff took an air hose, to which an iron nozzle was attached, and which was connected with a compressed air system, and for the purpose of blowing the shavings away from the upper knife head, and without stopping the machine, stood near the machine, and with the nozzle in his left hand directed an air blast against the revolving knives. While doing this the nozzle in some way became entangled in the knives, and his left hand was drawn in and cut off at the wrist. As before stated, the machine had not been installed but a short time, and one of the parts known as the "shavings exhaust" had not been placed upon it at the time the plaintiff was injured. It was placed thereon soon after the accident occurred. The testimony shows that this shavings exhaust consisted of a metal pipe or iron boxing running up from above the knife heads to a fan, and that the exhaust of air carried the shavings away from the top of the upper knife head. Directly over the knife heads there was an iron flange upon which the pipe or boxing of the exhaust was intended to rest. The fan and some portions of the material for the construction of the shavings exhaust were in the shop; other parts were missing; and, because another planer had broken down, the new machine was started in operation without waiting until the material for the exhaust arrived, and had been operated for two weeks without a shavings exhaust. It was shown by plaintiff's evidence that the hood of the exhaust, if it had been in place, would have set down over the knife heads like a box. "When it is down it completely covers the knives of the upper head."

[3] The contention is made that the undis-

puted evidence shows that it was not practicable to guard the knives against such an operation as the plaintiff was attempting to perform. We think the undisputed evidence is clearly the other way. Mr. Battelle was a witness and was very fair and frank in his testimony. While he testified that the only reason considered in going to the expense of installing the shavings exhaust system was an economic one for saving the cost of labor in carrying the shavings away, he was asked whether it serves as a guard or acts as a guard over the upper knives. His answer was: "It is a guard, of course, so long as it is down over the head and in its place on the bed; as long as it is not removed it covers the knives so they cannot be reached." He also testified that the usual method of removing shavings that have accumulated on the knives is to use the air blast. Witnesses for the plaintiff testified that the effect of having the shavings exhaust in its place was that it served as a guard, or, in other words, while it was in place it would be impossible for an accident, such as that by which the plaintiff was injured, to occur. In addition, there was testimony of the plaintiff tending to show that it was practicable to guard the machinery by other devices; and all of this was a question for the jury, if there had been no testimony at all upon that subject. *Bubb, Adm'x, v. Railway Co.*, 89 Kan. 303, 131 Pac. 575. It is wholly unimportant that the main purpose of the shavings exhaust was to carry away shavings from the knife heads. The evidence conclusively shows that if it had been in place it would have covered the knives so that this accident could not have occurred.

In *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657, it was expressly ruled that the burden is upon the defendant, under the Factory Act, to prove that it was not practicable to guard the machinery. We are not inclined to reconsider that ruling or to restate the principles upon which the decision rests.

But the ingenuity of counsel is not satisfied with the general contention that it was impracticable to guard these knives nor with the claim that the shavings exhaust was not intended as a guard. It appears from the evidence that the hood of the exhaust is designed to be raised and lowered, as occasion may require, by means of a rope and pulley; and evidence was offered tending to show that, even with the exhaust system in operation, the knives sometimes became clogged with shavings, especially when wet or very heavy lumber is being planed, and that when this occurs it is customary to raise the hood, stop the machine, and use the air blast to blow the shavings away. It is urged that by neglecting to keep the pile of shavings away from the trough the plaintiff had created a situation in which it would have been necessary for him to raise the hood in order to dislodge the shavings; and that if, in such a situation, he had attempt-

ed this without first stopping the machine, the injury would have occurred in the same way. In support of this contention, the recent case of *Weeks v. Seymour Packing Co.*, 90 Kan. 365, 133 Pac. 713, is cited. There the action was under the Factory Act for failure to guard an elevator. It was necessary for the plaintiff to gain access to a fuse box in the elevator shaft. The shaft was protected by a movable horizontal bar. He testified that the bar was down at the time of the accident; that he put it down himself; that it was about three feet from the floor; and, that while he was leaning over the bar and examining the fuse box, the elevator was lowered from the floor above and injured him. It was held that under the facts of that case there was no evidence that the failure to inclose the elevator contributed to his injury. It was suggested in the opinion that, had the elevator been inclosed with a door, he would have been compelled to open it in order to reach the fuse box and to have stood partially, at least, over the shaft. A rehearing has been granted in that case, and therefore the defendant cannot rely upon it as authoritative. However, the principles upon which it was decided can have no application to the facts in this case. The defendant's contention rests merely upon a theory as to what might possibly have occurred if the knives had in fact been guarded by the presence of the hood, and plaintiff had removed the protection. The application of the Factory Act must be determined upon the undisputed facts as they exist, instead of upon pure speculation of what might have happened upon a wholly different state of facts.

It does not appear that the plaintiff was allowed to state his conclusions respecting either the practicability of guarding the machine or that the hood was installed or intended as a guard. He, as well as the defendant and other witnesses, testified that it served the purposes of a guard when in place. It was not contended at the trial that the sole purpose of its installation was to provide a guard; nor indeed was it necessary to show that such was its purpose. As we have seen, the intention with which it was installed was not controlling, since it conclusively appears that the machine was designed to have such a device, and that when installed it served the purpose of a guard. Moreover, there was evidence from which the jury could have found that it was practicable to guard the knives by other methods and appliances.

[4] The court properly instructed that the plaintiff could not recover if the jury found from the evidence that it was impracticable to guard the knives so as to prevent the occurrence of the accident. Contributory negligence is not a defense under the Factory Act (*Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657); and it was not error to refuse to submit to the jury the question of whether the

plaintiff was negligent. If the direct cause of the injury was the failure to provide a guard, his negligence could not have been more than a contributing cause. What has been said respecting the various contentions of the defendant makes it unnecessary to consider in detail the objections urged against other instructions. It is sufficient to say that the instructions fairly defined the issues.

We discover no error in the record, and the judgment will be affirmed. All the Justices concurring.

KIMBALL et al. v. EDWARDS.†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The record in this case discloses competent evidence to support the judgment which was rendered in a cause tried to the court; and, since it does not appear that the admission of improper evidence affected the result, the judgment is affirmed. *McCreedy v. Crane*, 74 Kan. 710, 88 Pac. 748.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

(Additional Syllabus by Editorial Staff.)

2. EVIDENCE (§ 121*)—HEARSAY—DECLARATIONS OF OWNERSHIP—RES GESTÆ.

In an action to recover corporate stock represented by a certificate, declarations of ownership made by a person, since deceased, among whose papers the certificate was found after his death, were admissible as part of the *res gestæ* to explain his possession of the certificate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.*]

Appeal from District Court, Labette County.

Action by Helen W. Kimball and others against E. H. Edwards. From the judgment, plaintiffs appeal. Affirmed.

Kimball & Osgood, of Parsons, for appellants. W. D. Atkinson and John Madden, both of Parsons, for appellee.

PORTER, J. In this action plaintiffs sought to recover 13½ shares of the capital stock of the Parsons Water Supply & Power Company, alleging in their petition that the shares belonged to them but had been wrongfully transferred to the defendant. The answer made specific denials of some of the allegations and a general denial of the others. The cause was tried without a jury, and the court found that the shares in question belonged to the defendant, but that he was indebted to the plaintiffs for the value thereof; and accordingly judgment was rendered in favor of the plaintiffs for the book value of the stock, \$1,250. The costs were adjudged against the plaintiffs for the reason that before the commencement of the action the de-

fendant had offered to pay the value of the shares. From this judgment the plaintiffs have appealed.

Charles H. Kimball, a resident of Parsons, died intestate in 1907, leaving as his heirs his widow, Helen W., and five sons, four of whom with their mother are the plaintiffs. C. W. Kimball, the other son, was one of the administrators of his father's estate. The Kimball Investment Company was organized in 1907 for the purpose of holding and managing the property of the estate. At the time of his death Charles H. Kimball and E. H. Edwards were the owners of most of the stock of the Parsons Water Supply & Power Company; they practically owned the plant and had operated it since 1884. For a great many years they had been engaged in numerous business dealings in which the profits and losses were shared equally. Their real estate stood in the name of Edwards & Kimball as partners, and their friendly relations and confidence appear to have continued unbroken until the death of Charles H. Kimball. The evidence shows that there was an agreement between them that their interests in the water company should be equal; that whenever one purchased outstanding stock he would divide it with the other, each paying an equal share of the cost. The arrangement was in force at the time of the death of Charles H. Kimball, although some certificates of stock which had been held by him for several years had not been divided. This controversy arose over a certificate for 20 shares of the stock issued in the name of A. Matthewson which was found in the private papers of Charles H. Kimball after his death. The evidence shows that he had voted the shares represented by this certificate at stockholders' meetings and had generally exercised rights of ownership over it; further, that he had on several occasions stated that the certificate belonged to him but was to be divided with his partner. A. Matthewson is a relative of the Kimball family. He expressed surprise when informed by C. W. Kimball of the existence of the certificate, but said he would like to make a gift of it to the widow and heirs. For that purpose he assigned and delivered the certificate to C. W. Kimball, who, as stated, was one of the administrators. Some months thereafter the defendant Edwards explained to C. W. Kimball the arrangement between the former partners that each should share equally in the stock, and for the purpose of carrying out that agreement C. W. Kimball surrendered the Matthewson certificate and had 5 shares issued to the Kimball Investment Company and 15 to Edwards. It seems there were other certificates of stock which were divided at the same time, and in the division 15 of the Matthewson shares went to the defendant. At that time E. H. Edwards offered to pay the estate for his proportion of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

Matthewson stock, but C. W. Kimball declined to accept any payment. Helen W. Kimball, the other administrator, was not informed about the matter, nor were the other heirs consulted. When they learned of the transfer, they demanded the return of $13\frac{1}{2}$ of the 15 shares, being the proportion they claimed belonged to them, leaving $1\frac{1}{2}$ shares as the property of C. W. Kimball. Upon the demand being refused, this suit was brought.

As we have seen, the court gave the plaintiffs judgment for the book value of the shares; and it is manifest that the controversy is not over the value of the shares, but over the control of the corporation. The affirmation of the judgment leaves the control of the company divided equally between the two interests; the heirs of Charles H. Kimball holding 692 shares, and the defendant E. H. Edwards holding the same number.

[1] The errors complained of are the improper admission of evidence; that the judgment is contrary to law and not supported by the evidence; and error in overruling the motion for a new trial. The main contention is that under a general denial defendant was permitted to introduce evidence to prove estoppel and laches. Some evidence was admitted respecting an attempt to procure defendant's consent to a sale of the property and franchises of the company which had no bearing upon the issues; and some facts were shown indicating that the plaintiffs had permitted the Matthewson shares to be voted by the defendant at stockholders' meetings. It is contended that the only purpose of this testimony was to establish estoppel and laches, neither of which was pleaded as a defense. The judgment, however, is so abundantly sustained by competent evidence as not to require any aid from the principles of estoppel or of laches. We are unable to discover any ground of error that would warrant a reversal. The cause was tried to the court; there are no special findings; and there is abundant evidence to support the judgment. The presumption is that any incompetent evidence admitted was disregarded by the court. In *McCready v. Crane*, 74 Kan. 710, 88 Pac. 748, the first paragraph of the syllabus reads: "A judgment rendered in a case heard without the intervention of a jury will not be reversed on account of the admission of incompetent evidence unless the record discloses that there was no competent evidence to support it or in some other way shows affirmatively that the improper evidence affected the result." And see authorities cited in the opinion at page 713 of 74 Kan., page 748 of 88 Pac. See, also, *Sarbach v. Sarbach*, 86 Kan. 894, 122 Pac. 1052.

[2] There is a complaint of error in admitting evidence of statements made by Charles H. Kimball in his lifetime with respect to the Matthewson stock. It is said that the

statements of his ownership and title were incompetent until proof of his ownership appeared. We think the evidence shows that A. Matthewson, through whom plaintiffs claim, never had any interest in this stock, and never knew of its existence until he was informed of it by C. W. Kimball; that, on the contrary, the overwhelming evidence shows that the certificate belonged to Charles H. Kimball, and was held by him, impressed with the trust arrangement between him and the defendant that all purchases of stock by one should be divided and the cost thereof split. The admissions or declarations of ownership were competent because they explained his possession of the certificate. They were part of the *res gestæ*. *Butts v. Butts*, 84 Kan. 475, 114 Pac. 1048.

It follows from what has been said that the judgment must be affirmed. All the Justices concurring.

IOWA CITY STATE BANK v. CLAYPOOL.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. **BILLS AND NOTES (§ 315*)—NEGLIGENCE OF SIGNER—FRAUD.**

A paper printed with type of various sizes, and containing sundry agreements and conditions, followed by an order for merchandise, and this by a blank promissory note separated from the foregoing portion of the paper by a perforated line, was successfully presented to a merchant for execution in blank, with the statement that it was a mere order for goods on commission, and not a promise to pay anything. *Held*, that whether the execution was procured by the fraud of the person so presenting the paper, or was the result of such fraud, coupled with the negligence of the signer, none but a holder in due course could recover on the detached promissory note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 751, 753, 756-759, 764, 766-769, 864; Dec. Dig. § 315.*]

2. **APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.**

The allegations of a party warranted an instruction, which was given, submitting his negligence to the jury as a question of fact, while his own testimony justified a declaration of his negligence as a matter of law, which declaration was refused. *Held*, that the error, if any, was rendered immaterial by the verdict and answers of the jury, which showed that the complaining party could not have recovered had the requested declaration been given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

3. **TRIAL (§ 355*)—FINDINGS—INSTRUCTION—"Do Not Know"—"No."**

The rule that an answer to a special question "We do not know" is equivalent to "No" followed.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 846-848; Dec. Dig. § 355.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4810, 4811.]

Appeal from District Court, Franklin County.

Action by the Iowa City State Bank

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

against John Claypool. From judgment for defendant, plaintiff appeals. Affirmed.

W. S. Jenks, of Ottawa, for appellant.
F. M. Harris, of Ottawa, for appellee.

WEST, J. The defendant, a druggist at Williamsburg, a town of about 500 inhabitants, found himself in possession of a copy of a document indicating that he had ordered and given a promissory note for about 50 dozen packages of perfumes of various kinds, amounting to \$189.75. He notified the company that it need not ship the goods. The document mentioned is a composite affair, printed in various sizes of type, and containing, along with other items, a guaranty, a warranty, a list of things given free, and a blank order for the line of perfumes mentioned. Underneath the place for the signature to the order is printed in small italics this line: "*The company is authorized to detach the below agreement when this order is accepted and executed.*" And immediately following this is a line of perforations separating the portion of the document already referred to from the remainder, which consists of a blank promissory note, payable in installments. On this part of the paper detached, this suit was brought by a bank which claimed to be an innocent holder in due course by purchase from the company, which claims to have sold the goods to the defendant. The latter testified that the agent came to his store and said that he wanted the privilege of placing a line of toilet articles and perfumes on commission; that he would furnish a show case, and when the goods arrived would come and help display the goods therein; that he was not selling the goods, and did not want the defendant to buy them; wanted him to take them on commission, and he would come around every three months and check up what had been sold, which defendant should then pay for, after keeping out his commission of 33½ per cent.—and, having agreed to this, the defendant was handed the document in question, with the request that he would fix it up so that there would be no mistake about the matter and both would understand it. Upon the defendant's noticing the words "For value received I promise to pay," etc., and saying that he did not like the looks of that kind of a contract, the agent said: "I will fix that all right. I will write in here the time when I come around to check you up; I will not put any amount in it, because you are not buying the goods." He said that the figures at the bottom, showing when the installments were due indicated the times when he was to come around to check up. The agent professed to be in a hurry to take a train for another town, and requested the defendant to sign the document, which the agent was to fill out at his leisure. Without going into details the testimony clearly shows a skillfully planned and well-acted deceit by the agent, and surprising careless-

ness on the part of the defendant. His signature appeared following the order and also the note, so that an important question in the case was whether or not he bound himself by the latter, or by his negligence estopped himself from denying liability thereon as against an innocent holder in due course. The jury found in his favor, and the plaintiff appeals, complaining mainly of the instructions.

[1, 2] The court charged, in substance, that if the defendant signed a blank promissory note understanding that the agent was to fill the same out, and it was so completed and transferred to the plaintiff—an innocent holder—the latter should recover. But that if he signed what the agent led him to believe was merely a contract for the sale of goods on commission without any intention of signing a promissory note, then such instrument, when filled out by the agent in the form of a promissory note would not bind the defendant, even in the hands of an innocent purchaser, unless estopped by his own negligence to deny liability; and the question of such negligence was submitted to the jury. The plaintiff insists that under the defendant's own version of the facts in this case he was guilty of negligence as a matter of law, under the rule announced in *Ort v. Fowler*, 31 Kan. 478, 2 Pac. 580, 47 Am. Rep. 501. We are inclined to agree with this contention, but this instruction was apparently drawn to fit the allegations, rather than the evidence, of the defendant, and under the former the question of negligence could properly be submitted as one of fact. And while his own testimony showed such negligence as would estop him, as against an innocent holder in due course, the error, if any, in submitting, instead of declaring, it to the jury worked no substantial prejudice in view of the result reached.

The substance of section 21 of the negotiable instruments law (Gen. Stat. 1909, § 5267), touching an instrument signed in blank and delivered to another for completion, was given, and the jury were advised that this section applies only when the paper was understood by the signer and intended to be a blank promissory note. The plaintiff complains of this, and suggests that this rests the matter on intention rather than on negligence and agency, but the language of the section is: "A blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument." And the delivery of the paper with one's signature thereon, in order that it may be converted into a negotiable instrument, is certainly the same as if done with the understanding and intention that it is to be so converted.

The jury were told in instruction No. 8 that if they believed from the evidence that the note was procured from the defendant fraudulently, then the burden was upon the plaintiff to show that it was a holder in due

course. The instructions requested by the plaintiff were framed upon the theory that a signed blank note was delivered by the defendant to the agent, and by the latter filled out so as to become a promissory note, but the court had to frame its charge to fit the peculiarly devised and constructed document used in this case, which instead of being a blank promissory note included such blank so connected with other printed matter, and yet so easily severable therefrom, as to put the entire paper in a different class from that considered in *Ort v. Fowler*. Indeed authorities are cited by the defendant which seem to hold, in somewhat similar situations, that severance amounts to a material change in the paper, destroying the negotiability of the severed portion. Here, however, had the paper been filled properly and signed understandingly, it would have shown on its face an order for goods to be paid for in installments, an agreement that all which should remain at the termination of the agreement were to be purchased back on certain conditions if the purchaser so desired, a warranty as to their quality, an agreement as to return and exchange, and a note payable in installments preceded by an italicized line in small print, providing for its severance from the remainder of the document. The difficulty is not with this anomalous paper honestly used, but with the condition brought about by its fraudulent use. Whether the signature was obtained solely by the fraud of the agent or by that together with the carelessness of the defendant, in either event the plaintiff could not recover unless a holder in due course.

[3] From the counter abstract and a statement in reference thereto it appears that the verdict was received in the absence of counsel for both sides, and with it were certain special questions and answers which, though not signed by the foreman, were delivered to and filed by the clerk. No. 3 was as follows: "Was the note now sued upon sold by the Franklin-Price Company for a valuable consideration before maturity? A. We do not know." Under the repeated decisions of this court this answer was equivalent to "No" (*Railroad Co. v. Swarts*, 58 Kan. 238, 48 Pac. 953; *Hilligoss v. Railway Co.*, 84 Kan. 372, 114 Pac. 383), and the result is a finding in effect that the plaintiff is not a holder in due course. Gen. Stat. 1909, § 5305. It seems that the questions were submitted at the request of the plaintiff, and the fact that they were not signed by the foreman of the jury does not, under the circumstances shown, preclude their consideration as a part of the record of the proceedings in the case.

It is complained that the verdict is against the weight of the evidence. The plaintiff's testimony was that it purchased and received the note, detached, January 20, 1910, while the defendant testified that he saw the un-

severed paper after November 8, 1910, which would be after its maturity. This left the matter for the jury to determine, giving to the evidence such weight and significance as they believed it deserved. In view of this finding, which with the general verdict presumably met the approval of the trial court, the plaintiff would not be entitled to recover had the instructions requested by it been given instead of those which the court gave.

The judgment is therefore affirmed. All the Justices concurring.

CITY OF TOPEKA v. BOARD OF COM'RS OF SHAWNEE COUNTY.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. LEVEES (§ 19*)—ERECTION IN STREETS—CONSTRUCTION OF APPROACHES.

In the construction of a levee for the purpose of preventing the overflow of the Kansas river the board of county commissioners of Shawnee county erected in a street in the city of Topeka a concrete wall 13 feet high. In an action by the city to compel the county board to abate the same as a nuisance and restore the highway to its original use by building suitable approaches so that the street could be used for public travel, it is held, that the county board has no authority to raise the grade of the street, nor to determine the kind and character of approaches necessary, nor to construct the same.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 10; Dec. Dig. § 19.*]

2. LEVEES (§ 19*)—USE OF STREETS—RESTORATION.

Chapter 104, Session Laws of 1893, and acts amendatory and supplemental thereto, creating drainage districts and providing for the building of levees, in no wise limits or modifies the duty of the city to keep its streets in a safe condition for travel. The care and control of the streets are in the city; its prior and continuing authority yields only so far as to permit the construction of the levee by the drainage board in accordance with the act of the Legislature.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 10; Dec. Dig. § 19.*]

Appeal from District Court, Shawnee County.

Action by the City of Topeka against the Board of Commissioners of Shawnee County, State of Kansas. From judgment for defendant, plaintiff appeals. Affirmed.

W. C. Ralston, of Topeka, for appellant. E. R. Simon and Edwin A. Austin, both of Topeka, for appellee.

PORTER, J. The city of Topeka sued the board of county commissioners of Shawnee county for the abatement of a nuisance. Within the corporate limits of Topeka there is a highway 40 feet wide, known as the "River Road," running in a northeasterly direction along the south bank of the Kansas river. The petition alleged that during the year 1911 the county board constructed a concrete wall 13 feet high crossing the "River

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Road" diagonally, and thus obstructing the travel thereon, and that the wall constitutes a public nuisance. A mandatory injunction was asked to compel the defendant to abate the nuisance and restore the road to its original use by building suitable and proper approaches on both sides of the concrete wall so that the street could be used for public travel. The answer alleged that the wall is a part of a levee constructed by "drainage district No. 6 of Shawnee county," in pursuance of proper proceedings before the board of county commissioners under the provisions of chapter 104, Session Laws of 1893, and the acts of the Legislature amendatory and supplemental thereto; that, except so far as the construction of the levee across the street necessarily obstructs the use of the same as a highway, the care, maintenance, and control of the street, together with the power of changing the grade thereof and the duty to keep the same open for travel, remains in the plaintiff, the prior and continuing authority of the city yielding only so far as to permit the board of county commissioners to construct the levee for the purpose of preventing the destruction of property by the overflow of the Kansas river in time of floods. The court overruled a demurrer to this part of the answer, and from this ruling the city has appealed.

[1] It will thus be seen that the real controversy is: Which one of the two agencies of the state should build the necessary approaches so as to permit travel over the wall of the levee? In the briefs plaintiff has cited authorities holding that the right to cross a highway does not authorize an appropriation of any part of it, nor a material interference with public travel; and contends that, unless authority is expressly conferred by the Legislature, no person or corporation, public or private, has the right to permanently obstruct a public highway. It must be manifest that the wall in question was not constructed under any pretense of exercising the right to cross a highway, and that cases involving the duty of a railway company to maintain crossings where its road intersects public highways can furnish no aid in solving the question here. We think the demurrer was properly overruled. The board of county commissioners acting as a drainage board and the city are both agencies of the state. "The state is the sovereign power, and cities, towns, and all other municipalities are its subsidiary agencies for governmental purposes." *State v. Lawrence*, 79 Kan. 234, 257, 100 Pac. 485, 494. "Indeed, everything relating to the management of counties, cities, and townships not defined and limited by the Constitution may be taken away by the state acting through its Legislature, and as to these political divisions and their agents the Legislature has the same power that it possesses over state officers." *In re Dalton*, 61 Kan. 257, 264, 59 Pac. 336, 338, 47 L. R. A. 380.

The Legislature authorized the creation of drainage districts, quasi municipal corporations, as subsidiary agencies of the state, and gave them power to take public as well as private property for the purpose of erecting levees. In the recent case of *State v. Shawnee County*, 83 Kan. 199, 110 Pac. 92, the validity of the law under which the defendant constructed this levee was before the court for consideration. One of the questions involved was whether the streets of the city of Topeka could be taken by levee proceedings. It was said in the opinion: "It is said that the streets of the city of Topeka cannot be taken by levee proceedings, that no damages are allowed the city for streets taken, that benefits to streets from the levee are assessed to the city, that no method for collecting such assessments is provided, and consequently that the proceedings attacked are unlawful. The city of Topeka and its streets are wholly subject to the control of the Legislature. The Legislature has appointed the board of county commissioners to decide whether a levee partly within a city is necessary to prevent inundation from overflowing rivers, and to promote the public health, convenience, and welfare. If the decision be that such a levee is necessary, and that it must occupy a portion of a city street, one public use yields to the other. A city is not the owner of its streets in any private proprietary sense, but is merely the agent of the state respecting them for the promotion of certain public purposes. Consequently the appropriation of its streets gives the city no right to damages, under the statute, as an owner of a division of the land taken." 83 Kan. 204, 110 Pac. 94.

[2] The statute authorizing the creation of drainage districts gave the board its authority; and where the board, acting in good faith, determines that it is necessary to occupy a portion of a city street in the building of a levee, it necessarily follows, as said in *State v. Shawnee County*, *supra*, that, "one public use yields to the other." Manifestly the board of county commissioners has no authority to raise the grade of the street or to determine the kind or character of approaches to be constructed so that the public may travel across the levee. The duty to keep its streets, avenues, alleys, and bridges in a safe condition for travel rests upon the city under the ordinary powers which the statute confers upon it. *Com'rs of Shawnee County v. City of Topeka*, 39 Kan. 197, 18 Pac. 161. The act creating drainage districts and providing for the building of levees in no respect limits or modifies this power and authority of the city. The care and control of the streets are in the city; its prior and continuing authority yields only so far as to permit the construction of the levee in accordance with the act of the Legislature.

The judgment is affirmed. All the Justices concurring.

METRAKOS v. KANSAS CITY, M. & O. RY. CO.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. DEATH (§ 31*)—RIGHT OF ACTION—FOREIGN ADMINISTRATOR.

A resident of Kansas was killed in this state. No administration was taken out here, but in another state where the deceased left certain property a special administrator was appointed, who sues in Kansas under section 419, Code Civ. Proc. (Gen. St. 1909, § 6014), to recover for the next of kin damages for the death. *Held*, that he cannot maintain the action.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

(Additional Syllabus by Editorial Staff.)

2. EXECUTORS AND ADMINISTRATORS (§ 9*)—LETTERS OF ADMINISTRATION—POWER TO GRANT.

Power to grant letters of administration is not dependent upon the existence of debts left by the deceased or assets legally applicable to their payment.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 21, 27, 28; Dec. Dig. § 9.*]

3. EXECUTORS AND ADMINISTRATORS (§ 11*)—APPOINTMENT OF ADMINISTRATOR—PROSECUTION OF DEATH CLAIM.

For the purpose of the appointment of an administrator for the prosecution of a death claim, the personal property left by the deceased may be merely nominal.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. § 11.*]

4. EXECUTORS AND ADMINISTRATORS (§ 11*)—PROPERTY SUBJECT TO ADMINISTRATION—DEATH.

A claim under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery of damages for wrongful death, is not an estate of the deceased to be administered within the state.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 25; Dec. Dig. § 11.*]

5. DEATH (§ 31*)—PARTIES—FOREIGN ADMINISTRATOR.

An administrator appointed in another state may sue to recover under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), for the death in Kansas of a resident of such other state.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

6. DEATH (§ 8*)—RIGHT OF ACTION.

Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, does not confer a right of action for an injury inflicted in another state.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*]

7. DEATH (§ 31*)—RIGHT OF ACTION—FOREIGN ADMINISTRATOR.

An administrator appointed in another state cannot proceed under Code Civ. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, where the law of his state prohibits him from maintaining an action there; and if so permitted in the state of his appointment he may not maintain the action in Kansas, where the statute of such other state is in part penal and authorizes others to sue than those prescribed by the Kansas statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

8. DEATH (§ 31*)—RIGHT OF ACTION—WIDOW OF NONRESIDENT.

The widow of a nonresident whose death occurred in Kansas may recover as such widow under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, though not entitled to recover as administratrix.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

9. DEATH (§ 31*)—RIGHT OF ACTION—ALIEN PARENTS.

Alien parents may recover under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, for the death in Kansas of a minor son.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

Appeal from District Court, Sedgwick County.

Action by Arthur Metrakos, special administrator, against the Kansas City, Mexico & Orient Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Talbot & Allen, of Lincoln, Neb., Brown & Brown, of Wichita, E. G. Maggi, of Lincoln, Neb., and Paul Brown, of Wichita, for appellant. R. L. Holmes, C. G. Yankey, and Chester I. Long, all of Wichita, for appellee.

WEST, J. [1] The plaintiff was in Nebraska appointed special administrator of the estate of the deceased, who resided and was killed in Sedgwick county, Kan. The court sustained a demurrer to the second amended petition presumably on the ground that the plaintiff had no capacity to sue. The allegation is that the deceased left a personal estate in Lancaster county, Neb., and that a section of the statute of that state authorized the appointment. This section provides that, if the deceased at the time of his death resided in any other state leaving an estate to be administered in Nebraska, administration shall be granted in the county where such estate shall be; and provision is made for the appointment of a special or temporary administrator with authority to collect debts and bring suits. The pleading avers that the deceased was unmarried and gives the names of his next of kin. Plaintiff's theory is that by the terms of our statute he is entitled to maintain the action, which is not one to recover any assets which could become liable for the debts of the deceased or for any reason need to be administered upon here. The defendant relies on section 3436 of the General Statute of 1909, which provides "that upon the decease of any inhabitant of this state, letters testamentary or letters of administration on his estate shall be granted by the probate court of the county in which the deceased was an inhabitant or resident at the time of his death," which must be considered in connection with section 419 of the Civil Code (Gen. St. 1909, § 6014), which authorizes an

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

action by the personal representatives of the deceased.

Previous decisions have settled the following points:

[2] Power to grant letters of administration is not dependent upon the existence of debts left by the deceased nor assets legally applicable to their payment. *Ewing v. Mallison*, 65 Kan. 484, 493, 70 Pac. 369, 93 Am. St. Rep. 299; *Nickel v. Vogel*, 76 Kan. 625, 92 Pac. 1105; *Eklblad, Adm'r, v. Hanson*, 85 Kan. 541, 543, 117 Pac. 1028.

[3] For the purpose of the appointment of an administrator for the prosecution of a death claim, the personal property left by the deceased may be merely nominal. *Cox, Adm'r, v. Kansas City*, 86 Kan. 293, 120 Pac. 553, and cases cited.

[4] The claim for damages for causing the death of a person under section 419 of the Civil Code is not an estate of the deceased to be administered within this state. *Perry v. St. Joseph & W. R. Co.*, 29 Kan. 420.

[5] The administrator appointed in another state, being a mere trustee of the fund sought to be secured, can maintain an action to recover here for the death in this state of a resident of such other state. *K. P. Ry. Co. v. Cutter*, 16 Kan. 583.

[6] Section 419 of the Civil Code does not confer a right of action for an injury inflicted in another state. *McCarthy, Adm'r, v. Railroad Co.*, 18 Kan. 46, 26 Am. Rep. 742.

[7] An administrator appointed in another state cannot proceed under this section if the law of his own state prohibits him from maintaining an action there (*Limekiller v. Hannibal & St. J. R. Co.*, 33 Kan. 83, 5 Pac. 401, 52 Am. Rep. 523); and if so permitted in the state of his appointment he may not maintain the action here when the statute of such other state is in part penal and authorizes others than those prescribed by our statute to sue (*Dale v. Railroad Co.*, 57 Kan. 601, 47 Pac. 521; *Matheson v. Railway Co.*, 61 Kan. 667, 60 Pac. 747).

[8] The widow of a nonresident whose death occurred in this state may as such widow recover here, although not entitled to as administratrix. *Railway Co. v. Mills*, 57 Kan. 687, 47 Pac. 834.

[9] Alien parents can sue here for the death in this state of a minor son. *Railway Co. v. Fajardo*, 74 Kan. 314, 86 Pac. 301.

Section 3639, General Statute of 1909, is in these words: "An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may sue or be sued." This has been liberally construed and has been held to justify an action against a foreign executor or administrator on publication service (*Cady v. Bard*, 21 Kan. 667), the recognition by our courts of a foreign

administrator's possession of personal property here belonging to the deceased who was domiciled in another state, there being no local administrator and no local creditors (*Denny v. Faulkner*, 22 Kan. 89), an attachment here by a foreign administrator with the will annexed (*Dunlap v. McFarland*, 25 Kan. 488), an action against a foreign executor for the recovery of money on a contractual liability (*Manley v. Park*, 62 Kan. 553, 557, 64 Pac. 28), and the enforcement here by attachment of a contract obligation of a nonresident who died owning real estate here (*Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550, 1 Ann. Cas. 825). In the decision last cited the history, constitutionality, and meaning of the section were fully considered.

While the requirement of section 3436 that letters testamentary or letters of administration "shall be granted" is directory and not mandatory, and when there are no creditors no administration is necessary (*Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 547), still the courts are not called upon to disregard such requirement in a case like this when in all probability the deceased, who was earning wages here, left a sufficient estate to warrant the granting of letters of administration, for this section fixes the situs of the appointment at his residence, and not at some other place where he may have left property. What was said in the *Cutter* case respecting the province of the personal representative who sues for the fund provided by section 419 had reference to the facts of that case which did not involve the recognition of a foreign administrator to the exclusion of one who should have been appointed here. No former decision of ours has touched the question now presented, and no reason is perceived why the statutory method should not be followed. Various views have been taken of situations somewhat similar. *Tiffany, Death by Wrongful Act* (2d Ed.) § 110; *Boulden v. P. R. Co.*, 205 Pa. 264, 54 Atl. 906; 18 Cyc. 1239, 1240; *Morris v. C., R. I. & P. Ry. Co.*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39; *Robertson v. C., St. P., M. & O. Ry. Co.*, 122 Wis. 66, 99 N. W. 433, 66 L. R. A. 919, 106 Am. St. Rep. 925; *Sanbo v. Union Pac. Coal Co. (O. C.)* 130 Fed. 52; *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439. But decisions which involve the precise condition here presented have not been pointed out or discovered.

The provision for a special administrator in Nebraska appears to be practically the same as ours, and such appointment is not ancillary but preliminary and temporary. And while such appointee has in certain cases cited by the plaintiff been held to be the personal representative, we find no authority or reason for holding that either a special or a general administrator of another state can demand judicial recognition in this

case to recover for the death of one whose residence and death were here.

The judgment is affirmed. All the Justices concurring.

PATTERSON v. IMPERIAL WINDOW GLASS CO.†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. COURTS (§ 1*) — SCOPE OF AUTHORITY — ABUSE OF PROCESS.

Courts possess inherent power to prevent any abuse of their process.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1-4, 6-9, 91-106; Dec. Dig. § 1.*]

2. ACTION (§ 4*)—ILLEGAL TRANSACTIONS.

Whenever at any stage of the proceedings it is established to the satisfaction of the court that the cause of action upon which the plaintiff seeks to recover arose out of an unlawful conspiracy, it becomes at once the duty of the court to refuse to aid either party to profit by the iniquitous agreement.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 17-24; Dec. Dig. § 4.*]

3. ACTION (§ 4*)—UNLAWFUL CONTRACTS—ENFORCEMENT—PRACTICE.

Ordinarily the procedure in such a case would be to dismiss the action at the cost of the party bringing it; but the name given to the procedure is of no consequence if the action of the court be rightly taken.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 17-24; Dec. Dig. § 4.*]

4. CONTRACTS (§ 138*)—MONOPOLIES (§ 21*)—UNLAWFUL CONTRACTS—REMEDIES—SUFFICIENCY OF EVIDENCE.

On the facts stated in the opinion it is held that the plaintiff's cause of action arose out of and was based upon an unlawful conspiracy in the restraint of trade and in violation of the anti-trust laws of the United States (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) and of the provisions of chapter 257, Laws 1889, and the acts amendatory thereto, and that the court properly denied the plaintiff any relief.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138;* Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.*]

Appeal from District Court, Montgomery County.

Action by the Imperial Window Glass Company against R. M. Patterson. From judgment for defendant, plaintiff appeals. Affirmed.

J. B. Tomlinson, of Independence, for appellant. Stanford & Stanford, of Independence, Farrelly & Evans, of Chanute, and Banks & Bertenshaw, of Independence, for appellee.

PORTER, J. The only question to be determined is whether the trial court rightly denied the plaintiff any relief on the ground that his cause of action grew out of and was based upon an unlawful conspiracy and upon transactions between plaintiff and defendant in violation of the anti-trust laws. The question is largely one of procedure. R. M. Patterson, the plaintiff, sued the Imperial

Window Glass Company to recover the sum of \$34,946.48 damages for breach of a written contract entered into between himself, as lessor of the Osage Window Glass Company, and the defendant. Certain property was attached as belonging to the defendant. The Caney Window Glass Company filed an interplea, setting up a claim to the attached property, and alleged, among other things, that Patterson was a stockholder in the Imperial Window Glass Company; that it was a corporation organized in the state of West Virginia for the purpose of controlling the price and products of window glass factories and preventing competition in that class of merchandise; that the contract upon which the plaintiff sought to recover grew out of transactions between himself and the defendant, which were in violation of the provisions of chapter 81, General Statutes 1909, against monopolies and unlawful combinations. The cause came on for trial before the court on the interplea. Over the objections of plaintiff the court admitted in evidence an exemplified copy of an indictment, and the record of proceedings thereunder, filed April 7, 1910, in the District Court of the United States for the Western District of Pennsylvania against the Imperial Window Glass Company and other defendants. There was indorsed on the exemplified copy the statement that on November 11, 1910, the several defendants in open court severally waived arraignment and entered a plea of nolo contendere. The name of R. M. Patterson did not appear in the record, but the Osage Window Glass Company, of which he was the lessee, was mentioned in the indictment as one of the corporations with which the Imperial Company had entered into an unlawful combination in restraint of trade. The plaintiff and defendant separately demurred to the interpleader's evidence. The court sustained the demurrers, and at the same time held that all the parties were invoking the aid of the court in furtherance of an unlawful conspiracy, and that the court should not aid either of them, but leave them where it found them. In stating the reasons for the decision the court held that the demurrer of the plaintiff to the evidence of the interpleader should be carried back to the plaintiff's petition.

[2, 3] The plaintiff complains of this ruling, and insists that it is contrary to the rules of practice and of orderly procedure; that he has not had his day in court, and should have been permitted to introduce evidence. While we are not aware of any rule which would authorize a demurrer to evidence to be employed to search the whole record, or to be carried back and sustained against a pleading, we think the procedure by which the court denied the plaintiff relief is of little importance. When at any stage of the proceedings it was established to the satisfaction of the court that the cause of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

action upon which the plaintiff sought to recover arose out of a transaction in violation of the anti-trust laws, it became at once the duty of the court to refuse to aid either party to profit by the iniquitous agreement. Ordinarily the procedure would be to dismiss the action at the cost of the party bringing it. In this case the court taxed the costs against the plaintiff, and the name given to the procedure is of no consequence if the action of the court was rightly taken.

[4] In the contract upon which his cause of action is based plaintiff agreed to manufacture glass upon the orders of the Imperial Window Glass Company, and to sell to that company the entire output of his factory for a certain period. He was to be paid a certain price when the product was delivered, but it was understood that there were to be semiannual adjustments of prices by which he was to be paid any difference between the first price and the average price received by the Imperial Company from its customers. With respect to prices, there was this further provision: " * * * In the event that the wages of skilled labor employed in the manufacture of window glass shall be increased or decreased, from the scale upon which these discounts are based, the above prices shall be governed thereby, and shall be increased or decreased, as the case may be, in proportion to the relative increase or decrease of the scale of such wages as understood by window glass manufacturers." Severe penalties were imposed for his failure to sell all of his output to the Imperial Company. He was obliged to make daily reports of his business to that company, and it was to be permitted to audit his books and to examine his premises at any time to ascertain whether he had manufactured or sold any glass in violation of the contract. Patterson agreed that the brand of the Osage Window Glass Company should be placed on the boxes in which his product was shipped, but that the Imperial Company should give to its customers, as far as convenient and practicable, the brands of glass they had been accustomed to purchasing prior to the making of the agreement. Plaintiff was to subscribe for stock in the Imperial Company to the extent of \$3,000. The concluding paragraph of the contract provides that this stock was to be paid for by the Imperial Company and donated to the plaintiff, and likewise contains other provisions which throw additional light upon the character of the agreement. It reads: "This contract shall become inoperative at such times as lease of the Osage Glass Company's plant at Independence, Kansas, terminates. Percentage of cost to conduct Imperial Window Glass Company's business shall be based on duration of said lease and final settlement with lessee shall be made within thirty days from termination of same, and stock subscribed for, amounting to three thousand dollars shall be paid for by Imperial Window Glass Company at final set-

tlement." The contract was signed by Patterson as lessee of the Osage Window Glass Company, party of the first part, and by Myron L. Case as president of the Imperial Window Glass Company, party of the second part.

The extent to which the Imperial Company controlled the market did not appear from the contract; but there was considerable oral evidence introduced on the hearing of the interplea from which it was shown that the company by means of similar contracts sought to control to a large extent the output and price of window glass factories throughout the country. The president of the Imperial Window Glass Company testified that the principal owners of the stock of the company were individuals, most of whom were directly or indirectly interested in window glass manufacturing plants, holding stock in the company for their plants which were located in Pennsylvania, New York, West Virginia, Ohio, Indiana, Illinois, and Kansas; that these were the principal glass producing states at that time; that the Imperial had but one contract with each company, usually a separate agreement, a stock subscription, which included a contract for the purchase of glass, F. E. Wear, who was interested in other glass manufacturing plants, as well as in the Imperial Company, testified that the Imperial Company continued in business for about one year, and that it controlled 40 or 50 per cent. of the window glass trade.

While the plaintiff objected to the introduction in evidence of the record of the indictment, no objection was interposed to the oral testimony showing quite fully the nature and extent of the business conducted by the Imperial Company. If, at the stage of the proceedings where the court indicated an intention to deny the plaintiff any relief, the plaintiff had offered or suggested that he had or could procure evidence to show that the contract had not been entered into for an unlawful purpose, or evidence in rebuttal of the oral testimony, it would have been the duty of the court to hear the evidence, and doubtless the court would have done so in this case. But no offer of that kind was made. The plaintiff objected to the judgment upon two grounds: First, that the court had no right to carry back to the petition a demurrer to evidence and sustain it; and, second, that the court had no right to make the ruling without permitting him to introduce evidence in support of his cause of action. It appears, moreover, that instead of dismissing plaintiff's action at once, the learned trial judge proceeded with the utmost caution and deliberation, stating that while he would at once sustain the demurrer interposed by the plaintiff to the interplea, and believed he ought to carry the demurrer back to the petition and sustain it against the plaintiff because he was satisfied that all the parties were seeking the aid of the court in further-

ance of an unlawful controversy, and that it would be the duty of the court to leave them where it found them in their controversy, "but, not being sufficiently advised in the premises, the court reserves its judgment upon the demurrer to plaintiff's said cause of action until a later adjourned date of the present term of this court." That was on the 19th day of June. On the 20th day of July following, and at the same term, the parties again appeared, and the court for the reasons stated made the ruling complained of. The plaintiff can hardly claim to have been surprised or prejudiced by the manner in which the ruling was made. It seems that he had ample time to have procured testimony if he desired to satisfy the court that the transaction upon which he was seeking to recover was not unlawful, or that the contract itself had not been entered into in restraint of trade. If the ruling were reversed, it would be merely for the purpose of giving to the plaintiff an opportunity first to offer proof to satisfy the trial court that he is not seeking the court's aid in furtherance of an unlawful transaction.

It was the intention of the anti-trust act of 1889 (chapter 257, Laws of 1889), and the acts amendatory thereto, that the courts should not be used to enforce any agreement or contract entered into in violation of that law. In *Barton v. Mulvane*, 59 Kan. 313, 317, 52 Pac. 883, 885, it was said: "Obviously the Legislature intended that parties engaged in such an unlawful combination or trust should not use the law and its machinery to promote the unlawful combination or conspiracy, nor to enforce any agreement or contract growing out of it."

There is no room for the plaintiff's contention that the contract upon which he sought to recover was collateral to and independent of the unlawful combination. The doctrine of *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, therefore, has no application. There the action was on a note for goods sold by the pipe company in the ordinary course of trade. Connolly, the purchaser, was not a member of the unlawful combination and in no way connected with it; and it was held that the fact that the plaintiff was a member of an unlawful trust and combination was not available as a defense. A recent case in point is that of *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486. The authorities are reviewed in the opinion, and it is held that a contract made with direct reference to and in execution of a combination intended to restrain and monopolize trade is a violation of the federal anti-trust act.

It is unnecessary to inquire whether the

record of the indictment against the defendant was properly admitted in evidence at the hearing of the interplea, or to determine whether a plea of *nolo contendere* may be given the same effect as a plea of guilty. From an examination of the contract, we have no hesitation in holding that it is one prohibited by the federal act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), and likewise by the provisions of chapter 257, Laws of 1889, and the acts amendatory thereto. The court, therefore, had sufficient evidence, without either the exemplified copy of the indictment or the oral testimony, to authorize it to refuse the plaintiff any relief and to render judgment against him for costs.

[1] "Every regularly constituted court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, and to prevent any abuse of its process." 8 A. & E. Ency. of Law, 28.

In *Coppell v. Hall*, 7 Wall. (74 U. S.) 542, 558 (19 L. Ed. 244), it was said: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

Referring to the public policy upon which this rule of law is founded, Mr. Justice Peckham, in the course of an opinion, said: "To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." *McMullen v. Hoffman*, 174 U. S. 639, 669, 19 Sup. Ct. 839, 851, 43 L. Ed. 1117, 1129.

The court's ruling amounted to the same thing as dismissing the action at the costs of the plaintiff. The latter was not hurt by the name given to the procedure, and has no right to complain of the judgment denying him the aid of the court in furtherance of an unlawful transaction.

The judgment will be affirmed. All the Justices concurring.

GILLMORE v. GILLMORE et al.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. PROCESS (§ 120*)—EXEMPTION—NONRESIDENT WITNESS.

A nonresident of the state, while here only for the purpose of attending court as a witness, and while actually in such attendance, is exempt from the service of summons in a civil action.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 150; Dec. Dig. § 120.*]

2. LIMITATION OF ACTIONS (§ 100*)—COMMENCEMENT OF PERIOD—"FRAUD."

An action for damages because of the defendant having induced the plaintiff to become a user of morphine, in ignorance of its nature, is not one for relief on the ground of "fraud" within the meaning of that phrase as used in the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2943-2954; vol. 8 p. 7666.]

3. LIMITATION OF ACTIONS (§ 74*)—STAY OF PERIOD—LEGAL DISABILITY.

The running of the statute of limitations, upon an action for damages because of the defendant having induced the plaintiff to become a user of morphine, is not wholly suspended by the fact that the plaintiff, knowing the manner in which the habit was induced, and having acquired knowledge of the effects of the drug, has been so affected mentally as not to be capable of protecting his own interests; such an action can be brought only within one year from the time mental capacity is restored.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 413, 414; Dec. Dig. § 74.*]

Appeal from District Court, Stafford County.

Action by Rosamond Gillmore against Robert E. Gillmore and others. From judgment for defendants, plaintiff appeals. Affirmed.

Paul R. Nagle, of St. John, for appellant.
F. L. Martin, of Hutchinson, for appellees.

MASON, J. Rosamond Gillmore filed in the district court a petition asking damages against her husband, Robert E. Gillmore, and his parents, Frank B. and Mary A. Gillmore. The service on Robert E. Gillmore was set aside, and no new summons was served. Judgment was rendered in favor of the other defendants upon a demurrer to the evidence. The plaintiff appeals from both rulings.

[1] The motion to set aside the service of summons was based upon a showing that the defendant Robert E. Gillmore was a nonresident of the state, and that he was served with process while here for the purpose of attending court as a witness. In this situation the service was properly set aside. *Underwood v. Fosha*, 73 Kan. 408, 85 Pac. 564, 9 Ann. Cas. 833; note 6 Ann. Cas. 337.

[2] The plaintiff asked damages against the remaining defendants upon the ground that they had, by false representations on the

subject, induced her to marry their son, knowing that he was afflicted with a communicable disease, from which she afterwards suffered; and also that by administering morphine to her, she being in ignorance of its nature, they fastened upon her the habit of using that drug. There was evidence tending to show these facts: The marriage took place January 1, 1898. The consequences of the disease became manifest within a few weeks. The plaintiff was induced by her husband's mother to take morphine for the relief of her pains, she not knowing what it was, or the effects it would produce. By July, 1899, she had fully acquired the morphine habit, which persisted until December 24, 1910, when a cure was effected as the result of treatment at a sanitarium. This action was brought December 29, 1911.

The plaintiff contends that the action is one for relief on the ground of "fraud" within the meaning of that term as used in the statute of limitations (Code Civ. Proc. § 17, subd. 3 [Gen. St. 1909, § 5610]), that the statute did not begin to run until the discovery of the fraud, and that this did not take place until her cure was effected, because until that time she did not and could not fully realize her situation. We do not regard the action as one for relief on the ground of fraud within the statute referred to. The question is somewhat similar to that presented in *Bank v. Bay*, 90 Kan. 506, 508, 135 Pac. 584, 585, where it was held that duress does not constitute fraud in that sense, although, "broadly speaking, all conduct may be said to be fraudulent which results in unconscientious advantage over, or injury to, another." The plaintiff alleges that the injury she had received was concealed from her—that she did not know of it—until she was cured of the morphine habit. She testified that she had been anxious to take a cure as early as 1902; that in 1899 a doctor had told her she ought to do so, and she knew then that in his opinion she had the habit to such an extent as to require a cure; that about 1903 she refrained from the use of morphine for seven months while taking treatment provided by her husband, intended to accomplish a cure. It seems clear, therefore, that the plaintiff many years before this action was brought not only knew of the fact that the morphine habit had been fixed upon her, and how this had been accomplished, but also knew at least in a general way the nature and consequences of the habit. The contention that she did not know of the injury that had been done her until she had been cured of the habit is therefore not supported, except in the sense that her mental processes had been so impaired that she was not capable of protecting her own interests—in other words, that she was under disability. There was evidence which may be thought to go far toward proving her mental condi-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion to have been at least approximately normal, but that is not a matter to be determined upon demurrer.

[3] Assuming that the evidence justified a finding that until she was cured of the morphine habit she was not capable of acting upon the information she had, she was under legal disability, and the statute of limitations would not bar a recovery while that condition existed. The statute, however, fixes the period within which an action may be brought under such circumstances at one year after the disability is removed. Code Civ. Proc. § 18 (Gen. St. 1909, § 5611). The present action was not brought within that time, and we hold that the ruling of the trial court was correct, upon the ground that whatever cause of action the plaintiff had was barred by the statute of limitations.

The judgment is affirmed. All the Justices concurring.

WARNOCK v. MOORE.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL (§ 15*)—PENDENCY OF ANOTHER ACTION — EFFECT OF DISMISSAL.

The plaintiff sued the defendant in Ness county. Afterwards the plaintiff brought a second suit on the same cause of action in Reno county. After a plea in abatement had been filed in Reno county alleging the pendency of the former suit, the Ness county action was dismissed. The plea in abatement was then overruled, and the Reno county action proceeded to judgment. *Held*, the dismissal of the first action removed the bar to the maintenance of the second.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 111-117; Dec. Dig. § 15.*]

2. HUSBAND AND WIFE (§ 332*)—ALIENATION OF AFFECTIONS—PLEADING—SUFFICIENCY.

In an action for damages by a husband for the alienation of his wife's affections, it is not necessary to plead specifically the artifices by which the wrong was accomplished. It is sufficient to plead the ultimate facts.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1123; Dec. Dig. § 332.*]

3. HUSBAND AND WIFE (§ 332*)—ALIENATION OF AFFECTIONS—PLEADING AND PROOF.

Where a petition pleads certain conduct occurring between certain dates as means whereby alienation was accomplished, but further pleads that various other means of alienation were employed which the plaintiff cannot, for want of knowledge, describe with particularity, the plaintiff is not limited in his proof to the conduct and the dates specially pleaded.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1123; Dec. Dig. § 332.*]

4. HUSBAND AND WIFE (§ 335*)—ALIENATION OF AFFECTIONS—INSTRUCTIONS—EVIDENCE.

The plaintiff's wife left his home on July 5th in company with the defendant, who furnished the conveyance and supplied her with money. On the next day she and the defendant passed for husband and wife in a distant city and occupied the same apartment for two nights. *Held*, an instruction to the jury that they might consider the conduct of the defend-

ant with reference to the plaintiff's wife after she left home was proper.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1126; Dec. Dig. § 335.*]

5. HUSBAND AND WIFE (§§ 333, 334*)—ALIENATION OF AFFECTIONS—EVIDENCE OF VERDICT—MALICE.

The admission of an item of evidence offered to prove malice, and the verdict of the jury approved.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1124, 1125; Dec. Dig. §§ 333, 334.*]

(Additional Syllabus by Editorial Staff.)

6. HUSBAND AND WIFE (§ 333*)—ALIENATION OF AFFECTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in a husband's action for damages, *held* to show that the elopement of plaintiff's wife with defendant and their living together as man and wife was the result of defendant's siege of the wife's affections.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1124; Dec. Dig. § 333.*]

Appeal from District Court, Reno County.

Action by D. B. Warnock against W. E. Moore. From a judgment for plaintiff, defendant appeals. Affirmed.

Prigg & Williams, of Hutchinson, for appellant. F. L. Martin and E. T. Foote, both of Hutchinson, for appellee.

BURCH, J. D. B. Warnock sued W. E. Moore for damages resulting from the alienation of the affections of the plaintiff's wife by the defendant. The plaintiff recovered, and the defendant appeals.

[1] The plaintiff first sued the defendant in Ness county in August, 1911. Service was duly made, and the defendant filed a motion attacking the petition. On September 22, 1911, the plaintiff instituted a second suit against the defendant on the same cause of action in Reno county. On September 27th the plaintiff filed his motion to dismiss the Ness county action without prejudice. On October 10th the defendant filed a plea in abatement in the Reno county action, calling the attention of the court to the suit already pending in Ness county. On October 11th the action in Ness county was dismissed. On November 16th a second summons was issued and served on the defendant in the Reno county action. On December 4th the plea in abatement was overruled. The defendant then answered and, besides pleading to the merits, set up the institution of the suit in Ness county as a bar to further proceedings. No specific objection was interposed to the service of November 16th, but it is claimed that, notwithstanding such service, the action should have been abated.

The plaintiff could not rightfully ignore the first action and involve the defendant in another while the first suit was pending, and the plea in abatement was valid when filed. The plaintiff in effect confessed the plea and commenced again by procuring fresh service on November 16th, after the Ness county

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

suit was dismissed. It is not material that the summons was called an alias summons or that the plaintiff did not go through the formality of refiling the petition. The defendant did not ask that the proceeding thus instituted on November 16th be abated as a third suit on the same cause of action, and the ground of the plea in abatement and of the abatement feature of the answer, namely, that a former suit had been commenced in Ness county, did not apply to it. But, beyond this, the dismissal of the Ness county suit rendered it unavailable as a bar to further proceedings.

In the case of *Bond v. White*, 24 Kan. 45, the plaintiff sued the defendant for forcible entry and detainer before a justice of the peace and recovered judgment on March 19th. On the same day the defendant filed an appeal bond, which the justice of the peace approved, and thereby perfected an appeal to the district court, although the transcript was not sent up for some time. On March 26th the plaintiff commenced a second action for the same relief. It was held that the pendency of the first action on appeal was a bar to the prosecution of the second. In the opinion it was said that a party may not be vexed by two actions "at the same time" for the same thing; that, if the plaintiff be conscious of mistake in the one he has commenced, he should abandon it and try again; and that he has no right to harass his adversary "by mere multiplicity of actions." The same principle was announced in the case of *Challiss v. Smith*, 25 Kan. 563, where it was said that if the plaintiff, ignoring the first suit, may commence a second, he may on the same principle ignore the second and commence a third, and so on indefinitely, and thus unnecessarily vex and wrong the defendant and improperly consume the time of the courts. In support of the opinion in the *Bond-White Case*, the court quoted from 1 *Bacon's Abridgement*, p. 28, as follows: "The law abhors a multiplicity of actions, and therefore, whenever it appears on record that the plaintiff has sued out two writs against the same defendant for the same thing, the second writ shall abate, for if it were allowed that a man should be twice arrested, or twice attached by his goods for the same thing, by the same reason he might suffer infinitum, and it is not necessary that both should be pending at the time of the defendant's pleading in abatement, for, if there was a writ in being at the time of suing out the second, it is plain the second was vexatious and ill ab initio." Seizing upon the latter part of this quotation, the defendant argues that it is not enough that a defendant be protected from a multiplicity of suits for the same thing at the same time, but that the plaintiff must either proceed in the first case or else clear the dockets entirely and then begin anew. This court has not followed *Bacon's* rule to such an extreme length. To do so

would in some cases be merely to penalize the plaintiff and not to protect the defendant and disburden the courts. Consequently it has been held that, if the first action be dismissed before the trial of the second, it is no longer a bar to the maintenance of the second suit. *Snow v. Hudson*, 56 Kan. 373, 43 Pac. 260. It is true that in the case just cited the plaintiff could not have obtained in the first action the full relief sought in the second, but, as the syllabus shows, the decision was rested on the additional ground that the dismissal of the first action before the trial of the second lifted the bar to such trial. Such is the law elsewhere.

"Formerly the only question was whether, at the time of suing out the second writ, there was a writ in being, and it was held to be no answer to the plea that the first suit was ended when the plea was put in; but the prevailing rule now is that the discontinuance or dismissal of the first suit after the commencement of the second may be set up in reply to the plea, and thus defeat an abatement." 1 *Encycl. of Pl. & Pr.* 755.

"The tendency of the later cases and a preponderance of authority sustain the doctrine that it is a good answer to a plea of the pendency of a prior action for the same cause that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled unless the prior suit is pending at the time of the trial of the second." 1 *Cyc.* 25.

[2, 3] The plaintiff alleged that on unknown dates between March 1 and July 5, 1911, the defendant, contriving and intending to alienate the affections of the plaintiff's wife, had sexual intercourse with her and made disparaging remarks about the plaintiff. It is said there was no evidence of such relations between the defendant and Mrs. Warnock or of such remarks about the plaintiff between the dates named; that no other means of alienation were specified in the petition; and consequently that the verdict and judgment rest upon matters outside the issues tendered by the petition. The petition, however, charged that the defendant contrived to alienate the plaintiff's wife from him by other means than those mentioned and in various ways which, for want of knowledge, the plaintiff was unable to describe with particularity. Therefore the plaintiff was not restricted in his proof to the devices of seduction and disparaging remarks occurring between March 1st and July 5th.

"It was enough for the plaintiff to plead the ultimate facts as to the alienation of her husband's affections by the defendant, and the acts done and artifices used to accomplish the alienation are not required to be pleaded; indeed, these are largely matters of evidence by which the ultimate facts are to be proved." *Nevins v. Nevins*, 68 Kan. 410, 412, 75 Pac. 492.

[8] The plaintiff purchased of the defendant a farm on which the plaintiff resided with his wife and three children. The consideration was \$8,000. One thousand dollars of this sum was to be paid in cash. The payment, however, was not in fact made but was secured by a chattel mortgage on the plaintiff's personal property. The balance of the purchase price, which bore interest at 7 per cent., was secured by a contract of sale. The farm lay near the town of Turon, where the defendant resided. The defendant commenced coming to the farm to transact business. Mrs. Warnock was well educated, while her husband was not, and she usually conducted the business transactions. In the spring of 1911 the defendant concluded that he did not feel at home in town so much as he did in the country and arranged for board and lodging at the plaintiff's home. The plaintiff was a hard-working farmer who spent much time in his fields. The defendant had leisure and spent time at the house with Mrs. Warnock. The defendant frequently took the plaintiff's entire family automobile riding. As time progressed he took Mrs. Warnock automobile riding alone. On July 4th, at a picnic at Turner's Lake, the attentions of the defendant and Mrs. Warnock to each other, in the absence of the plaintiff, were so marked as to create much adverse comment. On the evening of July 5th the plaintiff made an excuse to look for his revolver and, after searching elsewhere, found it in the defendant's suit case, where his wife had placed it after she had removed the loads. The plaintiff testified as follows concerning the ensuing conversation with his wife: "Q. Were you quarreling with her? A. I wasn't exactly quarreling with her; I was talking to her. Q. What did you say to her? A. I told her that as soon as Mr. Moore came he was going to hit the road. Q. Did she holler or make a noise? A. She says, 'O, my God, David, don't do that, because he has a mortgage on everything we have got, and there are payments coming due on the place; if you do this he will foreclose, and we will lose everything we have got.'" About this time the defendant came up. An altercation between the two men followed, and the defendant was ordered to leave the place. The defendant exhibited no haste in leaving, and the plaintiff left for town, where he procured ammunition and another pistol. After he had gone, the defendant telephoned to Turon for an automobile in which, when it arrived, he and Mrs. Warnock and the three children went away. Before starting, Mrs. Warnock got a bundle of clothes from the house, and the defendant gave her two \$5 bills. The driver was instructed to go to Stafford. When the party arrived at Zenith, the children were sent in the automobile to Mrs. Warnock's sister at Sylvia, where they arrived between 10 and 11 o'clock at night. Mrs. Warnock asked the defendant if she should take the

youngest child with her, but the defendant said no he would be in the road. The defendant and Mrs. Warnock went to Stafford and from Stafford to Larned, where they arrived the next day. At Larned they passed for husband and wife and occupied the same bedroom for two nights. Not long afterwards the defendant foreclosed the chattel mortgage on the plaintiff's personal property.

The defenses to the action, which lacked the support of testimony given by the defendant himself, were that the defendant took the plaintiff's wife away for the chivalrous purpose of protecting her until the plaintiff should have time to "cool off," and that the whole affair was concocted by the husband and wife for the purpose of obtaining a blackmailing judgment against the defendant. A witness was produced who testified to meetings in the nighttime between the husband and wife at Hutchinson after the action had been instituted. This witness stated that on one occasion Mrs. Warnock desired her husband to remain over night with her at the place where she was staying, but that he said, referring to the pending suit: "No, Mamma, I don't dare stay with you. I don't dare stay here all night. You know that it will knock this deal in the head." This witness was impeached by testimony tending to show that the defendant had promised to assist in getting her brother out of the Hutchinson reformatory if she would help him in his litigation with the plaintiff.

[4] The court instructed the jury as follows:

"No. 8. The gist and substance of the claims of the plaintiff are that, by means of the wrongful acts and conduct of the defendant alleged in the petition, the defendant alienated the affections of plaintiff's wife from him and caused her to separate from him. In determining whether these claims are true, you should consider all the evidence in the case throwing any light upon the question, including the conduct of the defendant with reference to the wife of the plaintiff prior to, at the time of, and subsequent to the leaving of the home of the plaintiff by his wife as disclosed by the evidence; and, if you find by the evidence, by a preponderance thereof, that such claims are true, then your verdict should be for the plaintiff, and, if you fail to so find, then your verdict should be for the defendant.

"No. 9. In the absence of evidence, the motives of a person in the doing of any proper or lawful act are presumed to be good; and, when the motive with which an act is done is the subject of inquiry, in determining what such motive was the jury have the right to consider the nature and character of the act, the manner in which, and the circumstances under which, it was done, and all the evidence in the case touching upon the question of motive."

The defendant argues that these instruc-

tions were erroneous because they allowed the jury to consider the conduct of the defendant and Mrs. Warnock at Larned, although the alienation, if any occurred, was completed with the departure from the plaintiff's home on the night of July 5th. This argument is based upon the defendant's interpretation of the petition, which has been rejected. The ground of the action was the alienation of the affections of the plaintiff's wife. There could be no better proof of the fact than that Mrs. Warnock left her husband's home on the night of one day and on the night of the next day was conducting herself as the wife of the defendant. The petition stated that the plaintiff was not able to name and describe all the wiles employed by his wife's seducer, and he was not required to do so. Whether or not any were employed was a proper matter of inference from proved facts and circumstances. The inquiry properly extended to the time when Mrs. Warnock openly renounced fidelity to her husband and commenced to cohabit with the defendant as his wife. The plaintiff was not obliged to elect a given instant of time when his wife's affections were finally detached from him, and, if he had specifically charged that the alienation was fully completed on July 5th, his action would not fail if the proof indicated that the ties binding his wife to him were not completely broken until July 6th, at the end of the elopement, instead of at its beginning on the previous day.

Without discussing it in detail, the evidence justified the conclusion that the flight on the night of July 5th, ending in the seclusion of the bedroom of the apartment house in Larned on the night of July 6th, was the result of a siege of Mrs. Warnock's affections commenced when the defendant left Turon to take up his abode in the plaintiff's home.

It is said that the instructions quoted were erroneous because they did not inform the jury that the defendant must have caused the alienation intentionally and knowingly. These elements of the plaintiff's cause of action were fully covered by other instructions.

[5] The defendant insists that the statement of the plaintiff, made while testifying, that the defendant returned to the vicinity of Turon soon after the elopement and foreclosed the chattel mortgage on the plaintiff's property was improperly allowed to stand because the jury might have concluded that the defendant not only robbed the plaintiff of his wife but robbed him of his property also. Malice on the part of the defendant was pleaded, and the circumstance that he moved quickly against the plaintiff's property tended to establish it.

The verdict was for \$7,250 actual damages. No punitive damages were allowed. Estimation of damages was a matter for the jury, and it is not possible for the court to say

that they acted arbitrarily or capriciously or from passion or prejudice. Other assignments of error are disposed of by the foregoing considerations or else are not regarded as important.

The defendant has filed in this court an application for an investigation of the present relations of the plaintiff and his wife to the end that a new trial may be granted should it appear that they are now living together or are now reconciled to each other. It is said that, if Mrs. Warnock has returned to the farm where her husband and her children reside, it indicates collusion in July, 1905, and at least furnishes ground for reducing the judgment. A judgment for damages for alienating the affections of a man's wife is not accompanied by any warranty in favor of the wrongdoer, and no such extraordinary situation is presented, justifying resort to unusual procedure to correct a palpable mistake and prevent a miscarriage of justice, as in the case of *Caldwell v. Modern Woodmen*, 90 Kan. 175, 133 Pac. 843.

The judgment of the district court is affirmed. All the Justices concur.

LINDER v. WARNOCK.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

FORCIBLE ENTRY AND DETAINER (§ 6*)—JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—TITLE.

Where, in the trial of an action of unlawful detainer, it develops that the defendant took possession of the land in controversy under a contract for its purchase, having made a considerable part payment, and that there is a substantial controversy, involving disputed questions of fact, as to whether the equitable interest acquired under such contract has been lost, the court is justified in sustaining a demurrer to the plaintiff's evidence.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 29-32; Dec. Dig. § 6; * *Justices of the Peace*, Cent. Dig. §§ 83-97; Dec. Dig. § 36.*]

Appeal from District Court, Reno County.

Action by B. F. Linder against David Warnock. From a judgment for defendant, plaintiff appeals. Affirmed.

Prigg & Williams, of Hutchinson, for appellant. F. L. Martin and E. T. Foote, both of Hutchinson, for appellee.

MASON, J. W. E. Moore, the owner of a tract of land, on October 28, 1909, made a written contract for its sale to David Warnock for \$6,000, of which \$1,000 was paid down, and the remainder, bearing 7 per cent. interest, was to be paid in nine annual installments, the first two of \$200 each, the next of \$300, the next four of \$700 each, and the last two of \$750 each. Two payments were made of \$291.47 August 27, 1910, and \$175 February 17, 1911. The contract contained this

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

provision, the seller being the first party, and the buyer the second: "If said party of the second part * * * fail to pay any of the payments of principal or interest for thirty days from the date when the same becomes due and payable, as herein stipulated, then this agreement shall become null and void, at the option of the party of the first part, and the party of the second part shall and will forfeit to the party of the first part all moneys paid on this agreement, and shall and will on demand, surrender the possession of said premises to the party of the first part, or his assigns."

November 11, 1911, Moore made a warranty deed to J. N. Hinshaw, and January 12, 1912, Hinshaw made a deed to B. F. Linder. April 12, 1912, Linder brought an action of unlawful detainer against Warnock. It was taken to the district court, where a demurrer to the plaintiff's evidence was sustained. The plaintiff appeals.

The district court seems to have proceeded upon the theory that the pleadings and evidence showed that there was an actual controversy as to whether the rights of the defendant to the land under the written contract had been lost, and that this was not a question proper to be litigated in this form of proceeding. In this we think the court was correct. The time of making the deferred payments was not in so many words made of the essence of the contract. The buyer had made a considerable payment down and had made two additional payments. The situation was one in which a waiver of a right to strict forfeiture might be readily inferred. There was evidence of a chattel mortgage by Warnock to Moore, which was claimed to have been given in consideration of the extension of time of payment. There was also a claim on the part of Warnock that Hinshaw had agreed to act in his behalf in the matter; also that Moore was indebted to him. There was also evidence tending to show that Warnock had by his statements and conduct admitted that his interest had been extinguished. A number of other matters were involved, bearing more or less directly upon the controversy referred to. We think it fairly appeared that there was an actual conflict on the subject, involving serious questions both of law and fact, and in view of that situation the court properly brought the proceeding to an end.

The general rule is that, in the absence of an express statute (such as exists, for example, in Illinois), "an action of unlawful detainer cannot be brought against one claiming the premises in question under a contract to purchase." 18 A. & E. Encycl. of L. 767. In *C. B. & Q. R. R. Co. v. Skupa*, 16 Neb. 341, at page 346, 20 N. W. 393, at page 395, which arose upon a statute substantially like our own, it was said: "It must be further observed that, while the plaintiff might under the

terms of this contract cancel it and refuse to be further bound by it in case of default, yet it could not do so to the extinguishment of any equities which might exist in favor of the defendant. It may be and doubtless is claimed that in this case he has none. This may be true, but, if this action can be maintained in this case, it can in any case of the sale of real estate, and all equities in favor of the purchaser completely terminated and canceled at the will of the vendor by the simple act of the selection of the court in which he will prosecute his action, for it is well known that no defense of that kind can be made in proceeding under the sections above quoted. So long as the contract of sale continues, so long has the purchaser an interest in the subject of the contract. So long as that interest or title exists, the justice has no jurisdiction in the case. In an action in ejectment or other proper proceeding in a court of general jurisdiction, all equities and defenses can be fully adjudicated. In justice court they cannot be, for the reason that no jurisdiction or authority to do so exists, and therefore in suits between vendor and vendee, growing out of the contract of sale, the district court only has jurisdiction."

One claiming to be the equitable owner of property under a contract of purchase, his claim being substantial, and not a mere pretext, cannot be ousted from possession by a summary proceeding before a justice of the peace. *Alderman v. Boeken*, 25 Kan. 658. In *Dineen v. Olson*, 73 Kan. 379, 85 Pac. 538, the owner was permitted to recover possession by an action of unlawful detainer against one who had obtained it under a contract of purchase, but there it was expressly said that upon the agreed facts the defendant did not have, and did not claim to have, any legal or equitable right in the land. In forcible entry and detainer the title to the property cannot be an issue in the sense of being the final matter to be determined. *Armour v. Howe*, 62 Kan. 587, 64 Pac. 42. Here the real question in dispute, the one thing to be determined, was whether the defendant's equitable title, acquired under the contract, had been cut off. There was a reasonable basis for the claim that it was still in existence. The summary procedure chosen was not adapted to the determination of such a question.

The judgment is affirmed. All the Justices concur.

MOFFAT v. BEELER.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 156*)—FILING—CHANGE OF POSSESSION OF PROPERTY.

Under the statute requiring a chattel mortgage or a copy of it to be filed with the register of deeds, unless it is followed by an actual change of possession, in order to excuse the omission to file, the change of possession must

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be of such character as to be open to observation.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 265, 271; Dec. Dig. § 156.*]

2. CHATTEL MORTGAGES (§ 156*)—FILING—POSSESSION BY PRIOR MORTGAGEE.

The fact that the mortgaged chattels are already in the hands of the holder of a prior mortgage, who agrees to hold possession also for the benefit of the second mortgagee, does not dispense with the necessity of a record, as against creditors.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 265, 271; Dec. Dig. § 156.*]

Appeal from District Court, Edwards County.

Action by A. L. Moffat, as trustee, etc., against C. W. Beeler, as trustee, etc. From judgment for plaintiff, defendant appeals. Affirmed.

Ellis, Cook & Barnett, of Kansas City, Mo., for appellant. W. S. McClintock and A. L. Quant, both of Topeka, Charles E. Lobdell, of Great Bend, and Charles A. Baker, of Dodge City, for appellee.

MASON, J. E. O. Beckwith, a merchant, executed a chattel mortgage upon his stock of goods to a bank, which took possession of the property, placing its agent, J. E. Stowell, in charge. Ten days later he executed another instrument, which for present purposes may be spoken of as a chattel mortgage, to C. W. Beeler (who was president of the bank), as trustee for a number of Beckwith's creditors. Beckwith was adjudged a bankrupt, in proceedings begun more than four months later. The trustee in bankruptcy brought replevin for the goods and recovered a judgment, from which Beeler appeals.

A reversal is asked upon the ground that, under the facts as found by the trial court, the judgment should have been for the defendant. The findings that are here important are to the effect that the instrument executed to Beeler was a chattel mortgage; that it was never filed for record; that Beeler at once "assumed control of the stock of goods in question under said writing, but that said J. E. Stowell continued in the actual visible possession and charge thereof"; "that there was no apparent change of possession when said C. W. Beeler assumed control of said stock of merchandise." The court concluded that the chattel mortgage to Beeler was void as to the plaintiff because it was neither made of record nor accompanied by an actual and apparent change of possession.

[1, 2] The defendant contends that, as Beckwith had delivered the stock to the bank and was no longer himself in possession, the unrecorded chattel mortgage was valid without any change of possession except such as is shown by the findings. The court found that there was no visible change of posses-

sion whatever. When the mortgage was given, the person having physical possession of the goods was Stowell. After it was given the condition, so far as could be ascertained by observation, remained the same. Stowell was still in possession. The only difference was that, whereas he had formerly held only for the protection of the bank under its mortgage, he now undertook to hold also for the protection of the creditors secured by the second mortgage, under the direction of Beeler, the trustee, who was also president of the bank to which the first mortgage had been given. Stated in general terms, the question is: Where the mortgagor of chattels delivers them to an agent of the mortgagee, is an unrecorded second mortgage to another person valid against creditors, if the agent agrees to hold for the benefit of the new mortgagee?

The defendant relies strongly upon *Nash v. Ely*, 19 Wend. (N. Y.) 523, at page 524, which was decided in 1838. There a mortgage was given upon goods which were in the hands of a third person, claiming to have acquired title thereto by transfer from the mortgagor in payment of a debt. The mortgage was held to be good against an attaching creditor, who assailed it on the ground that it had not been accompanied by a change of possession. The court said: "The statute does not require that the mortgagee shall take the actual possession of the property at the time himself; it is enough if he removes it out of that of the mortgagor; and if he finds it in the custody of a third person, when the sale or mortgage is made, we do not perceive anything in the language, or in the object, or policy of the act against permitting it to remain with him till such time as he may choose to take the personal charge of it. Leaving the property in this condition is certainly not within the mischief of leaving it in the possession of the vendor or mortgagor."

When that case was decided, New York had a statute (passed in 1833) substantially like our own with respect to the filing of chattel mortgages. So the case upon the facts would seem to be directly in point. An examination of the opinion, however, discloses that no reference whatever was made either to the omission to file the mortgage for record or to the effect of the recording act. The statute to which the court there referred (obviously the only one considered, as it was the only one discussed) was one making all transfers of personal property *prima facie* fraudulent as to creditors unless accompanied by "an actual and continued change of possession," being somewhat the same as the third section of our statute of frauds (Gen. Stat. 1909, § 3835). However, it related only to sales made by a vendor of goods "in his possession or under his control." 3 Rev. Stat. of N. Y. 1859, pt. 2, c. 7, tit. 2, § 5. So the decision in the

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Nash-Ely Case was obviously sound so far as it related to the effect of that statute. Of that decision it was said in *Beskin v. Feigenspan*, 32 App. Div. 29, at page 31, 52 N. Y. Supp. 750, at page 751: "The defendant contends that as the property was in possession, not of the owner of the mortgaged property, but of a third party, the tenant, a change of possession was not necessary; and he relies on *Nash v. Ely*, 19 Wend. [N. Y.] 523, in support of this claim. It must be borne in mind that there are two statutory enactments relating to the validity of chattel mortgages, that of the act of 1833, already cited, and section 5, 2 Rev. St. p. 136 (now reproduced in the lien law and personal property law), which declares that sales and mortgages of goods and chattels, unless followed by an actual and continued change of possession, shall be presumed fraudulent and void as against creditors or subsequent purchasers in good faith. Even where a chattel mortgage is properly filed, the failure to change possession raises a presumption of fraud. *Smith v. Acker*, 23 Wend. [N. Y.] 653. It was in reference to this provision of the Revised Statutes that the court held in *Nash v. Ely*, supra, that, where the property is in the possession of third parties, the case does not fall within the statute. There is a difference between the language of the two statutory provisions. The section of the Revised Statutes makes provision for the case of a vendor of goods or chattels 'in his possession or control,' and merely creates a presumption of fraud in case of a failure to change possession, while the statute of 1833 provides that chattel mortgages shall be absolutely void unless filed as therein directed, and does not limit its application to the cases of a vendor 'of goods or chattels in his possession or under his control.' We are of opinion that *Nash v. Ely*, supra, is not in point on the question of change of possession under the act of 1833. If, however, we are in error as to this view, then it must be considered as overruled by the later cases in *Hill*, *Hun*, and in the *New York Reports*, already cited."

The cases referred to in the portion of the opinion just quoted are not absolutely in point upon the facts of the present case, but they sustain the view that the change of possession referred to in the recording act as a sufficient substitute for a record must be an actual and not a constructive change; must be such a change as to be apparent to an observer. The considerations already stated make it clear that the decision in *Nash v. Ely* is not an authority, except by analogy, upon the construction of the act relating to the filing of chattel mortgages. It has, however, been so cited by text-writers and by courts, for instance in *Buhl Iron Works v. Teuton*, 67 Mich. 623, 630, 35 N. W. 804, and *First Nat. Bank v. Barse Commission Co.*, 198 Ill. 232, 254, 64 N. E. 1097. Other cases apply the same rule, but under statutes

which do not require an actual change of possession in order to dispense with the record. *Morse v. Powers*, 17 N. H. 286; *Wheeler v. Nichols*, 32 Me. 233; *Clark v. Williams*, 190 Mass. 222, 76 N. E. 723. If the doctrine of the *Nash-Ely* Case were accepted, a chattel mortgage would be valid without record and without change of possession, if when it was made the property was not in the control of the mortgagor. We must regard the question before us as an open one, to be determined from the language of our statutes.

It is to be noted that our statute of frauds, which is somewhat similar to that interpreted in the *Nash-Ely* Case, expressly provides that it is not to interfere with the law relating to chattel mortgages. Statutes relating to the effect of a transfer of title to personal property, unaccompanied by an actual change of possession, may well receive a liberal interpretation in view of conditions that make such a change difficult. But the act requiring the record of a chattel mortgage is explicit, and compliance with it is easy. It requires a record unless there is an actual change of possession. Gen. Stat. 1909, § 5224. The mortgagee may always protect himself by making a record, which is the normal condition; the unrecorded chattel mortgage is the exception.

In the present case it may be that substantial justice would have been subserved by upholding the second chattel mortgage. But the general rule that would be established by such a decision here would hamper the operation of the recording act and might open the door to frequent injustice. For illustration, a merchant might make a small chattel mortgage on his stock and give the mortgagee possession until payment should be made. A third person, advised by the record that the stock was worth much more than the lien, might give credit to the mortgagor, only to find out later that in the meantime a second mortgage for the full value of the stock had been given, which was not of record, but was valid because the first mortgagee had agreed to hold possession for the protection of the second mortgagee as well as for his own. The whole question is one of legislative policy, and our statutes seem to have been drawn with a purpose to make the requirement of record especially rigid in the case of chattel mortgages. The failure to record a real estate mortgage can be taken advantage of only by one who has been thereby misled, a purchaser in good faith, for value and without notice. But an unrecorded chattel mortgage, although given in the best of faith, may be defeated by a creditor who had actual knowledge of it.

Upon the grounds stated and suggested, we approve the ruling of the trial court to the effect that, in order to be effective against creditors, a chattel mortgage must either be made of record or be accompanied by such a change of possession as would be apparent to

an observer. The question whether the instrument spoken of as a chattel mortgage was not in fact merely a void assignment for the benefit of creditors has been argued. It seems probable that the circumstances made this question one of fact, to be determined by the trial court upon all the evidence. But, in view of the ruling already made, this need not be determined.

The judgment is affirmed. All the Justices concurring.

ANDERS v. ATCHISON, T. & S. F. RY. CO.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. TRIAL (§ 357*)—EVASIVE FINDINGS—EVIDENCE.

The rule that the returning by the jury of an answer clearly evasive or contrary to the evidence is misconduct followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 597; Dec. Dig. § 357.*]

2. MASTER AND SERVANT (§ 288*)—INJURY TO BRAKEMAN—DEFECTIVE APPLIANCES—QUESTION FOR JURY.

A complaint by a brakeman to the proper agent of his employer of a defective instrumentality may be either express or implied, as may also be a promise to remedy, and when there is presented a situation including a report of a defect and a response thereto by such agent, the significance of which situation, report, and response might be differently interpreted by fair-minded men, it is for the jury to say what meaning should be given to such report and response.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.*]

3. MASTER AND SERVANT (§ 221*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The rule that the promise to repair must be the inducement to remain in the service means that such promise is deemed by the law to imply an agreement by the employer that until the defect is remedied or the lapse of a reasonable time therefor, he, instead of the employe, will assume the hazard arising from the defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-640, 642-645; Dec. Dig. § 221.*]

4. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—NEGLIGENCE.

When a railroad company places in storage for the use of its brakemen in their lanterns the best quality of oil that can be purchased in the market, it will not be liable for oil found to be defective, unless shown to have been guilty of negligence after so placing such oil in storage, which negligence might arise from failure, within a reasonable time, to replace with good oil that which is actually found and reported bad.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.*]

5. NEW TRIAL (§ 73*)—GROUNDS—INCONSISTENT FINDINGS.

When, in a case involving the alleged negligence of the employer in providing proper oil, numerous findings of fact are returned by the jury, some of which show negligence and others proper care, the latter being not only in-

consistent with the former but with the general verdict, a new trial should be granted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 149; Dec. Dig. § 73.*]

Porter, J., dissenting.

Appeal from District Court, Shawnee County.

Action by J. W. Anders against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Wm. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, for appellant. Waters & Waters and John J. Schenck, all of Topeka, for appellee.

WEST, J. The plaintiff, a brakeman, recovered for the loss of an arm alleged to have been caused by the negligence of the defendant in furnishing a poor quality of oil for his lantern. Upon the first trial a demurrer to the plaintiff's evidence was sustained, but upon appeal it was held that he was entitled to go to the jury upon the question whether the injury was occasioned by the want of a better light. *Anders v. Railway Co.*, 83 Kan. 218, 109 Pac. 773. A second trial resulted in a judgment which the defendant claims should be reversed for the reasons that the alleged bad oil was not the proximate cause of the injury; that no promise was made to the plaintiff to furnish him a better quality, and the risk of using what he had was assumed by him; that the findings conclusively establish proper diligence on the part of the defendant to provide proper oil; that there was error in giving and refusing instructions; that some of the findings are contrary to the undisputed evidence; and that a new trial should have been granted.

As to the first proposition the jury determined that the quality of the oil was the cause of the injury, and it cannot be said that this determination was entirely unsupported by the evidence. In connection with this branch of the case, however, the plaintiff testified that when he approached the obstruction he had time to have stopped and thrown it out of the way had he wanted to; that he had time, but did not have much light. "Q. And you had plenty of time to stop and look it over and see what it was, and you didn't do it? And you had plenty of time to pick it up and throw it out of the way if you wanted to? Didn't you? A. I suppose I had time. Yes, sir. But I didn't do it. Q. You could have stopped and observed the thing, couldn't you? You wasn't hurried there at that time? A. No, sir; I wasn't in no hurry. Q. You could have stopped right there and kicked the thing over and thrown it out of the way if you had wanted to? A. I had the time to do it."

[1] Question No. 32 with its answer is as follows: "Q. If the plaintiff had stopped and

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

made an examination of the obstruction, could he have determined what it was—its size, nature, and character by the light he was using? A. If he had time." Certain other answers are criticized but they include the element of opportunity, as well as time, to observe the obstruction, and opportunity under the circumstances involves the matter of sufficient light. But the answer to question No. 32 refers to a lack of time not shown by the plaintiff's own testimony, and the question was a proper one, which entitled the defendant to an answer in accordance with the plaintiff's own undisputed evidence.

[2] It was testified and found that about four days before the injury the plaintiff stated to his conductor that there was something wrong with the oil, that it was poor stuff, and that he could not get his lamp to burn it, and he was told in reply that it had already been reported. The conductor was the proper agent of the company to receive such complaint. The jury were instructed that they might take into consideration the purpose of making such report, that it was the duty of the defendant to furnish a supply of reasonably good oil upon reasonable request and within a reasonable time thereafter; and, if they believed that such report was to get good oil in place of bad, and that the conductor's statement led the plaintiff reasonably to believe that proper oil would be supplied, and was made by the conductor for that purpose, then they were to say as a matter of fact whether the plaintiff was guilty of contributory negligence, in remaining at work with the oil he had. Instruction No. 19 was as follows: "Before such a request and promise would relieve an employé of the assumption of risk, the request must be made for the purpose of securing protection by the employé from apprehended danger to himself, and his continuance in the employment thereafter with a defective instrumentality must be induced by the promise to remedy the defect." It is urged that there was nothing shown from which it could fairly be said that any promise was made by the conductor, and hence the plaintiff could not have been induced thereby to remain at work; that in fact no request was made, but a mere general complaint, with no purpose of securing protection from apprehended danger. *Railway Co. v. Mealman*, 78 Kan. 496, 97 Pac. 381, is cited. There the plaintiff testified that he had never thought of the defect as being dangerous, and hence it was held that he did not report it for the purpose of escaping a threatened danger. It was also laid down, as it has been by the courts generally, that the promise to repair must have been the inducement to remain in the service. Here we have no statement as to how the defect was regarded, or as to why the report was made or the response thereto. But a situation and a conversation were detailed and their significance was a fair matter for the jury to determine. Some might argue that a mere purposeless

criticism of the oil was made, and that the response meant only that the conductor felt like joining in such criticism. But it might also be contended that the brakeman, not caring unnecessarily to assume needless hazards, complained to the proper representative of the company who, instead of promising to do his part towards bettering the condition, stated that he had already done that, leaving the complainant to take it for granted that the company would act with reasonable promptness upon the report already made. The jury appear to have taken the latter view, and we cannot say it was without justification. As to the rule that a promise to repair must be the inducement to remain, this is but another way of stating the legal effect of such promise. When a workman takes employment the law implies that he assumes the ordinary risks thereof. The law also makes it the duty of the employer to use proper care to furnish a reasonably safe place to work and reasonably safe instruments to work with.

[3] When the workman finds himself supplied with an improper instrument, the use of which increases the hazards of his employment, he may either refuse to work longer—a privilege regarded much more highly in former times than now—or he may request the employer to provide a proper instrument. If upon such request a promise so to do is made, such promise is regarded by the law as an agreement on the part of the employer that until the promise is complied with, or until reasonable time therefor, he will assume the extra hazard, and not expect his employé so to do; and hence, as said by this court in the former decision, "The employé has still a reasonable time after the employer is in default before he is required to quit the service or assume the risk." *A., T. & S. F. Rld. Co. v. Lannigan*, 56 Kan. 109, 115, 42 Pac. 343. See elaborate footnote to *Ill. Steel Co. v. Mann*, 40 L. R. A. 781. That the request and promise may be implied, as well as express, is supported by numerous authorities, the following being more or less in point: *A., T. & S. F. Rld. Co. v. Sadler*, 38 Kan. 128, 16 Pac. 46, 5 Am. St. Rep. 729; *Lupher v. Railway Co.*, 86 Kan. 712, 122 Pac. 106, Ann. Cas. 1913C, 498, and cases cited; *Labatt, Master and Servant*, 1st Ed. § 419; 2d Ed. §§ 1345-1348; *Alkire v. Myers Lumber Co.*, 57 Wash. 300, 106 Pac. 915; *Stoutenburgh v. Dow, etc., Co.*, 82 Iowa, 179, 47 N. W. 1039; *Detroit Crude-Oil Co. v. Grable*, 94 Fed. 73, 36 C. C. A. 94.

[4] It was testified without dispute that for 15 years the company had supplied the best signal oil the market afforded, oil manufactured by a reputable firm, and that it had stood the tests made by the company; that this quality of oil was tested at the Topeka storehouse, and thence shipped out to division points, including Emporia; that a tank load was received at Topeka about January 1, 1907, a sample tested by the defend-

ant's chief chemist, and after his acceptance placed in stock; that a tank was shipped to Emporia January 21st, which was the last until after the occurrence of plaintiff's injury.

In addition to their general verdict the jury were asked to make 70 findings of fact. It was found that the signal oil used in the lanterns of the trainmen was purchased of a reputable and experienced manufacturer, who had been furnishing it for 15 years, during which time it had stood the tests made by the defendant, and had been accepted by it. "Q. 45. Was the quality of the signal oil used by the defendant company in its lanterns the best that could be purchased in the market? A. Yes. Q. 62. Was the oil with which the plaintiff Anders filled his lantern at Emporia, shipped from Topeka to Emporia by the defendant railway company? A. Yes. Q. 63. If you answer the above question 'Yes,' then state whether the oil was inspected and tested as to its burning qualities by a chemist of the railway at Topeka? A. Yes. Q. 41. Did the plaintiff procure the oil he was using on the night of the accident, at Emporia, Kan., about a week or 10 days before the accident? A. Yes." In the eleventh instruction the jury were told that if the company exercised reasonable and ordinary care in furnishing plaintiff such a quality of oil as to afford a reasonably clear and distinct light, it would not be liable, even though the oil actually used by him at the time of the injury was not of reasonably good quality. It is insisted that this was the proper criterion of liability, and that the findings show not only ordinary but extraordinary care. If the foregoing findings were all the jury had made, it is clear that under this instruction the defendant would be free from liability.

[5] But the following answers were also returned: "Q. 21. Did the lantern that the plaintiff was carrying go out when he was descending from the car, just before the accident? A. Yes. Q. 58. If you find that the oil in plaintiff's lantern was defective at the time of the accident, then state in what respect it was defective? A. Having a tendency to smoke chimney, crust wick, insufficient light, and go out. Q. 46. If you find that the plaintiff's injury was caused by any negligence on the part of the railway company, please state fully in what such negligence consisted? A. Bad oil." The plaintiff testified: That some four days before the injury he told the conductor that there was something wrong with the oil. "I said it was awful poor stuff, I can't get any light out of it. He said, 'It has already been reported.' Q. Did he say how it had been reported? A. He says, 'I have already reported it;' that is the word he made." That on the night he reported to the conductor the latter told him that he himself had been having trouble with it that evening. "We talked about the oil being poor and

how it was acting. Q. Was that before he said he had reported it? A. No; that was after he said he had reported it." The conductor denied having received any complaint from the plaintiff touching the oil used by the latter; denied telling him that the oil had been reported. On cross-examination he stated: "If a man would make the declaration that the oil was bad and he could not use it, I would give a requisition for more oil. It is not my duty to see that good oil is had. It is the company's duty to furnish good oil. The brakeman would report to me. If a brakeman has got bad oil and reports it to me, it is the company's duty to see that he gets good oil. I would notify the company of the condition he told me of. Q. Then after he has reported to you, what is your duty? A. I would make some inspection myself. Q. Suppose it was bad oil, what is it your duty to do? A. I would see how it burned for me, how it burned for other people. If he had oil that he could not use, I would return it to the storehouse and get new oil. I would get more oil. I could not tell as to the kind." The defendant's chief chemist stated on cross-examination that oil which would crust the wick so as to make a flame go below one inch in 12 hours, thus giving a poor light would be an inferior oil which he would not pass. Instruction No. 12 was that if the oil furnished the plaintiff was not of such quality as to afford a reasonably clear and distinct light, and he reported it as bad to the conductor, and he was the proper one to whom to make such report, it then became the duty of the defendant to exercise reasonable care in remedying the defect, and if it failed to do so within a reasonable time after it had notice or reasonably should have known of the defect, it would be liable. This is complained of as being a departure from the true rule given in the previous instruction, and as leaving the company liable notwithstanding it had, for 15 years, exercised not only ordinary but extraordinary care to supply its employes with proper oil for their lanterns. But the two instructions appear simply to apply the rule of reasonable care, first, to the general task of supplying proper oil for use by the defendant's employes, and, second, to a situation in which oil although drawn from the supply on hand, is found and reported to be of bad quality. The evidence indicated proper and commendable care in the first instance, and unless, having used due care to place good oil in storage, the company was thereafter guilty of some negligence, it would not be liable. If, however, oil afterwards taken from such supply on hand were actually found to be bad, and so reported to the company then the rule embodied in the twelfth instruction would obtain. But what do the findings mean? No. 45 is that the quality of oil, not placed or kept in storage, but used by the company in its lanterns, was the best that could be

purchased in the market. This would certainly show due care respecting the plaintiff, who was using one of the company's lanterns. Again, other findings show, not only that first-class oil was sent to Emporia, but that from it the plaintiff filled his lantern a week or 10 days before the injury, and yet that this oil at the time of the injury was so bad as to have been the cause thereof, and that the negligence of the company causing the injury was "bad oil."

The plaintiff in his brief says: "The jury found that the company itself had taken reasonable measures to supply itself with fair oil, and it also found upon the testimony that the particular oil used by Anders was furnished by the company and was bad oil, and that this oil was reported to the conductor, and good oil was not supplied." But such a construction practically ignores finding No. 45, which is almost, if not entirely, contradicted also by Nos. 51 and 52, which were that the conductor used the same quality of oil "at or about the time of the accident that was used by the plaintiff, J. W. Anders, and obtained from the same source of supply," and that this was also defective. No. 66 was that the kind and quality of signal oil "which the defendant company was furnishing for the use of its trainmen's lanterns at and prior to the time of plaintiff's injury" was of the same kind and quality it had been furnishing for the past 15 years. The company either was or was not "using in its lanterns," and "furnishing for the use of its trainmen's lanterns, at and prior to the time of plaintiff's injury" the best quality of signal oil that could be purchased on the market, but to all practical intents and purposes the jury have found both that it was and that it was not. One line of findings is in harmony with the general verdict, while the other is in conflict therewith and with the former line—such conflict that reconciliation without elimination seems impossible—and the motion for a new trial should have been sustained. *Burnett v. Street Railway Co.*, 90 Kan. 282, 133 Pac. 534.

Certain other rulings are complained of, but we find no substantial error therein.

The judgment is reversed and the cause remanded for further proceedings.

JOHNSTON, C. J., and BURCH, MASON, SMITH, and BENSON, JJ., concurring.

PORTER, J. I dissent from that part of the opinion and corresponding portions of the syllabus which hold that a promise to remedy a defect could be implied from the fact that the person to whom the complaint was made stated that he had reported it.

The jury find, as they were compelled to find from the undisputed facts, that the defendant had exercised not only reasonable diligence, but extraordinary diligence, to

furnish the best quality of signal oil that could be purchased in the market, and had done this for 15 years. The case is now sent back for another trial to permit a jury once more on pure speculation to find that notwithstanding this extraordinary diligence, the company was negligent because the oil in plaintiff's lantern smoked. The case has been tried twice, and at neither trial was any negligence shown against the defendant. Upon the special findings judgment should be ordered against the plaintiff.

RINEBARGER v. WEESNER et al.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. BROKERS (§ 32*) — RIGHT TO REPRESENT BOTH PARTIES.

Good faith is a vital principle of the law of agency which prohibits a real estate broker from acting as the agent of both the vendor and vendee, where their interests are antagonistic, without the knowledge of each that he is employed by the other.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 72; Dec. Dig. § 32.*]

2. BROKERS (§ 32*) — CONTRACT OF SALE — VENDOR AND PURCHASER.

A contract to convey land, made through the services of an agent employed and paid by the vendor, will not be enforced against him when, without his knowledge or consent, the vendee paid the agent a commission also for his assistance in making the purchase.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 72; Dec. Dig. § 32.*]

Appeal from District Court, Chase County.

Action by George R. Rinebarger against A. M. Weesner and another. From judgment for plaintiff, defendants appeal. Reversed, with directions.

O. S. Samuel, of Emporia, and Dudley Doolittle, of Cottonwood Falls, for appellants. Huggins, Ganse & Riddle, of Emporia, for appellee.

BENSON, J. This is an action for specific performance of a contract for the sale of land. The defense is based upon the alleged fraud of the defendants' agent in negotiating the sale. A demurrer to the defendants' evidence was sustained, and they appeal.

The defendants' evidence tended to prove the following facts: They authorized J. E. Bocock, a real estate agent, to find a purchaser for their farm at the price of \$7,500. The agent afterward came to the farm, accompanied by the plaintiff. After looking over the place, he came into the house, leaving the plaintiff outside, and told the defendants that he had brought a man to buy the farm; that he had talked a good deal with him and could not get their price but had succeeded in obtaining an offer of \$5,000. This offer was at once declined, and the agent then went out to the roadside one or more times during the negotiations and talked with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the plaintiff, and finally returned to the house and said that he (the agent) would give \$6,500 for the place net, clear of all expenses, and would himself sell it to the customer for \$7,000. This disposition, if carried out, it will be seen, would have given the agent \$500 compensation for his services. The fact was, however, that the plaintiff had offered the agent \$7,000 for the farm, but this offer was not made known to his principals. On the contrary, when Mr. Weesner said that he would go out and talk with the customer, the agent persuaded him not to do so, saying that it would spoil the trade, thus keeping the defendants in ignorance of the offer. After the defendants had consented to take \$6,500 net for their farm, the agent went out again and said to the customer, "There is just \$200 between us," which the plaintiff then agreed to pay to the agent in addition to the \$7,000. The plaintiff was then brought into the house by the agent and introduced to the defendants, and at the agent's suggestion the parties arranged to meet in town to have a contract written. This was done on the same day, and the contract was signed by the parties for the sale of the farm for \$7,000; \$100 being paid down. The \$100 was borrowed by the plaintiff from the agent, to whom the plaintiff gave his note for \$300 to secure the repayment of the \$100 borrowed and the \$200 he had agreed to pay the defendant's agent.

A few days after the contract was signed, the defendants learned for the first time that the plaintiff had offered \$7,000 for the place before their agent had made the proposition to pay them \$6,500 for it, and that, after making that offer, the plaintiff had agreed to pay the agent \$200 in order to get the place. The abstract recites that, after being told that the defendants had paid their agent \$500 commission, the plaintiff said to one of defendants' witnesses: "I am paying him \$200. * * * I had offered him \$7,000 for the place and those other items mentioned in the contract, and Mr. Bocock had come back to me, returned, after the conversation with the folks (meaning Mr. and Mrs. Weesner), and said there was just \$200 between us, and I said, 'Well, if that is the case, I will pay it.'" Again it is recited that the plaintiff said to Mr. Weesner, when he complained that they (the defendants) had been wronged, that he was paying the agent \$200 for commission for buying the place for him, and that the agent held his note for it and for the \$100 borrowed. This conversation was about 15 days after the trade and was the first information the defendants received that the plaintiff was paying their agent a commission.

While there are some other details, the foregoing are the material facts as shown by the evidence. The transaction amounts to this: The defendants' agent had obtained an offer of \$7,000 for the place, which he

concealed from the defendants, informing them only of an offer of \$5,000, or of \$6,500 if the proposition to pay that sum himself should be construed as indicating an offer by the plaintiff. Being informed by the defendants' agent that there was still \$200 between the parties, the plaintiff paid that sum as compensation to the defendants' agent to obtain the benefit of the purchase.

[1, 2] The agent undertook the legally impossible feat of serving two masters, whose interests were antagonistic, without the knowledge of one that he was employed by the other. The plaintiff knew that the agent was acting for the defendants, but the defendants did not know that he was acting for and receiving compensation from the plaintiff. "The vital principle of the law of agency is said to be good faith, and this prohibits one from acting as the agent of opposing parties." *Madden v. Provident Institution*, 77 Kan. 415, 94 Pac. 793. The interests of the vendor and vendee conflicted, and therefore the principle stated in *Wilson v. Insurance Co.*, 90 Kan. 355, 358-359, 133 Pac. 715, and *Citizens' State Bank v. Shawnee Fire Insurance Co.*, 137 Pac. 78, does not govern.

It is argued that, because the defendants received just what they finally agreed to take for the land, they have no cause of complaint. Their agreement, however, was made in reliance upon the untrue statement that the purchaser's offer was only \$5,000, or at most \$6,500, whereas it was \$7,000. Good faith required a frank disclosure of the offer. *Kershaw v. Schafer*, 88 Kan. 691, 129 Pac. 1137. It cannot be presumed that the defendants would have accepted the agent's offer of \$6,500 if they had known that the customer had offered \$7,000, nor can it be supposed that they would have signed the agreement had they known that their own agent was receiving pay from the purchaser in addition to the \$500 which was deducted from the consideration. Even if the agent's proposal could have been understood as an offer of \$6,500, it was still \$500 below the amount actually offered, and finally, when the contract was signed, it showed a consideration of \$7,000, which was still \$200 below the amount actually paid by the purchaser, and this fact, too, was concealed from the defendants. The commission paid by the plaintiff to the defendants' agent was an inducement to fraudulently conceal the facts from his principals which good faith required him to disclose.

Specific performance will be decreed only when equity requires it. A vendee, who knowingly pays commissions to the agent of the vendor without his knowledge or consent, in order to secure a better bargain, cannot successfully invoke the aid of a court of equity to enforce a contract thus obtained.

The judgment is reversed, with instructions to overrule the demurrer. All the Justices concur.

SCOTT et ux. v. SCOTT.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. DEEDS (§ 141*)—CONSTRUCTION—CREATION OF LIFE ESTATE.

In a deed conveying a farm from parents to their son the following clause was inserted immediately after the description: "This conveyance is made upon the express condition that the grantors, Adam Scott and Elizabeth Scott shall each have an estate for life in said conveyed lands and tenements. * * *" This clause was effectual to reserve a life estate in the parents.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 463; Dec. Dig. § 141.*]

2. EJECTMENT (§§ 5, 143*)—REMEDIES OF LIFE TENANTS—DECREE.

On delivery of this conveyance the grantee was given possession upon his oral promise to support the grantors, who were over 75 years of age, during their lives. The promise was performed by the son for over 2 years when, his health failing, he removed to Colorado, and his brother, the defendant, then living in that state, came home to take his place, and took the possession and management of the farm. He resided with and cared for his parents at their home—not on the farm in question—for a year, and provided for his parents during that time and for three or four months afterwards, when he ceased to do so upon the statement of his mother that they would look to another brother for their future support. It does not appear that the father was consulted, and he called upon the grantee still in Colorado to furnish the support as promised, but this was not done. The parents meanwhile had but \$180 income, which was from another source, for their support, and which was not sufficient. The grantee in the deed died in August, 1911. The defendant who had taken his place was still in possession of the farm receiving its income of about \$1,100 per year, and a demand for possession was made upon him, which being refused, this suit was brought to recover the life estate. It is held that the plaintiffs are entitled to possession and to a recovery of the value of the use of the farm for three years subject to a deduction for taxes and interest paid, and other equitable counterclaims, if any.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 5, 502-508; Dec. Dig. §§ 5, 143.*]

Appeal from District Court, Pottawatomie County.

Action by Adam Scott, Senior, and wife, against Adam Scott, Junior. From a judgment for defendant, plaintiffs appeal. Reversed and remanded.

Challis & Brookens, of Westmoreland, for appellants. Crane & Woodburn Bros., of Holton, for appellee.

BENSON, J. This is an action in ejectment by parents against their son to recover the possession of a farm in which they claim an estate for life.

[1, 2] In April, 1904, the plaintiffs conveyed to their son David Scott a farm of 475 acres, subject to mortgages amounting to \$4,500. The conveyance was made in the ordinary form of a warranty deed, but contained the following clause inserted immediately

after the description: "This conveyance is made upon the express condition that the grantors, Adam Scott and Elizabeth Scott shall each have an estate for life in said conveyed lands and tenements. * * *"

At the date of the conveyance the grantors, Adam Scott, Sr., and Elizabeth Scott, his wife, were of the ages of 79 and 75 years, respectively. They also owned another farm of 160 acres upon which they lived, called the home place. In consideration of this conveyance and the transfer of some personal property, David agreed to care for his parents while they lived. The agreement was verbal, and can only be stated in general terms, but it was faithfully performed until August, 1906, when by reason of failing health David was compelled to leave his father and mother and move to Colorado, where his brother, the defendant, then lived. In October, the defendant, Adam Scott, Jr., came to his parents and told them he had come to take David's place. They had, it seems, been informed of his intended coming for that purpose by letter from David, but the agreement between the brothers is not further shown. Adam, Jr., moved with his family into the house with his parents on the home place, and also entered upon the possession and management of the farm in controversy, with their consent and approval, and cared for them until August, 1907, when he left the home, but continued to furnish supplies for three or four months longer, when he ceased to do so because his mother told him that they had made arrangements with another son to provide for them. He said to her that whenever there was anything he could do for them they would find him willing. It does not appear that they ever demanded anything of him afterwards, although the father wrote to David at two different times asking for support but received nothing from either except the rent of the home place; Adam having rented it on March 1st. By some arrangement between David and Adam, Jr., a stock business was carried on upon the farm in controversy under the name of Scott Bros. Out of the rents received for the home place the parents have the taxes to pay, and interest upon a mortgage upon it, leaving them \$180 per year, which is all they have had to live on since Adam, Jr., ceased to furnish their supplies. David died in August, 1911. Adam Jr., has had the exclusive use of the farm since that time and has paid the taxes from the time he took possession. This suit was commenced April 19, 1912. Before commencing the action a notice to quit, in the usual form in proceedings for forcible detainer, was served on Adam, Jr., and also on him as survivor of the firm of Scott Bros. David paid \$2,500 of the principal of the mortgages, and it seems placed another mortgage upon the farm for \$1,000. It is pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

sumed that the brothers have paid the interest also. The assessed value of the farm is \$16,765, and its rental value was \$1,100 per year for the three years preceding the trial.

While the details of the agreement between David and his parents are not definitely shown, it appears that it provided for their support from this farm—and it may fairly be presumed that the condition in the deed related to this agreement. This relation further appears from extrinsic evidence. The father, when asked why this reservation was made, said: "I thought I had a perfect right to put it in that way; I gave him so much of it and retained so much of it for my future use. * * * Q. You did not claim possession of this land at any time during David's lifetime? A. No, sir; I had no need to. David tended well to us while he was with us. * * * My intention was that I should have possession of this land if it become necessary for me to rent it for our support." In a paper filed in the probate court, after referring to David's agreement for support, he stated: "That for the purpose of securing the performance of said agreement claimant reserved in said deed of conveyance a life interest and estate therein for himself and his said wife."

It is the contention of the defendant that the condition was put in the deed merely to secure the agreement for support; that the parents accepted Adam, Jr., in place of David to perform the agreement, and, as they did not demand performance from Adam, Jr., there was no default on his part, and hence can be no recovery of possession; and that in any event the remedy for any default would be an action to recover the value of the support withheld. The district court decided that the reservation in the deed was invalid and insufficient to reserve to plaintiffs or either of them an estate for life in said premises, and that they, nor either of them, were entitled to the possession of such premises, nor to any damages for the detention thereof. Neither the abstracts nor briefs inform the court of the particular reasons for this conclusion. It is not contended that the reservation contradicts the grant, and no sufficient grounds appear for holding the reservation void, and it must be held that a life estate was effectually reserved in the deed.

The next inquiry is whether the plaintiffs should recover the possession or be remitted to an action for support as contended by the defendant. The condition and the oral agreement should be considered in their relation to each other and in the light of all the attendant circumstances, and the intention of the parties should be carried into effect so far as possible. The parents relied upon the fidelity of David with whom they contracted, and, while his health permitted him to exercise personal care, they lacked nothing. When his brother offered to take his

place, they made no objections, doubtless believing that he would act with equal faithfulness. For a short time he attended to their wants, and then without any modification of the agreement, and without consulting with his father, he left them upon the statement of his mother that other arrangements for their support had been made with another son. It seems that the father did not rely upon these other arrangements, but called upon David, with whom the contract had been made, to comply with its terms. Whether David informed Adam of this request does not appear, but nothing was done. The parents were left with only \$180 a year for their support. Adam was enjoying the revenues of this large farm, yielding a rental value of \$1,100 per year. His father and mother were old and in need. Considering their age, it may fairly be presumed that they not only needed money, but also the care and attention that a son who had undertaken to support them should give and which is implied in such agreements. It is true that they made no special demand upon him, but it was his duty to ascertain whether the arrangements referred to by the mother were being carried out and to see that they were furnished the supplies which their comfort reasonably required. The clause in the deed should not be narrowly construed into a mere mortgage or conventional security. It was placed there for a broader purpose. They did not contract for a lawsuit, but for present and continued support, reserving the use of the farm while they lived that this support might be assured beyond question. They did not contemplate that a formal demand would be necessary in order that they might have the ordinary comforts of life. The alternative of a suit for damages would leave them dependent on charity while the slow processes of the law were going on. The son who undertook to discharge his brother's obligation owed a higher duty than to wait for a demand. He should have ascertained their condition and supplied their needs.

Treating the promise of support made by David as a sufficient consideration for the possession taken by him against the terms of the reservation, such possession cannot be withheld by his successor without fulfilling that promise, for possession was held upon that condition. An action for damages is not deemed an adequate remedy in the situation disclosed by the evidence. This conclusion is reached without deciding whether there was sufficient proof that the defendant was entitled to all the rights of his brother or the precise nature of those rights.

The plaintiffs should have judgment for the possession of the farm while they live and during the lifetime of the surviving spouse and for the value of its use, for the three years preceding the commencement of the action, subject to deductions for taxes and interest paid and other proper counter-

claims, if any, that may be found equitable by the district court.

The judgment is reversed, and the cause remanded for further proceedings. All the Justices concurring.

ELLSWORTH et al. v. ESLICK et al.
(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION (§ 31*)—WHAT CONSTITUTES—NOTICE.

A real estate mortgage was foreclosed, and a sheriff's deed of the land was issued, and duly recorded. At that time the land was vacant. Afterwards the foreclosed owner entered and took actual possession by tenant under a claim of full title based on legal advice, and a belief that the foreclosure proceedings were fatally defective. *Held*, the entry was not subservient to the title claimed by the holder of the sheriff's deed, that the possession following was hostile, and not permissive, and that such possession was sufficient notice to the sheriff's deed holder of its adverse character.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. § 31.*]

2. ADVERSE POSSESSION (§ 48*)—ATTORNMEN OF TENANT—EFFECT.

After the lapse of several years a tenant of the adverse occupant while in possession accepted leases from and paid rent to a claimant of title under the sheriff's deed for some two years. The tenant then renewed allegiance to his former landlord, and, after leasing for a year, purchased the land, and took a deed from her. Thereafter he held adversely on his own account to the claimant under the sheriff's deed. *Held*, the attornment of the tenant was void, the adverse character of the landlord's possession was not affected by it, and the entire period of such possession may be tacked to that of her grantee and those claiming title under him to make title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 236, 237; Dec. Dig. § 48.*]

Appeal from District Court, Pratt County. Action by Hattie Ada Ellsworth and others against William L. Eslick and others. From judgment for defendants, plaintiffs appeal. Affirmed.

William Barrett and R. F. Crick, both of Pratt, for appellants. W. B. Hess, of Pratt, for appellees.

BURCH, J. Hattie Ada Ellsworth and others claiming as devisees under the will of Eugene S. Ellsworth brought suit in ejectment for the land in controversy against William L. Eslick, his wife, and others who, with her, claimed as heirs of James Johnston. The defendants recovered, and the plaintiffs appeal.

The defendants claimed title by adverse possession. The plaintiffs assert that the possession of certain predecessors in interest of the defendants was that of landowners continuing in occupancy after a foreclosure, and so was not adverse, and that James Johnston, before he purchased, and while a

tenant of the land under the foreclosed occupants, attorned to one of the plaintiffs' grantors, and so precluded himself and those claiming under him from asserting adverse possession during the time he recognized the title held by the plaintiffs.

The land belonged originally to James W. Everhart, who conveyed to Sophia A. Everhart in 1887, who conveyed to Johnston on August 20, 1903. A mortgage given by James W. Everhart was foreclosed against Sophia A. Everhart and a sheriff's deed was issued to David Prouty on February 5, 1892, and duly recorded. Prouty died leaving a will, which was offered for probate on March 24, 1893, and his executors deeded to G. Henry Whitcomb on September 8, 1896. Whitcomb deeded to Edward E. Parker on June 27, 1902, and Parker deeded to Eugene S. Ellsworth on July 8, 1902. Prouty was a resident of Massachusetts, Ellsworth was a resident of Iowa, and the plaintiffs reside in that state. Mrs. Eslick, the widow of James Johnston, and other defendants reside on the land.

A former action by the plaintiffs for the same relief was commenced on January 28, 1909. A trial was had, and the cause was taken under advisement by the court; but before a decision was rendered the plaintiffs dismissed the action at their own cost on March 26, 1910. The present suit was commenced on January 2, 1911.

Sophia A. Everhart never lived on the land. Her business interests were looked after by her husband, J. T. Everhart. Neither the plaintiffs nor any of their predecessors in interest ever lived on the land. While Whitcomb held title his interests were in charge of W. H. Thompson, a real estate agent at Pratt. The land was in fact vacant and unoccupied until some time in the year 1893, when Everhart leased it to T. J. Ireland for grazing purposes. Ireland continued to pasture the land under leases from Everhart until 1897, when, with Everhart's consent, he assigned a written lease dated August 3, 1897, to Johnston, who thereupon took possession. The land was unfenced during Ireland's tenancy; but it was pasture land, and its use for the purpose for which it was best adapted was sufficient to make his possession actual and notorious. The dispute is with reference to hostility.

Soon after the foreclosure was completed—within six months or a year—Everhart was advised by an attorney that the proceedings were defective, and that his wife's title to the land was still perfect. He so informed his wife, and she claimed title from the time she placed Ireland in possession. J. T. Everhart testified that at some time while Ireland was occupying the land—he could not fix the date with any degree of certainty—he received a letter from some one in Iowa named Prouty inquiring what authority he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

had to lease the land. He replied by letter that he was leasing the land for the owner, Sophia A. Everhart, as her agent. This correspondence may be disregarded, since it is not possible to trace notice of an adverse holding by means of it to any one connected with the title.

The general rule contended for by the plaintiffs is sound. Where the owner of land subject to a mortgage continues in possession after a foreclosure sale and the issuance of a sheriff's deed, he is regarded as a sort of tenant of the purchaser, and his possession will not become adverse without a clear disavowal of the relation signified in such a way that the purchaser may be apprised of it. The former owner stands in the same relation to the purchaser as if he had made the conveyance himself, and had continued in possession. He is deemed to hold in subservience to the title of the grantee. 1 Cyc. 1054.

[1] In this case, however, the land was vacant when the sheriff's deed was issued and recorded. No one had actual possession. The possession of Sophia A. Everhart was merely the constructive possession which in contemplation of the law attends the legal title. When the sheriff's deed was issued and recorded, this constructive possession vested in Prouty, so that Sophia A. Everhart did not in fact or in legal theory continue in possession after the foreclosure was completed. When she actually entered by her tenant, Ireland, claiming the land as her own by title unimpaired by the foreclosure proceedings, her occupancy was not permissive, but was hostile to the Prouty title, and was of sufficient notoriety to apprise the holders of that title of her claims. *Bird v. Whetstone*, 71 Kan. 430, 80 Pac. 942.

[2] Was the adverse possession which commenced in 1893 interrupted so far as it affected Johnston and those deriving title through him?

In 1898 or 1899 Thompson commenced to look after the land as agent for Whitcomb. He paid the taxes for Whitcomb; Everhart having paid no taxes after the foreclosure. On March 10, 1900, Thompson leased the land to Johnston by a written lease expiring March 1, 1901, which Johnston signed and accepted. On January 3, 1901, a second lease was executed to commence March 1, 1901, and to expire on March 1, 1902, and on March 1, 1902, Johnston again leased from Thompson by a written lease extending to March 1, 1903. The last payment of rent provided for by these leases was made in March, 1901. The note given for the rent for 1902 seems not to have been paid. On October 7, 1902, Johnston again recognized Sophia A. Everhart as his landlord, and accepted a written lease from her, under which he continued to hold possession until he purchased the land.

The plaintiffs concede that, if the contest were against Sophia A. Everhart or any

one holding under her except persons in privity with Johnston, his attornment to Whitcomb would amount to nothing. But it is argued that Johnston and those claiming under him cannot be heard to say that his possession from March, 1900, to October, 1902, under leases from Whitcomb, was adverse to Whitcomb. The defendants make no such assertion. What they say is that Sophia A. Everhart's possession from March, 1900, to October, 1902, was adverse to Whitcomb, that the dealings between Whitcomb and Johnston were without legal effect so far as her title and possession were concerned, and consequently that such dealings are to be ignored as without benefit to Whitcomb, and without detriment to Sophia A. Everhart and her grantees.

The statute is unequivocal that the attornment of a tenant to a stranger to a landlord's title shall be void and of no effect on the landlord's possession, unless the landlord consent, or unless pursuant to a judgment at law or a decree in equity. Gen. St. 1909, § 4703. Without the statute such is the general rule of law, founded on principles of public policy. If the title held by the landlord should expire or be extinguished, the tenant may renounce his allegiance while holding possession of the premises. *Welchselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204; *Fry v. Boman*, 67 Kan. 531, 73 Pac. 61. But so long as the landlord's title remains as it was when the tenancy was created, the tenant is not permitted to open the door to confusion and fraud by disputing it. *Forbes v. Caldwell*, 39 Kan. 14, 17 Pac. 478.

Sophia A. Everhart entered upon the land under a claim of full title. Whether this claim were sound in law or not, it was the basis of her occupancy, and possession under a claim of right constitutes a kind of title which may be asserted and defended in the courts, and which may ripen into full title if maintained for the statutory period. The hostile character of this possession was not impaired by Whitcomb's tampering with her tenant. No rights were gained or lost by the void attornment, and her grantee and his successors are entitled to tack the full period of her adverse holding to their own.

The plaintiffs invoke the decision in the case of *Whittle v. Hughes*, 88 Kan. 702, 129 Pac. 1172. In that case the so-called patent title was extinguished by a tax deed. The tenant of the holder of the patent title then attorned to the tax deed holder. Afterwards the tenant purchased the patent title, and undertook to assert it against his landlord, the tax deed holder. He was not permitted to do so. His attornment was lawful, because his former landlord's rights were cut off by a new and paramount title which he was at liberty to recognize. Having accepted the holder of the new title as his landlord, he could not then dispute that title. In this case no change in Sophia A. Everhart's title

occurred during the tenancy. The Prouty title was in existence when the tenancy was created. Sophia A. Everhart entered in opposition to that title, and a tenant who chose to lease from her could not, while in possession under her, shift his allegiance to her adversaries.

The judgment of the district court is affirmed. All the Justices concurring.

SIEGRIST et al. v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

DEATH (§ 31*)—RIGHT OF ACTION—PARENT AND CHILD.

No recovery can be had by a parent for the death of a child, except in virtue of the statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.*]

Appeal from District Court, Reno County.

Action by Alpha G. Siegrist and others against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded, with directions.

W. R. Smith, O. J. Wood, and A. A. Scott, all of Topeka, and J. S. Simmons, of Hutchinson, for appellant. Prigg & Williams and F. L. Martin, all of Hutchinson, for appellees.

MASON, J. Alpha G. Siegrist and Hazel Siegrist recovered a judgment against the Atchison, Topeka & Santa Fé Railway Company for causing the death of two infant children of the plaintiffs, and the defendant appeals. The petition did not allege, nor did the proof show, the existence of facts sufficient to give the plaintiffs a cause of action under the statute. In their brief it is stated that the action was brought as a common-law action, and the judgment is sought to be upheld upon the ground that, under the common law, the father can recover damages against one who negligently causes the death of his child. Many decisions are cited to the effect that a father, being entitled to the services of his minor child, has a cause of action against one who deprives him of them. But these decisions merely announce the general principle, and they are based upon acts which did not result in death. It is held that where a minor receives an injury which results in death, the father may recover for the loss of services between the time of the injury and the death, but no further. 8 A. & E. Encycl. of L. 856; 13 Cyc. 311. The specific question involved is fully treated in a note in 41 L. R. A. 807, under the topic, "Common-Law Right of Action of Parent for Loss of Services of Child Killed." The conclusion there reached, which appears to be fully

sustained by the authorities, is that, in the absence of a statute, no action will lie by the parent for the death of a child, except in Georgia, and that even there no recovery is allowed in the case of a child too young to render valuable services. See, also, note, 70 Am. St. Rep. 669. In this state it has been held that an action by a parent on account of the death of a child can be maintained only in virtue of the statute. City of Eureka v. Merrifield, 53 Kan. 794, 37 Pac. 113. In Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938, it was held that a petition asking damages for the death of a child, which omits averments requisite under the statute, cannot have the omission supplied by amendment after the period fixed by the statute of limitations has run. Language was there used which might seem to suggest that a good cause of action at the common law was stated. The averments of the petition, however, were referred to as indicating "an attempt" to state a common-law liability, and the amendment was obviously desired because it was seen to be necessary to the statement of a cause of action.

We feel constrained by these considerations to hold that the plaintiffs can have no recovery outside of the statute, and therefore their action must fail. We cannot regard the soundness of the reason back of the established rule as open to inquiry. The Legislature, recognizing the defect of the common law, has undertaken to remedy it, and the statute passed for that purpose must be regarded as covering the subject, and affording an exclusive remedy. This view makes it unnecessary to examine the other matters argued.

The judgment is reversed, and the cause remanded, with directions to render judgment for the defendant. All the Justices concurring.

In re CARROLL,†

In re WELSH.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. JUDGES (§ 3*)—POLICE JUDGE—AUTHORITY TO APPOINT.

The office of police judge in cities of the first class operating under the commission form of government was created by the Legislature itself, and the passage of an ordinance by the mayor and commissioners fixing the term and salary of such officer is not essential to the authority of the commissioners to appoint a police judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 4-10; Dec. Dig. § 3.*]

2. PARDON (§ 4*)—PAROL—POWER TO CHANGE CONDITIONS.

Under the provisions of chapter 116, Laws of 1908, a judge of the police court of cities of the first or second class may parole persons convicted of the violation of city ordinances under such restrictions as he may see fit to impose; but he has no power to extend the conditions of the parole beyond the term of sen-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

† Rehearing denied February 13, 1914.

tence, nor has he authority after that time to declare that the conditions of the parole have been violated and to recommit the prisoner and require him to serve the unexpired part of his sentence.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4-6½; Dec. Dig. § 4.*]

Johnston, C. J., and Benson and West, JJ., dissenting.

Original habeas corpus by W. H. Carroll and S. W. Welsh. Carroll remanded, and Welsh discharged.

J. J. Bulger, of Wichita, for Carroll. J. B. Larimer, of Topeka, and T. A. Nofztger and George Gardner, both of Wichita, for Welsh. Earl Blake and R. C. Foulston, both of Wichita, for appellee.

JOHNSTON, C. J. The petitioners, who are confined in the city jail of Wichita, ask to be released in separate proceedings in habeas corpus brought by them. At different times each was convicted of the violation of an ordinance which provided for prohibiting and punishing the sale of intoxicating liquors and the maintenance of a liquor nuisance in the city. The penalty adjudged in each case was a fine of \$500 and imprisonment for six months in the city jail. Afterwards the petitioners applied to the police judge for paroles under chapter 116 of the Laws of 1909, and in the application each promised, substantially, that he would not sell or give away intoxicating liquors or keep any on his person or in any place under his control and would not violate the ordinances of the city or the laws of the state. He further promised that he would report to a certain person on Monday evening of each week for a period of two years from the time of the parole. Upon the application and the conditions named the police judge, on January 2, 1913, granted a parole to Carroll under which he was at liberty until May 19, 1913. At that time a complaint was made that he had violated his parole and in a hearing, wherein the petitioner and his counsel were present, and upon the evidence produced the police court found that he had violated the terms of his parole and ordered that he be recommitted. It was accordingly adjudged that Carroll should serve out the sentence and pay the fine imposed the same as if no parole had ever been granted. A parole was likewise granted to Welsh on January 2, 1913, upon similar conditions, and it was revoked by the police court upon a hearing duly had upon September 16, 1913. As in the Carroll case, Welsh was held to have violated his parole and was adjudged to serve his sentence and pay his fine as though no parole had been granted. The petitioners were recommitted to the city jail and were confined there when these proceedings were brought.

[1] In behalf of Carroll it is contended that Clyde Souders, who was acting as police

judge and revoked the parole, was not in fact a police judge and had no authority to recommit him to jail. It appears that Wichita is a city of the first class operating under the commission form of government. On April 11, 1911, the board of commissioners appointed Souders as police judge and he duly qualified and has since continued to hold the office. On April 7, 1913, his term having ended, he was reappointed and again qualified by taking the oath of office and giving a bond, and he was serving under that appointment when the order revoking the parole was made. The contention is that Wichita had no police judge and that there was no authority in the commission to appoint one because no ordinance had been enacted fixing the term and salary of the police judge. The statute relating to the appointment is as follows: "The board of commissioners may appoint, by a majority vote of all the members thereof, the following officers, to wit: A city attorney, a city clerk, a city treasurer, a city auditor, a city engineer, a superintendent of streets, a superintendent of waterworks, a secretary of waterworks, a fire marshal, a chief of police, a city physician, a judge of the police court, a superintendent of public parks, a city assessor, and such assistants and other officers and servants as they may deem necessary for the best interests of the city; but no such officer shall be appointed until his term and salary shall have been fixed by ordinance. The terms of all appointive officers shall expire with the term of office of the board appointing them: Provided, that they shall hold their respective offices until their successors are appointed and qualified: Provided, that in case of appointment to fill a vacancy, such appointee shall only serve for the remainder of the term for which his predecessor was appointed." Gen. St. 1906, § 1304.

It is argued that the passage of an ordinance fixing the term and salary of the police judge was a condition precedent to the creation of the office by the commission. The provision that no such officer shall be appointed until the passage of an ordinance fixing the term and salary applies to the other unnamed officers provided for in the section quoted, which the board may deem necessary in addition to those specifically enumerated. The offices of city clerk, city treasurer, city assessor, police judge, and the others that are definitely designated in the act were created by the Legislature itself. They were deemed by the Legislature to be absolutely necessary for the government of the city, and hence were directly created. Recognizing that assistants and other subordinate officers and servants might become necessary, the board was authorized to appoint them from time to time as they were needed, with the limitation that they should not be appointed until their terms and salaries had been fixed by an ordinance.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This has been the interpretation placed upon the section, and it was so recognized in *Jagger v. Green*, 90 Kan. 153, 133 Pac. 174. Whether a subordinate officer appointed by the commissioners without the passage of an ordinance fixing his term and salary would have any validity, or whether, having a potential existence, he would not be a de facto officer and his acts not open to question in a collateral proceeding, we need not determine. The office of police judge was created by the Legislature and as to its existence the board had no discretion. It may also be added that as to the police judge there was an ordinance fixing his salary, and so far as the term is concerned the statute provides that his term as well as those of all other appointive officers shall expire with the term of the board appointing them. Laws of 1907, c. 114, § 88; Gen. St. 1909, § 1304; *Jagger v. Green*, supra.

[2] When and by whom may a parole be revoked is the next question presented. The Legislature of 1909 passed an act empowering the judge of the police court in cities of the first and second class to parole persons convicted of the violation of ordinances (Laws of 1909, c. 116), and section 2 of the act is as follows: "The judge of the court named in section 1 of this act, subject to the restrictions hereinafter provided, may, in his discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed by the court, or any person actually confined in the city jail under the judgment of said court, will if permitted to go at large not again violate the law or ordinance, parole such person and permit him to go at large, upon such conditions and under such restrictions as the judge granting the parole shall see fit to impose. Such judge may at any time, without notice to such persons, terminate such parole by simply directing execution to issue on the judgment; or, in case the person shall have been actually confined in jail, the parole may be terminated by directing the chief or captain of police or any police officer to retake such person under the commitment already in his hands. After a parole has been terminated, as above provided, the judge may, in his discretion, grant a second parole, but no more than two paroles shall be granted the same person under the same judgment of conviction. If a parole shall be terminated the time such person shall have been at large on parole shall not be deducted from the time he shall be required to serve, but the full amount of the fine shall be collected or the full time in jail be served, the same as if no parole had been granted." In section 3 it is made unlawful for an officer to release from custody one who has been convicted unless such person has been paroled as the act provides or pardoned by the mayor. Section 4 provides that any one who commits an offense against the laws of the state or the ordinances of

the city when under a parole may be arrested and tried in the same manner as if he had not been convicted and paroled. Section 5 provides: "The action of the judge in refusing, granting or terminating a parole shall not be subject to review by an appellate court."

It is argued that the expression "such judge," in section 2, means the judge granting the parole, and that only the one then in office can terminate the parole, and further that he cannot do so in the succeeding term even should he be reappointed and remain in office. In the preceding provisions of the statute the Legislature had spoken of the judge of the police court, and the phrase "such judge" manifestly means the judge of that court, and not the individual who had been holding the office at some earlier time.

But is there no limit to the period of a parole? Can it have been the purpose of the Legislature that a police judge, having imposed a sentence of imprisonment for ten days, can issue a parole upon the condition that the paroled person shall be under surveillance for ten years, or even longer, and subject to be recommitted at any time for a violation of the parole? It is true the statute provides that the parole shall be granted upon such conditions as the police judge may see fit to impose, but the view of the court is that it was not the legislative intent that the parole period might be indefinitely extended. A limit is fixed in the act authorizing the district courts to parole persons convicted of violating the criminal laws of the state, and this to some extent indicates the policy of the state respecting the absolute discharge of paroled persons. Although the statute relating to paroles granted by police judges does not expressly declare a limit, one is doubtless contemplated, and, since provision is made for imprisonment for a fixed time, that should be regarded as the limit of time for the termination of a parole and the absolute discharge of the paroled person. It is argued that a parole is a matter of grace and discretion, but could it be regarded as a gracious act to hold over the head of a convicted person the unexecuted sentence for a lifetime with the uncertainty that he might be recommitted to prison without notice at any time when the police judge chose to order it? When the time for imprisonment is adjudged, the expiration of that period, whether the person is on parole or in jail, ends all punishment and satisfies the sentence. While a parole may be granted on such conditions as the judge may prescribe, they must be such as may be performed within the term for which the prisoner has been sentenced. The conditions which a judge may lawfully impose in granting a parole are to be determined from the statute itself and, being a matter of interpretation of our own statute, pertinent authorities are not numerous, but as having some bearing on the question involved the

following cases are cited: *In re Prout*, 12 Idaho, 494, 86 Pac. 275, 5 L. R. A. (N. S.) 1064, 10 Ann. Cas. 199; *Woodward v. Murdock*, 124 Ind. 439, 24 N. E. 1047; *Scott v. Chichester*, 107 Va. 933, 60 S. E. 95, 16 L. R. A. (N. S.) 304; *West's Case*, 111 Mass. 443; *Scott Huff v. B. F. Dyer*, *Warden Ohio Penitentiary*, 2 Ohio Cir. Ct. R. 595.

It appears that neither of the petitioners ever served any part of the prescribed terms of imprisonment prior to the granting of the paroles on January 2, 1913. Each had taken an appeal from the judgment rendered against him to the district court, and the appeal was dismissed on his application just prior to the time he applied to the police judge for the parole. Carroll was sentenced to imprisonment in the city jail for a period of six months, and that period had not expired when the parole was terminated by the police judge. Time began to run when the parole was granted on January 2, 1913, and the parole was terminated on May 19, 1913, less than five months after the parole was granted. The order terminating the parole as to him and recommitting him to jail is held to be valid, and therefore he must be remanded. The petitioner Welsh was out on parole from January 2, 1913, until September 16, 1913, and as more than six months, the term fixed by the sentence, had expired when the parole was revoked, the judge was without authority to recommit him to jail under the judgment of conviction. He will therefore be discharged.

MASON, SMITH, and PORTER, JJ., concurring.

JOHNSTON, C. J. (dissenting.) I am unable to concur in the view that the conditions of a parole end with the expiration of the term for which a prisoner is sentenced, which, in effect, is a holding that the time a prisoner is out on parole shall be counted as time served on the sentence. It was competent for the Legislature to provide for the granting of paroles to convicted persons and upon such conditions as it might deem best. It has provided that paroles may be granted upon such conditions and restrictions as the police judge may see fit to impose. He cannot, of course, impose a condition that would conflict with law or morals or which is incapable of performance. There is no claim that there is anything illegal, immoral, or incapable of performance in the conditions upon which the paroles in question were granted. The Legislature might have said that paroles shall be granted upon the condition that a repetition of the offense at any time during the life of the prisoner would be ground for revoking the parole and requiring him to serve out the unexpired term of his sentence. It has provided that paroles shall be granted upon any condition that the judge may see fit to im-

pose, and to avoid some of the questions that arose in the cases cited it provided that in case of a revocation the time that the prisoner shall have been at large on parole shall not be deducted from the term imposed by the sentence. To prevent misconception of the legislative purpose and the adoption of the theory taken by some of the courts in cases cited, that the prisoner was under some restraint and undergoing a sort of punishment while out on parole, the Legislature expressly provided that, on the termination of a parole by the judge, "the full amount of the fine shall be collected or the full time in jail be served, the same as if no parole had been granted." Laws 1909, c. 116, § 2; Gen. Stat. 1909, § 826.

There is no provision in the statute that the duration of the conditions imposed by the judge shall be long or short, and I find nothing in the act giving any basis for the holding that the conditions shall not be extended beyond the period fixed in the sentence. It might have been good policy to have provided for some limitation in the conditions, but that is a matter of legislative discretion and belongs in a field into which the court may not intrude. The fact that a limit was specifically provided for in cases of paroles granted by district courts and not in those granted by police judges only argues that none was intended in the latter case.

Counsel speak of the hardship of extending the conditions of a parole indefinitely and insist that diligent search should be made for an interpretation that would avoid it. A prisoner is not compelled to accept a tendered parole. If the conditions are onerous or unacceptable to him, he can refuse the parole and remain in prison and serve out the imposed sentence. As a matter of grace, and in part to prevent a recurrence of misconduct, he is generally offered liberty on condition of good conduct in the future with the option to accept or reject the parole. Such a condition can hardly be regarded as onerous, and experience has shown that the granting of paroles and pardons on conditions of this kind has operated beneficially. The petitioners were given paroles on condition of good behavior and that they would abstain from violating the prohibitory liquor law for a period of two years—not an unreasonable requirement. The judge may have known something of the habits and history of the petitioners and evidently concluded that such a restriction would enable them to resist the temptation to commit the offense of which they have been convicted. In case an unreasonable condition is imposed, a prisoner may appeal to the mayor, who has the authority to pardon, or to the successor of the judge, who may be more lenient and reasonable. It cannot be assumed that the judge will impose conditions that are unreasonable or that are unduly severe, and to provide against such a contingency is a legisla-

tive rather than a judicial function. The parole or the length of time the prisoner is at liberty under it does not shorten nor nullify the sentence of the court. The power to grant the parole includes the power to fix the conditions upon which it may be revoked, and the acceptance of the parole is a binding acceptance of the stipulated conditions. When the parole is terminated, the prisoner can be required to serve the unexpired part of his sentence the same as if no parole had been granted. The time during which he has been at liberty under a parole cannot be regarded as time served on the sentence. Some of the authorities touching the general subject and which tend to support this view of the statute are: *Fuller v. State*, 122 Ala. 32, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1; *State v. Wolfer*, 53 Minn. 135, 54 N. W. 1065, 19 L. R. A. 783, 39 Am. St. Rep. 582; *People v. Marsh*, 125 Mich. 410, 84 N. W. 472, 51 L. R. A. 461, 84 Am. St. Rep. 584; *Conlon's Case*, 148 Mass. 168, 19 N. E. 164; *State v. Barnes*, 32 S. C. 14, 10 S. E. 611, 6 L. R. A. 743, 17 Am. St. Rep. 832; *In re McKenna*, 79 Vt. 34, 64 Atl. 77; *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175; *Arthur v. Craig*, 48 Iowa, 264, 30 Am. Rep. 395; *State v. Hunter*, 124 Iowa, 569, 100 N. W. 510, 104 Am. St. Rep. 361; note, 5 L. R. A. (N. S.) 1064; note, 16 L. R. A. (N. S.) 304.

An additional reason why a discharge should not be ordered here is that the petitioners were adjudged to stand committed until the fines and costs had been paid, and it is conceded that payment has not been made.

BENSON and WEST, JJ., join in the foregoing dissent.

BURCH, J. (concurring). I concur in the judgment rendered. The Legislature undertook to realize in the parole law some of the modern ideas respecting the treatment of persons who have been guilty of infractions of the social order. Fines and imprisonment are no longer regarded as compensations to offended society, and the whole theory of punishment has changed and has been placed upon a scientific and humanitarian basis which regards both the protection of society and the welfare of the delinquent. When a person incarcerated for crime has fairly demonstrated that he intends to live an orderly and correct life and has capacity to do so, the purpose of imprisonment has been substantially accomplished. Society will not suffer from his release, and his own welfare will best be promoted if he be allowed to serve the remainder of his sentence outside the prison walls. Upon these considerations is based the original form of the "parole," which has been defined as follows: "A parole is a form of conditional pardon, by which the convict is released before the expiration of

his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole." 29 Cyc. 1562.

It has long been recognized that few records should ever be made in criminal courts against young persons, or even adults who, although they may have offended, are not criminals. Besides this, it is well demonstrated by criminologists and expert welfare workers that some substitute should be found for incarceration in as many cases as possible where anti-social conduct is not a habit and the offender possesses a fair measure of self-control, self-respect, and other moral and spiritual resources to draw upon. In numerous cases the simple fact of conviction is more than enough punishment, and fine and imprisonment have no legitimate or efficacious purpose to subserve. The foregoing doctrines form the foundation of the statute involved in these cases, which provides that if the judge be satisfied that an offender will not again violate the law he need not be fined or imprisoned, but may be allowed to go at large upon such conditions and restrictions as the judge may impose.

It needs no argument to demonstrate that the Legislature did not confer unlimited authority to impose conditions and restrictions. It did not mean that the offender might be required to curry the judge's horses or vote for him or some one favored by him for an office. The conditions and restrictions contemplated are those germane to the problem presented as to whether or not the hard and fast penalty affixed by the law should be enforced. It is not a matter of grace or of bargain between the judge and the offender, but a matter of the best interest of society and of the offender under the particular circumstances of the particular case. Neither was it intended that by the parole a general guardianship should be established. The question always is whether the statutory penalty will best accomplish in the case of a particular person guilty of a specific breach of law the true purpose for which alone the penalty should be inflicted. If not, there should be a discharge with suitable guarantees against lapses, in lieu of the penalty. This being true, an invented surveillance extended indefinitely by a police judge would violate the fundamental theory of the parole system. Such authority over an individual, perhaps to be sprung upon him in after years when the police court incident has been entirely forgotten, will not be inferred from general language. It must be granted in specific terms.

"Indiscreet attempts to extend the measure beyond its legitimate and restricted sphere have provoked reaction and imperiled the whole movement." Henderson, *Preventive Agencies and Methods* (Russell Sage Foundation) p. 259.

The Legislature must be credited with knowledge of this fact derived from experience in the use of the parole expedient. In the case of district judges the power was limited to two years, and it is not reasonable to suppose that petty judicial officers having cognizance of minor offenses only were clothed with larger discretion, extending even throughout the period of the natural life of an offender.

No specific time having been stated in the statute, the Legislature evidently intended that the accepted views of the nature and purpose of the parole should prevail. Applying those views to the cases of the petitioners, their paroles were in the nature of probations. They were permitted to serve their sentences, not in jail, but at large under the condition of strict law observance and under the condition that a misstep would entail actual incarceration for the full period of their sentences and payment of fine and costs. Whether or not the petitioners were persons to whom the principle of the parole should be extended was, of course, a matter for the police judge to determine. That the principle has been both misapplied and abused in many cases in this state is a matter of common knowledge.

HUMBLE v. GERMAN ALLIANCE INS. CO.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—SPECIAL FINDING—REFUSAL OF RE- QUEST.

The refusal of a request for a special finding which, if made, could have had no material effect upon the result unless considered in connection with another, which was not requested, is not substantial or prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.*]

2. INCUMBRANCES AND ADDITIONAL INSUR- ANCE.

The rules of law touching incumbrances and additional insurance on property covered by the policy sued on, announced in *Humble v. Insurance Co.*, 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630, followed.

Appeal from District Court, Cherokee County.

Action by Joseph Humble against the German Alliance Insurance Company. From judgment for plaintiff, defendant appeals. Affirmed.

M. A. Fyke and E. L. Snider, both of Kansas City, Mo., and A. D. Neale, of Chetopa, for appellant. J. N. Dunbar and Ira Heaton, both of Columbus, for appellee.

WEST, J. When this case was here before (*Humble v. Insurance Co.*, 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630) it was held that the policy was not avoided by additional

insurance taken out by another without the knowledge, consent, or ratification of the insured, and that a provision prohibiting incumbrance does not invalidate a policy issued on oral application when no inquiries or statements are made regarding incumbrances, and there is no concealment or misleading conduct on the part of the insured. The company appeals from a judgment resulting from a retrial.

The action was brought by a mortgagee to recover on a policy issued March 25, 1908, to the owner, loss payable to the mortgagee as his interest should appear, subject to all the stipulations, provisions, and conditions in the policy. It was contended by the defendant that when the policy was issued there was a chattel mortgage on the property and other insurance procured by the owner, each of which, by the terms of the policy, avoided the insurance. The plaintiff denied that he had procured any other insurance on the property, and alleged that a former chattel mortgage had been superseded by a subsequent agreement, and therefore the property was unincumbered. He alleged that when the policy in suit was taken out it was on a verbal application, and that no representation was made by the owner with reference to any incumbrance or any other insurance on the property, and that no questions were asked with reference thereto. The court found that there was other insurance, but that it was not taken out by the owner or with his knowledge, consent, or acquiescence, and that when he learned of it he directed its cancellation. No direct finding was made as to the alleged incumbrance, but its existence might be inferred from the language of a finding which was made. The defendant requested the court to find whether at the time of the issuance of the policy, there was other insurance upon the property, and this was properly refused because it was covered by the findings made.

[1] Request was also made to find whether there was a mortgage upon the property, and whether the agent of the defendant made any inquiry of the insurer as to other insurance or incumbrance upon the property. The finding last mentioned was within the issues, and evidence was introduced pro and con, and it should have been made. Others were requested and refused, but we deem them immaterial. But had the one improperly refused been made, it would have been without effect in and of itself. Had it been found that the defendant's agent did make inquiry of the insured, this fact could have no particular bearing on the result, unless it were further found what answer was made to such inquiry, and this was not asked for. And, in view of the evidence and the result reached by the court had such a finding been requested and made, we must conclude that it would have been unfavorable to the defendant, as the other findings which were made

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

indicate that the plaintiff's version of the matter must have been taken as the correct one. While a party has the right to answers to special questions on material matters within the issues, and their refusal is error, and usually material error, as in *A. T. & S. F. Rld. Co. v. Ayers*, 56 Kan. 176, 42 Pac. 722, still in this instance it appears from the record that, had the one requested finding to which the defendant was entitled been made either way, it would have been supported by evidence; and, unless followed by another finding not requested, it could have had no effectual significance, and hence cannot be said to have been material to the case as were the questions discussed in the *Ayers* Case, 56 Kan. 180, 42 Pac. 722. Its refusal, therefore, was not substantial or prejudicial error. 38 Cyc. 1910; *Miner v. Vedder*, 66 Mich. 101, 33 N. W. 47.

Complaint is made of sustaining an objection to a certain question on cross-examination of the owner touching a subsequent settlement of other alleged insurance and the refusal of an offer to prove by him an adjustment thereof. But an examination of the abstracts shows that the question and offer were so confused with what was said to have been theretofore stated in the case that no error is manifest in the ruling made.

[2] The principal contentions on the trial concerned the questions of an incumbrance and additional insurance on the property; and the law as announced in the former decision applies to the findings and conclusion of the trial court, and need not be restated.

The judgment is affirmed. All the Justices concurring.

HURLESS v. WILEY et al.†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. CONTRACTS (§ 65*)—CONSIDERATION—RIGHTS UNDER CONTRACT.

Where, after a written contract for the sale of land has been entered into, the seller signs an undertaking to find a purchaser at an advanced price, within a stated time, the buyer may obtain damages for the breach of the agreement evidenced by such subsequent writing, upon proving by parol evidence that the consideration for it was an oral promise to the same effect, made when the original contract was executed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 234, 267, 292, 293; Dec. Dig. § 65.*]

2. CONTRACTS (§ 309*)—BREACH—DEFENSE—IMPOSSIBILITY OF PERFORMANCE.

An action for the breach of an agreement to find a purchaser for a tract of land at a fixed price, within a stated time, cannot be defeated by showing the impossibility of procuring such a purchaser.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1444-1446; Dec. Dig. § 309.*]

Appeal from District Court, Finney County.

Action by G. W. Hurless against H. C. Wiley and others, etc. From a judgment for plaintiff, defendants appeal. Affirmed.

Hoskinson & Hoskinson, of Garden City, for appellants. H. O. Trinkle, of Garden City, and Foster & Gaskill, of Lakin, for appellee.

MASON, J. H. C. Wiley and G. W. Hurless entered into a written contract by which the former agreed to sell, and the latter to buy, a tract of land at \$25 an acre, and in pursuance of the contract a deed was delivered conveying the land from a third person to Hurless, who paid for it. A week after the execution of the contract Wiley signed and delivered to Hurless an agreement to find a purchaser for the land at \$30 an acre within the ensuing year. No buyer was found, and Hurless sued Wiley for a breach of the contract. The plaintiff recovered a judgment, and an appeal is taken by the administrators of the defendant.

[1] The appellants maintain that the contract sued upon is unenforceable because not supported by a sufficient consideration. The plaintiff contends, and the fact must be regarded as established by the judgment, that at the time the first written contract was made the defendant orally agreed to find a buyer at \$30 an acre within the year, this agreement being a part of the inducement for the purchase, and that the subsequent writing was given in pursuance of this promise. The appellants insist that to sustain a recovery on this ground would be to allow the terms of the written contract to be varied by parol.

The agreement on the part of the seller that he would find a purchaser for the property at a certain price within a fixed time appears to be one of that class which may be shown by parol to have been entered into at the time of the written contract of sale, although not mentioned or referred to therein. It has relation to the consideration of the contract, and is a part of its inducement. Such matters are ordinarily allowed to be shown by oral evidence, where they do not contradict the terms of the written instrument. 17 Cyc. 648, 693; note, 17 L. R. A. 274; note, 25 L. R. A. (N. S.) 1194. A somewhat similar question, concerning which there is some conflict, is whether the purchaser of a lot may show an oral agreement by the seller to make certain improvements on the tract of which it is a part. Note, 36 L. R. A. (N. S.) 896. The present situation seems to be one where the connection between the two writings might be shown by parol. This likewise is a matter concerning which there is a want of harmony in the authorities. 17 Cyc. 647. See, also, *Schneider v. Anderson*, 75 Kan. 11, 88 Pac. 525, 121 Am. St. Rep. 356; *Hendricks v. Brooks*, 80 Kan.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† Rehearing denied February 13, 1914.

1, 101 Pac. 622, 133 Am. St. Rep. 186. We prefer, however, to put the decision on this ground: If originally the buyer would not have been permitted to show that at the time of his purchase, and as an inducement thereto, the seller orally agreed to find a new buyer at an advanced price within the year, the reason is that the law protects the seller from having his documentary evidence overthrown by mere word of mouth. When he reduced the promise to writing the requirement of the law was met. The reason for his protection no longer existed. Oral evidence was necessary, not to prove the promise, but to show for what it was given. A consideration was implied from the contract being in writing, and its character was properly shown by parol.

[2] The appellants also contend that no liability could attach for the breach of the contract to find a purchaser for the land at \$30 an acre, because that was impossible, such a purchaser not being procurable. The performance of the agreement was not impossible in any such sense as to relieve the defendant from responsibility. See *Hampe v. Sage*, 87 Kan. 536, and cases therein cited on page 541, 125 Pac. 53.

The judgment is affirmed. All the Justices concurring.

ROMARY v. ROMARY et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE (§ 86*)—CONTRACT TO DEVISE.

The owner of land gave the possession of an 80-acre tract and a team to each of his children as they respectively attained to majority, with the understanding and agreement participated in by their mother that they should have the title at the father's death. It was also a part of the parents' plan that the youngest son should remain on the homestead of 120 acres and have the title to it when they died. The older children occupied and improved their respective tracts. The youngest son was still a minor when his father died. A family settlement was then agreed upon to carry out the original plan. The rights of majority were conferred on the minor that he might enter into the agreement. The sons and daughters conveyed all their interests in all the land to their mother. She conveyed to each of the older ones the tract occupied by him or her, respectively, and made a will, which she promised not to change, devising the homestead to the youngest son at her death upon his agreement to care for her on the farm while she lived. The agreement was verbal but was faithfully carried out until the youngest son married, when unhappy differences arose, causing strife and ill feeling between the mother and the son's wife, and also between the mother and son, in which harsh and reproachful language was used by all three, culminating in the withdrawal of the mother from the homestead. In a suit by the mother against the son to set aside the contract, which was verbal, and to quiet her title to the home, based upon his alleged default, and the charge that because of the unkindness of the son and his wife she could no longer live with him, the district court found general-

ly for the mother. Judgment was entered quieting her title to the homestead and for the recovery of one-half the crops raised after she left it, upon her paying \$2,500 to the son. Afterwards the mother died. It is held, after reviewing the facts and evidence, that, in view of the changed conditions caused by the death of the mother, the agreement should be specifically performed, as near as may be, by vesting the title of the homestead in the son upon his paying one-half the value of the crops, as before adjudged, in lieu of her support from the time she left the homestead, and also the expenses of her funeral, and that the judgment should be modified accordingly.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

Appeal from District Court, Coffey County.

Action by Hester S. Romary against J. F. Romary and another. From judgment for plaintiff, defendants appeal. Remanded for modification of judgment.

Huggins, Ganse & Riddle, of Emporia, for appellants. J. I. Wolfe, of Burlington, and Hamer & Harris, of Emporia, for appellee.

BENSON, J. This is an action to set aside a family settlement and to quiet the title of a widow to a tract of land against the claims of one of her sons.

Edward W. Romary died intestate, leaving six children and a wife, his only heirs. Frank, the youngest child, was 19 years old and is the defendant. His brothers and sisters were of full age. His mother, the plaintiff, was 60 years of age then, 65 at the time of the trial. Edward Romary owned 500 acres of land in Coffey county, and, when each child reached majority, he placed him or her in possession of 80 acres of this land and also gave a team to each, with the understanding between the parents and children that the title to the land should eventually follow the possession, and improvements were made by each of them accordingly. It was also understood that Frank was to have the homestead of 120 acres at the death of his parents. Upon the death of the father, Frank returned home from the State Agricultural College, where he was a student, and an oral agreement was made between the widow and children, intended to carry out the original plan, by which the title to the 80-acre tract, of which each child was still in possession, should be transferred to him or her; that the mother and Frank should occupy the homestead of 120 acres, where he should care for her during her life and have the place at her death. To make this agreement effectual, an application was made to the district court to confer upon Frank the rights of majority, which was done, and on November 1, 1906, all the children made conveyances of all their interests in the lands, including the homestead, to the mother; she in turn made a conveyance to each son and daughter of the 80-acre tract occupied by him or her, but held

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the title to the homestead which she devised to Frank by her will which she deposited with the probate judge, promising Frank that she would not change it. Frank then gave up attending school and remained with his mother upon the homestead. The father left about \$500 worth of personal property which was used by Frank and his mother on the farm, and out of it Frank paid expenses of his father's funeral, about \$100, and erected a monument at his grave. After a time the farm was leased. The mother and son lived together pleasantly until Frank's marriage, which occurred on December 27, 1909. When he brought his wife home his mother met them at the door, and, after greetings, said that another son and daughter naming them, had told her that they would never darken her doors while Frank's wife, Bernice, lived there. It appears that they were hostile to the marriage. Soon after Bernice came it was arranged that the tenant of the farm should occupy the lower floor of the dwelling house, which contained 11 rooms, and the mother and Frank and his wife the upper floor. In June after the marriage, the mother criticised Bernice for buying a \$4.50 hat and told Frank, in her presence, that such extravagance would send him to the poorhouse. This led to ill feelings and caused distress to Bernice. Later when she was working in the flower bed, and two little children of the tenant were with her, the mother came out and complained of her conduct in allowing the children to be with her and directed her to order them away. This incident increased the ill feeling. Some controversy also occurred about the cooking causing distress to both. Trouble about other domestic matters followed. Frank tried to compose these difficulties, but they still continued at intervals about rather trifling matters, the details of which it is not necessary to state. In September, 1910, because of the expected birth of a child, Bernice's mother came to remain for a time with her daughter. Frank's mother accused him of thinking more of his mother-in-law than of her, and he retorted by saying in substance that she treated him more like a mother than his own mother did. About a month after Bernice's mother came, Mrs. Romary, the plaintiff, went away to Arkansas and Oklahoma and remained until January, 1911. On her return different arrangements about the farm were discussed. She offered to lease the farm to Frank for \$200 per year, he to live on the lower floor of the house. He was willing to take such a lease, provided a clause was inserted in it that he should have the farm at her death. She made an offer to pay him \$2,500 for his interest and he offered to take \$3,000. No agreement was reached. She then requested him to send his mother-in-law away, which he refused to do, and requested her not to make any trouble with his wife or go to her room because of her delicate condition. Mrs. Romary left

the homestead at or soon after her return from Oklahoma. The mother-in-law left in April, 1911; the child having been previously born.

Mrs. Romary took her will from the probate office and destroyed it just before leaving for Arkansas. She had previously changed it by making the devise to Frank and the heirs of his body.

There was evidence of harsh and reproachful language used by Frank and his wife when differences between the mother and wife were being discussed. At one time he became angry over an April fool joke of his mother and used profane and contemptuous language. The mother used reproachful and unkind language towards the young people, and made charges of infidelity against Bernice. The mother testified that harsh words were spoken by all three. With respect to these unkindnesses, the age and physical condition of the mother and the son's duty of forbearance should be remembered; on the other hand, the situation and condition of the young wife, and his duty to protect and care for her so far as he could honorably do so, should be borne in mind.

There is some complaint that the mother received but little of the proceeds of the farm for her personal use, which is true. She also complained that she was not strong and that the assistance of a girl in the household was promised and should have been provided. It seems that at one time a girl was engaged but was soon discharged by the mother, and that Frank assisted in washing and other work in the home. On the whole, without stating further details, it is believed that these minor matters would never have been the grounds of serious complaint had not the difficulties following the advent of the son's wife into the home led to the disagreements between the mother and her daughter-in-law and the final rupture which followed. The mother loved her son fondly and expressed her feelings about the new situation in her testimony, saying: "He ceased to love his mother and he loved his wife so well that he had no room for his mother."

The district court made no special findings but found generally for the plaintiff, set aside the contract, and quieted the plaintiff's title to the homestead, adjudged that she should recover half the crops of the farming season beginning March 1, 1911, and have possession January 1, 1912, but that Frank should recover from her the sum of \$2,500 which was made a lien upon the land. The judgment was entered December 1, 1911.

It is obvious that these conclusions were reached upon finding that, because of the ill feeling and strife engendered between the plaintiff and the young wife, it was not possible for them to live happily together, and that therefore the agreement could not be specifically performed. Hence its annulment and the allowance made to Frank of a sum

doubtless deemed equitable by the district court in the situation then presented, and the provision out of the crops for her support after she left the homestead until she should obtain possession. The court probably considered the expectation of life of the mother at that time and directed the payment of a sum deemed equivalent to his interest in the land, charged as it was with her support for the remainder of her life. The evidence is that the 80-acre tracts were each worth about \$1,900, when possession was taken by the other children, but the dates of possession were not shown. The value of the homestead at the time of the trial was shown to be \$6,000, and its rental value \$200 to \$250 per year. The mother died June 21, 1912.

It is argued that Frank will obtain by the judgment \$500 more than his brothers and sisters, but it must be remembered that they have had the use of their land since majority, and it may fairly be presumed that the lands have increased in value meanwhile. The present value of these lands might have afforded the district court additional information in settling the decree. However, this court believes that it is its duty now to dispose of the case in the situation existing at this time, changed as it is by the death of Mrs. Romary. A careful consideration of values, and the probable expense of caring for the mother, are not so important now. It was the intent of all concerned that Frank should have the homestead upon his leaving school and caring for his mother. It is not reasonable to suppose that it was intended that he should remain single, nor could it have been anticipated that his marriage would cause a rupture in the home. His kindness to his mother before his marriage is not questioned, nor indeed afterwards, except at times of altercation between his mother and his wife. The repetition by the mother of what other members of the family had perhaps thoughtlessly told her, showing their hostility to Frank's wife, at the moment of her entrance into the household was most unfortunate. Petty quarrels and hasty accusations followed. True, the son should not have allowed anything to cause him to speak a harsh or angry word to his mother, but his wife was also entitled to his solicitous care, especially when her own motherhood was approaching. There was a lack of mutual forbearance. Mindful, as we all must be, of the common frailties of human nature, may we not pity rather than harshly condemn the members of this unhappy household? Shall we not, so far as safe procedure will permit, condone faults and carry into effect the good intentions of all, temporarily defeated by resentments born of an imperfect understanding of each others motives?

The will has been canceled. The mother is dead. The other children have secured and for years enjoyed all that the father and moth-

er intended they should have and just what they agreed to accept. The homestead alone remains for disposition. It was the cherished purpose of the father, which the agreement was designed to effectuate, that his youngest son should have the home, subject only to the care of his mother, but death has canceled that sacred charge so far as the future is concerned, and no obstacle now remains to prevent carrying out the plan as the parents intended, and as all the parties agreed, with such provisions relating to the mother's care after she left the home as may be equitable. It is concluded that this can better be done now by a specific performance of the agreement, upon the conditions just stated, rather than by giving Frank a sum of money and a release from the obligation of support, as the district court directed in the circumstances existing at the time of the trial. To accomplish this end the judgment should be modified by vesting the title to the homestead in the defendant J. F. (Frank) Romary and quieting that title upon his paying, in lieu of her support after leaving the home, one-half the value of the crops raised upon the farm for the farming seasons of 1911 and 1912, and the expenses of the funeral of his mother, if he has not already done so. These amounts will probably be fixed by agreement, but, if not, they will be determined by the district court. Costs in that court will be taxed in its discretion. The costs in this court will be divided.

The cause is remanded for modification of judgment as directed. All the Justices concurring.

SCOTT CITY NORTHERN R. CO. v. BILBY et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1001*)—REVIEW—DELIVERY OF INSTRUMENT—SUFFICIENCY OF EVIDENCE.

This action is upon an instrument containing a promise to pay \$20,000 upon the completion of a railroad by a certain time over a specified route. Many issues are raised by the pleadings and discussed in the argument, among others the question whether the instrument had ever been delivered as a subsisting obligation. Upon conflicting evidence this issue was determined by the findings of the jury in favor of the defendants. No error appears in the instructions upon this issue, and the finding of the jury that the instrument was never delivered determines the controversy. A judgment for the defendants is therefore affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.*]

Appeal from District Court, Ellis County. Action by the Scott City Northern Railroad Company against J. Ed Bilby and another. From a judgment for defendants, plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Kagey & Anderson, of Beloit, for appellant. Monroe, Roark, McClure & Monroe, of Topeka, L. C. Cook, of Phillipsburg, and R. D. Armstrong, of Scott City, for appellees.

BENSON, J. The plaintiff sued the defendants as copartners upon an instrument as follows: "Scott City, Kansas, August 12, 1910. Upon the completion of a standard gauge railroad between Scott City, Kansas, and a point on the Union Pacific Railroad in north Logan county, Kansas, on or before Dec. 31, 1911, for value received, I promise to pay to the order of the Garden City, Gulf & Northern Railroad Company, or any other company building said railroad, at the First National Bank, Scott City, Kansas, \$20,000 (twenty thousand and no/100 Dollars) with interest at eight per cent per annum after maturity. This obligation to be conditioned upon the construction and completion by the aforesaid company or any other company of a standard gauge railroad from Scott City, Kansas, to a point on the Union Pacific Railroad in north Logan County, Kansas, on or before Dec. 31, 1911. Failure to construct said railroad, as above specified, and on what is known as the Beaver Creek route, shall make this obligation null and void. [Signed] Bilby & Drain, by J. H. Drain." The defendant Bilby denied the alleged partnership, denied the authority of his codefendant to execute the instrument, and alleged that it had never been delivered. Other defenses were that the railroad was not completed at the time stipulated, nor upon the route referred to, and that his codefendant was induced to sign it by fraud and misrepresentation. The defendant Drain, admitting that he signed the instrument, averred that he was induced to do so through fraudulent representations and practices of promoters of the proposed railroad, alleged that it had never been delivered, and that the conditions respecting the time of completion and the route of the road had not been complied with.

In the spring of 1910 E. A. Tennis and B. M. McCue, who had just recently been engaged with others in constructing a railroad from Garden City to Scott City, planned to build a connecting railroad from Scott City northwardly to Winona on the Union Pacific Railway, and to this end they, with others, organized the plaintiff corporation. Before it was organized, however, the defendant Drain sought to influence the promoters to adopt a route through the Bilby ranch then under his management, containing 15,000 acres, and proposed a donation to induce them to do so. Subscription notes, so-called, made by landowners along another route called the Pence route, had been executed. After the organization of the company, a route was surveyed along the general course of Beaver Creek and touching a point at the mouth of Butte and Chalk creek on the Bilby ranch, deemed advantageous by the defendants as a station and town site. An-

other point eight miles north of the one just mentioned, on the same ranch, was selected for another station. This route was indicated by stakes set by the surveyors before the instrument sued upon was written. After determining to adopt this route the company surrendered subscription notes amounting to about \$20,000, taken from landowners along the Pence route, and its soliciting agents, with the assistance of the defendant Drain, employed by the plaintiff for that purpose, entered actively upon the canvass to secure subscription notes from landowners along the Beaver creek route. To facilitate this work it was agreed between the representatives of the company and Drain that he should sign the instrument in question, hereinafter called a note, for \$20,000, the amount of aid which he had proposed upon the adoption of that route, which should be deposited in a bank at Scott City, where it could be seen by other landowners as an inducement to them to give similar obligations, and that it should afterwards be exchanged for a like note to be signed by both Drain and Bilby personally, but that the first note should not be used otherwise than as stated. The route was changed in part from the one so designated so that it passed a mile or more distant from the mouth of Butte and Chalk creek although still passing through the Bilby ranch. The road was completed July 2, 1911. The company through its agents asked that another note of the same tenor, signed individually by the defendants, should be given and substituted for the one now in suit, then still remaining in the bank at Scott City. A new note was accordingly drawn ready for signing and given to Drain to be sent to Bilby, who resided in Missouri, for his signature. He signed the new note and returned it to Drain but, as he testified, with a change in its terms, interlining between the words "Logan county" and "Kansas" these words "and Liberal in South," so that the clause read "To a point on the Union Pacific Railroad in north Logan county and *Liberal in South Kansas*." This testimony was corroborated by witnesses who testified that they saw the note afterwards with the interlineation as stated, and by experts in handwriting, who testified that the signature and interlineation were made at the same time. Bilby explained that he made this alteration because it had been the understanding upon which aid should be given that the railroad already built with which this one was to be connected should extend to Liberal, there to connect with the Rock Island Railway, so that the new road would be a connecting link in a line extending from the Union Pacific, giving direct railroad facilities from his ranch, where cattle were raised extensively, to the cattle ranges of Texas and New Mexico. Witnesses for the plaintiff who saw the note after Drain had received it from Bilby testified that no such alteration appeared in

it. There is also evidence tending to show that both Drain and Bilby based their objections to the delivery of the new note upon the ground that Drain was entitled to a credit upon it for services, and made no mention of any change in its terms. The defendant's evidence tended to prove that the note was never delivered as an effective obligation. On the other hand, evidence on the part of the railroad company tended to prove that the note was intended as a valid obligation upon completion of the road, and was deposited in the bank for the purpose of substitution because a trust company, to which securities of this nature were transferred, desired the personal signature of Mr. Bilby. Mr. Drain testified: "I told Mr. Christy [the cashier] that Mr. McCue and Mr. Tennis and I had agreed that I would sign a note, J. Ed Bilby and J. H. Drain, by J. H. Drain, and place it in the bank at Scott City as a booster, or to be showed out; that he wanted that this note was to be held by Mr. Christy, and wasn't to be put up as collateral, and was to remain in the bank at Scott City, and I would see Mr. Bilby and get Mr. Bilby to— or use my influence for Mr. Bilby to sign a note for the same amount."

The bank in which the note was left held it until March 18, 1911, when Mr. Tennis, vice president and general manager of the railroad company, took it, without the knowledge or consent of the defendants, out of the bank, giving the following receipt: "Garden City, Kansas, Mar. 18th. Received of R. B. Christy note for ——— dollars in favor of the Scott City Northern Railroad Company, and signed by Bilby per James H. Drain. This note is one of the number for which we hold a receipt of the First National Bank of Scott City, and we hereby agree to return said note to said bank on or before April 1st, 1911, or in lieu thereof a note for like amount signed personally by Bilby and Drain. The Scott City Northern Railroad Company, by E. A. Tennis." Another witness testified to an admission of Mr. Tennis to the same effect.

The cashier of the bank testified: "I had possession of the note sued on; it was left with me by Mr. Drain in August, 1910. He said he was leaving the note which would be replaced by another note signed personally by J. Ed Bilby and himself; that this note was to be left at the bank until replaced by the other note, and was not to be delivered, as it was to be replaced by the other note. The other note has not been left with me."

Soon after withdrawal at the request of Bilby the bank demanded the return of the note, but the demand was refused and this action was brought upon it.

The evidence shows that Bilby is the owner of the ranch, and that Drain is the occupant and manager, under an agreement for carrying on a general stock raising and feed-

ing business for mutual profit. They may properly be considered partners in this stock business, and are so designated in the agreement.

The fraudulent representations relied upon as a defense are based mainly upon the alleged statement of the company, or its solicitors of local aid, that the connection south from Garden City would be made as a part of the undertaking upon which aid was promised. To give color to this scheme it was alleged, and the evidence tended to prove, that a bridge was built over the Arkansas river at Garden City and some roadway constructed south of it on the supposed line to Liberal, but abandoned when aid notes had been obtained, which representation was made, and work done, to induce the defendants and other landowners from whom aid was sought, to believe that an important line was to be built to connect the great railways referred to, whereas the Garden City—Scott City line—had before that time been leased to the Atchison, Topeka & Santa Fé Railway Company, a fact concealed from the people whose aid was solicited, and an extension south was not contemplated or intended.

A defense not before referred to is based upon the alleged illegality of the contract appearing from the indorsement on the note, whereby the obligors were to give land to individuals, who were officers of the road, in consideration of the proposed location, and an alleged accompanying agreement that they would locate stations in certain places designated by defendants.

Concerning the change of route, it is argued that the change was made and the road built upon the new route through the Bilby ranch with the full knowledge of the defendants, who made no objection, and thereby waived any defense based upon such change.

The jury made special findings as follows: That the railroad was located partly along the Beaver creek route; that Drain signed the note in suit for himself and Bilby, and advised Bilby that he had signed it in the name of Bilby and Drain; that Bilby had no knowledge that Drain had signed it for him, although he obtained the knowledge soon after it was done; that Bilby did not notify the plaintiff that he disclaimed liability on the note; that he telegraphed, in answer to an inquiry from a person named, that Drain had full charge of his, Drain's, railroad interests in Western Kansas; that he notified the Scott City bank that he claimed nonliability on the note; that he knew that a railroad was being constructed through his lands; that the plaintiff's solicitors before the note was signed represented and induced Drain to believe that the plaintiff was constructing and intended to complete a line of railroad to Liberal from Garden City, and that such representations were made to induce Drain to sign the note, but that he would have signed it even if he

had not believed the representations to be true; that the note was deposited by Drain in the Scott City bank for the purpose of having it held there for a time, and then returned to him, which purpose was made known to the banker; that its delivery to the railroad company was never authorized by the defendants or either of them; and that the Beaver creek route, referred to in the note, was understood and intended by Drain to mean the line then marked by stakes.

Instructions were given that: " * * * If you further find that the note was never delivered for both or either defendant as mentioned in the preceding instruction, but that the defendant Drain, after signing the note, placed it in the keeping of the First National Bank at Scott City, with direction that it should remain there until replaced by another note signed by Drain, and that, while the note sued on was being so held, the witness Tennis, without the consent of the defendants, or either of them, by any means whatever, got the note from the bank and into possession of the plaintiff, then if you find these to be facts, they would not constitute in law a delivery of the note sued on. But if you find that Drain deposited the note in said bank on condition that it was to become the property of plaintiff on completion of the railroad, as required by the terms of the note, and if defendants had the right to substitute another note of the same amount and terms in its stead, signed by both defendants personally, but did not do so, then such action would be a valid delivery of the note." These instructions, with others to which they refer, although criticized by the plaintiff, fairly submitted to the jury the issue as to the delivery of the note, an issue which, as we have seen, was determined by the jury by its findings upon conflicting evidence in favor of the defendants.

Issues arising upon the pleadings aside from the question of the delivery of the note have been fully argued. Briefly stated, they present the question of the authority of Drain to sign the note for Bilby and Drain; the question of fraud in inducing Drain to sign it; whether the defendants, if otherwise bound, should be released because of the change of route from the course indicated by stakes, or whether a waiver of that condition should be found from the evidence tending to prove that the defendants remained silent, although knowing that work was in progress upon the route as changed; and whether the note should be held void because of the proposed conveyances of land to the promoters, and the agreement concerning stations. All these matters would be important if the note had been delivered so as to become a valid obligation; but, in view of the finding of the jury, well supported by the evidence, that it had not been so deliv-

ered, the action upon it cannot be sustained.

Several instructions are objected to, besides those already referred to concerning delivery. In view of the conclusiveness of the finding upon that issue, they are not very important but no error is discovered in any of them. The judgment is affirmed. All the Justices concurring.

PINNEY v. SULZEN (two cases).†

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. HABEAS CORPUS (§ 99*)—CUSTODY OF INFANT—DIVORCE—DEATH OF PARENT.

Where a husband and wife having children are divorced and the court in its decree awards the custody of a child to each of them and the mother dies while the child awarded to her is in infancy, the father then becomes entitled to the custody of that child, and this right continues in him unless it appears that he is an unfit person to have the control and care of his child.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.*]

2. HABEAS CORPUS (§§ 85, 99*)—CUSTODY OF INFANT—DETERMINATION.

In determining to whom the custody of a child should be awarded, its welfare is to be regarded more than the technical legal right of the parent; but, where an application made by a father for the custody of his child after the death of its mother is resisted by a third party on the ground that the father is immoral and unfit to have its custody, he will not be deprived of such custody unless the objection is sustained by clear and satisfactory proof.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78, 84; Dec. Dig. §§ 85, 99.*]

3. HABEAS CORPUS (§ 99*)—CUSTODY OF INFANT—THIRD PERSONS.

Courts will not disturb the family relation, nor take a child from its parent merely because a third person, seeking its custody, may have larger means, and is therefore able to give the child greater comforts, wider education, and the promise of a larger inheritance.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 84; Dec. Dig. § 99.*]

4. HABEAS CORPUS (§ 85*)—CUSTODY OF INFANT—SUFFICIENCY OF EVIDENCE.

In the present case it is held that the testimony does not establish that the father is unfit to be intrusted with the custody and guardianship of his child.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. § 85.*]

Benson, J., dissenting.

(Additional Syllabus by Editorial Staff.)

5. DIVORCE (§ 332*)—DECREE IN FOREIGN DIVORCE SUIT—PROBATIVE EFFECT—CUSTODY OF CHILD.

While the action of a court of another state in modifying a decree in a divorce suit after death of the wife so as to give the father the custody of his child was not conclusive, in proceedings in habeas corpus in this state to obtain custody of such child, on the question of his fitness to have such custody, it was competent evidence thereof.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 848; Dec. Dig. § 332.*]

Original application for writ of habeas corpus by Perry F. Pinney against Theodore

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 13, 1914.

Sulzen, to obtain custody of a minor child, and application by Perry F. Pinney for a writ of habeas corpus against Theodore Sulzen in the probate court. Judgment for defendant was affirmed in the district court, and petitioner appeals. Judgment of district court reversed, and custody awarded to petitioner.

Waters & Waters and Monroe, Roark, McClure & Monroe, all of Topeka, and J. S. Amick, of Lawrence, for appellant and petitioner. Stone & McDermott, of Topeka, and J. H. Mitchell, of Lawrence, for appellee and respondent.

JOHNSTON, C. J. In proceedings in habeas corpus Perry F. Pinney seeks to obtain the custody of his daughter, Helen, who is about seven years of age. He and the mother of Helen were married in Omaha, Neb., in April, 1900. Two children were born to them, Harvey on March 23, 1902, and Helen on September 24, 1906. There was discord in the family relations, and a separation occurred shortly after the birth of Helen. In 1908 the petitioner began an action in a court in Iowa to obtain a divorce from his wife, and in November of that year a judgment of divorce was entered, but it was granted because of the fault of the petitioner. In the decree it was provided that the petitioner should have the custody of Harvey, while the custody of Helen was given to Mrs. Pinney. In the early part of 1910 Mrs. Pinney was married to Fred Moore, and she died on May 14, 1911. Just prior to her mother's death Helen was taken to the home of Sulzen, who was married to a sister of Helen's mother. The petitioner had taken out insurance on the life of his wife, payable to the children upon her death. When she died he was appointed guardian of the person and property of the children by the probate court of South Dakota; the principal purpose of the proceeding being the collection of the insurance. Under the direction of that court he arranged with the Sulzens to care for and maintain Harvey and Helen for a time at the rate of \$10 a month, and to furnish \$25 a year to pay for clothing the children. In February, 1913, Mrs. Sulzen died, and after that time the petitioner requested and tried to obtain the custody of Helen. Upon notice served upon the respondent the petitioner applied to the Iowa court which granted the divorce for a modification of the judgment, giving him the custody of his daughter, and on March 18, 1913, the decree was amended, the court finding that the welfare of the children demanded that both of them be given into the absolute custody of the petitioner, and it was adjudged that he be given the custody and control of Helen, and that Theodore Sulzen, in whose possession she then was, should deliver her to the petitioner. The respondent, Sulzen, refused to surrender the custody of Helen, and on February 18, 1913, a proceed-

ing in habeas corpus to recover her custody was instituted by petitioner in the probate court of Douglas county, where the respondent resided, and, the decision being adverse, the petitioner appealed to the district court, and, the judgment of that court being also against him, he brought the case here by appeal. About the same time he began an original proceeding in habeas corpus in this court asking for the custody of his daughter, in which considerable additional testimony has been taken and presented.

The respondent bases his claim to the custody of the child, to whom he is not related: First, upon the ground that the mother of Helen, shortly before her death, requested Mrs. Sulzen, now deceased, to take care of Helen, and that she and the respondent together consented to do so, and also on the further ground that the petitioner is an unfit person to have the custody of his child. The respondent owns and resides upon a farm. He married a sister of the mother of Helen when he was about 38 years of age, and has no children of his own. He testifies that he loves the child and is willing to make her an heir, but no steps have been taken towards the adoption of Helen, or to give her the status of an heir. Since the death of his wife the only woman in charge of his home has been the wife of the tenant who occupies the farm house. Testimony was offered to show that shortly after the death of his wife respondent made an arrangement with a relative, who had a wife and children, to take charge of his place and care for Helen, and witnesses stated that these parties were worthy people and likely to give her proper care. It appears, however, that shortly afterwards they moved away from the farm, and another tenant and his wife, strangers to the child, had taken their places. Some testimony was given to the effect that for a part of the time at least Helen had not been given proper care by any one. Although respondent appears to be kind in his disposition and generous in his offer to care for Helen, the testimony satisfies us that he is not situated so as to give her the attention and care that a girl of her years should have. If she cannot have parental care and attention she should have, at least, the watchful and tender care and nurture that only a woman interested in her welfare can give.

[1] The question remains whether she should be given into the custody of her father. Upon the death of her mother the custody of Helen naturally and legally passed to the petitioner, and it should be given to him unless he is manifestly unfit and incapable of performing his parental obligations to the child.

[2] This right was considered in *Swarens v. Swarens*, 78 Kan. 682, 684, 97 Pac. 968, 969, where it was said that: "The law regards the father, where, as in this case, the mother is not living, as the rightful custodi-

an of his child as against the claims of all others. This right might, of course, be forfeited by conduct of the father showing him to be manifestly unfit to have the custody and care of his child. Courts, in the interest of minor children, may take them from their parents and place them elsewhere, even in the custody of strangers; but in the exercise of this extraordinary power the rights of the parent must be recognized and protected."

The case of *Hollinger v. Eldredge*, 90 Kan. 77, 78, 132 Pac. 1181, was one where a divorce was granted the parties and the custody of their only child given to the mother. Afterwards the mother died, and the father then sought to obtain the custody of his child, who had been given by the mother to her foster parent. In the opinion it is remarked that: "The right of a parent to the custody of his child will often yield to considerations of its welfare. But special circumstances must exist in order to open the way to an inquiry in that regard. A court may not assume to disturb normal family relations merely upon a belief that it can thereby improve existing conditions. * * * The natural rights of the father were not completely annulled by the order in the divorce proceeding awarding the custody of the child to the mother; they were suspended for the time being, but they were revived in full force by the mother's death."

While the prima facie right to the custody of the child is in the parent, it is not an unconditional right. The well-being of the child is the prime consideration, and courts do not hesitate to take a child from its parents and give it to a stranger if the parents treat the child with cruelty, keep it in vicious or disreputable surroundings, or are unfit to be intrusted with its custody and control by reason of their habits, character, or condition.

[3] As said in *Hollinger v. Eldredge*, supra, the court will not disturb the normal family relation nor take a child from its parent because a third person seeking its custody may have larger means, and is therefore better able to give the child greater comforts, wider education, and the promise of a larger inheritance. It has been decided that: "The unfitness which deprives a parent of the right to the custody of his children must be positive, and not comparative, and the mere fact that the children would be better nurtured or cared for by a stranger is not sufficient to deprive the parent of his right to their custody." *Clarke v. Lyon*, 82 Neb. 625 (syl. par. 4) 118 N. W. 472, 20 L. R. A. (N. S.) 171.

The Supreme Court of Washington, in treating of the same question, said that the father "has the natural and legal right to the custody and control of the children, unless so completely unfit for such duties that the welfare of the children themselves imperatively demanded another disposition of their custody." In *re Neff*, 20 Wash. 652, 655, 56 Pac. 383, 384.

In *Miller v. Wallace et ux*, 76 Ga. 479, 486, 2 Am. St. Rep. 48, it was said: "Prima facie, the right of custody of an infant is in the father, and when this right is resisted, upon the ground of his unfitness for the trust or other cause, a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs. 'A clear and strong case' must be made to sustain an objection to the father's right." See, also, note, 41 L. R. A. (N. S.) 564.

[4] The attack on the fitness of the petitioner to care for his child is not because of recent misconduct, but is based on things done some time in the past. There is a charge of indecent conduct towards a young niece, alleged to have occurred about 13 years ago. This charge is supported only by hearsay testimony, a statement of a person not sworn as a witness, and which was repeated by a person who appears to be hostile to the petitioner. The charge has been denied, and besides some of the circumstances, including the cordial manner in which the niece subsequently met the petitioner, tends to refute the charge.

[5] It is urged that the conduct of the petitioner towards his wife prior to their divorce tends to establish his unfitness for the guardianship of his daughter. Before the divorce there were a number of disagreements and separations between petitioner and his wife. According to testimony produced, some of the requirements which he made of her were unreasonable, and some of his acts toward her were unkind and harsh. Admissions were made by him of acts that were inconsistent with marital obligations, but they apparently grew out of the disputes and bickerings of the parties, which ultimately ended in a divorce. He claims that he had grounds of a serious nature for refusing to live longer with his wife; but, if it be granted that the reasons were insufficient, the question still remains whether the custody of his child, whom he appears to love, shall be taken from him and given to a stranger. In the divorce action the court that examined into the conduct and character of the parties found the petitioner to be a fit person to have the custody of his son. It is true the custody of the daughter was awarded to his wife, but as the child was only about two years old at that time the custody was naturally given to the mother. After the mother's death the question of the custody of Helen came before the same court, notice of the hearing having been given to respondent, and the court granted the absolute custody and control to the petitioner, and based it upon a finding that the welfare of both of his children demanded that they be placed in his custody. In addition there is the decision of the probate court in South Dakota appointing the petitioner as the guardian of his children and their property. These rulings, however, do not preclude an inquiry in our

courts as to the fitness of petitioner at this time to have the custody of his child. It has been held that a decree of divorce of another state awarding the custody of children to a father is not conclusive in a proceeding brought by the mother in this state to obtain their custody, but that the court has the power to change the custody if the best interests of the children require it. In *re Bort, Petitioner, etc.*, 25 Kan. 308, 37 Am. Rep. 255. While the action of the Iowa court in modifying the decree of divorce as to the custody of Helen is not conclusive, it is worthy of consideration. In a case where there was a clash of jurisdiction between a district and a probate court as to the custody of a child it was said: "It is peculiarly the province of the district court which renders the decree to modify that decree respecting the custody of children, and to determine whether the altered conditions warrant a change in the decree with respect to such custody. * * *" In *re Pettit*, 84 Kan. 637, 643, 114 Pac. 1071, 1073.

A court granting a divorce is deemed to have a continuing jurisdiction which warrants it, at any time after the decree, in making any other or further orders in regard to the custody of the children as their welfare may require. The Iowa court which sits where the petitioner has worked and lived for a considerable time did determine, on March 13, 1913, that the welfare of his child demanded that he be given its custody. The child has visited him a number of times, and he appears to have a strong attachment for her, and her little brother expresses his love for her and a desire that they shall be permitted to live together.

It has been satisfactorily shown that the petitioner is sober, industrious, and in good repute in the neighborhood where he resides. The evidence of 25 of his neighbors has been produced, and they testify that he is a man of good character and habits, and a fit person to have the custody of his daughter. The district judge, county attorney, collector of customs, clergymen, doctors, mechanics, and officers and members of fraternal lodges to which he belongs all speak well of his character and habits. The manager of the company for which the petitioner has been working says that he has known the petitioner for about 20 years, and during that time he has borne a good reputation. He testifies that: "He is a man of good habits, steady and reliable, industrious; does not drink; and I know that he makes a sufficient salary to care for his family." Upon the testimony and all the circumstances in the case we are unable to say, under the governing rules of law, that the petitioner is unfit and should be deprived of the custody and guardianship of his child. He has not only the natural and technical legal right to her custody but, we think, the welfare of his daughter requires

that she be given into the custody of her father.

It follows that the judgment of the district court must be reversed, and in the original proceeding the order will be that the custody of Helen Beulah Pinney is awarded to her father, Perry F. Pinney.

BURCH, MASON, SMITH, PORTER, and WEST, JJ., concurring.

BENSON, J. (dissenting). I concur in the principles of law stated in the syllabus and opinion, but accepting the petitioner's own testimony of his treatment of his helpless wife, and her unfortunate child, the subject of this inquiry, given deliberately with full opportunity for explanation and extenuation, as true, I am constrained to agree with the findings of the district court and to dissent from the views of my Associates. A rehearsal of the testimony referred to would serve no good purpose, and is therefore omitted in this dissent, as it is in the opinion.

In view of circumstances which have developed since the hearing in the district court, the custody awarded there should be changed, but not given to the petitioner.

KUHN v. JOHNSON et al†

(Supreme Court of Kansas. Jan. 10, 1914.)

1. JURY (§ 14*)—RIGHT TO JURY TRIAL—EQUITABLE ISSUES—RESCISSION.

In a guardian's action to rescind a transaction on the ground of mental incapacity, involving restoration on both sides, including money to plaintiff, the cancellation of instruments, and other equitable relief, a jury trial was properly denied.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. § 14.*]

2. WITNESSES (§ 269*)—CROSS-EXAMINATION—SCOPE.

A witness cannot be properly cross-examined as to matters not directly connected with the facts testified to in chief.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.*]

3. APPEAL AND ERROR (§ 179*)—CROSS-EXAMINATION—MAKING WITNESSES PARTY'S OWN.

Where plaintiff regards testimony, excluded upon his cross-examination of an adverse witness, as important, he should make such witness his own, or ask later to open the case to admit such evidence as a part of his case in chief.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137-1140; Dec. Dig. § 179.*]

4. APPEAL AND ERROR (§ 301*)—MOTION FOR NEW TRIAL—PRESENTATION OF EXCLUDED EVIDENCE.

Where plaintiff believed that evidence was improperly excluded upon his cross-examination of an adverse witness, and that it would probably have changed the result, but failed to present it to the court on the motion for a new trial, any error in its exclusion was waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

† Rehearing denied February 13, 1914.

5. TRIAL (§ 404*)—FINDINGS—CONSTRUCTION.
Findings of fact are to be construed together.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.*]

6. APPEAL AND ERROR (§ 1008*)—REVIEW—QUESTION OF FACT—JUDGMENT.

In a case depending entirely upon the decision of a question of fact, in which all the material testimony was oral, its weight and credibility and the inferences to be drawn from it were for the trial court, and where it fairly performed its function as a trier of the fact, the Supreme Court is not authorized to disturb its finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3960, 3962-3989; Dec. Dig. § 1008.*]

Appeal from District Court, Jackson County.

Action by W. D. Kuhn, as guardian, against Peter Johnson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

J. J. Schenck, of Topeka, and Guy L. Hursh and E. R. Sloan, both of Holton, for appellant. Crane & Woodburn Bros. and Chas. Hayden, all of Holton, and A. A. Godard, of Topeka, for appellees.

PER CURIAM. [1] The action was not one for the recovery of money. It was an action to rescind a transaction on the ground of mental incapacity, involving restoration on both sides, including money to the plaintiff, the cancellation of instruments, and other equitable features. Therefore a jury trial was properly denied.

It is not practicable, and would be unprofitable, to discuss one by one the various assignments of error, although they have all been examined.

[2-4] Many of the objections to evidence which was excluded were well founded. Matters like the Texas trip, the condition of mind of Oswald E. Tieme's mother, and his conduct on several occasions were investigated with sufficient fullness, and the evidence concerning them which was rejected would not have changed the result. The rulings relating to evidence excluded as not proper cross-examination were correct. Such evidence extended to matters and occasions not "directly connected with the facts testified to in chief." *Blake v. Powell*, 26 Kan. 320. If, however, the testimony were regarded as important by the plaintiff, he should have made the witnesses his own, or asked later to open the case to admit the evidence as a part of his case in chief, or at least have presented the evidence to the court for consideration on the motion for a new trial.

The last observation meets all the assignments of error relating to excluded evidence. It may be conceded that the court might well have been more liberal in its rulings. Still, if the plaintiff believed that the rejected evidence ought to have been considered, and

that, if considered, it would probably have changed the result, he should have gathered it up and presented it to the court at the hearing on the motion for a new trial, when the court was finally determining whether or not the decision was wrong. Civ. Code, § 307 (Gen. St. 1909, § 5901). When this is not done, claims of error in the exclusion of evidence at the trial are waived.

[5] The findings of fact cover all the essential facts in the case. The findings are not inconsistent with each other. Those upon which the plaintiff relies as showing an abnormal mental condition must be considered with others, such as findings 24 to 30, inclusive; and, when so considered, they do not overcome, and do not conflict with, the very direct, positive, and explicit findings numbered 33, 39, 40, and 41. The findings show that the court considered the evidence in the light of the law governing the case, which was clearly comprehended, and its conclusions are abundantly sustained.

[6] The case is one depending entirely upon the solution of a question of fact. All the material testimony was oral. Its weight and credibility, and the inferences to be drawn from it, were matters for the trial court to determine. The court appears to have fairly and candidly performed its function as a trier of the facts, and no reason which the law deems sufficient appears authorizing this court to disturb the result.

The judgment of the district court is affirmed.

ROGERS v. KANSAS CO-OPERATIVE REFINING CO.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

1. INJURY TO SERVANT.

In an action to recover for personal injuries to an employé, the jury, in answer to special questions, found that the injuries were caused by the negligence of the defendant in failing to exercise reasonable care to provide the plaintiff a safe place in which to work. The findings are held to be consistent, and to be sustained by evidence; and, since they overturn every defense interposed, and no trial errors appear, the judgment must be affirmed.

(Additional Syllabus by Editorial Staff.)

2. TRIAL (§ 352*)—REFUSAL TO SUBMIT INTERROGATORIES—DISCRETION.

The matter of limiting the number of special interrogatories to be submitted to the jury rests in the sound discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 840-842, 844, 845; Dec. Dig. § 352.*]

3. MASTER AND SERVANT (§ 205*)—ASSUMPTION OF RISK.

An employé assumed only such dangers from defects of which he had no knowledge as would arise after the employer had exercised reasonable diligence to make reasonably safe the place of work and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547-549; Dec. Dig. § 205.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. MASTER AND SERVANT (§ 270*)—INJURY TO SERVANT—DEFECTIVE APPLIANCES—EVIDENCE OF SUBSEQUENT REPAIRS.

In an employe's action for injuries, evidence that immediately after the accident defendant caused changes to be made in the appliances was properly admitted where it was claimed in defendant's opening statement that no changes were made, and that the appliances were not defective.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.*]

5. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS COVERED.

Refusal of certain requested instructions was not error where the court gave other instructions embodying substantially the same principles of law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from District Court, Neosho County. Action by H. C. Rogers against the Kansas Co-Operative Refining Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. W. Brewster, of Chanute, for appellant. T. F. Morrison, of Chanute, for appellee.

PORTER, J. The plaintiff, while working in the capacity of stillman at the defendant's oil refinery, was burned by hot tar. He recovered judgment for damages, from which defendant appeals.

What is called the "tar line" consists of a 3-inch iron pipe, 150 feet long, which runs from the still to the pumphouse. In the process of refining the oil, a residue of heated tar and oil accumulates in the line, which it is necessary to remove before it cools and becomes coked. At the front of the still there was a 3-inch iron plug on the end of the pipe, and, in order to clean out the line, it was the duty of the plaintiff to start the pump running, and to unscrew the plug. Plaintiff claims that, after starting the pump, and removing the plug, the pump, by reason of its defective condition and lack of repair, suddenly stopped, causing the heated tar and oil suddenly to gush out upon him, whereby he sustained serious injuries. He alleges that the defendant was negligent in failing to provide him a safe place in which to work, and in failing to furnish reasonably safe appliances; that the dangers and defects were known to the defendant, and were unknown to him. The defenses relied upon were, first, that no negligence of the defendant was established; second, contributory negligence; third, assumption of risk.

[1, 2] A careful examination of the record fails to disclose any ground for a reversal of the judgment. Every question of law suggested in the briefs has been decided against the defendant's contentions in numerous decisions, and has been passed upon and considered in a number of quite recent cases, so that a discussion of them at this time is not deemed necessary. The case is purely one of fact, and the facts have all been determined

against the defendant. Thirty-five questions were prepared by defendant to be answered by the jury. The court submitted 25 of these, and refused the others. The refusal is complained of; but the matter rested in the sound discretion of the court. *Evans v. Moseley*, 84 Kan. 322, 114 Pac. 374. In this case we think the court might well have further limited the number.

The jury find that defendant failed to exercise reasonable care and diligence to provide the plaintiff a safe place and safe appliances; that the pump was out of order; that, under the method of cleaning the pipes, a stopcock should have been provided in place of a plug. We fail to discover any inconsistency in the answer of the jury to the separate questions, and the findings are abundantly sustained by the evidence offered by the plaintiff, as well as by testimony of the defendant's witnesses. The general verdict is against the claim of contributory negligence, and, besides, the evidence shows that plaintiff, at the time he was injured, was following the directions of the superintendent of the refinery. The net result is that every one of the defenses was overturned by the findings.

[3] The jury find that plaintiff had no knowledge of the dangers and defects, and that the defendant had such knowledge. The plaintiff only assumed the dangers which would arise after the defendant had exercised reasonable diligence to make the place and appliances reasonably safe. *Every v. Rains*, 84 Kan. 560, 115 Pac. 114.

[4] It is insisted that it was error to permit a showing that immediately after the accident the defendant caused changes to be made in the appliances used, which changes were obviously designed to prevent a recurrence of such accidents. Cases are cited from other courts in support of the contention. In this state evidence of subsequent changes and alterations has been held competent. *Howard v. Osage City*, 89 Kan. 205, 208, 132 Pac. 187, 188, and cases cited in the opinion. Besides, the evidence appears to have been made competent and relevant by the defendant's claim in the opening statement to the effect that no changes or alterations had been made, and that the appliances were not defective.

[5] The court charged the jury that certain claims of negligence should not be considered, because no evidence had been offered in support thereof, and the instructions fairly presented the real issues. There was no error in the refusal of the instructions asked, since the court in other instructions embodied substantially the same principles of law. *Raney v. Drainage District*, 84 Kan. 688, 115 Pac. 399.

We discover no error in the record, and the judgment will be affirmed. All the Justices concurring.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

STEWART et al. v. PRESTON et al.
(Supreme Court of Washington. Jan. 24, 1914.)

1. PRINCIPAL AND AGENT (§ 71*)—LIABILITY OF AGENT—FRAUD.

A principal may recover from his agent money obtained from him through fraudulent representations upon which the principal acts to his loss.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 147; Dec. Dig. § 71.*]

2. BROKERS (§ 38*)—FRAUD OF BROKER—ACTION—EVIDENCE.

In an action to recover from defendant, who acted as plaintiff's agent in the purchase of land, the difference between the price falsely represented to and paid by plaintiff in reliance thereon and the sum actually paid under a secret agreement with the owner, where defendant, on inquiry as to his commission, said that he would get his commission from the seller, evidence as to the customary commission paid real estate brokers was admissible on the issue of fraud.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

3. BROKERS (§ 38*)—AGREEMENT FOR COMMISSION—NECESSITY OF WRITING.

The statute providing that an agreement employing a broker to sell realty for commission shall be void, unless in writing, does not invalidate the agency, unless it is in writing, so as to make the lack of a writing a defense to an action by the client to recover from the broker the amount by which he increased the price of land sold to his client, falsely stating it was the least for which the land could be had.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

4. APPEAL AND ERROR (§ 173*)—PRESENTATION OF GROUND OF REVIEW—DEFENSE OR COUNTERCLAIM.

In an action against a broker to recover the difference between the price which plaintiff paid for land upon his fraudulent representation and the amount actually paid by the broker under a secret agreement with the owner, where it was not pleaded that, if plaintiff should recover, the broker would be entitled to recover commission, such contention could not be raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

5. BROKERS (§ 38*) — ACTION FOR WRONGFUL ACT—SET-OFF.

In an action to recover the difference between the amount paid by plaintiff for land upon a broker's false representation that it was the seller's lowest price and the amount actually paid for it by the broker under a secret agreement with the owner, the broker would not be entitled to credit for a commission.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 31-36; Dec. Dig. § 38.*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by C. H. Stewart and another against G. A. Preston and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Tolman & King, of Spokane, for appellants. Graves, Kizer & Graves, of Spokane, for respondents.

MORRIS, J. It was sought in this action to recover the sum of \$1,000, upon the ground

that G. A. Preston, a real estate broker, while acting as an agent for respondents in the purchase of 40 acres of land, falsely represented to them that he had purchased the land at \$100 per acre, which was the least sum for which the land could be obtained; that, relying upon the truth of these false representations, respondents purchased the land at \$100 per acre, and subsequently discovered that Preston had entered into a secret arrangement with the owner of the land whereby the land was actually sold at \$75 per acre, but the seller was induced by Preston to name the consideration in the deed as \$100 per acre in order to deceive and mislead respondents, paying the difference between the real consideration and the assumed one to Preston. Answering, appellants pleaded a general denial and affirmative defense, raising the statute of frauds by alleging that no written memorandum or agreement of employment had been entered into. The issues were submitted to a jury, verdict returned for respondents, and appeal taken from the judgment.

[1] The first assignment of error suggests insufficiency of the evidence to sustain the verdict. All we care to say on this assignment is that the relation between the parties was purely a question of fact, and there is ample evidence to sustain the verdict so far as it establishes the agency and fiduciary character of the relation. The facts being established by the verdict, the law fixes the right of recovery as, under all the authorities, a principal may, recover from his agent money obtained from him through false and fraudulent representations upon which the principal acts to his loss. *Hindie v. Holcomb*, 34 Wash. 330, 75 Pac. 873; *Hanna v. Haynes*, 42 Wash. 284, 84 Pac. 861; *Easterly v. Mills*, 54 Wash. 356, 103 Pac. 475, 28 L. R. A. (N. S.) 952.

[2] Error is next urged in the admission of evidence as to the customary commission paid real estate men in purchasing lands for their clients. The record discloses that on the day of the purchase, when Preston returned to respondents, informing them that he had purchased the land, and made a \$100 payment, they spoke to him about his commission, and "told him that we would be glad to pay him something for his trouble, and asked him what he wanted. He said we owed him nothing; that he was to get his commission from the other side." It was competent, therefore, to admit evidence of the usual commission as touching what was in the minds of the parties and understood and intended to be understood when respondents were informed that Preston was being paid a commission by the seller. Respondents had a right to assume that, when Preston spoke of his commission, he referred to the usual and customary commission paid real estate men for services of a like charac-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—63

ter. This evidence is clearly admissible on the issue of fraud.

[3] The next assignment urges there was no agency because not evidenced by writing. This contention is disposed of by *Peirce v. Wheeler*, 44 Wash. 326, 87 Pac. 361; *Merriman v. Thompson*, 48 Wash. 500, 93 Pac. 1075; and *Orr v. Perky Investment Co.*, 65 Wash. 281, 118 Pac. 19. In the *Peirce Case* it is said: "The contract which the statute declares to be void unless in writing is one for the payment of a commission to the agent; but it does not say that the actual authority to sell or purchase must be in writing." In the *Merriman Case* it is said: "The fact that there was not in writing an employment of appellants as agents for respondents might have a bearing upon the question of their commission, but we do not think the lack thereof would justify appellants, after selling this property for \$2,500, in retaining the difference between that and \$2,000, which was the amount they represented to respondents as being the highest sum they could get for the property, and for which they had sold, or were about to sell, the same." These authorities affirm the rule as declared in other states. In *Rathbun v. McLay*, 76 Conn. 308, 56 Atl. 511, in disposing of a like contention, it is said: "To adopt the defendant's contention would be to hold the monstrous doctrine that an agent employed to do anything concerning land could with impunity be as dishonest as he pleased, and cheat and defraud his principal to his heart's content, if it chanced that his agency was not evidenced in writing."

[4, 5] It is finally urged that the court charged the jury: "If you find for the plaintiff, your verdict will be for \$1,000, and interest from April 20, 1909."

Appellants suggest under this assignment that, if the jury should find for plaintiffs upon the question of agency, Preston should be entitled to a commission, contending: "To permit respondents to remain silent when appellant in effect notified them that he disclaimed any agency for them, and declared openly and frankly that he was acting for the seller, and receiving his commission from him, and then allow them to profit by their silence by mulcting appellant, not only of his commission which he notified them he was to receive from the appellant, but to receive in addition even that which they admit to have been his reasonable commission on the sale, would reward them for remaining silent when it was their duty to speak, and thereby permit them to take advantage of their own wrong."

There are two answers to this contention: (1) It was not pleaded; (2) it was not a defense. *Jameson v. Kempton*, 52 Wash. 106, 100 Pac. 186, where it is said, in disposing of a contention that in this sort of action the agent would be entitled to offset expenses

incurred in making the purchase: "The offset, if it be so taken, was not pleaded. Nor do we think it would have been a defense if it had been. One who undertakes to overreach another should not be allowed to offset his expenses against the actual damages sustained by his adversary." The authorities generally so hold (19 Cyc. 225; 4 Am. & Eng. Ency. Law, 971), based upon the sound rule that, when an agent is guilty of fraud in executing the command of his principal, his right to compensation is lost.

Finding no error, the judgment is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

STATE ex rel. MOUNTAIN TIMBER CO. v.
SUPERIOR COURT OF COW-
LITZ COUNTY et al.

(Supreme Court of Washington. Jan. 24, 1914.)

1. CONSTITUTIONAL LAW (§§ 26, 27*)—CONSTITUTIONS—LIMITATION OR GRANT OF POWER.

The federal Constitution is a grant of power, while a state Constitution is a limitation of power; a state being sovereign except where its power is limited.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 30, 31; Dec. Dig. §§ 26, 27.*]

2. EMINENT DOMAIN (§ 1*)—POWER OF EMINENT DOMAIN—NATURE OF POWER.

The power of eminent domain exists independent of state Constitutions, being an incident of sovereignty, and, apart from constitutional inhibitions, it is unnecessary that the condemnation be for a public purpose.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*]

3. EASEMENTS (§ 18*)—"WAY OF NECESSITY."

At common law a way of necessity was an easement which passed with a grant of land, wholly surrounded by the land of the grantor, and it depended solely on contract.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7418, 7419.]

4. EMINENT DOMAIN (§ 61*)—CONDEMNATION—"WAY OF NECESSITY."

Const. art. 1, § 18, declares that private property shall not be taken for private use except for private ways of necessity. Laws 1913, c. 133, § 1, authorizes a private individual to condemn land for a private way of necessity, and defines the term as meaning a way across the land of another for ingress and egress over which timber, minerals, and other valuable products may be transported. *Held*, that the term "way of necessity" used in the Constitution, could not be given its common-law meaning, for that would nullify the purpose of the Constitution, ways of necessity arising solely out of contract; and hence Laws 1913, c. 133, is constitutional, the Legislature having the power to define them.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51, 52, 54, 57; Dec. Dig. § 61.*]

5. EMINENT DOMAIN (§ 61*)—TAKING PROPERTY FOR PRIVATE USE.

All property is derived from society; and hence there is no natural prohibition against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the condemnation of the property of a private individual for a private use.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 51, 52, 54, 57; Dec. Dig. § 61.*]

6. CONSTITUTIONAL LAW (§ 280*)—DUE PROCESS OF LAW—TAKING PROPERTY FOR PRIVATE USE.

The taking of private property for private use for the promotion of the general welfare, on due notice and hearing, and on payment of compensation, is not incompatible with due process of law, as guaranteed by Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 877-890; Dec. Dig. § 280.*]

En Banc. Application by the State, on the relation of the Mountain Timber Company, for a writ of certiorari directed to the Superior Court of Cowlitz County and H. J. Wiberg and others to review a judgment against relator. Writ issued, and judgment reversed.

Imus & Gore, of Kalama, E. C. Strode, of Lincoln, Neb., and Coy Burnett, of Portland, Or., for appellant. Miller, Crass & Wilkinson, of Vancouver, for respondents.

GOSE, J. This is an application for a writ of certiorari to review the judgment of the superior court of Cowlitz county denying to relator the right to condemn land for a right of way for a logging road. The relator seeks to condemn a right of way for a logging road over and across land owned by the respondents Wiberg, in order that it may convey its timber from lands owned by it to its sawmill. The petition discloses that there is no outlet for a part of its timber other than over the respondents' lands, and that it cannot secure the right of way except by condemnation. A general demurrer to the petition was sustained, and a judgment adverse to the relator was entered.

Section 16, art. 1, of our Constitution, provides:

"Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made."

Laws of 1913, page 412, provide:

"Section 1. An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity * * * may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity. * * * The term 'private way of necessity,' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the con-

struction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried."

Section 2 provides that the procedure and mode of compensation in such cases shall be the same as that provided for the condemnation of private property by railroad companies.

The relator has brought itself within the provisions of the act by proper averments in its petition. The trial court sustained the demurrer because he thought the act unconstitutional. The constitutionality of the act is the only question presented in the briefs or argued at the bar.

[1, 2] A recurrence to certain fundamental principles will be helpful in clearing the way for a correct solution of the question. One of these principles is that the federal Constitution is a grant of power. Another is that a state Constitution is a limitation of power. Except as a state has surrendered to the federal government a portion of its sovereignty or as it has limited its own power, it is wholly sovereign. It therefore follows that the power of eminent domain is not derived from the Constitution but exists independent of the Constitution as an attribute of sovereignty. In short, it is a right which is inherent in sovereignty. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670. It follows, therefore, that, in determining whether a legislative act is violative of the Constitution of the state, we must look to that instrument, not for the purpose of ascertaining whether the power to pass the particular law has been granted, but to see whether the power has been taken from the law-makers.

The general power to take private property for a private use, in the absence of constitutional restrictions, is thus stated by Mr. Lewis: "Eminent domain is the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. * * * Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature; that is, a use in which the public participates, directly or indirectly, as in case of highways, railroads, public service plants, and the like. It is sufficient that the use of the particular property for the purpose proposed is necessary to enable individual proprietors to utilize and develop the natural resources of their land, as by reclaiming wet or arid tracts, improving a water power, or working a mine. In such cases the public welfare is promoted by the increased prosperity which necessarily results from developing

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the natural resources of the country. Such exercises of the power of eminent domain have been upheld by many courts, including the Supreme Court of the United States, and, we think, must be regarded as legitimate exercises of the power, in the absence of constitutional restrictions which limit the taking to public uses." *Lewis on Eminent Domain* (3d Ed.) § 1. "The correct view is that the power of eminent domain is not a reserved, but an inherent, right, a right which pertains to sovereignty as a necessary, constant, and inextinguishable attribute." *Same*, § 3. See, also, 15 Cyc. 557; *State v. County Com'rs*, 83 Ala. 304, 3 South. 761.

[3-5] The respondents contend that the term "private ways of necessity" must be given its common-law meaning. The theory of the common law is that, where land is sold that has no outlet, the vendor by implication of law grants one over the parcel of which he retains ownership. It passes as an appurtenance to the parcel expressly conveyed so as to enable the grantee to have access to it. In short, a private way of necessity at common law rests in grant and passes with the parcel expressly granted. The consideration paid for the parcel expressly granted extends to and embraces the appurtenance. The common-law right is wholly foreign to the power to take property by the exercise of eminent domain. The one proceeds from contract, the other from a proceeding in invitum. It follows that, if the argument is sound and the Legislature is without power to define the term "private ways of necessity" and prescribe the procedure for the taking, the constitutional provision is without meaning. As we said in an earlier case, there were eminent lawyers in the convention which framed our Constitution, and they will be presumed to have known the common-law meaning of the term and to have intended that it should be defined and construed so as to give it vitality and so as to give it a meaning in consonance with the subject of eminent domain. It seems to the writer that in the beginning it should have been construed to mean necessary private ways. But in the case of *Long v. Billings*, 7 Wash. 267, 34 Pac. 936, it was held that the term should be given its common-law meaning until the Legislature had defined it and established a procedure for making the right usable. In *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964, the principal question considered by the court was whether the contemplated use was a "public use," within the meaning of the Constitution, and whether that phrase was synonymous with "public benefits." At page 496 the court adverts to the fact that our Constitution makes it a judicial question whether a given use is in fact a public use. At pages 504 and 505 the court recognizes that the Legislature, untrammelled by constitutional restraint, may,

in the exercise of its sovereignty, take private property for private use. In that case, as in *Long v. Billings*, the court adopted the common-law definition of the phrase. In *Sultan Ry. & Timber Co. v. Great Northern Ry. Co.*, 58 Wash. 604, 109 Pac. 320, 1020, in referring to the *Healy Lumber Co. Case*, we said: "In this connection, however, the appellant makes the contention that the respondent had no legal right to cross its track with a private logging road, and that in consequence it gave up nothing when it surrendered such claim of right. The case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964, is cited as sustaining this contention, but we cannot think the case conclusive of the question. It is true we did there hold that a logging company performing no public function was without power to condemn a way for a logging road, notwithstanding the Legislature had purported to confer on it that power, but the question of the right of a logging company to condemn for such a way when the way was one of necessity was neither presented nor decided. The Constitution (article 1, § 16) grants the right to take private property for private ways of necessity, and it was open to the respondent to claim that the conditions then existing presented a sufficient cause for the exercise of the right. It is not necessary now that we inquire how well-founded was this claim. It is enough that the parties themselves treated it as a right and contracted with reference to it." *Schulenburg v. Johnstone*, 64 Wash. 202, 116 Pac. 843, 35 L. R. A. (N. S.) 941, was decided before the passage of the act of 1913, and follows the *Healy Lumber Co. Case*. We think the Legislature acted within its constitutional powers in defining a private way of necessity and establishing the procedure for making the right available. As defined, it is promotive of the public welfare in that it prevents a private individual from bottling up a portion of the resources of the state. In *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989, 20 L. R. A. 241, in construing a constitutional provision identical in language with ours, the court said: "It is apparent from the foregoing provisions that our Constitution is, in certain particulars touching the right to take private property for private use, exceptional, and for certain enumerated uses changes the accepted rule that the use to which private property may be condemned must be public." In *Jones & Co. v. Venable*, 120 Ga. 1, 47 S. E. 549, 1 Ann. Cas. 185, private parties engaged in the business of quarrying granite were permitted to condemn a right of way for a private railroad across the land of another so as to connect the quarry with a public service railroad. The court conceded that the enterprise was purely private. The Georgia Constitution provided: "In cases of necessity private ways may be granted upon just

compensation being first paid by the applicant." In *Sultan Ry. & T. Co. v. Great Northern Ry. Co.*, supra, it is said that "the Constitution, art. 1, § 16, grants the right to take private property for private ways of necessity." This statement is not legally accurate. The Constitution does not grant the right. It excepts the right from the general prohibition against taking private property for private use. In *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68, we said: "The power to condemn land is an attribute of sovereignty. It is a power recognized, not granted, by the Constitution." The word "necessary" means reasonably necessary. *Samish River Boom Co. v. Union Boom Co.*, supra.

The respondents have cited *Tacoma v. Nisqually Power Co.*, 57 Wash. 420, 107 Pac. 199, and kindred cases from this court. In these cases the question before the court was whether the contemplated use was a public one. The cases have no reference to private ways of necessity. The respondents have also cited a line of cases construing Constitutions which provide that no private property shall be taken for public use without just compensation. These words have uniformly been construed as equivalent to a constitutional declaration that private property, without the consent of the owner, shall be taken only for public use, and then only upon just compensation. It is apparent that such cases throw no light upon the question at bar. Broad language may be found in construing such constitutional provisions, but what is said by the courts must be read in the light of the particular constitutional provision under consideration. The respondents have cited *Arnsperger v. Crawford*, 101 Md. 247, 61 Atl. 413, 70 L. R. A. 497. The Constitution of Maryland provides: "The General Assembly shall enact no law authorizing private property to be taken for public use, without just compensation, as agreed upon between parties, or awarded by a jury, being first paid or tendered, to the party entitled to such compensation." In construing this provision the court quoted from *New Central Coal Co. v. Georgia Creek Coal Co.*, 37 Md. 539, as follows: "This constitutional prohibition is but declaratory of the previously existing universal law, which forbids the arbitrary and compulsory appropriation of one man's property to the mere private use of another, even though compensation be tendered." This language, if accepted literally, means that the state, in the absence of constitutional restraint, is not wholly sovereign. It is, we believe, the universally accepted view that all property is derived from society. *Cooley's Blackstone* (4th Ed.) vol. 1, p. 434, and footnotes.

In *State v. Mountain Timber Co.*, 135 Pac. 645, this court said: "The right of property is a legal right and not a natural right, and

it must be measured always by reference to the rights of others and of the public." If this be true, then there can be no universal law which, in the absence of constitutional restrictions, forbids a state from providing for the condemnation of private ways of necessity in furtherance of the development of its material resources. To accept the broad language used in the *Maryland* case would be to hold that our Constitution is itself unconstitutional.

[8] The taking of private property for private use for the promotion of the general welfare upon due notice and hearing and the payment of compensation is not incompatible with due process of law as guaranteed by the federal Constitution. *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 5 Sup. Ct. 441, 28 L. Ed. 889.

The judgment is reversed, with directions to overrule the demurrer.

CROW, C. J., and ELLIS, MAIN, CHADWICK, FULLERTON, MORRIS, MOUNT, and PARKER, JJ., concur.

BARBRE v. HIBSCHMAN et ux.

(Supreme Court of Washington. Jan. 24, 1914.)

1. BILLS AND NOTES (§ 539*)—ACTIONS ON NOTE—FINDINGS OF FACT—SUFFICIENCY.

In an action on a promissory note, where the trial court made specific findings of fact, a finding that the note was given for a valuable consideration is sufficiently specific, though the court was required to make findings of fact separately stated.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1911-1913, 1934; Dec. Dig. § 539.*]

2. APPEAL AND ERROR (§ 548*)—RECORD—QUESTIONS PRESENTED FOR REVIEW.

In the absence of a statement of facts, the appellate court cannot determine whether findings by the trial court were unsupported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.*]

Department 2. Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Action by C. M. Barbre against H. J. Hibschman and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

H. J. Hibschman and E. D. Reiter, both of Spokane, for appellants. Smith & Mack, of Spokane, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover upon a promissory note. The defense pleaded was want of consideration for the note. The cause was tried to the court without a jury, and the court made findings of fact, one of which is as follows: "That on November 5, 1910, the defendant H. J. Hibschman, for a valuable consideration, made, executed, and delivered

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the plaintiff that certain promissory note. * * * A judgment was entered in favor of the plaintiff for the amount of the note, with interest. The defendants have appealed.

[1] The appellants argue but one point, to the effect that it was the duty of the court upon request of the appellants to make a specific finding of the facts constituting the consideration. It is argued that the finding "for a valuable consideration" is too general. If we concede that it was the duty of the court to make findings of fact separately stated, it is too plain for argument that the finding in this case was sufficient. It was clearly not the duty of the court to set out in the findings what the consideration consisted of, whether money, property, services, or other things of that character. The finding that the consideration was a valuable one is the ultimate fact and was clearly sufficient.

[2] No statement of facts is brought here, and it is therefore impossible for this court to determine whether the court erred in concluding that the consideration was a valuable one or not.

There is no merit in the appeal.

The judgment is therefore affirmed.

CROW, C. J., and FULLERTON, MORRIS, and PARKER, JJ., concur.

TESTERA et ux. v. RICHARDSON et al.
(Supreme Court of Washington. Jan. 10, 1914.)
USURY (§ 56*)—WHAT CONSTITUTES.

Where a chattel mortgagor, who gave a mortgage to secure a note bearing 12 per cent. interest, paid the agent of the mortgagee for his services in obtaining a release of a prior mortgage and in preparing the mortgage and note in suit, and the payment was only a reasonable compensation for the services, such payment cannot be considered as a commission to the broker effecting the mortgage and rendering the transaction usurious, under Rem. & Bal. Code, § 6251.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 122-127; Dec. Dig. § 56.*]

Department 2. Appeal from Superior Court, King County; Everett Smith, Judge.

B. Richardson and another were proceeding to foreclose a chattel mortgage by notice and sale, and the mortgagors, James Testera and wife, transferred the proceedings to the superior court. From a judgment for the mortgagees, the mortgagors appeal. Affirmed.

Herbert E. Snook, of Seattle, for appellants. W. W. Felger, of Seattle, for respondents.

MOUNT, J. The respondent B. Richardson was proceeding by notice and sale to foreclose a chattel mortgage to satisfy a note executed by the appellants. The appellants thereupon transferred the proceedings to the

superior court for the purpose of contesting the amount claimed to be due upon the note on the ground of usury. The trial court concluded that the note was not usurious and entered a decree of foreclosure. This appeal is prosecuted from that decree.

The appellants maintain that the note was usurious. This is the only question presented.

It appears that the appellants in October, 1910, borrowed the sum of \$65 from the respondent B. Richardson. The respondent was acting through her agent, J. W. Richardson. In applying for the loan, the appellants offered as security a chattel mortgage upon a piano. Before accepting the security, J. W. Richardson desired to see the piano and to make an examination and appraisal thereof, and also desired that the county records should be examined as to the title to the piano. It was also necessary to prepare a mortgage and have the same acknowledged. It was also necessary to obtain a release from a prior mortgage upon the piano. J. W. Richardson agreed to perform these services for \$5, which the appellants agreed to and did pay. The note for \$65, for which the security was given, bore interest at the rate of 12 per cent. per annum.

It is argued by the appellants that, because this \$5 was paid to J. W. Richardson, the note was thereby made usurious under the statute (section 6251, Rem. & Bal. Code). The appellants rely upon the case of Ridgway v. Davenport, 37 Wash. 134, 79 Pac. 606. In that case the statute is quoted in full. We there held that, where a broker loans money of the principal and deducts a sum by way of commissions in excess of the legal interest, the note is thereby made usurious under the statute. But in this case there was no deduction for commissions for making the loan. The \$5 paid by the appellants to J. W. Richardson was paid for his services in examining the piano, in examining the county records, in preparing the note and mortgage, and for the notary's fee for taking the acknowledgment of the same, and for filing a release of a prior mortgage. In order to accomplish these results, it was necessary to expend some time and money in traveling from place to place. The trial court found that these services were rendered to the appellants at their request; that the fee charged therefor was reasonable and not a commission for making the loan; and for that reason held that the payment thereof did not make the note usurious. We are satisfied that this ruling was correct, and that the case of Ridgway v. Davenport, supra, does not control in this case.

If the money paid by the appellants to J. W. Richardson could be held to be unreasonable or in the nature of a commission for making the loan, the case of Ridgway v.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Davenport, supra, would control. But we are satisfied, and the court found, that the services performed were performed for the appellants and were reasonably worth the amount which the appellants agreed to and did pay, and the money paid was not for a commission.

The judgment is therefore affirmed.

CROW, C. J., and PARKER, FULLERTON, and MORRIS, JJ., concur.

PRESENTIN v. HAWKEYE TIMBER CO.
(Supreme Court of Washington. Jan. 17, 1914.)
FRAUDS, STATUTE OF (§ 23*)—DEBT OF ANOTHER—ORAL PROMISE TO PAY.

Plaintiff sued for merchandise furnished to N., who had a contract to deliver shingle bolts to defendant at a fixed price per cord. Plaintiff testified that the defendant's superintendent instructed him to deliver the goods to N., and that "the account would be taken care of"; that "if you make right prices to go ahead and sell him; that we will see that you get the money." Held, that such proof showed only a collateral undertaking to answer for the debt, default, or miscarriage of another and, not being in writing, was void under the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.*]

Department 1. Appeal from Superior Court, Skagit County; J. P. Houser, Judge.

Action by P. V. Presentin, doing business as the Marblemount Mercantile Company, against the Hawkeye Timber Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

Winfield R. Smith, of Seattle, for appellant. Hurd & Hilten, of Mt. Vernon, for respondent.

GOSE, J. This is a suit to recover a balance alleged to be due on an open account for goods, wares, and merchandise. It is alleged that the goods were sold in Skagit county in this state to the Hawkeye Timber Company, a corporation organized and existing under the laws of the state of Iowa, and doing business in this state; that the Iowa corporation in December, 1911, discontinued; that its stockholders organized the defendant corporation under the laws of this state, under the same name, with the same stockholders, the same officers, the same assets as the old corporation; that the Washington corporation is the same business entity; and that it assumed all the debts and liabilities of its predecessor. The defendant joined issue on the alleged sale to its predecessor. The case was tried to the court, resulting in a judgment for the plaintiff. The defendant has appealed.

The facts in brief are these: In December, 1909, and for nearly two years thereafter, the Iowa corporation was operating a shingle mill in Skagit county. On the date stated one Norlin contracted to deliver it

shingle bolts at a fixed price per cord. The goods in controversy were delivered to Norlin. The respondent claims that the Iowa corporation, through its local superintendent, promised to pay for the goods. This the appellant denies.

The respondent testified that the superintendent of the Iowa company told him to deliver the goods to Norlin, and that "the account would be taken care of." He also said that the superintendent told him: "If you make right prices to go ahead and sell him; that we will see you get the money." Following this he said: "That is all he said; for me to furnish Norlin with the stuff and they would pay the bill." After the respondent had closed his case, he was recalled for further cross-examination, and was asked: "Question: That is not in reference to a talk you now say you and he had in December, 1909, before this account with Norlin began? Answer: He simply told me to let Norlin have the stuff and they would take care of the account."

From December, 1909, until August 29, 1910, the company paid for the goods purchased by and delivered to Norlin. The accounts were sent direct to the company. The charges were made to the company by Norlin. On the date last mentioned the company wrote the respondent as follows: "We are inclosing check for \$126 covering orders forwarded by you. In future instead of sending *Ed Norlin's bills* to this office, hand the bill to him and he will give you an order for the full amount." (The italics are ours.) Thereafter, and until about July, 1911, the company paid Norlin's orders drawn upon it in favor of the respondent. It refused to honor his orders for goods delivered during the months of July and August, 1911, because Norlin was overdrawn.

The respondent's several versions of the promise bring the case within the statute of frauds. "Every special promise to answer for the debt, default, or misdoings of another person" shall be void unless the contract or promise is in writing. Rem. & Bal. Code, § 5289. Every statement of the promise except the third is clearly collateral. The case is controlled by *Goldie-Klenert Distributing Co. v. Bothwell*, 87 Wash. 264, 121 Pac. 60, Ann. Cas. 1913D, 849. In that case an appeal was taken from a judgment entered upon a demurrer to the complaint. The complaint alleged that the defendant promised to "pay," "become responsible for," and "indemnify and hold [the appellant] harmless." This was held to fall within the ban of the statute; the court saying: "Viewing the complaint as an entirety, without selecting particular words or phrases and giving them undue weight, prominence, or emphasis, we are of the opinion that the alleged promise offends the statute."

If the Iowa corporation directed the re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spondent to furnish Norlin with goods and expressly promised to pay for them, the respondent should have been able to make a clear and consistent statement of the transaction. This he seemed unable to do, or at least failed to do. In three statements he made the promise collateral and within the statute; in one he made it direct and without the statute.

In *Skinner v. Conant*, 2 Vt. 453, 21 Am. Dec. 554, an agreement "to see Conant paid if Andrus hired him" was held to be collateral. In *Wagner v. Hallack*, 3 Colo. 176, it was held that the promise, "We will see the article paid for," or equivalent words, imports a collateral undertaking and falls within the ban of the statute. In *Swigart v. Gentert*, 63 Neb. 157, 88 N. W. 159, a promise "that he would see that the plaintiff received his pay" was held to be collateral. In that case the court said: "But the promise to see the debt of another paid, although it is the basis of extending credit, is still within the statute of frauds." A promise to "pay or see that I had my pay" was held to offend against the statute. *Haverly v. Mercur*, 78 Pa. 257.

The respondent cites *Davies v. Carey*, 72 Wash. 537, 130 Pac. 1137. In that case there was a direct promise to pay the vendor for the goods. The respondent also cites a line of cases where the vendee had promised the vendor to pay a given sum of money to a third party as a part of the purchase price of the subject-matter of the transaction. These cases are clearly distinguishable. In such cases the vendee merely promised to pay his own debt.

The respondent also suggests that the account was carried on his books against the Hawkeye Timber Company. He admits, however, that the appellant had no notice of this fact. The record, taken as a whole, shows that the appellant treated the sales as having been made to Norlin. This view is made prominent by the letter of August 29, 1910, in which the account is referred to as Norlin's account.

We think the promise was a collateral one and within the statute. The judgment is therefore reversed, with directions to dismiss.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

CULVER et al. v. CULLITON et al.

(Supreme Court of Washington. Jan. 22, 1914.)

1. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTIONS FOR JURY.

In an action for breach of a contract by which plaintiffs were employed to do concrete work, evidence held to make a question for the jury as to whether the contract was for the doing of 1,800 cubic yards or all the concrete

work on 10 miles of railroad, which proved to be much less.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

2. CONTRACTS (§ 323*)—ACTIONS FOR BREACH—QUESTIONS FOR JURY.

In an action for breach of a contract, by which plaintiffs were employed to do concrete work, and which defendants alleged plaintiffs abandoned, where plaintiffs testified that they were told by the engineer when they quit work that there might be 160 yards more of concrete work, but that they were also told that, under the modified plans, there was practically no concrete work, the inconsistency in their testimony as to whether they understood that there were 160 yards more should have been left to the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. § 323.*]

3. CONTRACTS (§ 294*)—PERFORMANCE—SUFFICIENCY.

A party must substantially perform a contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1352, 1357-1361; Dec. Dig. § 294.*]

4. CONTRACTS (§ 323*)—ACTIONS FOR BREACH—QUESTIONS FOR JURY.

In an action for breach of a contract, by which the evidence tended to show plaintiffs were employed to do 1,800 cubic yards of concrete work, in which defendants alleged that plaintiffs abandoned the contract and it appeared that, when plaintiffs quit work, after doing 119 cubic yards, there were at most approximately 160 yards more, it could not be declared as a matter of law that defendants substantially performed the contract by tendering such 160 yards; and hence this question should have been submitted to the jury.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1311, 1349, 1466, 1543-1548, 1827, 1827½; Dec. Dig. § 323.*]

Department 1. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by George E. Culver and another against Charles C. Culliton and others, co-partners doing business as Culliton Bros. From a judgment for defendants, plaintiffs appeal. Reversed.

Robertson & Miller, of Spokane, for appellants. Alex. M. Winston, of Spokane, for respondents.

GOSE, J. This is an action for damages flowing from an alleged breach of contract. After all the evidence had been submitted, upon the motion of the defendants the court withdrew the case from the jury and entered a judgment in favor of the defendants for the amount of their counterclaim. The plaintiffs have appealed.

The complaint in substance alleges that the appellants entered into a contract with the respondents, wherein and whereby the appellants agreed to do 1,800 cubic yards of concrete work for the respondents on a branch of the Canadian Pacific Railway Company in British Columbia, at a fixed price per yard; that the respondents agreed to furnish the appellants that amount of con-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

crete work, that the respondents furnished them only 119 yards of concrete work, and failed and refused to furnish them any more work, and that the appellants would have made a profit of \$3.50 per yard. The answer alleges affirmatively that the respondents had a contract with the railway company in British Columbia, whereby they had agreed to do the concrete and bridging, as per specifications attached to the contract, upon 10 miles of the railroad; that at the time of entering into the contract with the appellants, it was supposed that the amount of concrete work would be approximately 1,800 yards; that they did not agree to furnish the appellants any fixed amount of concrete work, but that they gave the appellants a subcontract to furnish the material and perform the labor for all the concrete work on the 10 miles of railroad; that the appellants commenced work under the contract on the 1st day of July, 1912, and that on the 5th day of September following they abandoned and refused to complete their contract. It is further alleged that the appellants completed 119 yards of the contract, and that the respondents have overpaid them for such work to the extent of \$549.35, for which amount they pray judgment. It is also alleged that the appellants agreed with the respondents that they were indebted to them, and that, as soon as the amount could be ascertained, they would pay it. The new matter in the answer was traversed in the reply.

[1] The appeal presents but one question, viz.: Should the case have been submitted to the jury under proper instructions? We think it should. The appellants, in substance, testified that the contract was verbal; that it was made in Spokane; that the respondents guaranteed that there would be at least 1,800 yards of concrete work; that the respondents later told them that the plans were ready, and requested them to go to British Columbia and commence work; that they did so; that after completing 119 yards, they were informed by the respondents that there was no more concrete work; and that they then went away. The respondents' testimony is to the effect that they did not guarantee any particular amount of work, but that the appellants took a subcontract to do all the concrete work on 10 miles of the railroad, should the same be more or less, and that the respondents' contract with the railroad company provided that the plans and specifications were subject to change and modification by the railroad company's engineer, and that the appellants so understood it. The appellants meet this by saying that they made their contract without any reference to the contract between the respondents and the railroad company. They further say that they did not settle the counterclaim which the appellants are asserting, and that they did not agree to pay it. The respond-

ents also claim that, after the appellants went to British Columbia, they prepared duplicate written contracts, embodying their version of the contract which they made with the appellants; that they submitted them to the appellants, and that they agreed to, but did not, sign them. All these questions should have been submitted to the jury under proper instructions.

[2, 3] The respondents also assert that the appellants admit that, when they quit work, they were informed that there were about 160 yards of concrete work, according to the railroad company's plans as modified by its engineer. The appellants meet this by saying that the railroad engineer told them that there might be that amount, and that he also said to them that, under the modified plans, there was practically no concrete work. There seems to be an inconsistency in the testimony of the appellants as to whether they understood before quitting that there were 160 yards of concrete work. The jury should have been called upon to reconcile this seeming inconsistency. It does not present a law question. The rule, however, is that a party must substantially perform his contract. 9 Cyc. 602, 603; *Pallman v. Smith*, 135 Pa. 188, 19 Atl. 891.

[4] If it be conceded that the appellants quit work knowing that there were approximately 160 yards of concrete work, which, as they assert, was so situated that a loss would result from doing it, the question as to whether there was a substantial performance of the contract on the part of the respondents is one of mixed law and fact. It certainly cannot be declared as a matter of law that the tender of 160 yards of concrete work so situated is a substantial performance of a contract which guarantees a balance of approximately 1,700 yards. All of these questions should have been submitted to the jury under proper instructions.

The judgment is reversed.

CROW, C. J., and ELLIS and MAIN, JJ., concur.

GOLD RIDGE MINING & DEVELOPMENT CO. v. RICE.

(Supreme Court of Washington. Jan. 17, 1914.)

1. PLEADING (§ 427*)—OBJECTIONS—ISSUES—COUNTERCLAIM—EVIDENCE.

Where a counterclaim was proved by evidence admitted without objection, it was immaterial that it was not pleaded under the rule that the issues shall be regarded as broad as the evidence.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1428-1432; Dec. Dig. § 427.*]

2. ESTOPPEL (§ 66*)—SALE OF STOCK—ACCOUNTING TO OWNER—NOTE FOR PRICE.

Where plaintiff corporation sold certain of its stock belonging to defendant, and accepted the note of the purchaser for the price, thereafter using it as collateral and claiming to own it, the corporation could not deny its liability

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to account for the price on the ground that the note had not been paid.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 159-162; Dec. Dig. § 66.*]

3. CORPORATIONS (§ 99*)—ACTS OF OFFICERS—PURCHASE OF PROPERTY FROM ORGANIZERS—STOCK ISSUE—VALIDITY.

Defendant having a bond for title to certain mining claims in which H. was interested, they with S. organized plaintiff corporation, electing defendant president and general manager and H. secretary and treasurer, they with S. constituting the corporation's trustees. The minute book showed that H. made a written offer to assign the bond to the corporation for 200,000 shares of its capital stock, 100,000 to himself and another 100,000 to defendant; that the corporation "unanimously accepted" the proposal, and directed the secretary to issue the stock on the assignment of the bond, which was duly assigned and filed for record. *Held*, that such transaction was valid between the parties, and offended no rule of public policy, though defendant and H. were on both sides of the bargain when made, and that the corporation could not successfully claim that the stock so issued to defendant was without consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

4. ESTOPPEL (§ 65*) — SALE OF STOCK — VALIDITY—RIGHT TO DENY.

Where a corporation sold certain of its stock belonging to defendant, and thereafter received and held the proceeds of the sale, it was estopped to deny the validity thereof.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 155-158; Dec. Dig. § 65.*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by the Gold Ridge Mining & Development Company against H. J. Rice. Judgment for plaintiff, and defendant appeals. Reversed with directions.

N. C. Bardsley and F. H. Witt, both of Spokane, for appellant. M. O. Reed, of Colfax, Willis E. Reed, of Madison, Neb., and Robertson & Miller, of Spokane, for respondent.

GOSE, J. This action was brought to recover \$1,663.59 from the defendant, which it is alleged he drew from the bank account of the plaintiff in excess of the amount due him for his services as its general manager. The answer is in effect a general denial. The court found that the defendant had drawn from the plaintiff's bank account \$1,030.29 in excess of the amount due him, and entered a judgment against him for that amount, with interest and costs of suit. The defendant has appealed.

The appellant asserts a counterclaim of \$1,500, the proceeds of 7,000 shares of his stock which were sold by the respondent's secretary and treasurer with the consent of the appellant, retained by the respondent under an agreement that the appellant could draw against it. The respondent meets this claim in four ways: (a) That the counterclaim is not pleaded; (b) that the appellant paid nothing for his stock; (c) that the sale of the stock to the extent of \$1,000 is repre-

sented by a note which has not been paid; and (d) that the sale of appellant's stock is not binding upon respondent.

[1] In respect to the contention that the counterclaim is not pleaded, it is sufficient to say that the evidence was admitted without objection, and under the uniform decisions of this court the issues became as broad as the evidence.

[2] Upon the third contention that \$1,000 of the stock is represented by an unpaid note, the evidence shows that the note was drawn in favor of the respondent, that it was using it as collateral at the time of the trial, and that it claims to own it.

[3] The principal contention is that the appellant paid nothing for the stock, and hence that he was not entitled to the proceeds of the 7,000 shares which represent the \$1,500. This was the view taken by the trial court. The facts in brief are these: The appellant held a bond upon the "Wonder" group of mining claims situate in the Ten Mile mining district in Idaho county in the state of Idaho. One A. A. Hammer, although not named in the bond, appears to have had some interest with the appellant. The appellant, Hammer, and one Stone organized the respondent corporation. They were its first trustees. The appellant was elected president and general manager, and continued in that capacity until January 22, 1912. Hammer was elected its secretary and treasurer, and held these offices at the time of the trial. The minute book of the respondent shows that Hammer made a written offer to the respondent to assign the bond to it for 200,000 shares of its capital stock, 100,000 to himself and 100,000 to appellant, its capital stock being 300,000 shares, the respondent "to assume and carry out all the terms of said bond * * * and that said bond be taken in full payment of the subscription of said Hammer and Rice." The minute book shows that the respondent "unanimously accepted" the proposal, and directed the secretary to issue the stock upon the assignment of the bond. The bond was assigned and later duly filed for record. The rights of creditors are not involved. The appellant and Hammer were upon both sides of the bargain. The respondent was also represented by its third trustee. No one was wronged, and no rule of public policy was violated. The holders of the bond knew what they were selling, and the respondent knew precisely what it was buying. The deal was made in the open, and the transaction was valid as between the parties. *Inland Nursery, etc., Co. v. Rice*, 57 Wash. 67, 106 Pac. 499; *Old Dominion, etc., Co. v. Lewisohn*, 210 U. S. 203, 28 Sup. Ct. 634, 52 L. Ed. 1025; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

[4] It is further suggested that the sale of the appellant's stock is not binding upon the respondent. It suffices to say that it receiv-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed, and still holds, the proceeds of the sale. *Harvey v. Sparks Bros.*, 45 Wash. 578, 88 Pac. 1108.

The respondent received the proceeds from the sale of the appellant's stock on the 3d day of January, 1911. The appellant is entitled to a judgment against the respondent for \$1,500, with interest from the 3d day of January, 1911, at the legal rate, less \$1,030.20, with legal interest from the 22d day of January, 1912.

The judgment is reversed, with directions to enter a judgment in harmony with this opinion.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

MANHATTAN CO., Inc., v. UNITED STATES FIDELITY & GUARANTY CO.

(Supreme Court of Washington. Jan. 17, 1914.)

1. PRINCIPAL AND SURETY (§ 117*) — PAID SURETY—BUILDING CONTRACTOR'S BOND — DISCHARGE—GROUNDS—OVERPAYMENT.

A paid surety on a building contractor's bond was not relieved from liability because of an overpayment made by the obligee, either to the contractor or directly to the contractor's servants, where such payments were necessary to satisfy claims for labor and save the property from liens, and therefore did not operate to the prejudice of the surety.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

2. PRINCIPAL AND SURETY (§ 117*)—BUILDING CONTRACTOR'S BOND—OVERPAYMENTS.

A small overpayment made by the owner to a contractor in the earlier stages of the work, not equal to an amount by which the contractor was credited for extra work, did not constitute a material change or violation of the contract so as to release the contractor's surety from liability.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 283-285; Dec. Dig. § 117.*]

3. PRINCIPAL AND SURETY (§ 119*)—BUILDING CONTRACTOR'S BOND—RELEASE OF SURETY—TAKING OVER WORK.

Where an owner was required to pay the contractor's laborers in order to protect the property against liens by them, and the contractor continued with the work thereafter with every appearance of intention to complete it for a considerable time, and after his surety had been notified of the payment and the necessity therefor, such payment did not constitute a taking over of the work from the contractor by the owner, so as to relieve the surety from his liability on the bond.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 296; Dec. Dig. § 119.*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Action by the Manhattan Company, Incorporated, against the United States Fidelity & Guaranty Company and another. Judgment for plaintiff, and defendant company appeals. Affirmed.

McClure & McClure, of Seattle, for appellant. *Holzheimer & Herald*, of Seattle, for respondent.

PARKER, J. This is an action upon a surety bond executed by the defendant O. W. Lindsley as principal and the defendant the United States Fidelity & Guaranty Company as surety to secure the faithful performance of a building contract on the part of Lindsley. A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff against both defendants, from which the defendant guaranty company has appealed.

On March 16, 1912, the defendant Lindsley entered into a contract in writing with respondent Manhattan Company, whereby he agreed to furnish all labor for, and to perform certain specified portions of, the work of constructing a building then in course of construction by respondent in Seattle. The portions of the contract we are here concerned with read as follows:

"Art. V. Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payments under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor; but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner."

"Art. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the owner to the contractor for said work and labor shall be common brick five and no/100 (\$5.00) dollars per M., kiln count, press brick and arch brick, fifteen

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and no/100 (\$15.00) dollars per M., kiln count, setting stone and cast iron plates, seventy-five and no/100 (\$75.00) dollars. If arch brick ought to be cut an additional sum of ten and no/100 (\$10.00) dollars per arch will be paid to party of first part by party of the second part, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid by the owner to the contractor, in current funds and only upon certificates of the architect as follows: Eighty-five (85) per cent, to be paid as work progresses on weekly payments. Party of the first part must show receipts for all labor at the time each payment is made. The final payment shall be made within fifteen (15) days after the completion of the work included in this contract, and all payments shall be due when certificates for the same are issued. If at any time there shall be evidence of any lien or claim for which, if established, the owner of the said premises might become liable, and which is chargeable to the contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the contractor shall refund to the owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the contractor's default."

Thereafter, on March 18, 1912, the bond here involved was executed by Lindsley and the guaranty company, as principal and surety, respectively, in the sum of \$1,000, to secure the faithful performance of the contract on the part of Lindsley, which bond contains, among other things, the following:

"Now therefore, the conditions of the foregoing obligation is such that if the said principal shall well and truly indemnify and save harmless the said obligee from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said principal to be performed, then this obligation shall be void; otherwise to remain in full force and effect in law: Provided, however, that this bond is issued subject to the following provisions:

"First. That no liability shall attach to the surety hereunder unless, in the event of any default on the part of the principal in the performance of any of the terms, covenants or conditions of the said contract, the obligee shall promptly, and in any event not later than thirty days after knowledge of such default, deliver to the surety at its office in the city of Baltimore written notice thereof, with a statement of the principal facts showing such default and the date thereof; nor unless the said obligee shall deliver written notice to the surety at its office at city of Seattle, Wash., and the consent of the surety thereto obtained, before making to the prin-

cipal the final payment provided for under the contract herein referred to.

"Second. That in case of such default on the part of the principal, the surety shall have the right, if it so desires, to assume and complete or procure the completion of said contract; and in case of such default, the surety shall be subrogated and entitled to all the rights and properties of the principal arising out of said contract and otherwise, including all securities and indemnities theretofore received by the obligee and all deferred payments, retained percentages and credits, due to the principal at the time of such default or to become due thereafter by the terms and dates of the contract."

On April 13, 1912, Lindsley commenced work under the contract. On April 20th the respondent paid to Lindsley \$100, which was \$60 in excess of the amount then due him under the terms of the contract. On April 27th respondent paid to Lindsley \$295, which was \$58.50 in excess of the amount then due him under the terms of the contract after deducting the excess theretofore paid. On May 3d respondent paid to Lindsley \$270, which was somewhat in excess of the amount then due him under the terms of the contract after deducting excess payments theretofore made. The amount Lindsley was then overpaid is not made plain by the evidence, though we assume that, if the work progressed substantially as during the previous week, the excess payment was but a very small amount. The reason for the excess in the first payment is not shown. The excess in the second and third payments appears to have been to enable Lindsley to pay his workmen. In any event, it seems plain that all the money of the second and third payments was used in paying wages of workmen employed by Lindsley upon the building. On May 11th, Lindsley being unable to pay his workmen, they were paid direct by respondent; the amount so paid being \$543.80. This was somewhat in excess of the amount then due Lindsley under the terms of the contract, though to what extent we are not informed. On May 18th, Lindsley being again unable to pay his workmen, they were paid direct by respondent; the total amount so paid being \$681.80. This was \$523 in excess of the amount then due Lindsley under the terms of the contract. On that day respondent duly notified appellant guaranty company of this payment and of the amount of the excess, stating in the notice, among other things, the following: "O. W. Lindsley has notified us of his inability to pay the amount of wages due to his employes upon said work, and said employes have made to us claims and demands for such wages and have threatened to file liens therefor. Pursuant to the terms of said contract, you are notified that we have retained out of any payment due or to become due to said contractor under said contract, and have advanced sufficient money to pay and have paid to said

employés the full amount of their said claims for said labor." On May 24th Lindsley being again unable to pay his workmen, they were paid direct by respondent; the amount so paid being \$458.40. This also was in excess of the amount then due Lindsley under the terms of the contract. On June 1st, Lindsley being again unable to pay his workmen, they were paid direct by respondent; the amount so paid being \$479.90. This was also in excess of the amount then due Lindsley under the terms of the contract. On June 8th Lindsley's workmen were paid direct by respondent, for the same reason, the total sum of \$90.75. This also was in excess of the amount then due Lindsley under the terms of the contract. Immediately following each of these payments made to Lindsley's workmen after May 18th, appellant guaranty company was duly notified thereof, in substance as it was notified on May 18th, of the payment to Lindsley's workmen on that date. On June 10th Lindsley abandoned the work. On June 11th respondent duly notified appellant guaranty company of Lindsley's abandonment of the work. That notice, among other things, contained the following: "You are further notified that pursuant to the terms of said contract, by reason of the abandonment of said work by said contractor, unless provisions are made by you to complete said work within three days from date hereof we will take possession of said premises and complete said work and hold said contractor and you upon your bond for the difference between the cost of said work and the contract price." On June 17th, appellant guaranty company having failed to take any steps looking to the completion of the performance of Lindsley's contract, respondent took charge of the work and completed it. It seems plain from the record before us that it was necessary for respondents to make all the payments to Lindsley's workmen, which we have noticed, in order to protect the property from liens of the workmen. It does not seem to be seriously contended that the amounts thus paid were not due the workmen or that the workmen were not claiming and entitled to have liens upon the building as security therefor. The amount which respondent thus paid to Lindsley and his workmen in excess of the amount Lindsley would have earned under the contract was \$1,655.87. From this there was, by the court, deducted \$115, due from respondent to Lindsley for work which he had performed outside of that included in his contract, and judgment was rendered against Lindsley for the balance of \$1,540.87 and against appellant guaranty company for \$1,000, the amount of the bond upon which it was surety.

The principal contention of counsel for appellant is that it was released from all obligation under the bond because of these payments made by the respondent to Lindsley and his workmen. This contention is rested

upon the general rule, recognized and announced by this court in *Peters v. Mackay*, 20 Wash. 172, 54 Pac. 1122, that the surety is released where the payments to the contractor are in excess of the amounts provided for under the contract. In that case, apparently, the court took no notice of the exceptions to this rule, nor did it give any attention to what extent the rule might be regarded as modified in applying it to payments made which did not work to the prejudice of the surety. It is also worthy of note that, in that particular case, the surety was manifestly not a paid surety as in this case. In the later case of *Leghorn v. Nydell*, 39 Wash. 17, 80 Pac. 833, the court had under consideration a state of facts which did involve an exception to the rule announced in *Peters v. Mackay*. That is, a situation where the payments were without prejudice to the rights of the surety. It was there said: "The next objection urged is that the respondent paid the contractor the sum of \$300 at a time when the same was not due or payable under the terms of the contract. The facts in relation to this payment are these: The payments were due in installments under the contract and were to be made on certificates of the architect. The first certificate was given July 10, 1902, the second August 20, 1902, the third September 5, 1902, and the fourth November 11, 1902; and the payments were made on or about the same dates. On September 15, 1902, the respondent loaned or advanced to the contractor the sum of \$150, and a like amount on September 25, 1902. These amounts were repaid or deducted from the last certificate of November 11, 1902. Whether this was a loan, as claimed by the respondent, or an advancement under the contract, as claimed by the appellant, is wholly immaterial. The money was used by the contractor in the construction of the building, and the appellant was benefited rather than prejudiced by the [irregular payments]."

[1] The view that overpayments not resulting in prejudice to the surety will not discharge its obligation also finds support in *Monro v. National Surety Co.*, 47 Wash. 488, 491, 92 Pac. 280, and *Black Masonry, etc., Co. v. National Surety Co.*, 61 Wash. 471, 475, 112 Pac. 517. In *Leifendecker v. Aetna Indemnity Co.*, 52 Wash. 609, 101 Pac. 219, relied upon by counsel for appellant, the contractor was paid his entire contract price before work upon the building was even commenced, without the knowledge of the indemnity company, while the bond, by its very terms, expressly required that he should reserve payment "until the expiration of the time within which liens or notice of liens may be filed." It was, of course, rightly held in that case that full payment before the commencement of the work discharged the surety. In *Black Masonry, etc., Co. v. National Surety Co.*, 61 Wash. 471, 112 Pac. 517, relied upon by counsel for appellant, the owner paid the contractor

\$3,500 upon a \$16,500 contract before anything whatever was due the contractor thereon. The substance of the holding in that decision was that there was such a substantial change, or rather violation, of the terms of the contract as to release the surety, in view of the provisions of the contract for payments only after the stone had actually been placed in the building; there being no stone placed in the building at the time of the \$3,500 payment. That case also differs from this in that the payment was made direct to the contractor and not to those who may have had liens upon the building. Nor does it appear with certainty that the money paid the contractor was ever used by him in paying for labor or material used in the building. Nor does it appear that such payment was necessary to relieve the building from lien claims. In the case before us, all payments made after the third payment were made direct to workmen who had valid lien claims upon the building, the amount and validity of which are not questioned. Article 9 of the contract above quoted, it seems to us, clearly gave to respondent the right to protect the building from these liens by paying the same and charging the amounts so paid against Lindsley, even though the required amount was larger than the amount due Lindsley at the time of payment. We do not think that this was a change or violation of the terms of the contract between respondent and Lindsley for the faithful performance of which the bond was given.

[2] The first, second, and third payments made by respondents direct to Lindsley, it seems plain, at no time resulted in Lindsley being overpaid to exceed \$100. This small overpayment, it seems to us, in view of the quantity of work to be performed under the contract, the fact that these overpayments occurred so early in the work, and the fact that Lindsley was thereafter given credit for \$115 for work which he did for respondent entirely outside of that specified in the contract, should not be held to be a material change or violation of the terms of the contract. We are unable to see that these payments resulted to the prejudice of appellant.

[3] Some contention is made on behalf of appellant that it was discharged from liability under the bond because respondent's action in paying Lindsley's workmen on May 11th and following was in substance a taking over of the work from Lindsley by respondent. We cannot agree with this contention. It seems apparent that respondent was doing nothing more than protecting itself against the liens of Lindsley's workmen. Lindsley continued with the work with every appearance of an intention to complete it for a considerable time thereafter, and after appellant was notified of respondent's paying Lindsley's workmen and of the necessity therefor. We think this did not have the effect of taking

over the work by respondent without due notice to appellant.

We are of the opinion that the judgment should be affirmed. It is so ordered.

CROW, C. J., and FULLERTON, MOUNT, and MORRIS, JJ., concur.

HOLT MFG. CO. v. STRACHAN et ux.
(Supreme Court of Washington. Jan. 15, 1914.)

1. ELECTION OF REMEDIES (§ 3*)—RESCISSION—DAMAGES.

Defendants, having contracted to purchase a combined harvester and threshing machine, could not rescind because of defects therein and at the same time recover damages for loss of crops and expenses incurred in a futile attempt to harvest with the rejected machine.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. § 3.*]

2. ELECTION OF REMEDIES (§ 15*)—CONCLUSIVENESS.

The definite adoption of one of two or more inconsistent remedies by a party cognizant of the material facts is a conclusive bar to his resort to the alternative remedy.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 17; Dec. Dig. § 15.*]

3. SALES (§ 391*)—RESCISSION—STATU QUO.

Where defendants purchased a harvester from plaintiff and were allowed a credit of \$800 for a half interest in certain other machines previously sold, and the new machine was thereafter returned to plaintiff on a rescission of the sale, defendants were not entitled to recover the amount of the credit so allowed, since it is only where a payment is made in money, or the specific thing cannot be returned, that a judgment for money can be had on rescission.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1110-1127; Dec. Dig. § 391.*]

Department 1. Appeal from Superior Court, Whitman County; R. L. McCroskey, Judge.

Action by the Holt Manufacturing Company against Geo. Strachan and another. Judgment for defendants, and plaintiff appeals. Modified and affirmed.

Samuel P. Weaver, of Sprague, and J. M. McCroskey, of Colfax, for appellant. Milan Still, of Revere, for appellees.

CHADWICK, J. Plaintiff and defendants had certain transactions running over a period of years, during which time two combined harvester and threshing machines were sold by plaintiff to defendants and for which notes were given. In June, 1911, plaintiff sold to defendants another combined machine for the sum of \$3,575. For this several notes were given, and \$800 was credited upon the purchase price and for which plaintiff took a one-half interest in the two machines previously sold. The last machine was returned in the fall of 1911, plaintiff says under an agreement and settlement, and defendants say because they were ordered by plaintiff so to do. Plaintiff brought this action to recover upon certain notes made in previous

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

years and for \$750 which it says that defendants were to pay on the settlement for the use and wear of the machine during the season of 1911, and for \$106 alleged to be due for extras, supplies, etc. Two trials have been had in the lower court. The case was first tried on the third amended answer. The trial judge held that by their answer the defendants had elected to keep the machine and might recover the damages suffered while attempting to use it. A verdict was returned in favor of the plaintiff; a new trial was granted on grounds not now material, whereupon, and over the protest and objection of plaintiff, defendants were allowed to file a fourth amended answer. The trial court construed this answer to be a plea of rescission and instructed the jury that the measure of defendants' recovery was the amount paid upon the purchase price. The jury returned a verdict for \$3,775 in favor of the defendants. On motion for a new trial the court made the alternative order that, unless defendants remitted all of their judgment in excess of \$800, a new trial should be had. Defendants filed a written remission of their judgment, and plaintiff has appealed.

Many errors are assigned, most of them growing out of the confused record and manner of making up the issues. As we view the case, we think it unnecessary to discuss all of these assignments. Like the trial judge, we believe that there was probably enough evidence submitted to the jury to warrant it in finding that all the debts due and owing from the defendants to the plaintiff were paid.

[1] The court, by reducing the damages, held in effect that defendants could not rescind and at the same time recover damages for loss of crops and expenses incurred in a futile attempt to harvest their crops with the rejected machine. In so holding the court followed the settled law in this state. *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925; *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, 70 Wash. 192, 126 Pac. 418; *Thompson v. Rhodehamel*, 71 Wash. 24, 127 Pac. 572.

It is most strenuously insisted by counsel for plaintiff that the case should be sent back for a new trial because the trial judge abused his discretion in permitting defendants to file a fourth amended answer setting up a claim of damages which is inconsistent with the remedy claimed in their third amended complaint.

[2] The general rule is that a first pronounced election is final and imperative. "It is certainly the established law, in every state that has spoken on the subject, that the definite adoption of one of two or more inconsistent remedies, by a party cognizant of the material facts, is a conclusive and irrevocable bar to his resort to the alternative remedy." 7 Enc. Plead. & Prac. 364; 15 Cyc. 262; *Babcock, Cornish & Co. v. Urquhart*, 53

Wash. 168, 101 Pac. 713; *Gaffney v. Megrath*, 23 Wash. 476, 63 Pac. 520; *Houser & Haines Mfg. Co. v. McKay*, supra; *Blake-Rutherford Farms Co. v. Holt Mfg. Co.*, supra; *Thompson v. Rhodehamel*, supra. This rule would ordinarily be applied, but we find the state of the record to be such that we are not called upon to do it. Under the undisputed facts of the case, there was either a settlement or a rescission. The court, by reducing the verdict to the extent that he did, held defendants to the theory of rescission. These things, coupled with the fact that the machine is not now and was not at the time of the first trial in the possession of the defendants, but had been returned at the solicitation of the plaintiff and with the acquiescence of the defendants, makes it seem clear to us that it would work injustice to all parties concerned to return the case for a new trial upon a theory of law that cannot possibly fit any of the existing facts.

[3] The trial judge was of the opinion that, while it was his duty to cut off all the affirmative judgment, plaintiff was nevertheless answerable for \$800, the credited value of the half interest in the two old machines. The court held this to be a payment which defendants might recover under the authority of the *Houser & Haines-McKay* decision. In this we cannot follow the reasoning of the trial judge. This \$800 was not actually paid in money. It is true that it was allowed as a credit when the 1911 machine was purchased. The very essence of a rescission is that the parties are placed in statu quo. *Reidt v. Smith*, 134 Pac. 1057. The reason why one rescinding a trade cannot recover more than the amount paid is that he elects to swap back; he must put the other party where he found him.

There is nothing in the record to indicate that plaintiff would have taken the half interest in the old machines, if it had understood that it was to be obligated at that time or at some future time to pay for that interest in money. In rescinding the purchase defendants are bound to place plaintiff in the same situation it would have been had no trade been made. The rule has been laid down in this state, and it is consistent with the rule as declared in all the books. "The law is that a party cannot ratify one part of a contract or transaction, which is beneficial to his interests, and disaffirm as to the remainder; if he elects to rescind, he must rescind in toto. * * * He must either elect to affirm the contract and defend because of its breach, or rescind the same in toto." *Seattle National Bank v. Powles*, 33 Wash. 21, 73 Pac. 887. In other words, if defendants compel plaintiff to take back the 1911 machine, or if they acquiesce in the taking of it back, they thereby absolve the plaintiff of all liability growing out of the original transaction. The half interest in the machines, if it be called a payment, is in defendants' hands, and the possession of the

specific property is a sufficient return of the consideration and satisfies the law. It is only where a payment is made in money or where the specific thing cannot be returned that a judgment for money can be claimed upon rescission.

With this correction we believe that the judgment of the lower court is as nearly consistent with the true merit of the case as it is possible for any court to arrive at. Therefore, without discussing the record or the many assignments of error, we have concluded to remand the case, with instructions to the lower court to set aside the verdict in so far as it finds for the defendants in any sum, and that no judgment other than a judgment for costs be entered in their favor. The plaintiff will recover its costs in this court.

CROW, C. J., and GOSE, ELLIS, and MAIN, JJ., concur.

PIERCE v. MITCHELL, Judge, et al.
(Supreme Court of Washington. Jan. 21, 1914.)
FALSE IMPRISONMENT (§ 7*)—RIGHT OF ACTION—DEFENSES—JUDGMENT—BAC.

Where plaintiff, having been convicted of contempt of court, remained in jail for a few days, then paid his fine and costs, and took no other steps to have the judgment reviewed, either by appeal or by habeas corpus proceedings, he thereby acquiesced in the judgment and could not maintain an action against the judge and the sheriff for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 5-61, 79; Dec. Dig. § 7.*]

Department 1. Appeal from Superior Court, Thurston County; R. B. Albertson, Judge.

Action by C. R. Pierce against John R. Mitchell, as judge, and George Gaston, as sheriff, of Thurston county. From a judgment of dismissal, plaintiff appeals. Affirmed.

C. R. Pierce, in pro. per. Thomas M. Vance and John M. Wilson, both of Olympia, for respondents.

PER CURIAM. The plaintiff in this action, on information filed by the former prosecuting attorney of Thurston county, was cited to appear in the superior court for that county for an alleged contempt of court committed by the writing of a letter to the judge of that court containing scandalous and contemptuous matter touching a cause therein pending. He was tried, convicted, and sentenced to pay a fine of \$50 and costs and was by the court remanded to the custody of the sheriff until the same should be paid. After remaining in jail for a few days, the defendant in that action, plaintiff here, paid his fine and costs and went his way. No appeal was taken from that judgment, and, on the record, its legality therefore stands confessed. Some months after his discharge, the plain-

tiff brought an action against the presiding judge, who sentenced him and the sheriff, who carried out the sentence, claiming damages for his conviction, sentence, and imprisonment in the sum of \$10,000.

We find it unnecessary to review the pleadings in this case further than to say that the complaint seeks to allege the facts as constituting false imprisonment, and the answer sets up in justification the judgment of contempt, the payment of the fine, and the fact that no appeal was ever taken from the judgment. The fact of payment the reply admits. Upon the record so constituted the defendants moved for judgment on the pleadings. The motion was heard before Hon. R. B. Albertson, presiding judge; all parties being present by counsel. The motion was granted, and the action was dismissed, with costs.

It is obvious that, if the appellant was legally convicted and imprisoned in the contempt proceeding, neither the judge who pronounced the sentence nor the sheriff who carried it out can be made to respond in damages for so doing. The plaintiff, never having appealed from the conviction in the contempt proceeding, and never having sought to review that proceeding by habeas corpus or otherwise, but having, in effect, acquiesced therein and having confessed the validity of the judgment by paying the fine, cannot now question its validity or make his imprisonment thereunder the basis of an action for damages.

The judgment is affirmed.

STATE v. SMITH.
(Supreme Court of Washington. Jan. 21, 1914.)

FORGERY (§ 29*)—INFORMATION—DESCRIPTION OF OR SETTING FORTH INSTRUMENT.

An information for forgery, which set out as the subject of the forgery the following instrument: "Great Northern Railway Co. Certificate of Identification. Issue for the month of Feb'y, 1913, Cascade Division, Section Gang No. 325, Working No. Seven. Signature of Workman: John Hauser. Dan Armstrong, Foreman," and alleged that a certificate in that form was used to identify workmen to the disbursing agent, was sufficient without the averment of extrinsic facts showing its legal efficacy, since the instrument set out, as was apparent upon its face, was an instrument for the identification of a person, specifically made the subject of forgery by Rem. & Bal. Code, § 2583, though if it were not for the statute it might be necessary to aver facts extrinsic to the instrument to show how it could defraud.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 77-81; Dec. Dig. § 29.*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

A. W. Smith was convicted of forgery in the first degree, and he appeals. Affirmed.

Leola May Blinn and Ivan L. Blair, both of Seattle, for appellant. John F. Murphy, Crawford E. White, and Reah M. Whitehead, all of Seattle, for the State.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

FULLERTON, J. The appellant, defendant below, was informed against by the prosecuting attorney of King county for the crime of forgery in the first degree. At the trial the jury returned a verdict finding him guilty as charged. Thereafter he moved in arrest of judgment, basing his motion on the ground that the facts stated in the information did not constitute a crime. The motion was overruled, and on the verdict of guilty he was adjudged guilty and sentenced to a term of years in the state penitentiary. This appeal is from the judgment and sentence pronounced upon him.

The information upon which the appellant was tried and convicted, omitting the formal parts, is as follows: "I, John F. Murphy, prosecuting attorney in and for the county of King, state of Washington, come now here in the name of and by the authority of the state of Washington, and by this information do accuse A. W. Smith of the crime of forgery in the first degree, committed as follows, to wit: He, said A. W. Smith, in the county of King, state of Washington, on the 11th day of February, 1913, with intent to defraud, did then and there unlawfully and feloniously, well knowing the same to be forged, utter, offer, dispose of and put off as true to one J. B. A. Johnson, a certain false and forged instrument or writing, of the following tenor and effect, to wit: 'Great Northern Railway Co. Certificate of Identification. Issue for the month of Feby. 1913, Cascade Division, Section Gang No. 325 Working No. Seven. Signature of Workman: John Hauser. Dan Armstrong, Foreman.' A certificate in this form may be issued to any workman, whether there is a balance due him or not, and is to be used as a means of identifying the workman to any agent who may be called upon for delivery of any pay check or time voucher which may be claimed. The signature of the party calling for a pay check or time voucher should correspond to the signature of the workman in the space indicated above, which must be made in the presence of the foreman—said instrument of writing then and there being an instrument or writing for the identification of a person, to wit, John Hauser: Contrary to the statute in such case made and provided, and against the peace and dignity of the state of Washington."

The single question suggested in this court is the sufficiency of the information. It is argued that the instrument alleged to have been forged is not one showing upon its face that it is capable of effecting a fraud, and hence extrinsic averments should have been made, showing how, and in what manner, a fraud could have been effected thereby. But while the rule contended for is perhaps applicable to instruments not specifically enumerated in the statute as being the subject of forgery, it has no application, we think, to

instruments so specially enumerated. Stated in another way, if the instrument alleged to have been forged appears on its face to be one specifically prohibited to be forged by the statute, and it appears that it is capable of being used to defraud some person, it is sufficient to allege the forgery of the instrument without extrinsic averments showing in what manner it is capable of being so used. *Commonwealth v. White*, 145 Mass. 392, 14 N. E. 611; *People v. Johnson*, 7 Cal. App. 127, 93 Pac. 1042. The instrument here alleged to have been forged shows on its face that it is a "writing or instrument for the identification of a person," and as such is one specially mentioned in the statute as being capable of forgery. *Rem. & Bal. Code*, § 2583. That the instrument might be used to work a fraud is also apparent. It is alleged that the instrument was uttered and put off as true to one J. B. A. Johnson. If Johnson was a disbursing agent empowered to issue pay checks or time vouchers of the Great Northern Railway Company, it is easy to see how some such instrument properly issuable to John Hauser might have been thereby obtained from Johnson by the forger of the instrument. The instrument might, if accepted as true, work a fraud either upon Johnson or the Great Northern Railway, and the information is thus sufficiently full to meet the requirements of the law.

The judgment is affirmed.

CROW, C. J., and MOUNT, PARKER, and MORRIS, JJ., concur.

IN RE DESCHAMPS' ESTATE.

(Supreme Court of Washington. Jan. 23, 1914.)

1. HUSBAND AND WIFE (§ 258*)—SEPARATE OR COMMUNITY PROPERTY.

Where real estate was owned by a wife at the time of her marriage, the husband by paying out some of his money in repairs and upkeep did not acquire a community interest therein, since the status of the property was fixed at the time it was purchased, especially where the amount advanced by him was small and entirely disproportionate to the value of the property and did not appear to have been advanced with the understanding on the part of either the husband or wife that it carried an interest in the property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 909; Dec. Dig. § 258.*]

2. HUSBAND AND WIFE (§ 255*)—SEPARATE OR COMMUNITY PROPERTY.

Where the consideration for a conveyance was paid almost, if not entirely, by the transfer of property owned by a wife at the time of the marriage, and it did not appear that the wife intended to give up a one-half interest therein or understood that her husband could assert a greater interest than would be represented by his advances, if any, the naming of the husband in the deed as one of the grantees did not give him a community interest in the property.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 900-902; Dec. Dig. § 255.*]

3. HUSBAND AND WIFE (§ 262*)—SEPARATE OR COMMUNITY PROPERTY.

The presumption that property standing in the name of either spouse or both spouses is community property is rebuttable, and the courts will look beyond the terms of the conveyance and ascertain, if possible, the true intention and purpose of the parties.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

Department 1. Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceeding for final distribution and settlement of the estate of Anna Deschamps, deceased. From a decree awarding certain real property to a daughter, the surviving husband appeals. Affirmed.

McCafferty, Robinson & Godfrey, of Seattle, for appellant. Scott Calhoun, of Seattle, for respondent.

CHADWICK, J. Mrs. Deschamps died on the 24th day of December, 1909, leaving a will by the terms of which she devised and bequeathed to Mrs. Georgette McCabe, a daughter by a former husband, all of her estate except certain real property situated in Pierce county, which she willed to her husband, Samuel Deschamps, upon condition that he relinquish any claim which he might have in the estate devised to her daughter. The will was duly admitted to probate and pronounced valid. Deschamps was ordered to elect whether or not he would abide by the provisions of the will. In compliance with this order, Deschamps filed a notice in which he declined to accept under the will and stated his intention of retaining his separate and community interest in the property so devised. He also filed objections and exceptions to the final account of the executor, which were overruled and denied. On April 23, 1913, the court entered a decree awarding the real property to the daughter Mrs. McCabe. From an order overruling objections and exceptions to the final account, this appeal is taken.

The only question for our determination is whether or not the real property in controversy is community property. Appellant bases his claim upon the facts that in the deed of conveyance he is named as joint grantee; that part of the consideration was his separate property; and that the property was acquired during the time he and the deceased were living together.

[1] At the time of her marriage, Mrs. Deschamps was the owner of the Olympic Apartments, in Seattle, Wash. Appellant claims that they were in bad condition, and that he paid out some of his own money in repairs and up-keep. This would not give him a community interest. The status of the property was fixed at the time it was purchased. *Katterhazen v. Meister*, 134 Pac. 673. It was in Mrs. Deschamps, and unless divested by deed, by due process of law,

or the working of an estoppel, must remain there, subject to a possible equity under the case of *Heintz v. Brown*, 46 Wash. 387, 90 Pac. 211, 123 Am. St. Rep. 937, as distinguished in *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1068, and *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870, in which case the court said: "We do not desire to extend the rule in that case." The amount advanced, if any, was small, and entirely disproportionate to the value of the property, and, it nowhere appearing that it was advanced with the understanding on the part of either husband or wife that it carried an interest in the property, it ought to be disregarded under the rule of *Worthington v. Crasper*, 63 Wash. 380, 115 Pac. 849.

[2] Mrs. Deschamps traded a one-half interest in the apartments to one Grow for the property in controversy, consisting of two lots and a dwelling house, described as lots 31 and 32, block 174, Gillman's addition to Seattle. This property was mortgaged for \$2,286.70, which the grantees assumed. The other half interest in the Olympic Apartments was traded for a farm in Pierce county, also mortgaged. This mortgage was later foreclosed, and with this property we are not concerned. In both these transactions appellant is named as joint grantee. Appellant says that he gave Grow, as a part consideration for the Gillman addition property, mining stock worth \$600 and about \$100 in cash, and that he paid out of his own money over \$200 in installments to be applied on the mortgage. The stock was not shown to have had any value; it had never paid any dividends. The grantor does not seem to have been sufficiently impressed with its value to consider it a factor in the purchase price. While appellant's testimony as to the payments made by him is undisputed, it is also unsupported. It is probable that appellant furnished the money to make six payments of \$35.17 each, as he claims; no receipts were offered in evidence. Assuming, however, that appellant did expend the sums claimed to have been spent, the total amount would not exceed \$500. This, under the authorities cited, would not give him a community interest in the property. The conduct of the husband after the death of his wife is such as to warrant a belief that he did not at the time regard the property as his own. The beneficiary under the will met all payments due on the mortgage and in the way of taxes and assessments. He allowed her to proceed apparently on the theory that the property was the sole and separate property of her mother and that she was the sole devisee.

Appellant contends that he is the owner of a community interest in virtue of the deeds. He is named as a common grantee. The testimony upon which the husband depends to show his interest in the property as he

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

claims it to be evidenced by the deed is as follows: "Q. Do you recall how the deed came to be given to Mr. and Mrs. Deschamps, both names being mentioned here? You may have forgotten it, Mr. Grow. I will submit it to you. It is 'Exhibit B,' and this is your signature, J. A. Grow? A. Yes. Q. And I call attention to the body of the deed, which makes the grantees Samuel Deschamps and Anna Deschamps. Now do you recall anything about why that was? A. Why, as we were going down to get the deed signed up, Mr. Deschamps asked Mrs. Deschamps if she was willing for his name to appear in the deeds both the same, and she said, 'Yes,' to have them; he wanted his name in the deed. That was about all there is to it."

Another witness testified as follows: "I had a client that had 200 acres over at Roy, Wash., and wanted to get into a rooming house. I was up there one evening at Mr. Deschamps' and Mrs. Deschamps' place, and I submitted a proposition to them. So, of course, they says: 'Well, we will look into the matter.' So I brought my client up there to look at the house, and after we got through looking through the house, we took a trip over to Roy, Wash., to look at the land. So when we got over there, why, coming back, why everything was satisfactory. We were going to take Mrs. Deschamps along with us at the time, but she says the both of them cannot leave the house at the same time. So Mr. Deschamps went over there to look at the land, and he explained it to her just as he saw it, and, of course, they agreed to make the deal. So we made the deal. Q. Now, what talk, if any, had you with Mrs. Deschamps with reference to making the deal? A. Well, when we got through taking the invoice up at the house and we came down to—I asked them to come down to the office; I had my office at 805 Third avenue at that time. * * * I asked them to come down to close up the deal. So when the time comes they were down at the time. * * * So when the deed was drawn, I asked Mrs. Deschamps, * * * 'Now, Mrs. Deschamps, do you want this deed in your name or in your husband's?' I asked Mr. Deschamps first, 'Do you want this deed in your name?' He says: 'Ask my wife. Whatever she says.' * * * So she says, 'Why certainly, * * * the property belongs equal between us both.'"

Appellant's main reliance is put upon the case of *In re Treslender's Estate*, 70 Wash. 16, 125 Pac. 1034. In that case the husband attended to the purchase of the property, and there was much testimony to support the contention that the property was purchased with the separate funds of the wife. We held that the husband having taken the deed and having directed the insertion of the name of his wife as grantee, together with the recitation that the property was sold and conveyed

to the wife "as and for her sole and separate property, use, and benefit, and not as community property," was sufficient to bind the husband, and that we would not hear him in denial of his own act. In this case the consideration paid for the property was almost, if not entirely, paid out of the property of the wife. It is not shown that the wife ever intended to give up a one-half interest in the property, or that she understood that her husband could assert a greater interest in the property than would be represented by his advances, if any.

[3] The mouth of the wife is closed in death, and there is no one to speak for her unless it be the law, so often declared, that where property standing in the name of either spouse or in the name of both spouses is presumed to be community property, that such presumption is rebuttable, and that courts will not be bound by the terms of the deed but will look beyond it and ascertain, if possible, the true intent and purpose of the parties. Having this principle in mind, and considering the whole record, we are not satisfied that the husband has made out a case that would warrant this or any other court in decreeing him to be the owner of a one-half interest in the property.

Certain personal property was involved in the trial below. The court in rendering its decision said: "In the matter of the estate of Anna Deschamps, deceased, the ruling of the court in that case is that the real property described in the city of Seattle was the separate property of the deceased. That the furniture was, of course, community property, and it being frittered away and lost, the executor of the estate will be held to account for it, and you may take testimony as to the value of it."

No testimony seems to have been taken as suggested by the court, and no findings were made. The state of the record is such that we do not feel warranted in passing on the value of the personal property.

The judgment of the lower court is affirmed.

CROW, C. J., and ELLIS, MAIN, and GOSE, JJ., concur.

COOPER v. FARMERS' & MERCHANTS' BANK OF WENATCHEE.

(Supreme Court of Washington. Jan. 21, 1914.)
APPEAL AND ERROR (§ 1210*)—REMAND—PROCEEDINGS AT NEW TRIAL.

Where a judgment for plaintiff was reversed for exclusion of evidence offered by defendant which the Supreme Court deemed relevant and material, the trial court on the new trial should have weighed the evidence and rendered judgment in accordance with his views of the law and the facts instead of rendering judgment for defendant in supposed conformity to the Supreme Court's opinion, as the Supreme Court could not well direct a judgment with-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

out knowing what the evidence on the new trial would be.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4670, 4710; Dec. Dig. § 1210.*]

Department 2. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by Florence Cooper against the Farmers' & Merchants' Bank of Wenatchee. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Reeves & Reeves, of Wenatchee, for appellant. R. S. Ludington and Ludington & Shiner, all of Wenatchee, for respondent.

MAIN, J. This cause was here upon a former appeal. The opinion then rendered is reported in 68 Wash. 310, 123 Pac. 465. For a statement of the facts, reference will be made to that decision. The cause was there reversed for the reason that the trial court had declined to permit certain evidence to be introduced which this court deemed relevant and material. Upon a retrial in the superior court, the evidence which had been refused upon the first trial was admitted. At the conclusion of the retrial, the court, believing that, by the decision of this court upon the former appeal, it had been directed to enter a judgment for the defendant, apparently did so believing that the weight of the evidence sustained the plaintiff's contention. In rendering his decision the trial judge, while referring to the reversal by this court of the first judgment, among other things said: "Under this decision there is only one thing the Supreme Court is going to do with this case, and that is to hold that, irrespective of theories and irrespective of principles, they just sort of feel that the plaintiff in this action ought not to recover, and that the defendant should, and therefore they will so hold. I don't think that ought to be the real theory from the pleadings or the facts before the court. Whether it is fortunate or not don't make any difference. They will do that. You can't go beyond it. They have already said in fact they are going to." Thereupon judgment was entered in favor of the defendant, from which the present appeal is prosecuted.

We think the trial court did not correctly interpret the former opinion. Indeed, this court could not well have directed a judgment without knowing what the evidence was to be. Upon a retrial it became the duty of the trial court to weigh the evidence which had been introduced and render judgment in accordance with his views of the law and the facts. From the opinion of the trial judge it is very apparent that he believed the appellant had sustained her case by a fair preponderance of the evidence. Upon an examination of the record it is apparent to us that he might well think so. Giving the evidence introduced upon the retrial, including that

which had not been admitted upon the first trial, its full and fair consideration, it does not meet what this court in its former opinion held would be sufficient to justify a judgment for the respondent.

The judgment will be reversed, and the cause remanded, with directions to the superior court to enter a judgment in favor of the appellant.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

MUSSELMAN v. KNOTTINGHAM et ux.

(Supreme Court of Washington. Jan. 21, 1914.)

1. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVIT—REQUISITES.

Rem. & Bal. Code, § 228, provides that an affidavit for publication of a summons shall recite that a copy of the summons and complaint has been deposited in the post office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known. Held, that such section does not require that the affidavit shall recite the mailing of a copy of the summons and complaint, where it alleges that defendant's place of residence is unknown to the affiant.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 108-120; Dec. Dig. § 96.*]

2. MORTGAGES (§ 440*)—FORECLOSURE—SERVICE BY PUBLICATION—SUFFICIENCY.

Where, in proceedings to foreclose a mortgage, the owner was served by publication, and the record showed that he was not a resident of the county where the suit was instituted, that diligent effort on the part of the attorney who had charge of the foreclosure proceedings and who made the affidavit for publication, to locate him so as to make personal service, was made, and that service by publication was not commenced until a few days prior to the expiration of 90 days after the filing of the complaint, and the affidavit alleged that his residence was unknown, the service was authorized and regular.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1298, 1299, 1308-1307; Dec. Dig. § 440.*]

3. MORTGAGES (§ 401*)—MATURITY—FORECLOSURE.

An option contained in a mortgage to declare the whole debt due for nonpayment of interest is sufficiently exercised by the commencement of foreclosure proceedings.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1160-1165, 1208, 1209; Dec. Dig. § 401.*]

Department 2. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by Thomas O. Musselman against W. S. Knottingham and wife. Judgment for defendants, and plaintiff appeals. Affirmed.

Berkey & Cowan, of Spokane, for appellant. C. H. Spalding, of Lind, for respondents.

MORRIS, J. The lower court denied appellant any relief in an action to set aside a decree of mortgage foreclosure, together with the certificate of sale and sheriff's deed, up-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on the ground that the judgment of foreclosure was void because of lack of jurisdiction in the court, due to alleged fatal defects in the attempt to obtain service by publication. The objection to the sufficiency of the service by publication is that no copy of the summons and complaint was mailed to the appellant's last-known place of residence.

[1] Our statute (section 228, Rem. & Bal. Code) provides that the affidavit for publication shall recite that a copy of the summons and complaint has been deposited in the post office directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known. The affidavit upon which this publication was based recites "that affiant does not know the place of residence of said defendant." This recital was a full compliance with the statute, and, because thereof, it was not required that it should contain a further recital of the mailing of a copy of the summons and complaint.

[2] The record shows that appellant was not a resident of Adams county, where the foreclosure suit was properly instituted, and that a diligent effort upon the part of the attorney, who had charge of the foreclosure proceedings and who made the affidavit, to locate him, so as to make personal service, both through the sheriff's office of Adams county and the city marshal of Odessa, was made, and that service by publication was not commenced until a few days prior to the expiration of 90 days after the filing of the complaint. We are, for these reasons, satisfied that service by publication was regular. The foreclosure was had because of the default in the payment of taxes and an installment of interest, and complaint is now made that the lower court refused to permit appellant to make a showing that no notice was given him of the mortgagee's election to declare the whole sum represented by the mortgage to be due and payable because of default in the payment of interest and taxes. There was no tender of the interest due prior to the commencement of the foreclosure suit.

[3] The option contained in the mortgage to declare the whole debt due for nonpayment of interest was therefore sufficiently exercised by the commencement of the foreclosure proceeding. *Weinberg v. Naher*, 51 Wash. 591, 90 Pac. 736, 22 L. R. A. (N. S.) 956; *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232.

Other reasons might be given why the judgment of the lower court was right, but, as no other questions than those we have noticed are suggested by the appeal, no further discussion will be indulged in, and the judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

WEBSTER v. BEAU et al.

(Supreme Court of Washington. Jan. 21, 1914.)

1. DAMAGES (§ 40*)—BREACH OF CONTRACT—AMOUNT OF RECOVERY.

Where defendant breached a partnership contract to engage in the fur business in the northern part of Alaska, and there was no established business by which the profits could be measured, plaintiff cannot recover for prospective profits; the matter being one of speculation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72-88; Dec. Dig. § 40.*]

2. DAMAGES (§ 45*)—BREACH OF CONTRACT—RECOVERY.

Where a defendant breached a contract to engage in the fur trade in Alaska, plaintiff is entitled to recover such losses as he actually sustained in the way of expenses in performing his part of the agreement, and for loss of time while so engaged.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 92-98; Dec. Dig. § 45.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Edward Webster against John L. Beau and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Wm. Martin and Hugh C. Todd, both of Seattle, for appellant. Ira Bronson, of Seattle, for respondents.

CROW, C. J. Action by Edward Webster against John L. Beau, H. T. Harding, and Ed Born to recover damages for the breach of a written contract. The complaint, which purports to state two causes of action, in substance alleges: That plaintiff has passed a number of years in that portion of Alaska within the Arctic Circle, known as the "Mackenzie River Country," which is inhabited by fur-bearing animals. That during his sojourn there he acquired extensive and valuable information relative to the fur trade and the methods of obtaining furs from the native Indians and Eskimos. That in 1907, at Nome, Alaska, John L. Beau, one of the defendants, requested him to enter into negotiations with the view of jointly engaging in the fur-trading business. That later he asked that plaintiff accompany him to Seattle to confer with the defendants H. T. Harding and Ed Born. That further consultations were held in Seattle; all parties named being present. That on November 12, 1907, a verbal agreement previously made was reduced to writing by Beau, on behalf of himself and the defendants Harding and Born, in the form of a letter or proposition, which Beau signed, and which plaintiff accepted and also signed. That the defendant Beau then requested that plaintiff proceed to San Francisco to ascertain the plans of the whaling fleet for the next season, and also to secure suitable men to assist in conducting the contemplated fur-trading business. That Beau then advanced

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

\$95 to plaintiff for immediate expenses, and promised further advances as needed. That plaintiff went to San Francisco, where he wrote a number of letters and sent a telegram to the defendant Beau, but received no answers. That in April or May, 1908, he mailed a registered letter to Beau, and received an answer, in which Beau stated that he and his associates would not carry out the agreement. That plaintiff was capable of earning \$5 per day; and that, for money disbursed in necessary expenses and for loss of time, he had sustained a loss of \$1,985, upon which the \$95 advanced by Beau should be credited.

The written proposal upon which the second cause of action is also predicated reads as follows:

"Seattle, Wash., Nov. 12, '07.

"Mr. E. Webster, Seattle, Wash.—Dear Sir: Reference our conversation regarding McKenzie River Expedition will say: We will arrange to place a stock of trade goods there at such a place as you and we may select. The stock, to consist of such wares as we may deem proper for the native trade purposes, shall constitute approximately the value of twelve thousand dollars, including duty and freight. The stock to be shipped on such carrier as will make best and lowest rates, concurrent with safety. The title and ownership of all wares and buildings erected shall be vested in us. You are to devote your time and efforts to handling and trading off the said wares and merchandise for fur, whalebone, etc., and for your services you are to receive thirty-three and one-third (33⅓) per cent. of the net profit of the McKenzie 'Your Stations.' The fur and trade goods obtained by you in exchange and otherwise shall be turned over to us on arrival of our boat each and every season; such furs are to be kept separate and distinct and sold to the best possible advantage, and separate and distinct accounts kept and rendered to you. All accounts and invoices and all matters pertaining to your station shall be subject to your inspection at all times. Two-thirds, or 66⅔ per cent., of the net profit shall go to us. In taking stock of inventory for purpose of ascertaining profit or net results, the cost of building or equipment shall not be figured. We will put in another stock the second year as large or larger, if you advise us by mail to increase; otherwise practically same amount and commodities. Following propositions are to be part of our agreement, and you can avail yourself of any or either at any time:

"First. If the profits during or within five years shall be such that we have during these five years, or before, our money and one hundred per cent. profit, then and in that event from that time on you shall receive fifty per cent. profit, and be the one-half owner of all stock and buildings, and title vested in you to that extent.

"Second. If you at any time invest or put in 18⅔ per cent. of all capital invested in

your stations, then and immediately thereafter you shall receive fifty per cent. of the profits, and the 16⅔ per cent., or one-sixth, of the property shall then be vested in your name.

"Third. If at any time you can establish the conditions as in article first, you shall receive a salary in addition to the fifty per cent. profit.

"Fourth. In case you have made one hundred per cent. net profit or more the first year, then you shall have one-half, or fifty per cent., of the profit for your services, and same ratio if the net profits shall be large; this also applies to subsequent years.

"Fifth. Any and all trading or buying the Schooner Abler does from spring 1909 on between point one-half distance between Point Barrow and your station, you shall receive twenty-five (25) per cent. of the net profit. Of the profits derived from any purchases or trade made by Schooner Abler season 1908 from Camden Bay and East, you shall receive twenty-five per cent. of the profits. Losses to be borne in same ratio as profit. You are to keep accurate account of all transactions.

"Truly,

John L. Beau.

"O. K. E. Webster."

For his second cause of action the plaintiff, after pleading the agreement, in substance alleged that the defendants refused and neglected to purchase goods in the sum of \$12,000 for the partnership as agreed; that, as a result of such refusal, the entire season of 1908 was lost, together with profits that would have been earned by the plaintiff; that the portion of Alaska to which it was agreed the plaintiff should go with the goods was a section but little frequented by traders, where heavy profits in the fur, ivory, and mercantile business would have been realized; and that the proposed partnership during the term of two years would have earned a net profit of \$75,000. Plaintiff demanded judgment for \$1,890 on his first cause of action, and for \$25,000 on his second cause of action.

The defendants John L. Beau and H. T. Harding admitted the execution of the written agreement by John L. Beau, but denied all other allegations of the complaint. The defendant Ed Born has been dismissed from the action, and no further notice will be taken of him. The first trial resulted in a verdict for \$14,905 in plaintiff's favor against the defendants Beau and Harding. Upon the hearing of the defendants' motion for a new trial, the trial judge, being of the opinion that anticipated profits were too remote and speculative to be made the basis of a recovery, ordered the plaintiff to remit \$13,585 from the verdict, or accept a new trial. Plaintiff refused to make any remission, and a second jury trial was had before a different judge, who instructed the jury, and tried the cause, upon the theory that lost profits for one year only could be recovered, and that there could be recovery for expenses or

lost time. Following this instruction, the second jury returned a verdict for \$8,000 in plaintiff's favor against the defendant John L. Beau. Motions for a new trial were interposed by the plaintiff and the defendant Beau. The defendants also interposed a motion for judgment notwithstanding the verdict. The latter motion was sustained, and a judgment of dismissal was entered, for the reason that the trial judge concluded that no contract between the parties had been proven. The plaintiff has appealed.

The trial judge in substance instructed the jury that the written instrument would not be binding upon the parties until (1) they agreed upon and selected a place or station in which to instal their stock of goods, and (2) they had selected and approved a stock of goods which they deemed suitable for trading purposes. This instruction was given upon the theory that the written instrument itself contemplated the performance of these prerequisite conditions to make it a binding contract. There was evidence that the station and stock of goods had been agreed upon. As the jury found in appellant's favor on the issue involved, the instruction, although excepted to by appellant, could not have been prejudicial as against him; yet, in view of the new trial which must be ordered, we announce our approval of the instruction as given.

Other assignments of error, in substance, present two questions: (1) Whether appellant can recover damages occasioned by loss of anticipated profits; and (2) whether he can recover damages occasioned by loss of time, and for necessary disbursements. The trial judge at first held he could recover for loss of anticipated profits only, and that, the contract being one for a partnership which could be terminated at any time after the business had actually been installed, appellant's claim for lost profits should be confined to those that might have been earned during the year 1908. He further held appellant could not recover for loss of time, or for expenses incurred. As before stated, a verdict was returned for \$8,000; but later the trial judge sustained respondents' motion for judgment non obstante veredicto, on the theory that no valid contract had been shown. We conclude that he erred in sustaining the motion, and also erred in the theory upon which he tried the case.

[1] There was sufficient evidence to be submitted to the jury upon the issue whether there was a definite, certain, and binding contract, and the jury, upon such evidence, which was properly submitted, found a valid contract had been made. We hold that under the contract here involved appellant was not entitled to recover damages for loss of anticipated profits. The contract contemplated the establishment of a future business in a remote and sparsely settled country, under dangerous and adverse conditions. It did not pertain to any existing business.

Any loss of profits would necessarily mean the loss of such anticipated profits as might possibly be earned in the future from a business not yet created, installed, or conducted. There was no going business which had previously earned profits sufficient to form a basis upon which to estimate probable future profits. Evidence offered to show a loss of profits in this action would necessarily consist of opinions of witnesses, uncertain and speculative in character. Who could anticipate or foretell that circumstance or contingencies might not have arisen after the business had been actually installed which would result in a total failure to earn any profits whatever? It is common knowledge that parties expecting profitable results frequently enter upon business enterprises which terminate in failure. This court, in common with others, has held that loss of profits under certain conditions may be the basis of a recovery in actions for damages, and appellant has cited the following cases from this court in support of that rule: *Skagit, etc., Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Federal Iron & Brass Bed Co. v. Hock*, 42 Wash. 668, 85 Pac. 418; *Belch v. Big Store Co.*, 46 Wash. 1, 89 Pac. 174; *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 593, 109 Pac. 113, 137 Am. St. Rep. 1059.

The first three cases cited either award damages for actual losses which were not in the nature of profits, or disclosed an established business which presented facts and practical experience upon which an estimate of lost profits could be intelligently predicated. In the *Church Case* a recovery was allowed only for commissions on sales shown to have been actually made. An examination of the authorities will show that the courts with marked uniformity have announced the doctrine that, where an established business has been interrupted or destroyed by breach of contract, or by tort, a resulting loss of profits may become the basis of a recovery; there being a past experience sufficient to render the extent of such loss reasonably certain, and fairly susceptible of proof. *Bogart v. Pitchless Lumber Co.*, 72 Wash. 417, 130 Pac. 490. The cases from this court cited by appellant, where the loss of profits was involved, are in harmony with this rule. The doctrine is equally well established that a loss of prospective profits will not become a basis of recovery in an action upon the breach of a contract to launch a new venture or business. "Where a profit has actually been made, this may be proved as very pertinent to the question what the future profits would probably have been had not the business been interrupted, and as a material aid to the jury in the solution of this question; but, where no profit has ever been realized, the mere loss of an opportunity to try to make a profit is of too uncertain value to be compensated." 1 *Sedgwick on Damages* (9th Ed.) § 193.

Counsel cite and especially rely upon *Dennis v. Maxfield*, 10 Allen (Mass.) 138, to sustain appellant's right to recover for loss of prospective profits herein. Commenting on that case, Mr. Sedgwick, in his work on Damages, immediately after the quotation above made, further says: "In *Dennis v. Maxfield* the plaintiff was hired for a whaling voyage, and was to receive a certain 'lay' or percentage of the profits, and additional compensation, if the cargo reached a certain amount. Being wrongfully dismissed, it was held he could recover compensation for both items of loss; the voyage having ended and the profits of the voyage being known. * * * This, it must be noted, is a contract where the profits are those of a business, not the profits of the plaintiff's individual exertions. He may in such a case wait until the business is completed, and the profit realized, and then recover his proportion, as he did in the case just cited, or, if the business has been so long established that he can reasonably prove that a profit will be realized, he may recover at once upon the breach. But, if it is a new enterprise, and there is no proof that profit will be made, the plaintiff can prove no loss, and should recover no damages on account of the loss of profits; the burden of proving a profit is upon him." This rule is well sustained by authority. *Kenny v. Collier*, 79 Ga. 743, 8 S. E. 58; *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244; *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 614, 44 Pac. 621, 54 Am. St. Rep. 598; *Winslow Elevator Co. v. Hoffman*, 107 Md. 621, 637, 69 Atl. 394, 17 L. R. A. (N. S.) 1130.

"Where a new business or enterprise is floated, and damages by way of profit are claimed for its interruption or prevention, they will be denied, for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation." 13 Cyc. 59.

"The loss of profits to a business which has been wrongfully interrupted by another is an element of damage for which a recovery may be had; but it must be made to appear that the business was an established one—that is, that it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable." *States v. Durkin*, 65 Kan. 101, 68 Pac. 1091.

A clear distinction is manifest between an interruption of, or an injury to, an existing business which has been successfully conducted for a considerable period of time and the prevention of the establishment of an entirely new business. When the business is in contemplation, but not established, profits that may be anticipated therefrom are too speculative, uncertain, and conjectural to become a basis for the recovery of damages in

an action for the subsequent loss of such profits.

[2] As there was evidence sufficient to sustain the finding of the jury that a valid and definite contract had been entered into between appellant and respondent Beau, and as, under the rule heretofore announced, appellant cannot recover damages for the loss of prospective profits, it necessarily follows that he is entitled to recover such losses as he actually sustained in the way of expenses incurred in performing his part of the agreement, and for loss of time while thus engaged. This was the view entertained by the court on the first trial, when appellant was ordered to remit a considerable amount of the verdict, or submit to a new trial, and is the theory upon which the case must be again tried.

Upon the last trial there was an absolute failure of evidence sufficient to show that the defendant H. T. Harding was a party to the contract, or that he had authorized the respondent Beau to act for him when entering into the contract. As to the defendant Harding the judgment of dismissal was properly entered. As to the respondent Beau the judgment is reversed, and the cause is remanded for a new trial upon the issues joined between him and the appellant. The appellant will recover his costs in this court from the respondent Beau.

MOUNT, PARKER, GOSE, and CHADWICK, JJ., concur.

ALLEN et al. v. CITY OF BELLINGHAM et al.

(Supreme Court of Washington. Jan. 23, 1914.)

1. MUNICIPAL CORPORATIONS (§ 293*)—PUBLIC IMPROVEMENTS—PRELIMINARY RESOLUTION.

Under Bellingham City Charter, § 327, providing that all proceedings for the assessment of sewer districts shall, as far as practicable, conform to the methods therein prescribed for the establishment of street improvement districts, and section 299, providing that no ordinance for the improvement of any street, etc., shall be passed without the publication of the resolution declaring the intention of the city to make such improvement, which shall contain a statement of the nature of the proposed improvement, the estimate of the cost thereof, the portion of such cost which is to be assessed against the property abutting and included in the assessment district provided by such resolution, and shall designate a time in which protests against the proposed improvement may be filed, a resolution reciting that it was necessary to improve a certain street by the construction of a trunk sewer outlet and the doing of such other work as might be necessary in connection therewith at a total estimated cost therein specified, which cost it was proposed to assess against the property which could be conveniently sewered or drained by such trunk sewer, and included in an assessment district thereafter to be established according to law, and providing that all persons desiring to make protests might file their protests at

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any time before a time specified, and that the manner of making such improvement and the methods of payment therefor, and all protests against it, would be considered at a meeting of the city council at a time specified, substantially complied with the charter; it being manifest therefrom that the proposed improvement was for sewer construction rather than primarily for the improvement of a street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 773-775; Dec. Dig. § 293.*]

2. MUNICIPAL CORPORATIONS (§ 444*)—PUBLIC IMPROVEMENTS—PRELIMINARY RESOLUTION.

As there is no constitutional requirement that notice of a proposed municipal improvement be given by resolution or otherwise, and as the Legislature might therefore dispense with such notice, a failure on the part of taxing officers to initiate an improvement by a proper resolution did not avoid the assessment, where an opportunity was given to present objections to the assessment roll on a reassessment as authorized by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1064, 1069; Dec. Dig. § 444.*]

3. JUDGMENT (§ 714*)—RES JUDICATA—VACATION OF ASSESSMENT.

Under Laws 1911, c. 98, § 21, providing that the council or other legislative body of a city at the time fixed for hearing objections to the confirmation of an assessment roll for a local improvement may set aside such roll and order that such assessment be made de novo, and then shall confirm it by ordinance, where an assessment was vacated in an action to enjoin its collection, whereupon, as authorized by an ordinance, a new assessment roll was prepared and approved, a judgment in such action was not res judicata as to the invalidity of the new assessment roll.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1240, 1242, 1243; Dec. Dig. § 714.*]

4. MUNICIPAL CORPORATIONS (§ 514*)—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—REJECTION OF ASSESSMENT ROLL.

Under Laws 1911, c. 98, § 21, authorizing the council or legislative body of a city to set aside an assessment roll for a local improvement, and order that such assessment be made de novo, where after a judgment vacating an assessment the city council adopted an ordinance providing for the making of a reassessment, but, upon the submission of the new assessment roll prepared by the board of public works, rejected such roll, a further reassessment could be made and confirmed without the adoption of a new ordinance directing such further assessment.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.*]

Department 2. Appeal from Superior Court, Whatcom County; John A. Kellogg, Judge.

Action by C. W. Allen and others against the City of Bellingham and others. From a judgment of dismissal, plaintiffs appeal. Affirmed.

Black & Black, of Bellingham, for appellants. Dan F. North and Walter B. Whitcomb, both of Bellingham, for respondents.

MAIN, J. This action was brought for the purpose of enjoining the collection of certain

reassessments for local improvements. On May 25, 1908, the city council of Bellingham passed a resolution declaring its intention to construct a trunk sewer outlet on C street between Holly and Laurel streets, and do such other work as might be necessary in connection therewith. This resolution reads as follows:

"Whereas it is necessary to improve C street from Holly street to Laurel street by the construction of a trunk sewer outlet, and doing such other work as may be necessary in connection therewith at a total estimated cost of twenty-two thousand two hundred and fifty-two dollars and sixty-one cents (\$22,252.61) and in accordance with the plans and specifications prepared therefor and now on file with the comptroller, which cost it is proposed to assess against the property which can be conveniently sewered or drained by said trunk sewer and included in an assessment district hereafter to be established according to law.

"It is further hereby resolved that all persons interested desiring to make protests against the said improvement may file their protests at any time before 8 o'clock p. m. Monday, June 8th, 1908, in the office of the city comptroller.

"It is further hereby resolved that the manner of making said improvement and the method of payment therefor and all protests against the same will be considered at a regular meeting of the city council to be held in the council chambers at the city hall at the hour of 8 o'clock p. m. of said Monday, June 8, 1908, at which time and place all persons desiring to be heard are hereby notified to be present."

On June 15, 1908, in pursuance of the intention declared in the resolution, ordinance No. 871 was passed, which provided for the construction of the sewer outlet, and for the levying and collection of a special assessment to pay for the same. Subsequently the sewer was constructed and the assessment roll prepared. Thereafter, and on January 21, 1910, the Bellingham Bay Land Company, W. R. Moultray, John Siegfried, and Thos. W. Miller, all of whom are appellants in this action, instituted an action in the superior court for Whatcom county to enjoin the collection of the assessment. Judgment was rendered vacating, setting aside, and holding void the assessment. On April 10, 1911, ordinance No. 1587 was approved, which provided for a reassessment of the property benefited by the construction of the sewer in C street between Holly and Laurel and the doing of such other work as was necessary in connection therewith, and created an assessment district. Thereafter the board of public works of the city of Bellingham prepared an assessment roll, and notice was published that a hearing would be had upon the same on November 20, 1911. This roll was not approved by the city

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

council, and a resolution was passed directing that a new roll be prepared. A new roll was prepared, and on March 18, 1912, was confirmed by the city council. No claim is made that an opportunity was not given to make objections to this roll and to have a hearing thereon. The present action was instituted for the purpose of restraining the collection of the assessment made in the reassessment roll of March 18, 1912. The complaint is voluminous, but the facts stated are sufficient for an understanding of the questions which are presented. To the complaint a demurrer was interposed and sustained. The appellants elected to stand upon their complaint, and refused to plead further. Judgment was entered dismissing the proceeding, from which an appeal is prosecuted.

The principal contentions of the appellants are: First, that the city council had not acquired jurisdiction to make the reassessment in question; second, that the former proceeding in which the original assessment was held to be void was *res judicata* as against the right to reassess; and, third, that in any event the reassessment could not be made under ordinance No. 1587 after the council had rejected the first roll prepared thereunder and by resolution directed the making of a new roll.

[1] I. It is earnestly contended that the resolution above set out, declaring the intention to make the improvement, was not sufficient to confer jurisdiction, and therefore the reassessment was made without due process of law.

Section 327 of the city charter, being one of the sections in which the city is empowered to provide sewerage, requires that: "All proceedings for the assessment of drainage or sewer districts or subsewer districts, shall, as far as practicable, conform to the methods herein prescribed for the establishment of street improvement districts."

Section 299 of the charter, being one of the sections covering the matter of street improvements, provides: "No ordinance providing for the improvement of any street, avenue, public way or alley shall be passed without the publication of the resolution declaring the intention of the city to make such improvement and not until the expiration of at least ten days from the date of the first publication of such resolution. Such resolution of intention so to improve shall contain, among other things, a statement of the nature of the proposed improvement, and the estimate of the cost of the same, and the portion of the cost of the same which is to be assessed against the property abutting (and included in the assessment district provided by such resolution) on such street or alley proposed to be improved, and shall designate a time, not less than ten days, in which protests against the proposed improvements may be filed in the office of the city clerk."

* * *

It will be noted that by this section of the charter a local improvement is to be initiated by resolution declaring it to be the intention of the city to make such improvement. The requirements of the resolution as therein specified are: (a) The statement of the nature of the proposed improvement; (b) the estimated cost thereof; (c) the portion of the cost that is to be borne by the property benefited and included in the assessment district; and (d) shall designate a time and place at which protests against the improvement may be presented.

The resolution in question specifies: (a) An intention to improve C street from Holly street to Laurel street by the construction of a trunk sewer outlet, and to do such other work as may be necessary in connection therewith; (b) the estimated cost to be \$22,252.61; (c) the cost of the improvement to be assessed against the property which can be conveniently sewer or drained by such trunk sewer and included in an assessment district to be thereafter established; and (d) a time and place for the making of protests against the proposed improvement was fixed. When the matters covered by the resolution are compared with the charter requirements, it appears that there is a substantial compliance therewith. While the resolution may not be artfully drawn, it is sufficiently clear to make manifest that the proposed improvement was for sewer construction, rather than primarily the improvement of a particular street. It would be difficult for one reading the resolution to misconceive its purpose. But if it were assumed that the resolution were insufficient, it would not necessarily follow that the reassessment would be void.

[2] There is no constitutional requirement which makes it necessary that notice of a proposed improvement be given by resolution or otherwise. The Legislature would have had the power to have dispensed with such a notice. Where an opportunity has been given to present objections to a reassessment roll, a failure on the part of the taxing officers to initiate the improvement by a proper resolution does not avoid the assessment if the requirement of the law which was not observed was one which the Legislature might have dispensed with. *Rucker Bros. v. Everett*, 66 Wash. 366, 119 Pac. 807, 38 L. R. A. (N. S.) 582; *Collins v. Ellensburg*, 68 Wash. 212, 122 Pac. 1010. As already stated, in the present case there is no claim that an opportunity was not given to present objections to the reassessment roll which is attacked by this proceeding.

[3] II. It is argued that since three of the appellants here brought a proceeding against the original assessment roll and had it declared void, the judgment there is *res judicata*, and no right existed to make the reassessment. But we think this contention cannot be sustained. The roll here involved is not the same roll as was involved in the

former proceeding. The statute authorizes a reassessment. Laws 1911, c. 98, § 21. To deny the right to reassess would be to withhold a power which is conferred by this act of the Legislature.

In *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448, the court, speaking of the effect of a judgment, declaring the original assessment roll void as against the right to subsequently assess, said: "The cases brought under the old assessment above referred to are not *res adjudicata*, for the reason that the old assessment is superseded by the reassessment. Those cases had reference to the old assessment, and were *res adjudicata* as to the questions raised therein; but they are not so as to the reassessment, further than a payment under the old assessment becomes by the ordinance a payment *pro tanto* under the reassessment. * * *

[4] III. After the decree was entered in the former action holding that the original roll was void, the city council passed ordinance No. 1587, which provided for the making of a reassessment in pursuance of this ordinance. The board of public works prepared a proposed roll, and submitted the same to the city council. This was rejected by resolution and a new reassessment directed. It is claimed that after the submission of the first reassessment roll prepared by the board of public works, the power to proceed under the ordinance directing the same was exhausted, and that a further reassessment could not be made without the passage of a new ordinance. But obviously the power to proceed under the reassessment ordinance could not be exhausted until a roll had been prepared and confirmed by the council or the ordinance repealed. The proposed roll had no validity or effect until confirmed. The right to reject is reposed in the council by the statute. Laws 1911, p. 452.

Finding no error, the judgment will be affirmed.

CROW, C. J., and ELLIS, MORRIS, and FULLERTON, JJ., concur.

JOHANSEN v. PIONEER MINING CO.
(Supreme Court of Washington. Jan. 20, 1914.)

1. MASTER AND SERVANT (§ 287*)—INJURY TO SERVANT—JURY QUESTION.

In a personal injury action by a servant, evidence of the master's negligence in continuing to employ an incompetent, careless foreman *held* to raise a question for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1054-1067; Dec. Dig. § 287.*]

2. MASTER AND SERVANT (§ 271*)—INJURIES TO SERVANT—EVIDENCE.

In a personal injury action against a master, where the servant counted on the incompetency and carelessness of the foreman, evidence of independent circumstances tending to show the foreman's negligence; and also his

general reputation, is admissible; for after several specific acts of carelessness are shown, evidence of the general reputation is admissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 347, 928-931; Dec. Dig. § 271.*]

3. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—JURY QUESTION.

In a personal injury action by a miner who was hurt in riding out of the mine on the elevator, the question of the defendant's negligence in maintaining an unsafe signal wire *held* for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISKS.

Where there are two methods by which a service may be performed, one perilous and the other safe, an employé who voluntarily chooses the perilous way assumes the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

5. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—ASSUMPTION OF RISKS.

Where a miner who was riding out of a mine on the elevator was injured because it was not stopped at the top in accordance with the custom when men were being carried out, a recovery cannot be defeated because there was a way out of the mine by ladder, where it did not appear that the miner knew of the danger from the elevator, or that it was dangerous if properly managed.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.*]

6. TRIAL (§ 194*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In a personal injury action, where the defendant's foreman had been in its employ for a long time, and it was claimed that the defendant was negligent in employing a careless and inefficient foreman, an instruction that where a servant has been in the master's employ for a long time the master is charged with his general reputation as to carelessness and incompetency is not on the weight of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.*]

7. MASTER AND SERVANT (§ 245*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

One who is hired by the day, week, or year is just as much in his master's service in going to or from his work as when actually engaged in the work itself, and hence a miner who rode on the top of the elevator when leaving the mine for a lunch is not guilty of negligence, where he assumed that position in obedience to the orders of the defendant's foreman, unless the danger was glaring and apparent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 682, 778-788; Dec. Dig. § 245.*]

8. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In a personal injury action by a servant, where the jury were charged that they could allow plaintiff compensation only for the injuries shown by the evidence, a charge that for any permanent disfigurements and injuries the compensation could not exceed a sum specified was not erroneous in assuming that the plaintiff was permanently disfigured or crippled.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

9. TRIAL (§ 244*)—INSTRUCTIONS.

In a personal injury action, an instruction restricting the award of damages for permanent disfigurements and injuries to the sum named in the bill of particulars is not erroneous in specifically calling the attention of the jury to the bill of particulars.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

10. TRIAL (§ 260*)—INSTRUCTIONS—GIVING OF INSTRUCTIONS.

The refusal of instructions covered by those given is not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

11. TRIAL (§ 242*)—INSTRUCTIONS—NATURE OF INSTRUCTIONS.

Instructions should be brief and to the point; and, when they are such that they would tend to mislead the jury, they are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.*]

12. APPEAL AND ERROR (§ 978*)—REVIEW—DISCRETION OF TRIAL COURT.

Whether a new trial should be granted because of improper argument of counsel is largely within the discretion of the trial court, and its exercise of that discretion will not be disturbed except in cases of clear abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866-3870; Dec. Dig. § 978.*]

13. NEW TRIAL (§ 29*)—ARGUMENT OF COUNSEL.

In a personal injury action, where defendant called a witness who was not placed upon the stand, and on plaintiff's counsel remarking to the jury upon that fact, the cause was reopened to allow defendant to show why the witness was not called, it was not an abuse of discretion for the trial court to refuse a new trial because plaintiff's counsel again referred to the failure of the defendant to call that witness.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 43, 44; Dec. Dig. § 29.*]

14. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE AWARD.

An award of \$18,000 in favor of a miner capable of earning \$4 per day and his board and lodging, and who was only 29 years old at the time of the injury, is not excessive, where he was very severely crushed and injured.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.*]

Department 2. Appeal from Superior Court, King County; H. A. P. Myers, Judge.

Action by Nils Johansen against the Pioneer Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Ballinger, Battle, Hulbert & Shorts, of Seattle, for appellant. Arctander, Halls & Jacobsen, of Seattle, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover damages for personal injuries received by him while in the employ of the defendant. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff, and a judgment was entered thereon for \$18,000. The defendant has appealed.

The facts are substantially as follows: In the year 1910 the defendant was engaged in

mining in the Nome district, Alaska. It was operating a mine known as the Portland Bench. This mine consisted of a shaft which had been sunk to a depth of about 45 feet. At the bottom of this shaft certain levels had been run in different directions. Within the shaft the defendant had constructed an elevator for the purpose of elevating ore cars from the bottom of the shaft. This elevator extended above the surface something over 20 feet. The construction above the surface was a framework. At the top of this framework was a timber called a crossbeam. Small cars were provided, which were run into the levels and there filled with earth containing gold. These cars were then pushed into the elevator and lifted to a point about 20 feet above the surface, where they were run out on rails to what was called the dump. The power for operating the mine was a steam plant which was located about 60 feet away from the shaft. The hoisting machine was within the power house. A cable ran from the hoisting machine to the top of the framework above the shaft, and extended down into the shaft. By this means the elevator was run up and down the shaft. A system of signals had been arranged by the company for operating this elevator. The signal system consisted of a bell located in the power house. A wire cable extended from the bell to the top of the tower, where it connected with an angle iron which worked on a pivot. Another wire cable extended from a point on this angle iron down the shaft. When it was desired to hoist the elevator loaded with ore, the signal was one bell. When it was desired to hoist when men were upon the elevator, three bells in quick succession, a pause, and then one bell, were the signals given. These signals were given from the bottom of the shaft by pulling upon the signal wire, which extended vertically down the shaft. These signals indicated that when men were upon the elevator it was to be stopped at the surface of the shaft instead of being hoisted to the top of the framework. When one bell was given it indicated that the elevator contained ore, and that the elevator was to be raised to the top of the framework. On the 27th day of March, 1910, the plaintiff had been in the employ of the defendant about nine days. It was his duty to shovel dirt into the cars and assist in pushing them to the elevator. In addition to the elevator, the defendant had constructed a ladder reaching from the bottom of the shaft to the surface. This ladder was usually used by the men in going into and out of the shaft; but men frequently used the elevator for that purpose. At noon on March 27, 1910, the men in the bottom of the shaft were going to their dinner. One Cooper, who was the foreman of the men employed in the shaft, was also at the same time going to his noon meal. The men were

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

requested by Cooper to ride in the elevator instead of climbing the ladder. The men had taken their places within the cage of the elevator when Cooper directed the plaintiff to climb on top of the cage because there was not room in the cage for all of them. In obedience to this request the plaintiff climbed on top of the elevator cage and held to the cable which raised the cage up the shaft. Cooper then signaled the power house to hoist the cage. He gave three short jerks upon the signal wire, paused a moment, then gave another short jerk. But one bell rang in the power house. The engineer in the power house, instead of stopping the cage at the surface of the mine, caused it to be hoisted to the top of the framework above the surface. When the cage reached the top of the framework, the plaintiff was caught between the cage and the crossbeam, and was crushed and badly injured.

The complaint alleged negligence in five particulars: First, that the foreman was incompetent and habitually negligent, and the defendant, knowing these facts, while the plaintiff was unacquainted therewith, retained such foreman in its employ; second, that the hoist house or power house, as it has heretofore been referred to, was stationed a long distance from the shaft, and therefore made the place dangerous; third, that the signal system which was used at that time was defective and out of repair, and that the defendant knew thereof, while the plaintiff did not know of this defective condition; fourth, that the bell used in the power house was not of sufficient size to convey the signals to the operator of the hoisting engine; fifth, that the defendant was negligent in not employing a helper to assist the operator of the hoist in his work in the power house. Defendant, for answer to this complaint, denied these allegations of negligence, and alleged affirmatively: First, that the accident and injuries to the plaintiff were caused by his own negligence in failing to choose a known safe way out of the mine instead of the dangerous method which he adopted; second, that the injuries to the plaintiff were caused by his own carelessness and the carelessness and negligence of a fellow servant; third, that all the conditions surrounding the plaintiff were obvious and apparent at the time, and the plaintiff knew thereof and assumed the dangers; fourth, that under the law of Alaska the plaintiff and the foreman, Cooper, and the operator of the hoist, were fellow servants; that the accident was caused by the negligence of fellow servants for which the defendant is not liable; fifth, that the plaintiff had instituted a prior action in Alaska on the same cause of action, which was dismissed upon its merits with prejudice.

At the close of the plaintiff's evidence, and at the close of all the evidence, the defendant moved the court for a directed verdict. These motions were denied. After the verdict the defendant moved the court for judg-

ment non obstante veredicto and for a new trial upon all the statutory grounds. These motions were also denied.

It is argued by the appellant that the court erred in denying the motions for a directed verdict and for judgment non obstante veredicto, for the reason that there was insufficient evidence to go to the jury upon the question of negligence of the appellant.

[1] It is first argued by the appellant that the evidence shows that the foreman, Cooper, was a careful and competent man. There was evidence offered by the appellant to that effect. There was also evidence to the effect that Mr. Cooper upon several different occasions had been negligent in his work, and that his general reputation about the mine and where he had previously worked was that he was careless. It is plain we think that this made a question for the jury upon this point.

[2] The appellant argues further that the court erred in receiving in evidence independent circumstances which might tend to show negligence, and also the general reputation of the foreman. We are cited to *Dossett v. St. Paul Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Hage v. Luedinghaus*, 60 Wash. 680, 111 Pac. 1041, and *Girocamo v. Tribble*, 70 Wash. 25, 126 Pac. 67. These cases, as we read them, were based upon a single act of alleged negligence. The rule is quite different where numerous acts are proved, and where the general reputation of the servant for negligence is generally talked about. In *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, we said: "We think it was also competent to show the general reputation of the pit boss for competency and regard for the lives and limbs of the miners under his charge. * * * Specific acts of incompetency of the pit boss were admissible in evidence under the general allegation that the pit boss was ignorant and incompetent. * * *"

Wigmore, in his work on Evidence, vol. 1, p. 257, says: "A single act may signify little, but two or three of an extreme quality would signify everything. * * * Proof by reputation is inconclusive, and needs to be reinforced."

In 1 Bailey, *Personal Injuries* (1st Ed.) § 1502, it is said: "Evidence of general reputation is admissible to prove the unfitness of a fellow servant, and ignorance of such general reputation on the part of the master may of itself, where it is his imperative duty to know the fitness of his servant, and where inquiry would have led to such knowledge, be such negligence as to charge the master."

We think it was not error to admit evidence of these several specific acts and of the general reputation of this servant. Upon this question, therefore, we think there was sufficient evidence to go to the jury.

[3] The appellant argues at length that

there was no evidence of the other allegations of negligence sufficient to go to the jury. The evidence on the part of the respondent showed that the foreman, Cooper, gave the proper signal at the bottom of the shaft to cause the elevator to be raised only to the surface. This signal was three sharp pulls on the wire, a pause, and then one pull. This indicated to the man who was operating the hoisting engine that men were upon the elevator, and that it should be stopped at the surface of the shaft. But one bell was rung in the power house, and the operator heard but one bell. This was accounted for on the part of the respondent by the fact that the wire which extended from the top of the framework above the surface of the ground to the power house was very slack. It had no supports under it. And when the jerks were given upon the wire, there was not sufficient force in the wire to ring the bell. It was shown that this condition had existed for some time, and that the foreman himself had complained to the operator of the hoisting engine of this fact. If this was true, as was testified to by witnesses, it made a clear case to go to the jury upon the question of the negligence of the appellant in not maintaining a safe appliance. If this bell wire did not ring the bell according to the signals which were given, it is plain that it was because the wire was slack or the appliance was unfit. The appellant, knowing this fact, was liable by reason thereof. It is true this testimony was disputed, but there was clearly sufficient to go to the jury upon that question.

[4, 5] The appellant also argues that the evidence shows that the respondent adopted an unsafe way out of the shaft, and selected a perilous and unsafe way voluntarily, and for that reason he cannot recover. It is true there was a ladder upon which the men were accustomed to climb out of the shaft. There was also an elevator by which men frequently were carried out of the shaft. The fact that signals were agreed upon for hoisting men from the shaft is sufficient alone to show that it was customary for men to ride out of the shaft in the elevator. The evidence shows that the respondent had been employed in the mine but a short time. He was directed by the foreman to climb on top of the cage. He was acquainted with the signals. It is apparent, we think, that if the cage had been hoisted to the surface of the shaft, which the signals given called for, the respondent would not have been injured. The peril, if any existed, was that the elevator, instead of stopping at the surface as it was signaled to do, was raised more than 20 feet above the surface and to the top of the framework, and injury resulted therefrom. It cannot be said that the way out of the shaft by the ladder was less dangerous than the way out of the shaft by the elevator. One was as safe as the other if they had been properly used. So we think it cannot

be successfully maintained that, even though the respondent climbed upon the top of the elevator of his own volition, this shows that he chose a perilous rather than a safe way.

The rule contended for by the appellant is well settled that where there are two methods by which a service may be performed: one perilous and the other safe, an employé who voluntarily chooses the perilous rather than the safe way assumes the risk of the perilous way. But that rule does not apply to this case, because it was not shown that the plaintiff knew that the elevator was a dangerous way, or that it was in fact perilous.

In *Campbell v. Winslow Lumber Co.*, 66 Wash. 507, 119 Pac. 832, we quoted with approval the language of *Labatt, Master & Servant*, § 439, in part as follows: "In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from an obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order." There was therefore no error in the trial court refusing to direct a verdict or to enter judgment in favor of the appellant non obstante veredicto.

[6] The appellant next argues that the court erred in instructing the jury to the effect that the jury might consider specific acts of negligence on the part of the foreman, and his general reputation as being an incompetent and unfit foreman. Such evidence may be considered upon the question whether the appellant knew, or should have known, of the foreman's negligence. What we have said heretofore disposes of the question here presented.

The court instructed the jury as follows: "It is the duty of the master to ascertain the character of the servants whom he employs and retains as to being careless or otherwise. This duty is especially applicable in the case of a foreman. A foreman is one who has immediate charge of a gang of workmen, and whose orders and authority, in and about and concerning their work, the workmen are bound to obey. A master is under the duty towards his servants not to place incompetent or unfit persons in authority over his other servants. And in respect to a servant that has been in the master's employ for a long time, the master is charged with knowledge of such servant's general reputation in the community as to carelessness or incompetency." It is argued by the appellant that this instruction is erroneous for the reason that it is a comment upon the weight of the evidence because the servant may have been in the employ of the master for a long time. We think there is no merit in this contention, because it was conceded that the foreman had been in the employ of the master for a long time. We think the instruction was proper, and was a correct statement of the

law. It was certainly not a comment upon a fact.

[7] It is next argued that the court erred in instructing the jury as follows: "If you find that Cooper was the mine foreman, and that as such he was in charge of and had authority over the men in the mine, including plaintiff, and the only one who gave orders to the workmen in the mine, and among them to plaintiff, and that the workmen, plaintiff with the others, were bound to obey his orders, that he gave plaintiff and others the order to ascend to the surface at the time in question, by way of the cage instead of by the ladders, and that he thereupon ordered plaintiff to ascend to the roof of the cage and to stand on its roof beam, then in that case, the court charges you that if plaintiff was injured in taking this position in obedience to this order, he is not guilty of contributory negligence in obeying the order, unless the danger was so glaring and apparent that a reasonably prudent person would have refused to obey the order given." It is argued that this instruction is erroneous because there was no claim that the respondent was ordered to ascend to the surface by way of the cage instead of by the ladder, and because the respondent was not at that time in the employ of the appellant, and was not required to obey the order if given. From what we have already stated, it is plain that the respondent's contention was that he was ordered to the roof of the cage by the foreman; at least the respondent's testimony shows that he was directed by the foreman to ascend to the top of the cage, and that in obedience to that request he did so. It is plain, we think, that the respondent at that time was still under the direction of the foreman. "One who is hired by the day, week, or year, is just as much in his employer's service in going to or from his work as when actually engaged in the work itself." *Abend v. Railway Co.*, 111 Ill. 202, 53 Am. Rep. 616; *Sayward v. Carlson*, 1 Wash. 29, 23 Pac. 830.

[8, 9] The court instructed the jury that if they found for the respondent they should allow "what will fairly and justly compensate him for the injuries shown by the evidence, and for this purpose may consider" the time lost after receiving the injuries in which he had been prevented from earning wages by reason of the injuries sustained by him, not to exceed the sum of \$3,250, the amount given in the bill of particulars. And then followed a similar instruction with reference to other items named in the bill of particulars. Subdivision 5 of that instruction was as follows: "For any and all permanent disfigurements, maimed and crippled condition of the plaintiff during the rest of his natural life, not to exceed, however, the sum of \$10,000." The appellant contends that this instruction was erroneous because it specifically calls the attention of the jury to the bill of particulars, and particularly as regards the fifth subdivision above quoted,

relating to permanent disfigurement, for the reason that the same assumes that the respondent is permanently disfigured, maimed, and crippled. But the jury were particularly told that they could find what would compensate the respondent only for the injuries shown by the evidence. We think there was no error in this instruction.

[10, 11] In addition to these instructions, the appellant bases error upon other instructions which the court gave, and also upon a long list of instructions which were requested by the appellant, and which were refused by the court. It is not necessary for us to set out these instructions at length, nor to state the grounds of the objections, because the instructions given by the court were clear and explicit, and covered every phase of the case correctly. The instructions requested were either given in substance, or were not applicable to the case. Instructions to the jury should be short and concise. If the instructions requested by the appellant had been given, even if they correctly state the law, which we think some of them do not, the jury, we think, would not have been enlightened, but probably would have been misled, on account of the length and involved condition of some of these requested instructions. It is sufficient to say that the instructions given correctly state the law of the case, and were sufficient to cover every point necessary to be considered by the jury.

[12, 13] It is also argued by the appellant that misconduct of counsel for the respondent during the argument of the case to the jury constituted reversible error. During the trial of the case, one of the appellant's witnesses by the name of Planting was not present, and had not been called by the appellant. Counsel for the respondent remarked to the jury upon this fact. Objection was made by the appellant, and the case was reopened to allow the appellant to show why the witness, Planting, had not been called. A showing was made to the effect that Planting had promised to be in attendance upon the trial, but was not there. After this fact had been shown, the respondent's counsel said: "I still insist on saying to you, ladies and gentlemen of the jury, where is Mr. Planting?" Other statements of the same character were made. Whether a new trial should be granted upon this ground alone is largely within the discretion of the trial court. The exercise of that discretion will not be disturbed except in cases of clear abuse. *Snider v. Washington W. P. Co.*, 66 Wash. 598, 120 Pac. 88; *Taylor v. Spokane, P. & S. Ry. Co.*, 67 Wash. 96, 120 Pac. 889. We think there was no such abuse of discretion in this case as would warrant a reversal.

[14] It is next argued that the verdict is excessive. The record shows that the respondent was a young man, 29 years old at the time of the accident; that he was a miner by occupation, capable of earning \$4 per day and his board and lodging. He was se-

verely crushed and injured. This case is very similar to *Gennaux v. Northwestern Improvement Co.*, 72 Wash. 268, 130 Pac. 495. The injuries to the respondent here are as great as the injuries to the respondent in that case. We there refused to find that the verdict was excessive, and we are of the opinion that the verdict in this case is not so excessive as to warrant a reduction.

Finding no error in the record, the judgment is affirmed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, J.J., concur.

LAMB v. LEVY.

(Supreme Court of Washington. Jan. 23, 1914.)
FRAUD (§ 20*)—MISREPRESENTATIONS—LOCATION OF PROPERTY—RELIANCE.

Where plaintiff was induced to exchange a store for a lot by reason of defendant's misrepresentation that the lot was located in or near the Tacoma tide flats, and was worth \$300, when in fact it was not within two miles of the flats and worth little or nothing, plaintiff was not barred from relief as a matter of law, because after he had agreed to make the trade, but before it had been consummated, he had inquired as to the value of the lot of a friend in the real estate business, and had been informed that if it was located as represented it was worth from \$600 to \$1,000.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by W. H. Lamb against Lewis Levy. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. M. Fouts, of Seattle, for appellant.
Thos. J. Casey, of Seattle, for respondent.

MOUNT, J. The plaintiff brought this action to recover damages on account of alleged false and fraudulent representations made to him by the defendant, which representations were relied and acted upon. The cause was tried to the court and a jury. A verdict was returned in favor of the plaintiff. A judgment was entered upon this verdict, and the defendant has appealed.

The argument in the brief of the appellant is based upon the ground that the court erred in refusing to take the case from the jury and direct a verdict in favor of the appellant. In view of the fact that the jury found in favor of the respondent, we must assume that the facts as testified to by him are correct. It appears therefrom that in April, 1911, the respondent was the owner of a small store and fixtures and stock of confectionery goods in the city of Seattle. This store was worth \$300, for which amount the respondent had offered to sell it. The appellant and the respondent had been personal friends for several years. At about the date above stated the parties met, and the

respondent told the appellant that he was endeavoring to sell his store for \$300. Whereupon the appellant said to the respondent: "Let me deal with you. I will give you a good deal; one that you can rely on. It is a lot close in to the tide flats in Tacoma." The respondent said, "What is your lot worth?" To which the appellant answered: "\$300, the same as your store. * * * I will give you a good deal to a big lot. Furthermore I will give you writings to the effect that it is worth \$300." The respondent testified that, relying on these statements, and believing the appellant to be an honest, upright man, he took the writing and said, "Well and good, the deal is made." On the same day or the next, the respondent met a friend who was engaged in the real estate business, and told him of the trade he had made with the appellant, and asked him if he knew the value of the lot. This friend said to the respondent, in substance, that if the lot was where it was represented to be, in the tide flats of Tacoma, it was worth from \$600 to \$1,000. On the next day the respondent received a deed from the appellant and surrendered to him the writing which had theretofore been given. The respondent afterwards learned that the lot was of no value, or practically of no value; that it was not located in or near the tide flats in Tacoma, but was located many miles from Tacoma and at least two miles from the tide flats; that it was rough, covered with brush, inaccessible by road or otherwise, and could not be located except with the assistance of a surveyor. When the respondent learned these facts, he tendered the deed back to the appellant, which he refused to accept. Thereupon this action was brought.

The substance of the appellant's argument is that inasmuch as the only allegation of fraud was misrepresentation as to the value, and inasmuch as the respondent inquired of a friend as to the value, that therefore he did not rely upon the representation as to value, and for that reason the action should be dismissed. But, as we have seen above, the appellant represented that the lot was worth \$300; that it was located close in to the tide flats in Tacoma. The location of the lot was the principal part of its value. The respondent testified that he had no means of investigating the location of the lot, and that he did not investigate its location, but relied wholly upon the statements of the appellant. The respondent simply stated to a friend where the location was, as represented by the appellant, and asked its value. The friend told the respondent if it was in that locality the lot was worth between \$600 and \$1,000. It was not in that locality, and it was not located where it could be of any substantial value. We think the case was clearly one for the jury. In *Grant v. Huschke*, 133 Pac. 447, this court

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said: "Representations, as of his own knowledge, of material and inducing facts susceptible of knowledge made by a vendor in ignorance of the facts, but with the knowledge that the vendee is relying upon the representations as true, and under circumstances reasonably excusing the vendee from investigating for himself, are actionable on the part of a vendee so relying to his injury. In such a case the fraud of the vendor consists in representing as true, with knowledge that it is being relied upon as true, that which he did not know to be true. This rule is supported by the trend of modern authority, and has been consistently adhered to by this court. (Citing a number of cases.)" Under this rule we are satisfied that if the evidence of the respondent was true, as the jury undoubtedly found, he was justified in relying upon the representations of his friend.

The judgment is therefore affirmed.

CROW, C. J., and FULLERTON, MORRIS, and PARKER, JJ., concur.

O'DANIEL et ux. v. STREEBY et al.

(Supreme Court of Washington. Jan. 17, 1914.)

1. PRINCIPAL AND AGENT (§ 147*)—AGENT'S AUTHORITY—DUTY TO ASCERTAIN.

Third parties dealing with an agent cannot rely upon his assumption of authority, but must, at their own risk, ascertain both the fact of agency and the extent of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 528-533; Dec. Dig. § 147.*]

2. PRINCIPAL AND AGENT (§ 119*)—AGENT'S AUTHORITY—BURDEN OF PROOF.

The burden is upon third parties dealing with an agent to show that his acts were within the scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391-401; Dec. Dig. § 119.*]

3. PRINCIPAL AND AGENT (§ 99*)—POWERS OF AGENT—APPARENT AUTHORITY.

When the fact of agency is once established, the principal is bound by the acts of his agent within the apparent scope of his actual authority, or that which the principal knowingly permits him to assume; such apparent authority being determined by what is usual or necessary to effect the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 254-261; Dec. Dig. § 99.*]

4. PRINCIPAL AND AGENT (§ 119*)—AGENT'S AUTHORITY—BURDEN OF PROOF.

Where an agent's acts come within the apparent scope of his authority, the principal seeking to avoid liability has the burden of showing, not only that the authority to do such acts was not expressly given, but was expressly withheld, and that the person dealing with the agent knew of that fact.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 391-401; Dec. Dig. § 119.*]

5. PRINCIPAL AND AGENT (§ 115*)—AGENT'S AUTHORITY—SALE OF LAND.

An agent for the sale of land had authority to represent that a meat market refrigerator,

shelving in a storeroom, kitchen sink, storm sash, screen doors, and boards about the premises, such as would ordinarily be appurtenant to the realty, belonged to and were a permanent part of the realty, so that as between the principal and the purchaser the principal was bound thereby.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 339-343; Dec. Dig. § 115.*]

6. FIXTURES (§ 27*) — AGREEMENT AS TO TRADE FIXTURES—REMOVAL.

A refrigerator, sink, etc., which might or might not be a part of the realty, if put thereon by the tenant, under an agreement that he might remove them, would belong to the tenant.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. § 27.*]

7. PRINCIPAL AND AGENT (§ 156*)—ACTS OF AGENT—RIGHT TO RELY UPON REPRESENTATIONS.

A purchaser of real estate from the owner's agent acting in the scope of his authority, and who in answer to a direct inquiry was falsely assured that a refrigerator, sink, storm sash, screen doors, etc., were appurtenant to the realty, had the right to rely upon such assurance, and was not bound to make further inquiry.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583-587; Dec. Dig. § 156.*]

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Edward H. O'Daniel and wife against W. M. Streeby and others. Judgment for plaintiffs, and defendant Streeby appeals. Affirmed.

Scott & Campbell, of Spokane, for appellant. G. G. Ripley, of Spokane, for respondents.

ELLIS, J. This is an action for damages because of an alleged misrepresentation made by an agent on a sale of real estate. The court, in substance, found that the defendant Streeby was the owner of the real estate in question on September 1, 1910; that the defendant Tipton, as agent for Streeby, and for a commission, negotiated a sale of the premises in question to the plaintiffs, who purchased the premises, paid the purchase price, and received a deed thereof from the defendant Streeby; that Tipton, during the negotiations by which the sale was accomplished, represented to the plaintiffs that the following articles, namely, a meat market refrigerator, shelving in a storeroom, kitchen sink, storm sash, seven screen doors, warehouse, pieces of 2x6 scantling in attic, lumber from tent in rear of barn, and sundry other boards, all of which were then on the premises, belonged to and were a permanent part of the realty; that these representations were false, in that these articles were placed on the premises by one Floan (a tenant) who, by agreement with Streeby, owned them and had the right to remove them, and, subsequent to the conveyance, did remove

them; that these articles were of a reasonable value of \$504; that these representations were a material inducement to the plaintiffs in making the purchase; and that the plaintiffs had no knowledge or notice of their falsity till long afterwards. We have examined the evidence, which is conflicting, with much care; but its discussion in detail would merely lengthen this opinion to no useful purpose. We are convinced that, by a clear preponderance, it supports the court's findings. Tipton's agency to find a purchaser and negotiate a sale of the real estate was clearly established, and it was also established by the evidence, and in fact conceded in argument, that the warehouse, refrigerator, and shelves were the chief things in issue, and were of such character and were so attached to the realty as to be a part of it, but for the agreement with the tenant that he might remove them. It is conceded that the other articles were of little value. Upon these findings and suitable conclusions of law, the court entered judgment for the plaintiffs and against the defendants for \$504, with legal interest from September 1, 1910, and for costs. At appropriate times the defendants moved for a nonsuit and for a new trial. Both of these motions were overruled. The defendant Streeby appeals.

The appellant presents his several assignments of error under two heads, contending: (1) That the authority of the agent was limited to the mere finding of a purchaser, and that he could not bind the principal by his representations; (2) that, conceding a general authority to make the representations claimed, they were not such that respondents had the right to rely upon them.

[1-3] 1. The appellant claims that his agent, Tipton, had no authority to make any representations concerning what was appurtenant to and passed with the realty, which would bind the appellant as principal. It is, of course, a general rule that third parties dealing with an agent cannot rely upon the agent's assumption of authority, but must, at their own risk, ascertain both the fact of agency and the extent of the agent's authority. The burden is upon them to show that the acts of the agent were within the scope of his authority. But it is also a general rule that, when the fact of agency is once established, the principal is bound by the acts of his agent within the apparent scope of his actual authority, or that authority which the principal knowingly permits the agent to assume. 1 Am. & Eng. Encyc. of Law (2d Ed.) p. 989. What comes within the apparent scope of an agent's authority, whether the agency be general or special, is determined by what is usual or necessary to the performance of the principal power; that is, what is necessary to effect the purpose of the agency. Such necessary powers are *prima facie* incident to every authority. "The principle is elementary and uniform that a power given an agent in a transaction car-

ries with it the authority to do whatever is usual and necessary to carry into effect the principal power. And this applies as well to special as general agents, unless the manner of doing the particular act is prescribed by the power." 1 Am. & Eng. Encyc. of Law (2d Ed.) pp. 997 and 998; *Driver v. Galland*, 59 Wash. 201, 109 Pac. 593.

[4] It would seem to follow as a corollary that, where the acts done come within the apparent scope of the authority so defined, it is incumbent upon the principal seeking to avoid liability for such acts to show not only that the authority to do the acts was not expressly given to the agent, but that the authority was expressly withheld and that the person dealing with the agent had knowledge of that fact.

[5, 6] The application of these general principles to the facts before us makes it plain that the agent had authority to represent what was appurtenant to the realty, so as to bind the appellant. It was clearly established that the agent was authorized to conduct the negotiations for the sale, merely submitting the terms of the sale to the principal for approval. The appellant himself so testified. He admitted that he never, at any time during the negotiations, communicated with the respondents or their agents. Such an authority clearly empowered the agent to point out and exhibit to the purchaser the property to be sold. That was a necessary part of the most preliminary negotiation. There could hardly be a beginning of negotiations without an indication to intending purchasers of the subject-matter of negotiation. If therefore the fixtures pointed out and exhibited by the agent as part of the realty were of such a nature and so attached that, in the absence of an agreement with the tenant to the contrary, they would have constituted a part of the realty, then, as between the principal and purchaser, the principal was bound by his agent's representations. There was no pretense on the appellant's part that he ever actually informed the agent that these articles were not his own. He does not claim to have limited the agent's authority by any express instructions in that particular. The representations were made by the agent in the line of his employment. They were within the apparent scope of the agent's authority even as admitted. "We judge from the remarks interjected by the court during the trial that it entertained the view that the owner of the land was not responsible to the purchaser for the fraudulent representation of its selling agent. This, we think, was a wrong theory of the law. The owner is the beneficiary of the sale. The salesmen are his agents, and under the ordinary rule of agency the owner is responsible for the representations of his agent made in the line of his employment. It is true that the agency in this case is one degree removed, Erickson who sold the lots to appellant having been employed by Arnold & Nachant,

the firm who had a contract with the owner to sell the addition, Arnold & Nachant agreeing to divide with Erickson their commission on lots sold by him. But this was a mere detail as to the manner of sale by Arnold & Nachant. The owner was still equally the beneficiary of the transaction, and it would tend to encourage fraudulent misrepresentation if such owner were allowed to escape responsibility through the subterfuge of having the sale made by a subagent. It must not be allowed to disclaim responsibility and at the same time receive the benefit of the fraudulent transaction." *Nelson v. Title Trust Co.*, 52 Wash. 258, 260, 261, 100 Pac. 730, 731; *Smith v. Gray*, 52 Wash. 255, 100 Pac. 339.

The case of *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180, mainly relied upon by the appellant, is clearly distinguishable from the case here. In that case, the agent's representations were as to the physical condition of the house, namely, that there was a brick foundation under the whole of it. The house was at hand and was examined by the purchaser, who, at the time, was told where he could find a certain reputable contractor who had superintended the work of construction, but he made no personal examination or inquiry. The representation of the agent was not, as here, confined to an indication of the very subject-matter of the negotiation for the purpose of inspection, but went to its physical condition. The one was within the apparent scope of the agent's authority. The other was not. It may be conceded, as held in *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331, that "an agent with restricted power to sell a tract of land at a given price has no power to bind his principal by any representation as to the quantity or quality of the land," but, even so, he surely has power to point out the thing to be sold if he has power to conduct the negotiations for its sale; that is to say, that act is within the apparent scope of his authority so as to bind his principal. That the representations attributed to the agent here were within the apparent scope of his authority is manifest from their very nature. The storeroom itself, just as the articles here in question, might or might not have been a part of the realty as between the appellant and his tenant, according as they had contracted. Had it been put there by the tenant under an agreement that he might remove it, it would have belonged to the tenant. *Morin v. Bremer*, 61 Wash. 62, 111 Pac. 1058, 116 Pac. 1135. In such a case, had the agent, in exhibiting the property and offering it for sale, failed to advise the purchaser of that fact, and the principal, in making the deed, failed to except the building from the conveyance, no one would have had the hardihood to say that the suppression of that fact would not be actionable fraud. The principle here involved is exactly the same. True, the articles were such

that they might be trade fixtures, but the purchaser made the direct inquiry of the agent authorized to negotiate the sale, and the agent, as the court found on what we deem sufficient evidence, represented that they were appurtenant to, and a part of, the realty. They were not excepted from the conveyance executed by the appellant pursuant to the agent's negotiations. On sound principles, these representations should be held binding on the principal, if they would bind him had he made them himself.

[7] 2. The appellant's second contention is that the plaintiffs had no right to rely upon the agent's representations for the reason that the subject-matter of the representations was at hand and that all of the facts concerning the articles in question and their ownership could have been readily ascertained by the exercise of ordinary care on the respondents' part. The argument in support of this contention proceeds upon the theory that, had the representations been made by the appellant himself, they would not have constituted actionable fraud. This position is obviously untenable. There was nothing in the appearance of the articles in question which negated the idea that they were a part of the realty. The representations were concerning a matter of fact peculiarly within the knowledge of the appellant and not within the knowledge of the respondents. When the respondents made the direct inquiry of the agent whether these articles went with the realty, they had the right to assume that they would receive a truthful answer. It was not incumbent upon them, on receiving an answer in the affirmative, to make any further inquiry. As said in *Wooddy v. Benton Water Co.*, 54 Wash. 124, 127, 102 Pac. 1054, 1056 (132 Am. St. Rep. 1102): "Strong language has been used by this and other courts in defining the duties of purchasers from which it might be inferred that vendors have an unbridled license to lie and deceive, but such has never been the law, and the tendency of the more recent cases has been to restrict rather than extend the doctrine of caveat emptor." See, also, *McMillen v. Hillman*, 66 Wash. 27, 119 Pac. 903; *Kuehl v. Scott*, 66 Wash. 318, 119 Pac. 742; *Breese v. Hunt*, 67 Wash. 398, 121 Pac. 853; *Simons v. Cissna*, 60 Wash. 141, 110 Pac. 1011; *Grant v. Huschke*, 133 Pac. 447; *Willson v. Clark*, 63 Wash. 136, 114 Pac. 916.

The decisions chiefly relied upon by the appellant are clearly distinguishable from the case here. In *Washington Central Improvement Company v. Newlands*, 11 Wash. 212, 39 Pac. 366, it was represented as an inducement to the purchaser that a certain building was already in process of construction. The ascertainment of the fact was easy by a mere inspection of the property and its environment. Moreover, the broad doctrine laid down in that case has been much restricted by all of the more recent decisions

in this state and by the trend of modern authority everywhere. In *Shores v. Hutchinson*, 69 Wash. 329, 125 Pac. 142, the purchaser entered upon and prosecuted an independent investigation of the condition of a corporation, stock in which he was purchasing, and, as the opinion shows, was fully cognizant of all of the facts. It fully appears that he did not, in fact, make the purchase in reliance upon any representations made by the seller or his agent. The appellant here argues that no representation that personal property was in fact realty could make it realty. This argument, however, overlooks the fundamental consideration that whether or not the articles here in question were personal property was a question of fact which could not be discerned by mere inspection. It is admitted that all of the articles of any material value were of such nature and so attached as ordinarily to constitute a part of the realty. Had the representations been made by the appellant himself, there could be no question that they would have constituted actionable fraud. Having been made by his agent, and being such as fairly to come within the scope of his apparent authority and within the line of his employment, they bind the principal to the same extent as if made by the principal himself.

The judgment is affirmed.

CROW, C. J., and GOSE, CHADWICK, and MAIN, JJ., concur.

ZIZICH v. HOLMAN SECURITY INV. CO.

(Supreme Court of Washington. Jan. 17, 1914.)

1. AGRICULTURE (§ 15*)—LIEN FOR CLEARING LAND—FORECLOSURE—ISSUES.

Where the complaint in an action to foreclose a laborer's lien for clearing land was drawn on the theory that plaintiff had performed his contract and demanded a deed to lots which were to be taken in part payment, and that defendant's title to such lots was defective, a finding that defendant directed plaintiff to quit work was not within the issues.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. § 15.*]

2. AGRICULTURE (§ 15*)—LIEN FOR CLEARING LAND—FORECLOSURE—SUFFICIENCY OF EVIDENCE—DIRECTION TO QUIT.

Evidence, in an action to foreclose a laborer's lien for clearing land, *held* not to sustain a finding that the defendant had directed the plaintiff to quit work.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. § 15.*]

3. VENDOR AND PURCHASER (§ 144*)—SALE WITHOUT TITLE—PERFORMANCE OF CONTRACT.

A vendor selling while his title is defective may perform his obligation if he is able to convey title when the time for performance arrives.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 271-275; Dec. Dig. § 144.*]

4. AGRICULTURE (§ 15*)—LIENS—FORECLOSURE—SUFFICIENCY OF EVIDENCE—PAYMENT.

Evidence, in an action to foreclose a laborer's lien for clearing land, *held* to show that plaintiff had been paid in full for his work in money and credits upon the several contracts.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. § 15.*]

5. AGRICULTURE (§ 15*)—LIENS—FORECLOSURE—SUFFICIENCY OF EVIDENCE—BREACH.

Evidence, in an action to foreclose a laborer's lien for clearing land, *held* to show that the contract was breached by the plaintiff and not by the defendant.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 42-49; Dec. Dig. § 15.*]

6. APPEAL AND ERROR (§ 1012*)—TRIAL TO COURT—REVIEWING FINDINGS.

Under Rem. & Bal. Code, § 1736, requiring the Supreme Court, in cases tried without a jury, to try the case *de novo*, the finding of the trial judge will be treated with great respect; but, where convinced that a preponderance of the testimony is against it, the court will give effect to its own findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

Department 1. Appeal from Superior Court, Jefferson County; Lester Still, Judge.

Action by Milan Zizich against the Holman Security Investment Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss the action.

Tom W. Holman, of Port Townsend, for appellant. Walter B. Allen, of Seattle, and U. D. Gnagey, of Port Townsend, for respondent.

GOSE, J. This is an action to foreclose a laborer's lien. The case was tried to the court. There was a judgment for plaintiff. The defendant has appealed.

The complaint alleges that about the 1st day of January, 1911, the plaintiff and his five assignors began working for the defendant; that the work consisted in the clearing of certain lands at an agreed price of \$30 per acre, one-half to be paid in cash and the remainder to be applied upon the purchase price of six lots in the town of Irondale, each of the parties purchasing one lot at an agreed price of \$250 per lot; that under the terms of the contracts each of the parties became entitled to a deed to his respective lot when the six had cleared 100 acres of land; that the respondent and his assignors worked from about the 1st of January, 1911, until about the 1st day of June following; that they cleared 115 acres, and were paid in cash the sum of \$1,056.33, leaving a balance of \$2,393.67; that the respondent and his assignors thereupon demanded good and sufficient deeds to the lots embraced in their respective contracts and payment for the balance due them; and that the appellant had not at that time, nor has it now, a clear title to the lots. The complaint also alleges that the respondent and his assignors in due

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time filed a notice of a claim of lien upon the land upon which the clearing was done, and that five of the six lien claimants had assigned their claims of lien to the respondent. The appellant answered, alleging that it had paid the respondent and his assignors \$935.89 in cash; that it had credited them on their respective contracts in the aggregate \$1,199.51, and alleged that they had cleared 71.12 acres and no more.

The court found that the respondent and his assignors had cleared 74.53 acres, that they had been paid \$935.89 in cash, and that there was due them on June 1, 1911, a balance of \$1,300. The court also found "that the plaintiff and his assignors continued to work for the defendant under said contracts until on or about June 1, 1911, when they were informed by the defendant that there was no more land to be cleared and that they should quit." The court further found that the appellant's title to the land was defective, and therefore concluded that it had breached its contract in two respects: (a) In requiring the respondent and his assignors to quit, and (b) in that the title to the land which it had agreed to convey to them was defective. These findings and conclusions were made effective by the decree. A decree was entered in favor of the respondent for \$1,300 with interest and attorney's fees, and a lien was established against certain lands of the appellant and foreclosure and sale were directed.

The contract with the respondent and each of his assignors provides: "The purchaser is to do clearing work for this company at the rate of \$30 per acre, \$15 per acre to apply as a credit on this contract. In addition to this \$15 per acre, there will be deducted on the first settlement made for clearing done [about February 10, 1911] five dollars per acre cleared at that time in lieu of cash payment by the purchaser, and \$2.50 per acre will be deducted on each acre cleared thereafter until \$40 has been paid as the initial payment." This provision in the several contracts accounts for the discrepancy between the cash payment and the property credits allowed by the appellant. There is a difference of 3.42 acres between the amount of clearing conceded by the appellant and the amount found by the court. In other words, the court found that the respondent and his assignors had cleared 3.42 acres more than the appellant concedes. The land had been logged about 1890, and the clearing consisted in cutting the young growth.

A reading of the testimony makes it clear that the appellant has conceded to the respondent and his assignors a larger credit for clearing than they were entitled to. The testimony shows that they were to clear the land, cut the growth within six inches of the ground, and fall the small timber so that it would all lie in the same general direction and so as to give it harmony with other clearing which the appellant was having done

at the same time by other contractors. The testimony of disinterested witnesses makes it clear that they did not do the "clearing work" in the manner contemplated by their contract, but, as one of the witnesses puts it, that they did it "in a careless and improper manner"; that their work was "slashing of a rough sort," not "clearing at all"; that they left stumps varying in height from 13½ inches to 43 inches; that, as another witness puts it, the ground was "roughly slashed"; that, as another witness states, the slashing was "crude and unworkmanlike" and not "clearing in any sense of the word." Another witness says that "they did only slashing work, and it was not well done." Another witness, Mr. William Bishop, testified that he had had 25 years' experience in clearing, that he had gone over their work, and that it was "the roughest slashing," not "cleared at all," and that they had done about 60 per cent. of the contract work. Other disinterested witnesses testified that the work they had done was worth \$12 to \$15 per acre. The appellant settled with them for this slashing from time to time on the theory that they had done 80 per cent. of the work; that is, it allowed them 80 per cent. of the contract price, based upon acres. Under the overwhelming testimony, this allowance was exceedingly liberal.

[1, 2] As we have observed, the court found that the appellant directed the respondent and his assignors to quit. Under the findings of the court they still owed \$200 upon the land and were not then entitled to deeds unless they had been directed to quit. The finding is not within the issues, nor is it supported by the preponderance of the testimony. There is no suggestion in the complaint that the respondent or his assignors were directed to quit. On the other hand, the complaint is drawn upon the theory that they had performed their contract, that they had demanded deeds, and that the appellant's title to the land was defective. The respondent testified that, about June 1st, "the force" in charge of the appellant's work told them that the appellant had no more land to clear, and that "we would have to quit." He further testified, upon cross-examination: "That all quit in June, 1911; that we quit in June, 1911. J. P. Holman, who had taken charge after Mr. Oliphant left, would not pay us the amount of the acreage we had gone over." One of the plaintiff's assignors testified: "We started to work on the defendant's land in January, 1911. * * * We quit in June, 1911." He further said that "we quit finally because J. T. Holman, who had taken charge of the work after Oliphant quit, would not give us pay for the amount of land we cleared." Another of the respondent's assignors testified in rebuttal "that Mr. Holman ordered us to quit, and go to Seattle to get our money." This is all the testimony offered by the respondent which tends to show their reasons for quitting

the work on June 1st. Mr. Holman, who was in charge of the work, testified that he did not direct them to quit, but that they quit because they became dissatisfied with the percentage basis which he was allowing them for their slashing. After they had quit and on June 6, 1911, counsel for the respondent and his assignors wrote the appellant as follows: "The Austrian laborers insist that they have cleared more acres than shown by your statement, and they are very insistant upon an early settlement. I shall have some one go up to Irondale and measure the land to-morrow or next day, and I wish you would have your surveyor do the same again right away so the matter may be closed. They claim they want to go out to work and will not do so until this is settled." The appellant's version that they quit voluntarily because they claimed that they were not being paid for all the clearing is corroborated by the silence of the complaint upon this question, by the letter of their counsel, and by all the attending circumstances. There was still clearing to be done. The ground which they had slashed still required much work to clear it within the meaning of the contract.

[3] The trial court concluded as a matter of law that the appellant's title to the land which it had agreed to convey to the respondent and his assignors was not a marketable title, and hence that the parties were entitled to a lien. The question of title is not before us. The lots have not been fully paid for. The appellant will have fulfilled its obligation if it is able to convey title when the time for performance arrives. *Morris v. Columbia Canal Co.*, 135 Pac. 238.

[4, 5] Our conclusion is that the respondent and his assignors, at the time of the commencement of the action, had been paid in full for their work in money and credits upon their several contracts; that the contracts were breached by the respondent and his assignors, and not by the appellant; and that the respondent has failed to sustain his cause of action by a preponderance of the testimony. The case was tried in January, 1912. The findings were not signed until October following. A reading of the testimony has persuaded us that, during this interval, some of the testimony in the case must have escaped the attention of the trial judge.

[6] The statute (Rem. & Bal. Code, § 1736) puts the burden upon this court of trying the case de novo in actions legal or equitable tried to the court. In the discharge of this duty we treat the findings of the trial judge with great respect; but if, upon an examination of the evidence, we become convinced that a preponderance of the testimony is against the findings of the trial judge, it becomes our duty to make our own view effective. *Lewis v. Dean*, 137 Pac. 341, recently decided; *Borde v. Kingsley*, 136 Pac. 1172.

The judgment is reversed, with directions to dismiss the action.

CROW, C. J., and ELLIS, MAIN, and CHADWICK, JJ., concur.

STATE v. CROSSEN.

(Supreme Court of Washington. Jan. 21, 1914.)

1. LARCENY (§ 71*)—DEFENSES—GOOD FAITH—INSTRUCTIONS.

Rem. & Bal. Code, § 2608, provides that in a prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, though the claim be untenable. In a prosecution for larceny from a pasture or range of one head of neat cattle, defendant claimed that he had purchased a calf from an Indian; that he went out on the range and drove in the calf which he supposed he had purchased and butchered it; and that, if the calf taken was the property of the complaining witness, it had been taken under the honest belief that it was the calf purchased from the Indian. *Held*, that the court erred in refusing to charge that if defendant had purchased a calf from the Indian and killed the animal, described as belonging to complaining witness, by mistake, believing it to be the one defendant had purchased, he could not be convicted.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 191-194; Dec. Dig. § 71.*]

2. LARCENY (§ 40*)—THEFT OF ANIMALS—DESCRIPTION.

Defendant was accused of stealing from a pasture "one head of neat cattle." He defended on the ground that he had purchased a calf, which he described as a "bull," from an Indian, and that the animal that he took from the range and pasture he honestly believed was the animal he had purchased from the Indian, while the complaining witness described the animal taken as a "steer." *Held*, that the only description by which the court was bound was that stated in the information, and that the variance in the description by accused and the complaining witness did not justify the refusal of an instruction that if defendant had purchased a calf from the Indian, and killed the animal belonging to complainant by mistake, believing it to be the calf which he had so purchased, he could not be convicted.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 102-126, 160; Dec. Dig. § 40.*]

3. LARCENY (§ 75*)—STEALING CATTLE FROM RANGE—ELEMENTS OF OFFENSE—INSTRUCTIONS.

Where accused was charged with stealing from a pasture or range one head of neat cattle, which by Rem. & Bal. Code, § 2605, subd. 4, makes such offense grand larceny, instructions defining larceny and charging that the first essential to conviction was to find that the one head of neat cattle referred to in the information was taken, led, or driven away, without requiring that the same must have been taken or driven from a range or pasture, were fatally defective.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 190, 198; Dec. Dig. § 75.*]

Department 2. Appeal from Superior Court, Ferry County; Bruce Blake, Judge.

E. H. Crossen was convicted of grand larceny, and he appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

Cornelius & Hooper, of Spokane, for appellant.

MORRIS, J. [1] Appeal from a conviction of grand larceny. The information charged appellant with stealing "from a pasture and range one head of neat cattle," etc., and was evidently drawn under section 2605 (4), Rem. & Bal. Code, including within the crime of grand larceny the unlawful taking of animals from any range or pasture. The defense was a taking under claim of right, appellant claiming that he had purchased a calf from an Indian; that he went out on the range and drove in the calf he supposed he had purchased, and butchered it; and, if the calf taken was the property of the complaining witness, it had been taken under the honest belief that it was the calf purchased from the Indian. Supporting this theory, the court was requested to charge the jury as follows: "You are instructed that, if you should find from the evidence that the animal killed by the defendant was the animal described in and identified by the state's evidence, and that it belonged to H. J. Carlstein, still you must find the defendant not guilty, if you should further find that the defendant had purchased a calf from the Indian Long Alex, and that he killed the animal described as belonging to Carlstein by mistake, believing it to be the calf he had purchased from the Indian." This request was denied, and error is now predicated upon such denial. This instruction, or one of similar import, should have been given. Section 2608, Rem. & Bal. Code, embodying what has long been the law, provides that: "In any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable." It was therefore the duty of the court, under the defense made, to include this statute, or its equivalent, in the instructions given.

[2] The court's refusal seems to have been based upon the theory that the complaining witness describes the animal taken as a "steer," while the appellant describes the animal he took and butchered as a "bull," and the court concludes it could not have been the same animal. The animal appellant was on trial for unlawfully taking was the animal described in the information as "one head of neat cattle," which was the only description of the animal the court was bound by. We do not think the court was justified in refusing the instruction because of its memory as to the peculiar description given by any witness of the animal referred to in the information. Further, to refuse the instruction upon this ground would be for the court to conclude that the complaining witness was correct in describing the animal taken as a steer, while the appellant was mistaken in referring to it as a bull. We do

not think the court would be justified in so concluding a question of fact.

[3] Another error assigned is the court's definition of grand larceny as: "Larceny is defined to be the felonious taking and carrying away of the property of another without the knowledge or consent of that other and with the intent of the party taking, at the time of the taking, to permanently deprive the owner thereof, and with the further intent at said times to wholly and permanently appropriate it to the use of the party taking." Whatever may be said as to the general correctness of this definition as applied to grand larceny, it was not sufficiently broad because of the fact that, under this information and the section under which it was drawn, the unlawful taking, to constitute grand larceny, must be from a range or pasture. Further on the jury were told that the first essential was to find that "one head of neat cattle referred to in the information was taken, led, or driven away." Here again the court falls short of the crime defined and the crime charged in failing to add "from any range or pasture." This limitation of place is just as much a part of the crime defined and the crime charged as any other ingredient, and it was error not to include it. We are not clear that we would consider these last errors as sufficiently prejudicial to say they call for a new trial, as it doubtless might well be contended that there was no issue as to the place from whence the animal was taken. We think, however, as the case must be reversed for the first error discussed, it is best to call attention to these other assignments in order to eliminate any like question upon a second trial.

Judgment reversed, and cause remanded for a new trial.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

IN RE HEDEMARK'S ESTATE.

STEWART v. GEAR et al.

(Supreme Court of Washington. Jan. 23, 1914.)

HOMESTEAD (§ 150*)—RIGHTS OF CHILDREN OR HEIRS.

Where, under Rem. & Bal. Code, § 1465, authorizing the widow and children of deceased to comply with the law relative to the acquisition of a homestead where he, in his lifetime, had failed to do so, the children of deceased, after his death, filed a homestead declaration in land which was his separate property, the court could not authorize setting aside such property to them in fee, but only for a limited period, since their rights were the same as those of the widow, and, it being his separate property, on his death descended to his heirs, subject to the power of the court to set it aside for a limited period to the widow or children.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 294-306; Dec. Dig. § 150.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Cowlitz County; Wm. T. Darch, Judge.

Petition by J. T. Gear, guardian of the minor heirs of Andrew Hedemark, deceased, and others against F. L. Stewart, administrator, to have property set aside as a homestead for the minors. From an order granting relief, the defendant appeals. Reversed.

McKenney & Brush, of Kelso, for appellant. B. L. Hubbell, of Kelso, for respondents.

MOUNT, J. This appeal is from an order of the superior court for Cowlitz county setting apart in fee certain real property as a homestead for the minor heirs of Andrew Hedemark, deceased. The facts are stipulated. It appears therefrom that Andrew Hedemark died intestate in February, 1912. At the time of his death, all the real and personal property belonging to the estate was his separate property. He left surviving him six children, four of whom are minors. At the time of his death he owned certain real property in West Kelso, Wash., upon which he resided with his children. He had never filed a declaration of homestead. In May, 1912, after the appointment of an administrator, the superior court of Cowlitz county made an order setting aside the premises in question to the minor heirs, to be used by them during the settlement of the estate, and at the same time made an allowance of \$20 per month out of said estate pending the settlement thereof. A large number of claims have been filed against the estate by creditors. The assets of the estate will probably not be sufficient to satisfy these claims. The premises are incumbered by a mortgage of \$1,700 which, with interest, amounts to \$1,900; and, subject to the mortgage, the premises are worth less than the sum of \$1,000. In April, 1913, J. T. Gear, who had theretofore been appointed guardian of the minors, filed a petition to have the property in controversy set aside in fee as a homestead for the minor heirs. The adult heirs renounced all interest in the premises in favor of the minors. At the time of filing this petition the guardian also filed a declaration of homestead, claiming the premises as a homestead for the minor heirs. The court thereafter made an order setting the premises apart to the minor heirs in fee, and releasing the same from administration and all claims against the estate. The administrator has appealed from that order.

The only question presented upon this appeal is whether the lower court had authority, under the statute, to set aside the premises in fee to the heirs as a homestead.

Questions similar to the one here presented were before this court in *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155, *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116, and in *re Lloyd's Estate*, 34 Wash. 84, 74 Pac. 1061.

In *Stewin v. Thrift*, supra, we quoted in

full all the statutes bearing upon the question, and there said: "But we said in *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155, that these sections must be read and construed in connection with the general homestead act of 1895, and, so reading and construing them, it would seem that sections 6219 and 6222 had been in part superseded by that act. It will be noticed that the tenure by which a homestead is held by the survivor of a community is made to depend upon the nature of the title to the land from which the homestead is selected. If it is selected from community property in the lifetime of both spouses, it vests in the survivor in fee, and becomes his or her separate property; if it is selected from separate property, it goes, on the death of the person from whose property it was selected, to the heirs or devisees of such person, subject to the power of the court to assign it for a limited period to the family of the decedent. Now section 6219 provides that, if the head of the family in his lifetime had not complied with the provisions of the law relative to the acquisition of a homestead, his widow may comply with such provisions, and shall be entitled on such compliance to a homestead as now provided by law for the head of the family; that is to say, if she makes the selection from what was formerly the community property of herself and husband, she takes title thereto in fee, to the exclusion of the children, minors as well as adults; if she selects from her late husband's separate property, she takes a limited estate, the duration of which is fixed by the court having jurisdiction over the estate."

And in *re Lloyd's Estate*, supra, we said: "The logic of the opinion in the case of *Austin v. Clifford*, supra, shows plainly that, under the facts as stated therein, the widow had no permanent homestead rights or estate in the deceased husband's property; that it descended to his heirs at law, including the widow. Applying this rule to the proceedings at bar, it must necessarily follow that the realty in question, on the death of Michael Lloyd, vested in his lawful heirs, subject to the lawful rights and claims of creditors, and all parties interested, in the regular course of administration. See, further, *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116. If the contentions of appellant's counsel be correct, no matter how valuable the homestead of decedent may be, it must go to his widow or children, to the exclusion of the rights of his creditors. This would have the effect of enlarging the homestead rights of the widow and children, by reason of the death of the husband. We cannot give our statutes on this subject any such forced construction. The filing of the appellant's homestead declaration after the death of her husband can have no such effect. Section 5246, supra, refers to the selection of the homestead, made prior to the death of either spouse."

It is plain, under the provisions of section 1465, Rem. & Bal. Code, which is section 6219 referred to in *Stewin v. Thrift*, supra, that the child or children therein mentioned take the same as the widow; they obtain no greater right by the subsequent homestead declaration than the widow. The logic of the decisions above referred to is that the children of Andrew A. Hedemark obtained no greater interest in the estate of their father by reason of the homestead declaration than the widow would have obtained had she filed such declaration, and that the effect of such declaration was to authorize the court to set aside the homestead for a limited period, as was said in *Stewin v. Thrift*, supra, "perhaps during his minority," and did not authorize the court to set aside the homestead in fee to the minor children. The order of the lower court setting aside the homestead to the minor children in fee was therefore error, because the power of the court is limited to setting aside such homestead for a limited period, with an allowance for their support.

The order must therefore be reversed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

LEONARDO v. BUNNELL et al.

(Supreme Court of Washington. Jan. 23, 1914.)

1. SUBMISSION OF CONTROVERSY (§ 17*)—SCOPE OF INQUIRY—EVIDENCE.

Under Rem. & Bal. Code, § 378, providing that the parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission thereof to any court which would have jurisdiction, and that the court shall thereupon hear and determine the case and render judgment as if an action were pending, the controversy must be determined on the facts agreed upon and submitted, even though it be necessary to dismiss the cause for insufficiency of the facts upon which to base a judgment, and hence, where the agreed case contained no agreement that the court might receive other evidence, the court erred in so doing.

[Ed. Note.—For other cases, see *Submission of Controversy*, Cent. Dig. § 18; Dec. Dig. § 17.*]

2. ANIMALS (§ 22*)—CONSTRUCTION OF CONTRACT.

A contract by which defendants placed sheep in charge of plaintiff for one year, provided that defendants would furnish all necessary winter range, that they would furnish as a loan all necessary money for labor, supplies, and expenses for running the sheep, that plaintiff agreed to repay the principal of such advancements with interest, that plaintiff would perform all necessary work and take care of the sheep in a careful manner, that the ownership of all the increase and wool should vest and remain in defendants as security for the advancements mentioned, that if, after all the expenses of running the sheep required by the parties thereto were paid, one-half of the net proceeds of the increase and wool did not equal

\$50 a month during the time plaintiff worked with and cared for the sheep, defendants would add and pay a sufficient sum to make \$50 a month, but, if such one-half of the net proceeds exceeded \$50 a month, such excess would be equally divided between the parties. *Held*, that the entire expense of running the sheep was chargeable against the gross receipts from the wool and increase, and that one-half of the net proceeds after deducting plaintiff's wages at \$50 a month should then be divided equally between the parties.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 40-42; Dec. Dig. § 22.*]

3. SUBMISSION OF CONTROVERSY (§ 18*)—JUDGMENT—VACATING.

Where a judgment was entered on an agreed case submitting a controversy without action, without granting a hearing, the court properly set the judgment aside and granted a hearing.

[Ed. Note.—For other cases, see *Submission of Controversy*, Cent. Dig. § 20; Dec. Dig. § 18.*]

Department 2. Appeal from Superior Court, Klickitat County; H. E. McKenney, Judge.

Submission of controversy on agreed case by M. A. Leonardo against A. L. Bunnell and others. From a judgment for plaintiff for an insufficient amount, he appeals. Reversed and rendered.

W. B. Presby, of Goldendale, for appellant. N. B. Brooks, of Goldendale, and Miller, Crass & Wilkinson, of Vancouver, for respondents.

PARKER, J. These parties submitted to the superior court for Klickitat county an agreed case, under section 378, Rem. & Bal. Code, with a view to having certain differences between them settled by the judgment of that court. Their agreed statement of facts, which they submitted as a basis of the court's judgment, reads as follows: "The parties hereto have a question in difference which might be subject to a civil action and agree upon and submit to the court a case, and stipulate and agree that the following are the facts upon which the controversy depends: (1) A. L. Bunnell and G. L. Bunnell on the one part and M. A. Leonardo on the other entered into a contract which is herewith submitted to the consideration of the court. (2) Since the execution of said contract the said G. L. Bunnell has died, leaving a widow, and A. L. Bunnell is the agent of said widow and has authority to sign this agreement in her behalf. (3) That under the terms of said agreement M. A. Leonardo has run the sheep mentioned in the lease for the term of one year, has returned them to the said A. L. Bunnell and the widow of said G. L. Bunnell, deceased, and has performed all of the conditions of the contract. (4) That the only controversy between the parties is how much, if anything, Leonardo is entitled to under the terms of said contract. (5) That the entire gross proceeds from the sale of wool and increase amounted to \$10,750.82,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which was received by the said A. L. Bunnell. (6) That M. A. Leonardo has received from said gross proceeds \$4,966.75. (7) That the entire expenses paid by Leonardo in running said sheep, including his wages, are \$4,876.55. His wages amounted to \$257.80. (8) That A. L. Bunnell has paid on the expenses and running said sheep \$375. The parties hereto submit as an agreed case to the court the question of how much, under this statement and under the terms of said contract, Leonardo is entitled to receive."

The portions of the contract which require notice here, submitted to the court as a part of the agreed case, read as follows:

"This agreement, made in duplicate, between A. L. Bunnell and G. L. Bunnell (partners doing business under the name of A. L. Bunnell) of Klickitat county, state of Washington, parties of the first part, and M. A. Leonardo, of the same county and state, party of the second part witnesseth:

"That the said parties of the first part agree to furnish and place in charge of the party of the second part consisting of 2317 head of ewe sheep for a period of one year beginning October 15th, 1910, and ending on October 15th, 1911 on the following terms and conditions: * * *

"Said parties of the first part are to furnish all necessary winter range in and about the home ranch near Centerville, in Klickitat county, Washington. * * *

"Said parties of the first part are to furnish as a loan all necessary money for labor, supplies and expenses for running said sheep during the existence of this agreement, said party of the second part agreeing to repay the principal of such advancements with interest from the date they are made until repayment, at ten per cent. per annum.

"The party of the second part is to perform all necessary work and take care of said sheep in a careful manner usual among persons experienced and skilled in sheep raising and in his employing laborers he is so far as it is possible for him to do employ those experienced and skilled in the handling of sheep, and at the termination of this lease, is to return said sheep at Glenwood, Wash. * * *

"It is expressly agreed and understood by the parties hereto that the ownership of all the increase and wool from said sheep shall vest and remain in the said parties of the first part as security for advancements herein provided for and made to the party of the second part until said advancements are fully paid.

"If after all the expenses of running said sheep required by the parties hereto are paid, if one-half of all the net proceeds of the increase of said sheep and one-half of all the net proceeds of wool grown on said sheep and of their increase and also one-half of the net proceeds of the bucks on the bucks used for breeding together

does not equal the sum of fifty dollars per month during the time the party of the second part works with and cares for said sheep, then the parties of the first part agree to add and pay a sufficient sum to make the party of the second part fifty dollars per month while he works with and cares for said sheep, and in consideration of the parties of the first part warranting the party of the second part the sum of fifty dollars per month while he works and cares for said sheep the party of the second part agrees in the event that one-half of the net proceeds of the increase and wool from said sheep as hereinbefore mentioned exceeds the sum of fifty dollars per month while he works with and cares for said sheep to divide said excess equally with the parties of the first part.

"It is understood and agreed that the parties to this agreement are to divide equally the expenses of summer range, in the Columbia forest reserve in the vicinity of Mt. Adams, and are to pay equally for expenses of shearing and hauling wool to market.

"One-half the losses of the original sheep during the year are to first be made good from the increase with good mutton lambs and the remainder of said lambs are to be considered net increase for equal division.

"The parties hereto are to sell the wool and net increase of lambs at such time and price as to them seems most advantageous and as may be jointly agreed upon.

"The party of the second part is to furnish the parties of the first part with an itemized account of the expenses of caring for and maintaining said sheep each month during the term of this lease."

On November 1, 1911, there was prepared and signed by the court a judgment in favor of Leonardo, awarding him \$1,220.17. This judgment, it was claimed, and we will now assume, was prematurely rendered before the parties were given a hearing upon their agreed case. Thereafter the Bunnells applied to the court to have the judgment set aside and a hearing granted upon the merits, which was, by the court, ordered over the objection of counsel for Leonardo. Upon the hearing thus granted, counsel for the Bunnells contended that the contract for the care of the sheep was so uncertain and ambiguous in its terms touching the division of the proceeds as to call for oral explanatory evidence relative thereto. They offered evidence along this line all of which was by the court received over the objection of counsel for Leonardo. At the conclusion of the hearing, the court rendered judgment in favor of Leonardo for the sum of \$289.53 only. This judgment was the result of the court's conclusion, drawn from the agreed case and the oral evidence received. From this disposition of the cause, Leonardo has appealed.

[1] It is contended by counsel for appellant that the superior court erred in receiving evidence outside of the statement of the

agreed case submitted by the parties to the court in their signed and verified statement. This contention must be upheld. A proceeding of this nature comes into court by the free and voluntary act of all of the parties concerned, and not otherwise. No fact or question can be the subject of the court's inquiry in such a proceeding save as agreed upon and submitted in the signed and verified statement constituting the agreed case. The agreed case here presented goes no farther than this. It submits nothing but certain agreed facts and certain questions. It contains no agreement for the court receiving other evidence touching the facts or questions involved. Section 378, by authority of which this proceeding was instituted, reads: "Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case and render judgment thereon as if an action were pending."

The Court of Appeals of Missouri, dealing with a similar question under a statute which reads exactly like ours (Missouri Annotated Statutes, 1906, vol. 1, § 793), in the case of *State v. McCune*, 129 Mo. App. 511, 518, 107 S. W. 1030, 1032, observes: "Where the controversy is submitted by agreement without action, i. e., without filing suit, having summons issued and the defendant brought into court against his will and without formal pleadings, etc., the jurisdiction of the court over parties and subject-matter attaches only to the precise state of facts contained in the stipulation and in such proceeding, the court has no authority to permit either party against the objection of the other to adduce other facts or to introduce evidence of any character. As we have intimated, the jurisdiction to entertain the cause is founded on the contract of submission—the agreement of the parties—and, should the court permit either party to inject new matter into the case, obviously the submission would not consist of the state of facts voluntarily brought to the court by the parties but of an entirely different case and one not approved by mutual consent." This view finds support in the following authorities: *Crandall v. Amador County*, 20 Cal. 72; *Fralley v. Legion of Honor*, 132 Pa. 578, 20 Atl. 684; *Andrus v. Shippen Township*, 36 Pa. Super. Ct. 22; *Mo. K. & T. Ry. Co. v. Union Trust Co.*, 156 N. Y. 592, 51 N. E. 309; 37 Cyc. 353.

We think it clear that the judgment to be rendered in a proceeding of this nature must be rested entirely upon the facts appearing

in the agreed case. If such facts should appear insufficient upon which to base a judgment, it would seem to follow that the cause would have to be dismissed rather than go outside and bring into the case facts beyond the agreement of the parties.

[2] The question then is: What is the proper judgment to render upon the facts here submitted by the agreed statement of the parties? We think the court's basis for the computation of the amount due appellant must be found in the correct answer to the question: Is the sum of the amounts of the entire expense stated in the agreed case chargeable against the gross receipts from the wool and increase of the sheep as though it were an ordinary partnership affair? We are of the opinion that a reading of the entire contract renders it reasonably certain that this question must be answered in the affirmative, though it must be conceded that there are certain portions of the contract standing alone, which furnish some ground for argument to the contrary. We are also of the opinion that the contract, when read as a whole, shows an intent that Leonardo's wages of \$50 per month should be first paid from one-half of the net proceeds of the wool and the increase, and the balance of that one-half divided equally between Leonardo and the Bunnells. Computation upon this basis will readily arrive at the result reached by the superior court in its first judgment, to wit, \$1,220.17. Indeed, there does not seem to be any serious controversy that this would not be the correct result when computed upon the basis we have adopted as the proper construction of the contract.

[3] Some contention is made that the court was in error in setting aside the first judgment and granting the hearing upon which the judgment here sought to be reversed was rendered. This, however, we think of but little consequence now, though it would affect the question of interest upon the proper judgment. We think, however, in view of the facts shown touching the premature rendering of the first judgment without a hearing, that its setting aside was not erroneous. We therefore conclude that, instead of reinstating that judgment, the judgment finally rendered should be reversed and a new judgment rendered in favor of Leonardo for the sum of \$1,220.17.

It is so ordered.

CROW, C. J., and FULLERTON, MOUNT, and MORRIS, JJ., concur.

BRITZ et al. v. HOULEHAN.

(Supreme Court of Washington. Jan. 23, 1914.)

1. EXPLOSIVES (§ 12*)—INJURIES—COMPLAINT—NEGLIGENCE.

Where a complaint alleged that defendant set off a blast without notice or warning in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the midst of a populous city immediately across the street from plaintiff's residence, causing a terrific concussion and throwing dust into plaintiff's eyes, whereby they were injured, it sufficiently alleged negligence on defendant's part, without characterizing such acts as negligent.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

2. PLEADING (§ 388*) — COMPLAINT — VARIANCE.

Where, in an action for injuries to plaintiff by an explosion in defendant's brickyard across the street from plaintiff's residence, the complaint alleged that the explosion caused a large quantity of dirt, dust, and brick dust to be thrown in every direction, and that a considerable quantity of dust and brick dust was thrown into her eyes, there being ample evidence to show that some foreign substance was thrown into plaintiff's eyes by the blast, it was not a fatal error that such evidence did not show that it was brick dust.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1305-1308; Dec. Dig. § 388.*]

3. TRIAL (§ 296*) — INSTRUCTIONS — DAMAGES.

In an action for injuries to plaintiff by dust being thrown into her eyes by alleged negligent explosion on defendant's premises, the court's charge that defendant's affirmative defense that plaintiff was suffering from disease of the eyes prior to the injury added nothing to the pleadings in the case was not error, where the instruction was immediately followed by a charge that any trouble with plaintiff's eyes prior to the injury would not in itself be a defense, but should be considered in connection with the amount of the recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713, 715, 716, 718; Dec. Dig. § 296.*]

4. EXPLOSIVES (§ 12*) — INJURIES — NEGLIGENCE — PRIMA FACIE CASE.

Setting off a heavy charge of an explosive without warning or notice in defendant's brickyard, located in a populous part of a city and directly across the street from plaintiff's residence, was prima facie evidence of negligence.

[Ed. Note.—For other cases, see Explosives, Cent. Dig. §§ 9, 10; Dec. Dig. § 12.*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Mary Britz and husband against A. N. Houlehan. Judgment for plaintiffs, and defendant appeals. Affirmed.

John P. Hartman and Arthur E. Nafe, both of Seattle, for appellant. Willett & Oleson, of Seattle, for respondents.

ELLIS, J. This is an action for damages for personal injuries claimed to have been sustained by the plaintiff wife by the setting off of a blast by the defendant. The complaint, in substance, alleged that the defendant owns and operates a brickyard in the city of Seattle, directly across the street from the home of the plaintiffs; that about March 1, 1910, while the plaintiff wife was in the back yard of her home, the defendant, without warning, caused to be discharged an explosive in or near their brickyard; that the explosion was accompanied by a terrific concussion, and caused a large quantity of dirt, dust, and brick dust to be thrown in every direction; that the plaintiff wife was stunned and shocked by the explosion, and

that a considerable quantity of dust and brick dust was thrown against her person and into her face and eyes; that her eyes thereby became sore and ulcerated, and she was rendered practically blind for some time, suffering great pain; that prior to that time her eyes had been sound and in good condition; that she was forced to secure the services of a physician, and incurred expense to the extent of \$50; that she was rendered unable to perform her regular duties, and still has much trouble with her eyes because of the injury. The answer denied the material allegations of the complaint, and, by way of affirmative defense, alleged that prior to the time of the accident, the plaintiff wife was suffering from some disease of the eyes which caused their present condition, and that this condition was in no way caused by any act of the defendant. The affirmative matter in the answer was traversed by the reply. The jury returned a verdict for the plaintiffs in the sum of \$500. The defendant moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial. Both of these motions were overruled, and judgment was entered upon the verdict. The defendant appeals.

The appellant advances three grounds as entitling her to a reversal: (1) That the complaint charged no negligence; (2) that the evidence was insufficient to sustain the verdict; (3) that the court erred in giving certain instructions.

[1] 1. Though the complaint does not characterize the acts of the appellant as negligence, it does set out facts which, if sustained, would constitute negligence. It alleges the setting off of the blast, without notice or warning in the midst of a populous city, directly across the street from the respondents' residence, causing a terrific concussion and throwing dust or brick dust into the respondent's eyes, whereby they were injured. These things, if sustained by the proof, prima facie established negligence. They were sufficient to put the appellant to her defense of due care. "We hold, therefore, that in this case, as the blasting is not claimed to have been unlawful, the liability of the appellants depended upon whether they were negligent or not, to prove which, under the circumstances, the fact of the injury was sufficient prima facie evidence, but that they should have been permitted to show due care on their part, and that the question of their negligence was for the jury." *Klepsch v. Donald*, 4 Wash. 436, 442, 443, 30 Pac. 991, 993 (31 Am. St. Rep. 936); *Beall v. Seattle*, 28 Wash. 593, 69 Pac. 12, 92 Am. St. Rep. 892, 61 L. R. A. 583; *Klein v. Phelps Lumber Co.*, 135 Pac. 226; *Judson v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Hay v. Cohoes Co.*, 2 N. Y. 159, 51 Am. Dec. 279; *Colton v. Onderdonk*, 69 Cal. 155, 10 Pac. 395, 58 Am.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Rep. 556; *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. It was only necessary to plead such facts as it was necessary to prove, and which, if established, would make a *prima facie* case. Such facts were pleaded. The complaint was sufficient.

[2] 2. There was ample evidence to sustain the verdict. A review of it in detail would merely lengthen this opinion to no profit. The principal contention is that there was a variance between allegation and proof in that the evidence showed that the plaintiff's eyes were injured, if at all, by some other substance than brick dust. There was ample evidence to go to the jury, tending to show that some foreign substance was, by the blast, thrown into the plaintiff's eyes. That it did not affirmatively appear that it was brick dust hardly arises to the dignity of a variance, much less a fatal variance between pleading and proof. We have carefully examined the voluminous record, consisting of nearly 300 pages, and find a sharp conflict on nearly every question of fact. The trial court denied the motion for new trial. In such a case, it is elementary that the verdict of the jury will not be set aside on appeal for insufficiency of evidence.

[3] 3. In his charge to the jury, the trial court, after reciting the allegations of the affirmative defense contained in the answer, said: "This affirmative defense adds nothing to the pleadings in the case." The appellant contends that this language was calculated to lead the jury to believe that evidence tending to establish a prior diseased condition of the eyes should have no weight or consideration. If this were all of the instruction, there would be some merit in the claim. The court, however, almost immediately thereafter, and as a part of the same instruction, charged the jury as follows: "Any soreness or trouble of Mrs. Britz's eyes prior to that time would not in itself be any defense. That would simply go to the amount of the recovery. Defendants would not have any right to injure or damage Mrs. Britz's eyes because of the fact that they were sore or diseased, if you find that they were sore and diseased. On the other hand, the defendants would not be responsible for such soreness or disease not caused by the acts of the defendants as set forth in the complaint. For any aggravation, however, of such trouble, or any injury in addition to any prior trouble, if any, the defendants would be liable, if liable at all. You will therefore not consider this affirmative defense pleaded in the answer as a separate affirmative defense, but could only take into consideration the matters pleaded therein in determining the amount of your verdict, if you should find in favor of the plaintiffs." The instruction, taken as a whole, clearly stated the law as repeatedly declared by this

court. *Frick v. Washington Water Power Co.*, 135 Pac. 470; *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090; *Jordan v. Seattle*, 30 Wash. 298, 70 Pac. 743.

[4] The court further instructed the jury to the effect that proof that the explosion occurred without warning, and was caused by the defendant to the plaintiffs' injury, made a *prima facie* case against the defendant, casting upon her the burden of showing that she exercised due care. The appellant contends that this instruction was erroneous, in that it casts upon her the burden of showing that she used due care and gave warning. Under the circumstances of this case, we find no error in this instruction. What we have said in discussing the pleadings, and authorities there cited, make a further discussion of this question unnecessary. In *Munro v. Pacific Coast Dredging & Reclamation Co.*, supra, the Supreme Court of California, in passing upon an instruction couched in almost the same terms as that here under consideration, used the following language: "We perceive no error in the above direction. The evidence shows clearly that this blast was exploded in a thickly settled portion of the city. We are of opinion that no degree of care will excuse a person, where death was caused by such explosion, from responsibility for it."

The record presents no error warranting a reversal.

The judgment is affirmed.

CROW, C. J., and MAIN, CHADWICK, and GOSE, JJ., concur.

FELIX et al. v. YAKSUM et al.

(Supreme Court of Washington. Jan. 23, 1914.)

1. INDIANS (§ 15*)—STATUS OF INDIANS.

Indians are recognized as wards of the nation, and it is the duty of the court to uphold those restrictions against the alienation of their lands which the federal government has established to prevent them from impoverishing themselves.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 20, 34, 37-44; Dec. Dig. § 15.*]

2. INDIANS (§ 27*)—REVIEW—LIMITS OF REVIEW.

While even in those cases *triabie de novo* in the Supreme Court that tribunal must look to the records made below for the facts upon which their determination must be based, yet, in an action to enforce alienation of lands by an Indian, the court will, in view of the status of Indians, consider the defendant's power of alienation, though not shown by the record below.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

3. INDIANS (§ 15*)—ALIENATION OF LAND—POWER.

In an action to declare a parol gift of land made by an Indian, where it appeared that the patent to the land was issued in 1908,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

and that the parol gift was made in the spring of that year, and that in 1912 the patentee gave a quitclaim deed to the same property, a judgment sustaining the gift will be reversed and remanded on appeal; it appearing that the alienations were both made within five years, for Act Cong. March 3, 1875, c. 132, 18 Stat. 420, extending the privilege of the homestead laws to Indians, fixed the privilege of alienation at 5 years, and Act July 4, 1884, c. 180, 23 Stat. 96, enlarged the period of alienation to 25 years.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 84, 37-44; Dec. Dig. § 15.*]

4. INDIANS (§ 15*)—PATENTS—ALIENATION.

Where land patented to an Indian in 1908 had not been surveyed until 1884, the patent cannot be held to be the second patent provided for by Act Cong. July 4, 1884, c. 180, 23 Stat. 96, which conveyed the land free from restrictions against alienation, for the 25-year limitation against alienation could not have expired before 1909.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 84, 37-44; Dec. Dig. § 15.*]

5. INDIANS (§ 15*)—PATENTS—RESTRICTIONS AGAINST ALIENATION.

Federal laws restricting Indians from alienating their land become part of the patents of such Indians, and the restrictions against alienation cannot be defeated because the patent does not contain them.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 17, 29, 84, 37-44; Dec. Dig. § 15.*]

Department 2. Appeal from Superior Court, Chelan County; William A. Grimshaw, Judge.

Action by Mary Felix and husband against Anastus Yaksum and others. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

C. F. Wallace, of Cashmere, and Williams & Corbin and Reeves, Crollard & Reeves, all of Wenatchee, for appellants. Kemp & Baker, of Wenatchee, for respondents.

PER CURIAM. Action to declare a parol gift of land. The pleadings below were framed upon the issue of gift from Anastus Yaksum to the respondent Mary Felix, and a subsequent quitclaim deed from Anastus Yaksum to the other appellants. Findings were made sustaining the gift subject to a life estate in Anastus Yaksum, and this appeal followed.

[1, 2] The first point urged by appellants in this court is that all of the parties to this action are Indians, and that the title of Anastus Yaksum to the land in controversy is subject to a restriction against alienation, and for this reason the gift, though established, cannot be upheld. This point must first be determined before we can pass to the question of a gift, for it is clear, if Anastus Yaksum held this land under a restriction against alienation, no gift made by her within the period of alienation can be sustained. This question being here suggested for the first time, we are unaided by the

record in attempting its solution. Ordinarily, whatever may be suggested in cases triable here de novo, we look to the record made below for the facts upon which our determination must rest, and base our finding upon the evidence or lack of evidence. But this is an exceptional case. We are dealing with the questioned rights of Indians to hold and convey real estate, and, as Indians are recognized as wards of the nation, it is the duty of this court and every other to uphold those barriers which the federal government has seen fit to establish against their impoverishment by withholding from them the power of alienation.

[3, 4] The patent conveying the lands in controversy was issued February 8, 1908, to "Anastus Yaksum, widow of Yaksum." It contains no restriction whatever against alienation. The gift under which respondents claim was made in the spring of 1906; the exact date not being shown. The deeds under which appellants Kami Sam and Josephine Sam claim were made in July, 1912. Both of these dates would fall within the restrictive period, whatever be the one applicable to the title of Anastus Yaksum, if her title is subject to such limitation. The Act of March 3, 1875, c. 132, 18 Stat. 420, extending the privilege of the homestead laws to Indians who had abandoned their tribal relations, fixed the period of alienation at five years. The Act of July 4, 1884, c. 180, 23 Stat. 96, enlarged this period to 25 years. *Frazee v. Piper*, 51 Wash. 278, 98 Pac. 760. In speaking of this last statute it was observed, in *Frazee v. Spokane County*, 29 Wash. 278, 69 Pac. 779, that it provided for the issuance of two patents; one when a person entitled to it under the act had consummated his right and which patent should declare a trust under which the United States would hold the land for the period of 25 years for the sole use and benefit of the patentee and his heirs, and the other to be issued upon the expiration of 25 years, conveying the whole title discharged of the trust and of all charge or incumbrance whatsoever.

Respondents now urge that the patent issued to Anastus Yaksum, since it contains no restrictive clause, is the second patent referred to in the act of 1884, whereby the land is conveyed discharged of the trust. The weakness of this argument is manifest from the fact that the township in which these lands are situate was not surveyed until 1884, making it impossible for the 25-year trust period to have expired in February, 1908, when this patent was issued. The patent therefore, it seems to us, shows upon its face that it is not the second patent referred to in the act of 1884. There is another act not referred to in the briefs, that of August 4, 1894 (chapter 290, 28 Stat. 321), which made provision for allotments in severalty to members of the Wenatschapam tribe, resid-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing along the Wenatchee river, under the Act of February 8, 1887, c. 119, 24 Stat. 388, as amended by the Act of February 28, 1891, c. 383, 26 Stat. 794. These acts may be found in volume 1, *Indian Affairs, Laws & Treaties* (2d Ed.) pp. 33, 56, 530. Under these acts the restriction against alienation was fixed at 25 years. From the location of these lands within the territory covered by these acts, it is not improbable that they are the proper ones to apply to the situation before us. However, because of the imperfections of the testimony it is impossible to say with any degree of accuracy. The difficulty is there is nothing to show to what tribe of Indians Yaksum belonged, or when and under what law he made his homestead application. Nor do we know what, if any, effect to give to section 6 of the act of February 8, 1887, according citizenship to Indian allottees who have complied with certain conditions.

[5] Nor is it of any determinative force that the patent contains no restriction against alienation. The law becomes a part of the patent, and no federal official can waive or render inoperative, because of the failure to incorporate it, any limitation which Congress has imposed upon the title. *Frazer v. Spokane County*, supra.

We have therefore made no attempt to review the case submitted to the lower court, since we must first reach a conclusion on the question here first submitted and upon which the record is practically silent. The only order we can make is to set aside the judgment and send the case back for a new trial, when we trust counsel will appreciate the questions involved in the case and make a record accordingly. Appellants will not recover costs in this court.

STATE ex rel. SIELER v. VIRNIG et al.,
Board of Com'rs of Grant County.

(Supreme Court of Washington. Jan. 23, 1914.)

ANIMALS (§ 50*)—RUNNING AT LARGE—REPUTATION.

Laws 1911, c. 25, § 1, provides that county commissioners may designate, by an order made and published as provided in section 3, territory in which it shall be unlawful to permit live stock to run at large. Section 3 declares that, if the county commissioners determine to prohibit the running at large of live stock, they shall make an order defining the boundaries of such territory, which shall be published in a newspaper for four successive weeks, or by posting for four weeks. The county commissioners on December 2d made an order prohibiting the running at large of live stock in a given territory, and on December 3d they entered an order providing for a reconsideration of their action. *Held*, that the action of the board was not final until publication had been made, and might be reconsidered at any time before.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 148-157; Dec. Dig. § 50.*]

Department 2. Appeal from Superior Court, Grant County.

Action by the State of Washington, on the relation of Henry Sieler, to prohibit William H. Virnig and others, constituting the Board of County Commissioners of Grant County, from reconsidering their action prohibiting live stock from running at large. From a judgment denying the writ, relator appeals. Affirmed.

Wm. M. Clapp, of Ephrata, and Herbert H. Sieler, of Spokane, for appellant. C. G. Jeffers, of Ephrata, for respondents.

MORRIS, J. This action was brought under Laws 1911, c. 25, authorizing boards of county commissioners to create districts in which live stock shall not run at large. The case was submitted to the court below and here upon an agreed statement of facts, from which it appears that the relator and others, seeking to take advantage of the act, filed a petition with the board of county commissioners of Grant county, seeking to have certain territory described in the petition set aside as a district. Due notice of the filing of this petition and of the time fixed for hearing was given, and on December 2, 1912, the matter came on to be heard. At this meeting of the board two members only were present. Section 3867, Rem. & Bal. Code, however, provides that two shall constitute a quorum for the transaction of business. The statement recites: "And the said board, after hearing the said petition on the merits and fully considering the same and there being no opposition to the said petition or any part thereof, granted the petition as prayed for and ordered that live stock of all kinds be prohibited from running at large within the territory named in said petition, and notice given accordingly, as required by law; and the said order was entered in accordance with the practice of the said board." On December 3d the third member of the board appeared and presented a remonstrance against granting the petition, and the board, after considering the remonstrance, made an order to the effect that the board would reconsider its action on the petition, and fixed January 7, 1913, as the time for a rehearing. Notice of this rehearing was given relator in the form of a letter from the county auditor. The statement then recites that no other notice of the hearing was contemplated, and that, at the hearing on January 7th, the board intended to proceed "with the reconsideration of the said petition and to refuse to grant the petition." Relator then sued out this writ, in which he sought a decree holding the action of December 3d to be illegal, prohibiting the board from any reconsideration of its action of December 2d, and requiring publication of an order prohibiting live stock from running at large within the territory described in the petition and order of Decem-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ber 2d. This writ was denied, and he appeals.

The appeal presents this question: Did the board of county commissioners have the power to reconsider their action of December 2d? The act of 1911, in so far as here applicable, provides:

"Section 1. That the board of county commissioners of any county of this state shall have the power to designate by an order made and published, as provided in section three of this act, certain territory within such county in which it shall be unlawful to permit live stock of any kind to run at large. * * *

"Sec. 3. If the board of county commissioners shall determine to prohibit the running at large of live stock within the territory described in such petition or in any portion thereof, it shall make an order defining the boundaries of such territory, which shall be entered upon the records and published in a newspaper having general circulation in such territory for four successive weeks, or by posting in three public places in such territory for four weeks.

"Sec. 4. Any person, or any agent, employé or representative of a corporation, violating any of the provisions of such order after the same shall have been published or posted as provided in section three of this act, shall be guilty of a misdemeanor. * * *

It is, we think, clear from the reading of these sections that the power vested in the commissioners was not wholly exercised until the publication provided for in section 3. The granting of the petition and the record entry of such action did not establish the contemplated district. That could only be designated, in the language of section 1, "by an order made and published, as provided in section three." And section 3 provided that the order should not only be entered of record but published and posted for four weeks. While section 4, confirming the contention that the order did not become effectual until after the publication, provided there could be no violation of it until after its publication or posting. When, therefore, the board on December 3d determined to reconsider its action of December 2d, the order was yet in the making. It had not passed beyond the determinative stage and was not a final or completed action under which rights, either property or personal, could have vested. It does not seem to us that the requirement for the publication of the order of segregation was of a nature like to those statutes requiring the publication of the proceedings of boards of this character, which have sometimes been held to be directory only, and hence the failure to publish in no wise affected the proceedings. Under this law a special power was conferred upon county commissioners and the manner of its exercise specifically pointed out. It cannot be

doubted that the power so conferred could be exercised only in the prescribed manner, and that the prescribed manner includes not only the making of an order but its publication or posting. Hence we say that on December 3d the matter was still within the discretionary power of the board, and it had the power to reconsider its action of the previous day.

In *People v. Bailhache*, 52 Cal. 310, in construing a statute empowering boards of supervisors to unite and consolidate county offices by "adopting, recording, and publishing" an ordinance to that effect three months prior to an election, it was held that the adoption and recording were of no effect without the publication, and that under the statute the publication was as essential as the adoption or recording. This case seems to us to be directly in point. It was followed and a like rule announced in *People ex rel. Stoddard v. Williams*, 64 Cal. 87, 27 Pac. 939.

We do not think this appeal calls for a decision of the question submitted by the briefs as to the general power or right of county commissioners to reconsider their action. That question might have been presented had the commissioners made and published the order of segregation. We therefore do not discuss that question, except in so far as it may be embraced in what we have said.

The judgment is affirmed.

CROW, C. J., and PARKER, MOUNT, and FULLERTON, JJ., concur.

TABOR v. CITY OF WALLA WALLA et al. (Supreme Court of Washington. Jan. 24, 1914.)

1. OFFICERS (§ 61*)—RECALL—STATUTES.

Laws 1913, c. 146, passed to carry into effect the constitutional amendment of 1912, relating to the recall of officers, superseded earlier laws.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 90; Dec. Dig. § 61.*]

2. CONSTITUTIONAL LAW (§ 9*)—CONSTITUTIONAL AMENDMENT—RECALL OF OFFICERS.

The constitutional amendment of 1912, relating to recall of officers, is not invalid because of irregularities in its proposal and submission.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 5, 7; Dec. Dig. § 9.*]

Department 2. Appeal from Superior Court, Walla Walla County; E. C. Mills, Judge.

Petition by O. D. Tabor for writ of mandamus against the City of Walla Walla and others. From a judgment dismissing the petition, relator appeals. Affirmed.

Brooks & Bartlett, of Walla Walla, for appellant. Thos. H. Brents and John F. Watson, both of Walla Walla, for respondents.

MOUNT, J. On May 31, 1913, a petition was filed with the city clerk of Walla Walla

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

demanding the recall of the mayor and street commissioner of that city. On June 9, 1913, the city clerk attached his certificate to the petition, reciting that the petition was insufficient for the reason that there were not enough signers thereto and for other reasons. The laws of 1913, relating to the recall of elective officers, went into effect on June 12, 1913. On June 19, 1913, additional petitions were filed with the city clerk as amendments to the original petition. On June 28th following, the city clerk certified that these petitions were insufficient under the act of 1913. Thereafter, on July 12th, the plaintiff petitioned the superior court for Walla Walla county for a writ of mandamus to compel the calling of an election to recall the officers. The defendants filed a motion to quash this proceeding for the reason that it had not been commenced within time, and that the petitions upon their face were insufficient both in form and substance. This motion was sustained, and the proceedings were dismissed. This appeal was prosecuted from that order.

[1, 2] The appellant apparently concedes that the petitions were insufficient under the Acts of 1913, c. 146, p. 454, but argues that this proceeding is controlled by the Acts of 1911, c. 108, first, because the Acts of 1913 did not supersede the Acts of 1911, and, second, because the constitutional amendment authorizing the recall of elective officers was void because of insufficiency of the title, and because it was not passed in the method provided by law. These questions were all decided adversely to the contention of the appellant in *Cudihoe v. Phelps*, 136 Pac. 367, and in *State ex rel. Lynch v. Rairley*, 136 Pac. 374.

The judgment is therefore affirmed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

CHAPMAN v. HILL.

(Supreme Court of Washington. Jan. 23, 1914.)

1. SPECIFIC PERFORMANCE (§ 53*)—CONTRACT TO EXCHANGE REAL ESTATE—MISREPRESENTATIONS.

Misrepresentations as to the maturity of certain mortgages on complainant's land to be exchanged to and assumed by defendant with knowledge that defendant did not intend to make a personal investigation of the facts, but to rely absolutely on the truth of complainant's statement, was ground for refusal of specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 160-171½; Dec. Dig. § 53.*]

2. SPECIFIC PERFORMANCE (§ 21*)—RIGHT TO RELIEF—CONTRACT—EXCHANGE OF PROPERTY—COMMUNITY PROPERTY—PARTIES.

Complainant was not entitled to enforce specific performance of a contract to exchange property, where complainant's land to be exchanged was community property and com-

plainant's wife was neither a party to the contract nor to the action.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 49, 50; Dec. Dig. § 21.*]

Department 2. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Suit for specific performance by W. D. Chapman against Henry T. Hill. From a judgment of dismissal, plaintiff appeals. Affirmed.

John C. Hurspool, of Walla Walla, for appellant. Dunphy, Evans & Garrecht, of Walla Walla, for respondent.

MORRIS, J. Action for the specific performance of a contract for the exchange of real estate. The contract was made in this state on May 31, 1912, and covered lands of appellant situate in Oregon, and lands of respondent situate in Oregon and Washington. The action was resisted on two grounds: (1) Misrepresentations as to the maturity of two mortgages upon appellant's lands, one for \$3,600, the other for \$1,000; and (2) that the land in this state was the community property of respondent and his wife, who was a party to neither the contract nor the action. The court below, without making findings, dismissed the action.

[1] The judgment of dismissal must be sustained upon both grounds. We find that appellant represented to the respondent, to induce him to enter into the contract, that only \$500 interest was then due upon the two mortgages, and that the mortgages themselves would not be due for two years; while as a matter of fact the mortgages were given to secure installment notes, one of which for \$1,000 was due in October, 1911, and still unpaid; another for \$1,000 would become due in October, 1912; a third in October, 1913; and the remaining \$600 of the \$3,600 mortgage would become due in October, 1914. Both of these mortgages were held by nonresidents of this state. Here we have a false representation of an existing and material fact, the truth or means of knowledge of which was peculiarly within the knowledge of one party, and the opportunity of ascertaining the true facts, not readily ascertainable, to the other, together with the knowledge by one party that the other did not intend to make a personal investigation but relied absolutely on the truth of the facts communicated to him. These facts vitiated the contract and rendered it unenforceable. *Bell v. Jovita Heights Co.*, 71 Wash. 7, 127 Pac. 289; *Contra v. Corglat*, 74 Wash. 28, 132 Pac. 746; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186; *Borde v. Kingsley*, 136 Pac. 1172.

[2] Having reached this conclusion, it is unnecessary to discuss the second point relied upon to sustain the judgment, other than

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—66

to say it is well taken. *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499.

The judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

FABEN v. MUIR.

(Supreme Court of Washington. Jan. 23, 1914.)

1. ACTION (§ 25*)—NATURE OF ACTION—LAW OR EQUITY.

The nature of an action as one at law or in equity is determined by the substance of the issues made by the pleadings and proof.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 124-145, 147-149, 153, 156-159, 313; Dec. Dig. § 25.*]

2. ACTION (§ 25*)—NATURE OF ACTION—LAW OR EQUITY.

Where, in an action by an attorney for services rendered, the principal issue was whether there was a contract as to compensation for services, or whether plaintiff was entitled to recover on a quantum meruit, and appellant's brief admitted that the parties were agreed as to the amount of money which had come into plaintiff's hands, and for which defendant was entitled to credit, there was no question of accounting raised, so that the action was properly maintained as one at law.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 124-145, 147-149, 153, 156-159, 313; Dec. Dig. § 25.*]

3. NEW TRIAL (§ 78*)—GROUNDS — INSUFFICIENCY OF EVIDENCE.

Where two judges and one jury have determined upon the same record that the weight of the evidence, which conflicted, was with defendant, and a contrary verdict was set aside by the trial court and its action sustained on appeal, a motion for a new trial by plaintiff for insufficiency of the evidence to support a verdict, for defendant on the second trial should be denied.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 162-165; Dec. Dig. § 78.*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Vince H. Faben against B. L. Muir. Judgment for defendant, and plaintiff appeals. Affirmed.

S. H. Kelleran, of Seattle, for appellant, Will H. Thompson, of Seattle, for respondent.

ELLIS, J. This is an action by an attorney at law to recover a balance claimed to be due upon account for professional services. A prior trial resulted in a verdict for over \$700 in the plaintiff's favor. The trial court ordered a new trial on the specific ground that the evidence was insufficient to sustain the verdict. The plaintiff appealed, and this court affirmed that order. *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798. A second trial resulted in a verdict of \$400.31 for the defendant. The plaintiff's motion for a new trial was overruled. From a judgment on the verdict, he again appeals, urging two grounds which he claims entitle him to a reversal, namely: (1) That the respondent's answer called for an accounting

and credit for various sums of money received by the appellant as attorney, making the action one of equitable cognizance, triable to the court, and that the court erred in submitting the issues to a jury over the appellant's objection; (2) that in any event a new trial should have been granted for insufficiency of evidence to support the verdict.

[1, 2] The appellant brought his action as one at law, but he contends that the nature of the action as one at law or in equity is determined by the substance of the issues as presented by the entire pleadings, and as developed by the proof. As a general rule, this must be conceded on the authorities. Tested even by this rule, however, the record here presents a cause triable by jury. Touching the issues, we said on the first appeal: "An examination of the evidence discloses, however, that the question of the excessiveness of the verdict was dependent on the view taken of the question whether there was a contract between the parties fixing the amount the appellant was to receive for his services. If there was such a contract, as the respondent contended, then the verdict was excessive; in fact the verdict should have been in his favor rather than against him. On the other hand, if there was no contract, and the appellant should be permitted to recover on a quantum meruit, the verdict could be said to be within the evidence introduced to show the value of the services." Clearly we then regarded the question as to whether or not there was a contract fixing the amount appellant was to receive for his services as the substance of the issue. The second trial was upon the same pleadings and the same evidence as the first. By stipulation, the evidence introduced at the first trial was read to the jury on the second trial, and constitutes the statement of facts on this appeal. Upon this unchanged record, we still regard the dominant issue presented both by the pleadings and by the evidence as simply this: Was there a definite contract as to the amount appellant was to receive for his services, or was he entitled to recover on a quantum meruit? As to the amount of the moneys which had come into the appellant's hands, for which he must account, and to which the respondent was entitled to credit, there was no serious controversy. In his brief, discussing the sufficiency of the evidence, the appellant now admits this, using the following language: "From the pleadings and proof, the parties seemed to be agreed as to the exact amount of money which had come into the plaintiff's hands, and to which defendant was entitled to credit, viz., \$1,808.91." This concession, which the respondent accepts and which the record necessitates, negatives the assumption that there was any such question of an accounting presented by the answer as to make the action one essentially cognizable

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

in equity. The court committed no error in submitting the cause to the jury.

Nor did the court err in refusing a new trial. As pointed out in our former opinion, the evidence was sharply conflicting. Upon a re-examination of the same evidence, we are still of the same opinion. This phase of the case is ruled by our decision in *Thomas & Co. v. Hillis*, 70 Wash. 53, 126 Pac. 62. We there held, where a new trial was granted because the evidence was insufficient to sustain a verdict for the defendant, and the order was affirmed on appeal, that upon a retrial of the same case upon substantially the same evidence, which was conflicting, it was an abuse of discretion to set aside a verdict for the plaintiff as not sustained by the evidence. Under this rule it would have been positive error to grant a new trial upon the record before us. Here the evidence was not only substantially the same, but identically the same on the second trial as on the first. In *Thomas Co. v. Hillis*, we said: "The evidence being conflicting, and it being held by one judge and one jury that its weight is with the plaintiff, and another judge and a jury having held that weight to be with the defendants, there must be evidence to sustain a verdict one way or the other, and, there being no error of law to compel a new trial, we are of opinion that it was an abuse of discretion on the part of the trial judge to set aside a verdict rendered upon a second trial upon the ground of insufficiency of the evidence."

[3] The case here presented invokes the rule there announced even more emphatically. Here two judges and one jury have held, upon the same record, that the weight of the evidence was with the defendant. The verdict of one jury to the contrary was set aside by the trial court, and we sustained his action on the former appeal. If there is ever to be an end of this litigation, there must be a time, as was said in the *Thomas Case*, "when the question of the insufficiency of the evidence to sustain a verdict is foreclosed."

The judgment is affirmed.

CROW, C. J., and MAIN, OHADWICK, and GOSE, JJ., concur.

YTTREGARD v. YOUNG et ux.

(Supreme Court of Washington. Jan. 23, 1914.)

HIGHWAYS (§ 184*)—INJURIES TO PERSONS ON HIGHWAYS—ACTIONS—INSTRUCTIONS.

In a personal injury action by one thrown from a wagon when his horse took fright at defendant's automobile, an instruction that the only negligence by defendant of which there was any evidence was whether plaintiff signaled defendant to stop his machine and defendant stopped the machine within a reasonable time, and whether defendant, after observing the fright of the horse, failed to act as a reasonably prudent man should have acted, is not

erroneous in withdrawing from the jury the consideration of evidence of the defendant's negligence in running the automobile at an excessive speed, cutting out the muffler when near the horse, trying to pass on the wrong side, failing to stop on signal, and not using proper caution when first observing the horse's fright.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 471-474; Dec. Dig. § 184.*]

Department 2. Appeal from Superior Court, Kitsap County; Walter M. French, Judge.

Action by Carl Yttregard against Andrew Young and wife. From a judgment for defendants, plaintiff appeals. Affirmed.

C. J. Smith and Heber McHugh, both of Seattle, for appellant. Van Dyke & Thomas, of Seattle, for respondents.

PARKER, J. The plaintiff seeks recovery of damages from the defendants for personal injuries which he claims resulted to him from the negligent driving of their automobile. On August 5, 1912, the defendants were driving their automobile along a public road in Kitsap county, approaching a horse and wagon going in the same direction, driven by a young man with whom the plaintiff was riding. Upon the approach of the defendants' automobile to the wagon, the horse became scared and, in a measure, unmanageable for a few moments, when the plaintiff fell, or was thrown, from the wagon and received the injuries he sues to recover for. A trial before the court and jury resulted in verdict and judgment in favor of the defendants, from which the plaintiff has appealed.

The substance of the contention made in behalf of appellant is that the trial court, by its instructions, in effect excluded from the consideration of the jury certain alleged acts of negligence on the part of respondents which there was evidence tending to show. In appellant's brief it is asserted: "There were five grounds of negligence alleged, and evidence given in support of each: (1) Running the automobile at an excessive rate of speed; (2) cutting out the muffler when near the horse; (3) trying to pass on the wrong side; (4) failure to stop on signal; (5) failure to use proper caution when first observing that the horse was afraid of the automobile."

The first, second, and third grounds of negligence so claimed by counsel for appellant, it is insisted, were excluded from the consideration of the jury by the fifth instruction given by the court, reading as follows: "You are further instructed that the only acts of negligence on the part of the defendants on which there has been any evidence whatsoever is: First, on the question of whether or not the plaintiff in this case, at or about the time his horse became frightened, signaled to the defendant to stop his machine, and if the defendant failed to stop the machine within a reasonable time after receiving such sig-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

nal, if you believe from the testimony that said signal was so given; and, second, whether or not the defendant, on first observing that the horse behind which plaintiff was riding was frightened, failed to act as a reasonably prudent man should have acted under the circumstances (that is, failed to reduce the speed of the car and failed to use such care as a reasonable and prudent man should have used under all the circumstances)."

Assuming, for argument's sake, that there was competent evidence introduced tending to show negligence in these particulars, we are still unable to see that this instruction excluded consideration of such specific acts of negligence, in view of the comprehensive language of the second portion of the instruction. That language, it seems to us, had the effect of submitting to the jury every possible act of negligence that the respondents might have been guilty of, except, possibly, negligence they might have been guilty of before seeing that the horse was frightened and before appellant signaled to them to stop their machine; and we think it clear that there was no evidence tending to show negligence on their part before that time. We are of the opinion that appellant had a fair trial, and a reading of the entire record impresses us with the belief that it would hardly have been possible for the jury to find otherwise than as they did.

The judgment is affirmed.

CROW, C. J., and MOUNT, FULLERTON, and MORRIS, JJ., concur.

FREEBURY et ux. v. CHICAGO, M. & P. S. RY. CO. et al.

(Supreme Court of Washington. Jan. 23, 1914.)

1. MASTER AND SERVANT (§ 319*)—INDEPENDENT CONTRACTOR—DEFENSES.

In general, an employer is not liable for the wrongful or negligent act of an independent contractor; but, if the work in itself is inherently dangerous, and will probably result in injury to third persons, unless great care and precautions are taken, an employer cannot evade responsibility by acting through an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1259-1260; Dec. Dig. § 319.*]

2. MASTER AND SERVANT (§ 319*)—INDEPENDENT CONTRACTOR—LIABILITY.

Whether the work of blasting is so inherently dangerous that one having it done cannot shield himself behind an independent contractor depends upon the circumstances of the case, and, where it is being done in a populous city, it is no defense for the employer that the work was being done by an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1259-1260; Dec. Dig. § 319.*]

3. APPEAL AND ERROR (§ 1002*)—REVIEW—VERDICTS.

A verdict assessing damages on conflicting evidence is conclusive where there is substantial testimony sustaining the amount of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Action by Thomas Freebury and wife against the Chicago, Milwaukee & Puget Sound Railway Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

F. M. Dudley, of Seattle, and Cullen, Lee & Hindman, of Spokane, for appellants. W. H. Plummer and Henry Jackson Darby, both of Spokane, for respondents.

MAIN, J. This action was instituted for the purpose of recovering damages on account of personal injuries.

On June 14, 1910, the city council of the city of Spokane passed an ordinance granting to the Chicago, Milwaukee & Puget Sound Railway Company a franchise for the operation of a railway upon certain streets and alleys as specified. Subsequently the franchise was accepted by the railway company. On February 23, 1911, the franchise ordinance was amended. The amendment provided for the change of the established grade of a portion of Division street extending between the Great Northern Railway tracks and Main avenue. By section 9 of the franchise as amended the railway company, at its own expense, was required to make and complete the changes of grade provided for in Division and other streets.

On July 15, 1911, the railway company contracted in writing with Bates & Rogers Construction Company for doing certain of the regrade work in the streets affected. This contract provided that, in blasting for the removal of rock or other material, Bates & Rogers Construction Company should use the greatest care and precaution for the purpose of protecting the safety of persons and property. The contract also provided a classification for solid rock excavation, and fixed a price for the same.

On May 17, 1912, the Bates & Rogers Construction Company sublet the doing of a portion of the work to Breen & Johnson. This contract was approved by the chief engineer of the railway company. The Breen & Johnson contract provided that they should furnish all the labor for doing the work on Division street within certain specified limits.

On May 31, 1912, while Breen & Johnson were excavating for a sewer trench or tunnel in Division street near the intersection of Main, and blasting with dynamite, a blast was discharged, and a stone weighing approximately 20 or 25 pounds was hurled a

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

distance of 100 feet, striking the window casing of a window on the second floor of the Station Hotel, and rebounded into the room thereof, striking the plaintiff, and causing the injury complained of.

Division street at the point where the blasting was being done was in the business section of the city. The buildings on either side thereof were from one to three stories in height, and were used for stores, hotels, and lodging houses.

The rock mentioned struck the plaintiff Allie Freebury in the region of the left shoulder blade. She was thrown from the chair in which she was sitting, and across the room, rendered unconscious, and sustained serious injury. The present action was begun for the purpose of recovering damages for the injuries sustained.

The cause came on for trial before the court and a jury on October 15, 1912. At the close of the plaintiffs' case, each of the defendants challenged the legal sufficiency of the evidence, and moved the court for a judgment of dismissal. This motion was overruled. After all the evidence had been introduced, the defendants again moved the court for a dismissal of the action. These motions were likewise overruled. The court, in submitting the matter to the jury, instructed that both the Bates & Rogers Construction Company and Breen & Johnson, under their respective contracts, were independent contractors. The jury returned a verdict in favor of the plaintiffs in the sum of \$12,000. Motion for a new trial was seasonably made and overruled. Judgment was entered on the verdict. The defendants have appealed.

The principal question is the liability of the railway company and the Bates & Rogers Construction Company. That Breen & Johnson could be held to respond in damages is conceded. But it is claimed that, since they were operating under an independent contract, they alone are liable.

[1] The general rule is that, where an individual or corporation contracts with another individual or corporation exercising an independent employment, the employer is not liable for the wrongful or negligent acts of the contractor or of his servants, employes, or agents. In *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6, this proposition is stated in this language: "Where an individual or corporation contracts with another individual or corporation, exercising an independent employment, for the latter to do a work not in itself unlawful or attended by danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders, except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor's servant [citing cases]."

But this general rule is subject to well-settled exceptions. One of these is that,

where the work to be done is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, an employer cannot evade responsibility by entering into an independent contract with another person for the doing of the work. In *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310, it is said: " * * * Where the work is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injury to third persons, unless measures are adopted by which such consequences may be prevented, and in other like cases, a party will not be permitted to evade responsibility by placing an independent contractor in charge of the work."

[2] Whether the work of blasting falls within this exception depends upon the facts and circumstances that may attend each individual case. And it has been held that, where the employer contracted for the construction of a railroad grade in the Cascade Mountains, far removed from any human habitation, the rule of nonliability applies. In *Kendall v. Johnson*, supra, it was further said: "The work of blasting may or may not fall within the exceptions to the general rule, according to the particular circumstances of the individual case; but under the facts here presented, where the parties were employed to construct a railroad grade in the Cascade Mountains, far removed from any human habitation, we think the general rule of nonliability applies."

In the present case the contract called for the digging of a tunnel or trench in the business section of the city of Spokane, and the rule applicable to a situation far removed from human habitation cannot be invoked. This case falls squarely within the exception that the work was inherently dangerous in itself and would necessarily or probably result in injury to third persons unless measures were adopted to prevent such consequences.

[3] It is contended, also, that the verdict is excessive. A verdict of \$12,000 seems large, and, were we to weigh the conflicting evidence upon the extent of the injury sustained, we might reach a different conclusion. A careful reading of the record demonstrates that, if the injuries sustained by the respondent Allie Freebury were as serious and permanent as the evidence introduced on the part of the respondents would tend to show, then the verdict is not excessive. If, however, the extent of her injuries are correctly set forth in the evidence introduced on behalf of the appellants, the amount of the verdict should not be sustained. Upon this conflicting evidence, the jury apparently believed the witnesses for the respondents.

Where the evidence as to the extent of the injuries is conflicting, and there is substantial testimony which sustains the amount

of the verdict, the finding of the jury must control. If the verdict is not sustained by substantial evidence, then a reduction of the amount thereof will be ordered, or a new trial granted. In the recent case of *Frostman v. Stirrat & Goetz Inv. Co.*, 138 Pac. 1144, speaking on this question, it was said: "It is next urged that the verdict of \$10,000 was excessive. Unfortunately there was much dispute and contradiction between the medical men as to respondent's present condition. Those testifying for respondent said his injuries were severe and permanent; while appellant's witnesses were of the opinion that respondent was a malingerer. Whatever our opinion may be of the fact, we cannot usurp the function of the jury, and say that they have erroneously decided a question of fact. If there was no dispute as to respondent's physical condition, we could say whether or not, in our judgment, the damages allowed were more than compensatory, and under such circumstances appellate courts frequently do say that verdicts are excessive. But, where there is a sharp conflict as to the damages sustained, the verdict becomes a finding of fact, which we are not at liberty to disturb, unless we could say, assuming the theory of respondent as to the extent and nature of the injuries to be correct, the amount awarded is excessive."

The judgment will be affirmed.

CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

BARKLEY v. KERFOOT et al.

(Supreme Court of Washington. Jan. 24, 1914.)

1. GARNISHMENT (§ 13*)—PROPERTY SUBJECT —FUTURE INDEBTEDNESS.

A creditor can obtain no greater relief against a garnishee than exists in favor of the debtor, so that, if there is no present indebtedness from the garnishee, there is nothing upon which the writ can operate.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 21-24; Dec. Dig. § 13.*]

2. GARNISHMENT (§ 41*)—PROPERTY SUBJECT —FUTURE INSTALLMENT OF RENT.

Under Rem. & Bal. Code, § 693, providing that if the garnishee is indebted to the principal defendant, but that such indebtedness has not matured, the court shall require him to pay such sum into court when it becomes due, a covenant to pay future installments of rent as they become due under a lease is too uncertain and contingent to be regarded as an absolute present but not matured indebtedness.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 78-81; Dec. Dig. § 41.*]

3. GARNISHMENT (§ 41*)—PROPERTY SUBJECT —"EXISTING EQUITIES."

Under Rem. & Bal. Code, § 8766, providing that gifts or conveyances of community property between husband and wife are valid except as to existing equities in favor of the husband's creditors, the term "existing equities" embraces both existing and contingent liabilities and does not

include existing debts or apply to a garnishment of rent to be due under a lease.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 78-81; Dec. Dig. § 41.*]

Department 2. Appeal from Superior Court, Franklin County; O. R. Holcomb, Judge.

Action by B. L. Barkley against John B. Kerfoot, with garnishment against C. C. Pinckney. From a discharge of the garnishee, plaintiff appeals. Affirmed.

Chas. W. Johnson, of Pasco, for appellant. Gerard Ryzek, of Pasco, for respondents.

MORRIS, J. Appellant, having obtained a judgment against Kerfoot, garnisheed respondent Pinckney, who was a tenant of Kerfoot, under a written lease with rent payable monthly in advance. The rent for the current month having been paid at the time of the issuance and service of the garnishment, the garnishee was discharged, and Barkley appeals, contending that the garnishee should be held under the writ for future installments of rent to become due under the lease. We cannot so hold.

[1] The general rule is that a creditor can obtain no greater relief against a garnishee than exists in favor of the debtor. It follows that, if there is no present indebtedness from the garnishee to the debtor, there is nothing upon which the writ can operate, except in so far as some statutory provision would establish a contrary rule. *Eureka Sandstone Co. v. Pierce County*, 8 Wash. 236, 35 Pac. 1081; *Marx v. Parker*, 9 Wash. 473, 37 Pac. 675, 43 Am. St. Rep. 849; *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153.

[2] Appellant contends we have such a provision in section 693, Rem. & Bal. Code, providing that: "If it shall appear from the trial hereinafter provided for that the garnishee is indebted to the principal defendant in any sum, but that such indebtedness has not matured and is not due and payable, the court shall make an order requiring the garnishee to pay such sum into court when the same becomes due." This provision plainly covers cases where the indebtedness has been created and exists at the time of the garnishment, but the time of payment has been extended to some future time or, as the courts sometimes put it, "debitum in presenti, solvendum in futuro." The covenant to pay rent at a stated future time creates no existing legal demand for the rent nor present indebtedness until the stipulated time has arrived. Such a covenant creates not an absolute but a contingent liability, as causes may arise which may destroy the liability. "The rent may never become due. The lessee may quit the premises with the consent of the lessor; or he may assign over his term with such consent, so as to discharge himself from rent; (b) or he may be

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

evicted by a title paramount to that of his lessor—in either of which cases he will be discharged from the operation of his covenants." *Wood v. Partridge*, 11 Mass. 498. It therefore seems to us quite clear that the covenant to pay future installments of rent as they become due and fixed under a lease is too uncertain and contingent to be regarded as an absolute present but not matured indebtedness within the meaning of our statute, and the great weight of authority supports this rule. *Haffey v. Miller*, 6 Grat. (Va.) 454; *Thorp v. Preston*, 42 Mich. 511, 4 N. W. 227; *Ordway Bros. & Co. v. Remington*, 12 R. I. 319, 34 Am. Rep. 646; *Buxbaum & Co. v. Dunham*, 51 Ill. App. 240.

[3] Appellant cites us to *Sallaske v. Fletcher*, 73 Wash. 593, 132 Pac. 648, where it was held that a husband's contingent liability upon a lease upon which no rent was due at the time was an "existing equity," within section 8766, Rem. & Bal. Code, providing that gifts or conveyances of community property between husband and wife are valid except as to existing equities in favor of creditors. "Existing equities," as there treated, embrace both existing and contingent liabilities, and the opinion makes a clear distinction between existing debts and existing equities. The case before us presents no question of "existing equities" under the cited statute, and the case is in no wise applicable to any question here involved.

The judgment is affirmed.

CROW, C. J., and PARKER, FULLERTON, and MOUNT, JJ., concur.

CARD et al. v. WENATCHEE VALLEY GAS & ELECTRIC CO.

(Supreme Court of Washington. Jan. 24, 1914.)

1. ELECTRICITY (§ 14*)—STANDARD OF CARE.

The degree of care required of one handling the dangerous agency of electricity depends upon the danger from the current, slight care being sufficient where the current would not injure persons with whom it came in contact, and the highest care being necessary where the current would be fatal to human life, as in the case of a high tension wire in dangerous position.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.*]

2. ELECTRICITY (§ 19*)—ACTIONS—JURY QUESTION.

In an action for the wrongful death of one killed by the electric current carried by defendant's wire, the question of defendant's negligence in stringing high power wires within 17 feet of the ground and over decedent's land held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

3. ELECTRICITY (§ 16*)—PROXIMATE CAUSE—WHAT CONSTITUTES.

In an action for the death of one killed by the current from a high power electric wire which extended over his land and was only 17 feet from the ground, the defendant cannot ex-

cuse itself upon the ground that its negligence was not the proximate cause of the injury, it appearing that deceased in fixing an irrigation flume inadvertently brought an iron pipe in contact with the uninsulated wire, the test not being whether the particular accident could have been ascertained, but whether a person, following his usual avocation where he has a right to be, might be injured by the current.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.*]

4. ELECTRICITY (§ 19*)—ACTIONS—JURY QUESTION.

In an action for the wrongful death of one killed by contact with a high current electric wire, the question of his contributory negligence held, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.*]

Department 2. Appeal from Superior Court, Chelan County; William A. Grimshaw, Judge.

Action by Ida B. Card and another against the Wenatchee Valley Gas & Electric Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Reeves, Crollard & Reeves, of Wenatchee, for appellant. Frank A. Steele, of Seattle, and Fred Kemp, of Wenatchee, for respondents.

PARKER, J. This action was prosecuted in the superior court for Chelan county by the widow and minor child of James W. Card, to recover damages which they allege resulted to them from his death, caused by the defendant's negligent manner of maintaining its electric power transmission line. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiffs, from which the defendant has appealed.

The contentions of counsel for appellant all go to their claim that the trial court erred in refusing to take the case from the jury and decide it in appellant's favor as a matter of law, it being claimed that the evidence was insufficient to support any finding of negligence on the part of the appellant, and also that the evidence conclusively showed that deceased met his death as the result of his own negligence. The facts are not seriously in dispute, the real contentions having to do with the question of what conclusions reasonable minds might draw from the facts as to the negligence of appellant and deceased.

James W. Card, at the time of his decease, owned and occupied with his family a small farm fronting upon a main traveled road in Chelan county. Appellant maintained along this road a high power electric transmission line, consisting of poles supporting wires. The lower wire of this line was uninsulated, carried 16,500 volts, and was suspended from the ends of cross-arms which projected over the line of the highway some two feet, so that it was directly over the land of deceased, and within 17 feet of the ground. The land

of deceased, like all other land in that neighborhood, was farmed by irrigation. It was customary for the farmers to carry water for irrigation on and across their land to a considerable extent in iron pipes as well as in open ditches and wooden flumes. The pipes varied in length from 10 to 20 feet. Some of the iron pipes were made of light, galvanized iron, and some of the heavier wrought iron. On April 23, 1912, deceased was working upon his land near the highway, directly under appellant's transmission line, on one of his lateral flumes. He had a length of wrought iron pipe about 20 feet long and 2½ inches in diameter from the inside of which he was trying to remove a piece of wood. In his efforts to do so, he raised the pipe on end, and proceeded to raise and let it down upon the boards of the flume with a view to jarring the wood out of it. The pipe then came in contact with the wire of appellant's transmission line which was directly over his head. The pipe coming in contact with the wire, when raised off the ground while held by deceased in his hands, caused a ground connection of the electric current through his body, and he was thereby instantly killed. Deceased had lived on this land for about three years, during which time appellant's transmission line had been there over his land. He knew of its presence, but there is no evidence that he knew of the extreme high power of the current, nor of its deadly effect to one coming in contact with it. There was evidence tending to show that he knew that a neighbor boy had received a shock from throwing a long piece of sea kelp over the wire, while playing with the kelp as he would with a long whip, but apparently the shock then received by the boy was not serious. There was introduced testimony of experienced electrical engineers touching the proper height at which wires carrying powerful electric current should be suspended above the ground. This evidence was such as to fully warrant the jury in believing that for a proper degree of safety a transmission wire carrying 10,000 volts or more should be, in no event, less than 25 feet from the ground, and that the usual construction regarded proper by engineers would suspend a wire carrying 10,000 or more volts about 45 feet above the ground. Appellant had a franchise for the maintenance of its transmission line along this road, but had no right to suspend any of its wires over the land of deceased. It is conceded that the 16,500 volts carried by the wire which was suspended over respondents' land was highly dangerous; in fact deadly in its effect should any one come in contact with it, either directly or through any medium which would cause the current to pass through the body of such person.

[1, 2] It is first argued that the evidence failed to show negligence on the part of appellant in the maintenance of its transmission line in the manner and location shown.

It seems to us the degree of care required by the law from appellant in the handling of this highly dangerous agency must be considered in connection with the question of its negligence. The degree of care required of one in the handling of a more or less dangerous agency must be commensurate with the degree of danger involved; that is, the degree of care which must be exercised by one in handling an agency which is attended with but slight danger would require but a moderate degree of care, while if the agency is attended with great danger, and especially if it is such as to destroy human life, the care must be of the highest degree. This view is well expressed by Mr. Crosswell in his work, "The Law Relating to Electricity," at section 234, as follows: "The amount of care necessary varies with the danger which is incurred by negligence, for a prudent and reasonable man increases his care with the increase of danger. If but little danger is incurred, as, for instance, when the wires carry only a harmless electric current, such, for instance, as the telegraph or telephone current, only ordinary care may be required. While if the wires carry a strong and dangerous current of electricity, so that negligence will be likely to result in serious accidents, and perhaps death, or if a harmless wire is in dangerous proximity to a high-tension wire, a very high degree of care, indeed the highest that human prudence is equal to, is necessary. This is particularly true of electric light and electric railway wires, which carry a high-tension current, often of great danger. The rule is thus stated in a case in Massachusetts: 'The vigilance and attention required must conform to the nature of the emergency and the danger to which others may be exposed, and is always to be judged of according to the subject-matter, the danger and force of the material under the defendant's charge.' This is in harmony with the views generally expressed in the decisions of the courts. *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Metropolitan St. Ry. Co. v. Gilbert*, 70 Kan. 261, 78 Pac. 807, 3 Ann. Cas. 256; *Harter v. Colfax Electric Light & Power Co.*, 124 Iowa, 500, 100 N. W. 508; *Gilbert v. Duluth General Electric Co.*, 93 Minn. 99, 100 N. W. 653, 106 Am. St. Rep. 430; *Mangan's Adm'r v. Louisville Electric Light Co.*, 122 Ky. 476, 91 S. W. 703, see note to this decision in 6 L. R. A. (N. S.) 459. Applying this rule of law to the facts we have noticed, we think there is little remaining to be said in support of the correctness of the action of the trial court in leaving the question of appellant's negligence to the jury. In the light of all the circumstances, we think it cannot be said that reasonable minds might not arrive at the conclusion that appellant was negligent in maintaining this high-powered electric transmission line suspended within 17 feet of the ground over the land of deceased.

[3] Contention is made that the coming in contact with this wire by deceased in the manner shown was so extraordinary as not to require anticipation thereof by appellant. It may be that the particular manner of coming in contact with the wire would hardly be anticipated by appellant or its agents. That, however, it seems to us is not the real test. As was said by Justice Siebecker, speaking for the Supreme Court of Wisconsin in *Wilbert v. Sheboygan, etc., Ry. Co.*, 129 Wis. 1, 106 N. W. 1058, 116 Am. St. Rep. 931: "To say that a condition is reasonably to be apprehended does not imply that the exact condition proven as to the erection of this tree wire was to have been expressly contemplated, but it implies that a dangerous condition, in the nature of this one, was likely to arise in connection with the conduct of appellant's business." It seems to us it is not so much a question of what particular incident might occur to bring a person in contact with the wire, but whether a person, following his usual avocation where he has a right to be, might in any manner be brought in contact with the wire. It seems to us, in view of the deadly character of this powerful current, the high degree of care required of appellant in its maintenance, and the fact that it was suspended over the land of deceased at the height of 17 feet, the jury might well conclude that appellant was bound to anticipate occurrences of the nature here involved. We are of the opinion that, under all the circumstances, the question of appellant's negligence was one for the jury, and could not be determined as a matter of law.

Our attention is called to the decisions of this court in *Graves v. Washington Water Power Co.*, 44 Wash. 675, 87 Pac. 956, 11 L. R. A. (N. S.) 452, and *Mayhew v. Yakima Power Co.*, 72 Wash. 431, 130 Pac. 485, where the court held with the defendants on the question of their negligence as a matter of law. Those were extreme cases. In the *Graves Case* the plaintiff was not where he had a right to be, and, besides, he was required to use extraordinary efforts to come in contact with the wire of the defendant. He was climbing up near the wire to secure a bird's nest. In the *Mayhew Case* the wire was suspended 45 feet above the highway, and it was plain that no usual contemplated use of the highway could possibly bring a person in contact with the wire. We think those cases are not controlling here.

[4] It is finally argued that the deceased was negligent in allowing the pipe in his hands to come in contact with the wire. This, we think, was also a question for the jury, and could not be determined as a matter of law, in view of the facts we have noticed; especially in view of the fact that deceased was where he had a right to be, engaged in his usual avocation; that appellant's wire was suspended over his land without right, and

it not being shown that deceased had knowledge of the extremely dangerous character of the current carried on the wire.

The judgment is affirmed.

CROW, C. J., and FULLERTON and MOUNT, JJ., concur.

EMPIRE REALTY CO. v. RATCLIFF et ux. WARNER v. EMPIRE REALTY CO. et al.
(Supreme Court of Washington. Jan. 24, 1914.)

1. BROKERS (§ 40*)—EMPLOYMENT OF SALESMAN—COMPENSATION—RIGHT AGAINST PRINCIPAL.

Where a real estate broker contracted with a salesman to pay him a percentage of the commissions on sales and exchanges which he effected, the salesman acquired no rights against clients of his employer, and his only relief was to sue the employer, and hence his assignee could not recover against a client of the employer who was indebted for a commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 38-40; Dec. Dig. § 40.*]

2. JUDGMENT (§ 744*)—CONCLUSIVENESS—MATTERS CONCLUDED.

In an action by the assignee of a salesman employed by a real estate company, and entitled to a percentage of the commissions, brought against a client of the company who was indebted to it, a denial of relief against the client is not an adjudication against the company's liability.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1278-1281; Dec. Dig. § 744.*]

3. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

Where plaintiff was clearly entitled to no relief, the improper exclusion of evidence which would not have changed the result is harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

Department 2. Appeal from Superior Court, King County; John E. Humphries, Judge.

Actions by the Empire Realty Company, a corporation, against F. A. Ratcliff and wife, and by Thomas M. Warner against the Empire Realty Company and F. A. Ratcliff and wife. There was a judgment for plaintiff in the first action, and for defendants in the second, and plaintiff in the second action appeals. Consolidated on appeal. Affirmed.

Beechler & Batchelor, of Seattle, for appellant. Wm. C. Keith, of Seattle, for respondents.

PARKER, J. These actions, while commenced separately in the superior court for King county, were, by stipulation of all parties thereto, consolidated in that court. The rights of the plaintiff Warner are, in substance, those of an intervener in the action of Empire Realty Company against Ratcliff and wife. Warner seeks recovery from Ratcliff and wife of a commission upon an ex-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

change of real estate, also sought to be recovered from Ratcliff and wife by Empire Realty Company. Warner also prays that the Empire Realty Company be adjudged to have no right to the claimed commission. A trial before the court, without a jury, resulted in a judgment in favor of Empire Realty Company against Ratcliff and wife for the sum of \$147, and also in the denial of the relief prayed for by Warner. The judgment against Ratcliff and wife was immediately satisfied by paying the amount thereof into court, which was, by order of the court, paid to Empire Realty Company. From this disposition of the cause, Warner has appealed to this court.

The controlling facts, we think, are not subject to serious controversy. In March, 1910, Empire Realty Company entered into a contract in writing with M. N. Knuppenburg; the provisions of which, so far as we need here notice them, being as follows: "The said Empire Realty Company hereby employs the said second party as a real estate salesman to take charge of the farm and acreage department of their said business, to work upon a commission basis, the said second party to devote his best efforts to the success of said business. It is hereby agreed between the parties hereto that said second party shall receive as his compensation for said services a certain share of the commissions earned by sales of acreage and farms, as hereinafter provided, to wit: [Here follows a statement of commissions to be paid by Empire Realty Company to Knuppenburg for his services.]" In December, 1910, Empire Realty Company entered into a contract in writing with Ratcliff and wife, by which it was to effect an exchange of certain lands of Ratcliff and wife, and receive a certain commission as compensation therefor. Thereafter Knuppenburg, acting for Empire Realty Company, in pursuance of his employment contract above quoted from, effected the exchange of Ratcliff and wife's lands, resulting in the earning of the commission due from Ratcliff and wife in pursuance of their contract with Empire Realty Company. In December, 1911, Empire Realty Company commenced the first of these actions against Ratcliff and wife to recover a claimed balance of \$285 due upon the commission. In January, 1912, Knuppenburg made an assignment to appellant Warner, reading as follows: "For value received, I hereby sell, transfer, set over, and assign unto Thomas M. Warner any and all accounts in favor of myself against F. A. Radcliffe and Nora A. Radcliffe, his wife." In August, 1912, Warner commenced the second of these actions to recover from Ratcliff and wife the claimed balance of \$285 due upon the commission, and also prayed that the Empire Realty Company be decreed to have no interest in this balance.

[1, 2] Counsel for appellant evidently pro-

ceeded upon the theory that a portion of the commission equal to the agreed compensation due Knuppenburg, measured by his employment contract with Empire Realty Company, constitutes an obligation which can be recovered upon by Knuppenburg, or appellant as his assignee, direct from Ratcliff and wife, and that Empire Realty Company had already received from Ratcliff and wife its portion of the commission. It seems to us that appellant's contentions rested upon this theory are fully answered by the contract of employment entered into by Knuppenburg with the Empire Realty Company, which renders it plain that he was employed by that company, and that his assignee, appellant, must look to it for the payment of his compensation. Appellant is not seeking from the Empire Realty Company, Knuppenburg's employer, a personal money judgment against it for services rendered by Knuppenburg, but seeks to pass over the head of Knuppenburg's employer, Empire Realty Company, and recover the compensation from its debtors, Ratcliff and wife, not through the usual garnishment proceedings, which would require that he first have judgment against the Empire Realty Company, but evidently upon the theory that Ratcliff and wife were indebted to appellant, as Knuppenburg's assignee, as well as Empire Realty Company for commission in making the land exchange. We are of the opinion that appellant was not entitled to judgment against Ratcliff and wife, since Ratcliff and wife owed him nothing, from which it necessarily follows that he was not entitled to the money paid into court in satisfaction of the judgment rendered against Ratcliff and wife in favor of Empire Realty Company. Whether Knuppenburg or appellant, as his assignee, is entitled to a money judgment in any sum against Empire Realty Company on Knuppenburg's employment contract is a question that is not involved in this controversy, nor is the judgment rendered herein in any wise res adjudicata of that question.

[3] It is complained that the court erroneously excluded certain evidence offered by counsel for appellant. A somewhat careful reading of the statement of facts leaves us in doubt as to the exact offer of proof made. We think, however, that no offer of proof was made tending to show that the employment contract between Empire Realty Company and Knuppenburg, from which we have quoted, was not entered into and was not in force at the time of the earning of the commission due from Ratcliff and wife upon their land exchange, nor was there any offer made tending to show that Knuppenburg, in the consummation of that exchange, was acting otherwise than under and in pursuance of that employment contract. The offers of evidence would, in no event, have changed these controlling facts. We are of the opinion that the offered proof could have in no

event changed the result upon the merits, and therefore no prejudice resulted from the court's rulings thereon.

A number of other rulings of the court touching the pleadings and other matters of procedure are challenged. It is possible that a careful review of these rulings might disclose some technical errors; but they were so clearly without prejudice to the rights of appellant that we think they do not call for discussion.

The judgment is affirmed.

CROW, C. J., and MOUNT, FULLERTON, and MORRIS, JJ., concur.

SLEDGE et ux. v. ARCADIA ORCHARDS CO.

(Supreme Court of Washington. Jan. 23, 1914.)

1. DAMAGES (§ 78*)—CONTRACT—BREACH—LIQUIDATED DAMAGES OR PENALTY.

Defendant contracted to plant 100 acres of land belonging to plaintiff to apple trees as early as the weather would permit in the spring of 1912; also to plant such a cover crop between the rows of trees as, in the judgment of plaintiff's horticulturist, should be of most advantage to the land, and to properly care for such crop and trees when planted. *Held*, that the provision in the contract that, in case of defendant's failure to comply therewith, he should pay \$60 for each acre of land remaining unplanted at the close of the planting season in the spring of 1912 was for a penalty, and not for liquidated damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-163; Dec. Dig. § 78.*]

2. CONTRACTS (§ 316*)—PERFORMANCE—BREACH—WAIVER.

Defendant contracted to plant to apple trees, and care for same, 100 acres of plaintiff's land during the season of 1912, and to forfeit \$60 for each acre unplanted in accordance with the contract. Plaintiff, with notice that defendant was not complying with its contract, on May 13, 1913, commenced an action to recover damages, but on May 20th wrote defendant a letter, calling attention to defendant's obligation to plant a cover crop at the time the trees were planted, and stating that it would be agreeable to plaintiff if defendant delayed planting the cover crop, provided it was planted by September 1st following. *Held*, that such letter was a waiver of defendant's breach by delay, and justified defendant in believing that, if the work was then prosecuted to completion, it would be accepted as part performance, and that the remaining undertaking to plant the cover crop might be delayed until September 1st, and would then be accepted as final performance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1382-1387, 1395, 1398-1400, 1480-1491; Dec. Dig. § 316.*]

3. CONTRACTS (§ 322*)—BREACH—DAMAGES—EVIDENCE.

Where, in an action for breach of an orchard planting contract which fixed no definite time within which the trees should be planted, the parties knew that the land had to be cleared, stumps blown, etc., before the trees could be planted, and that little work could be done before the spring of 1912, evidence that the open season for planting trees in the vicinity began from the 1st to the 10th day of April,

and ended about the middle or last of May, and that trees planted after that time would probably be delayed in producing for one year, was inadmissible.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1801; Dec. Dig. § 322.*]

4. CONTRACTS (§ 294*)—PERFORMANCE—EVIDENCE.

Where an orchard planting contract did not fix any specific time for completion, but merely required that the trees be planted as early in the spring of 1912 as the weather would permit, and defendant substantially performed such undertaking, the contract having provided a penalty for delay, plaintiff was not entitled to recover damages therefor, in the absence of proof of actual pecuniary damages resulting therefrom.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1352, 1357-1361; Dec. Dig. § 294.*]

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by J. B. Sledge and wife against the Arcadia Orchards Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

John T. Mulligan, Neil O. Bardsley, and H. N. Martin, all of Spokane, for appellants. Cullen, Lee & Hindman, of Spokane, for respondent.

ELLIS, J. In this action the plaintiff sought to recover from the defendant the sum of \$6,000 as liquidated damages for alleged breach of a written contract. In the contract, which is attached to the complaint as an exhibit, the defendant is designated as party of the first part, and the plaintiff as party of the second part. It was dated November 1, 1911, and, omitting formal parts and signatures, reads as follows:

"(1) The party of the first part, for and as part consideration for the dismissal by plaintiff of cause No. 78632, in the superior court of the state of Washington for King county, J. B. Sledge, plaintiff, v. Arcadia Orchards Company, a corporation, defendant, and an extension of time to the first party in which to plant said second party's land to apple trees, hereby covenants and agrees to plant to apple trees two years old in the fall of 1911 the entire 100 acres of land described and mentioned in a certain contract between the parties to this agreement, dated December 20, 1909, requiring the first party to plant said land to apple trees, and to plant all of said land to a cover crop between the rows of said trees which shall be, in the judgment of A. G. Craig, horticulturist for the first party, of the greatest advantage to said land, as early as the weather will permit in the spring of 1912, and to properly care for said apple trees according to the terms of said contract, which is hereby expressly continued in full force and effect, and to which this agreement is supplemental; and, if the first party shall fail to plant all or any portion of

said land to apple trees two years old in the fall of 1911, or properly care for said trees, or plant said cover crop as soon as said trees have been planted, or fail to fully perform any and all of the covenants and agreements entered into by the first party, the first party shall and it hereby expressly covenants and agrees to pay said second party \$60.00 for each acre of said land remaining unplanted after the time herein specified for planting said land in the spring of 1912, and said sum shall become due and payable, and the first party hereby agrees to pay the same to said second party, upon default by the first party, and the first party hereby further agrees to pay said second party \$60.00 for each acre of said land remaining unplanted at the close of each planting season after the time herein specified for said land to be planted in the spring of 1912, which sum or sums shall become due and payable to said second party immediately upon said default by the first party, as liquidated damages, and, if the first party shall fail to properly care for said trees after the same are planted, it hereby expressly agrees to pay said second party \$60.00 for each acre of said land on which said trees are not properly cared for, and the first party hereby expressly covenants and agrees with said second party the payment of said liquidated damages for and on account of the breach of this agreement on its part as herein specified according to the number of acres of said land remaining unplanted after and including the spring of 1912 represents and is a just amount to be allowed said second party for damages said second party will suffer on account of any default on the part of the first party to fully and promptly perform any and all of the covenants and agreements herein specified by it to be performed on the dates herein specified.

"(2) The party of the second part, for and in consideration of the covenants and agreements herein made and entered into by the first party hereinbefore mentioned, and the prompt performance of said covenants and agreements by said first party, hereby covenants and agrees to and does give said first party an extension of time from the fall of 1911, which is the latest date said first party has to plant said land belonging to the second party under the terms of said contract dated December 20, 1909, which contract and all rights thereunder is expressly reserved by the second party, in which to plant said 100 acres of land purchased by the second party from said first party to apple trees two years old in the fall of 1911 to as early as the weather will permit said first party to plant said land in the spring of 1912, upon the express condition said first party will pay the second party all sums due as liquidated damages for default on the part of said first party to perform any of the covenants and agreements herein specified to be performed by said first party promptly as soon

as said first party shall be in default in the performance of any of said covenants and agreements, and the second party grants to said first party the right to harvest the cover crop to be planted between the rows of trees on said land, if said first party shall so desire and proceed to harvest said crop."

The complaint was verified on May 13, 1912, and alleged that at that time no trees had been planted, that the season for planting, according to the terms of the contract, has passed, and that, by virtue of the terms of the contract, this constituted a breach, entitling the plaintiff to \$6,000 damages as therein provided. The answer denied generally the allegations of the complaint; but on the trial the defendant admitted the execution of the contract. The cause was tried to the court without a jury. The evidence adduced by the plaintiff tended to establish the following facts: When the contract was made, the land in question, though it had been logged off in prior years, was densely covered with small trees, underbrush, and large stumps. Both parties knew that the land had to be cleared of trees and underbrush, the stumps blown out, and the brush and stumps piled and burned before the land could be plowed and prepared for planting to trees. It fairly appears that the land could not be cleared to any advantage during the winter season, though the plaintiff Sledge did testify that, in his opinion, some of the clearing might have been done after November 1, 1911, when the contract was made. It appears that the clearing was commenced some time early in the spring of 1912, and prosecuted as rapidly as possible; the plaintiff Sledge testifying that he visited the land on May 5, 1912, when he found men working all over the place, that the underbrush had all been cleared off and burned, that 20 acres had been fully cleared, and the stumps piled, that on another 20 the piling of the stumps was going on, while on another 20 stumps were being blown out preparatory to piling and burning. Plowing was commenced on other land belonging to the defendant on March 27th, and progressed as steadily as the weather would permit; the plaintiffs' land being reached on May 13th, between which time and June 8th it was all plowed, and set out to apple trees. There was evidence to the effect that, had the plaintiffs' land been cleared before the spring of 1912, the weather conditions were such that plowing could have been commenced thereon about April 18th. Sledge testified that he visited the land again on May 12th, the day before the plowing began, and on the next day began this action. The evidence makes it clear that he knew that the work was in progress when the action was commenced, and that the defendant was intending to prosecute the work, and plant the trees, since, after suit was commenced, he wrote the defendant, under date of May 20, 1912, a letter as follows:

"Arcadia Orchards Co., Spokane, Wash.—Gentlemen: As specified in supplemental contract for planting one hundred acres of my land by you, cover crop therefor is to be planted at time of tree planting, being this spring. Beg to state it will be agreeable to me, provided you delay this planting of cover crop, getting same planted by September 1, 1912, at which time it is desired a planting of vetch and rye, mixed, be used. Such being recommended by your horticulturist, Mr. A. G. Craig, as of most advantage to the soil, and which is in accordance with mentioned contract. Yours truly, J. B. Sledge."

No offer was made to prove any actual pecuniary damage by reason of the delay in planting the apple trees, nor was any offer made to show that the trees, when planted, were not properly cared for, or that any of the trees on the whole 100 acres failed to grow. At the close of the plaintiffs' evidence, the court, on defendant's motion, granted a nonsuit, holding that the provision in the contract for payment of \$60 an acre was not a legal provision for liquidated damages, but a penalty, first, because the same sum was to be paid on default in any one or all of three things undertaken by the defendant, namely, the planting of the trees, the caring for the trees, and the planting of the cover crop; second, because the time for the final performance of the contract was uncertain, and that, had the parties intended the payment stipulated as liquidated damages, they would have fixed a definite time beyond which the planting could not be delayed; and, third, because there was a substantial compliance with the contract in that all of the land was planted to trees, as shown by the evidence, by June 8, 1912. The plaintiffs appeal.

Three questions are presented for our determination: (1) Should the contract be construed as providing for liquidated damages, or for a penalty? (2) Did the appellants, by the letter of May 20th, waive default, and accept what had already been done as part performance? (3) Did the court err in refusing to permit such proof of damages as was offered?

[1] 1. It will be noted that, by the contract, the respondent undertook to do three principal things: First, to plant the entire 100 acres to apple trees "as early as the weather will permit in the spring of 1912"; second, to plant the land to such cover crop between the rows as shall be, in the judgment of the respondent's horticulturist, to the best advantage to the land; third, to properly care for the trees when planted. By a literal construction of the contract, the \$60 an acre was to be paid by respondent upon failure to perform any one, any two, or all of these things. It is manifest that these things were, in their very nature, different in degree of importance. The total

failure to plant the trees would be of much greater damage to the appellants than the failure to plant the cover crop, or the failure to properly care for the trees when planted, and the latter would doubtless be a greater damage than the failure to plant the cover crop. Yet, if the contract be construed literally, as one for liquidated damages, the respondent would be liable for payment in the same amount on its default in the least important of these undertakings as for a default in the most important. While it may be reasonably argued that each of these things, by reason of the difficulty in estimating the damages likely to result from a default in either of them, would be a proper subject for liquidated damages, it is still evident that they are not, from their very nature, the proper subject for stipulated damages in the same amount. Though stipulated damages are allowable whenever actual damages are incapable of accurate measurement and proof, the damages stipulated cannot be sustained when, on the face of the contract, they have no reasonable relation to the gravity of the default for which they are intended to compensate. Reasonable compensation is of the very essence of the distinction between stipulated damages and a penalty. It is self-evident that, if \$60 an acre would be reasonable compensation for the failure to plant the trees, that is, a total failure to perform the contract, it would be an unreasonable amount as compensation for a failure in either of the other two things undertaken, or for a mere partial failure to perform the contract. It is equally clear that, if the \$60 an acre would be only a reasonable compensation for a failure to properly care for the trees, or to plant the cover crop, then it would be unreasonably small and inadequate as a compensation for a total failure to plant the trees, that is, a total breach of the contract. If the parties had actually intended to fix stipulated damages to be paid for default, it is obvious that they would have stipulated different sums for default in these different undertakings.

To permit a recovery of the same sums for a minor as well as a major default, or for a partial as well as for a total failure to perform the contract, would be unconscionable. The very fact that the parties fixed the same sum without regard to the gravity of the default, and whether the default might be partial or go to the whole contract, made the provision for payment a penalty, and not an enforceable stipulation for liquidated damages. "Where an agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and then a certain sum is stipulated to be paid upon a violation of any or of all such provisions, and the sum will be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be

treated as a penalty, and not as liquidated damages." 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 443. "Whether an agreement provides for the performance or non-performance of one single act, or of several distinct and separate acts, if the stipulation to pay a certain sum of money upon a default is so framed, is of such a nature and effect that it necessarily renders the defaulting party liable in the same amount at all events, both when his failure to perform is complete and when it is only partial, the sum must be regarded as a penalty, and not as liquidated damages." 1 Pomeroy's Equity Jurisprudence (3d Ed.) § 444. "Contracts often contain a variety of stipulations of unequal importance, and therefore admitting of many breaches for which the damages would be different in amount. In such a case a total breach would involve an injury greater than that which would result from the infraction of a particular stipulation. Hence it is self-evident that a sum stipulated to be paid, either for breach of one of the minor provisions or of the whole contract, could not be a liquidation of damages on the principle of compensation for actual injury. The sum would either be too great for a partial breach or wholly inadequate to one which involved the loss of the whole contract." 1 Sutherland, Damages (3d Ed.) § 294; Krutz v. Robbins, 12 Wash. 7, 40 Pac. 415, 28 L. R. A. 676, 50 Am. St. Rep. 871; East Moline Co. v. Weir Plow Co., 95 Fed. 250, 255, 37 C. C. A. 62; Monmouth Park Ass'n v. Warren, 55 N. J. Law, 598, 27 Atl. 932; Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676; Carter v. Strom, 41 Minn. 522, 43 N. W. 394; City of Madison v. American Sanitary Eng. Co., 118 Wis. 486, 95 N. W. 1097; Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582, 54 N. E. 987. In *Ellers Music House v. Oriental Co.*, 69 Wash. 618, 623, 125 Pac. 1023, we distinctly recognize these principles, though finding that they were not applicable to the facts there presented.

[2] 2. But, even assuming that, notwithstanding the provision for payment in the same amount for any default, regardless of its gravity, the contract might be construed as one for liquidated damages because of the uncertainty of the amount of damages in case of either default, still, the appellant's letter of May 20, 1912, presents, in our opinion, an insuperable obstacle to the recovery of the sum in question as liquidated damages. It is clear from the evidence that, at the time this letter was written, the appellants knew that the respondent had cleared the land, and was proceeding with the planting of the trees. The letter which we have set out in our statement of the facts is a clear recognition of this fact, and carries a conclusive inference that, if the work were even then prosecuted to completion, it would be accepted as a part performance, and the

remaining undertaking to plant the cover crop might be delayed until September 1st, and would then be accepted as a final performance. Clearly the respondent was justified, notwithstanding the fact that suit had already been commenced, in assuming that the default therein claimed would be waived, and that, if it then proceeded with the planting of the trees, such action would be accepted as a performance pro tanto of the contract. To now permit the appellants to say that they meant nothing by this letter, and that the respondent was not justified in proceeding with the performance of the contract on the faith of that letter, would be most inequitable. Mr. Sutherland, after discussing the rule that the same sum cannot be fixed as liquidated damages for different breaches of a contract of different degrees of importance, says: "For the same reason that one sum cannot consistently be compensation alike for a total and partial breach, a stated sum made payable for the former cannot by construction be applied to any infraction after acceptance of part performance. In case of such a stipulation the stated sum is only recoverable upon the happening of the very event mentioned in the contract. If a partial breach occurs, it has sometimes been said the stated sum is as to that breach only penalty, and damages are given on proof without regard to it." 1 Sutherland, Damages (3d Ed.) § 296.

The principle here applied has been admirably stated by the Supreme Judicial Court of Massachusetts as follows: "The question what is liquidated damages, and what is a penalty, is often a difficult one. It is not always the calling of a sum, to be paid for breach of contract, liquidated damages, which makes it so. In general, it is the tendency and preference of the law to regard a sum, stated to be payable if a contract is not fulfilled, as a penalty, and not as liquidated damages, because then it may be apportioned to the loss actually sustained. But, without going at large into the subject, one consideration, we think, is decisive against recovering the sum in question as liquidated damages, namely: That here there has been a part performance, and an acceptance of such part performance. If the parties intended the sum named to be liquidated damages for the breach of the contract therein expressed, it was for an entire breach. Whether divisible in its nature or not, it was in fact divided by an offer and acceptance of part performance. It is like the case of an obligation to perform two or more independent acts, with a provision for single liquidated damages for nonperformance; if one is performed, and not the other, it is not a case for the recovery of the liquidated damages." *Shute v. Taylor*, 5 Metc. (Mass.) 61, 67. This rule was recognized and applied, and the above language quoted, by this court in *Myers v. Ralston*, 57 Wash. 47, 106 Pac. 474.

[3, 4] 3. Since the appellants cannot recover the sum claimed as liquidated damages, it remains only to inquire whether there was any such proof or offer of proof of actual damage as to put the respondent to its defense. The only offer of evidence on the appellants' part was an offer to prove by an expert horticulturist that the open season for planting trees in the vicinity of appellants' land begins from the 1st to the 10th of April, and ends about the middle or the last of May, and that trees planted later than that would probably be delayed in producing to the extent of one year. The appellant contends that the refusal to admit this evidence constitutes reversible error. It seems to us, however, that this evidence was properly refused, for two reasons. In the first place, the contract fixed no definite time within which the trees should be planted. The parties to the contract knew that the land had to be cleared, the stumps blown out, the brush and stumps burned, the land plowed and fully prepared before any trees could be planted. In the very nature of the case, little, if any, of this work could be performed in the winter time, and there is nothing arising to the dignity of evidence to indicate that weather conditions at any time after the making of the contract, November 1, 1911, until the opening of the spring of 1912 were such that the land could have been cleared, much less plowed, earlier than it was. Construing the contract, therefore, in reference to the known condition of the subject-matter, and remembering that no definite time was fixed in the contract when the planting of the trees should be completed, it seems to us that evidence as to the most advantageous time for planting was immaterial. The respondent had merely undertaken to plant the trees as early as the weather would permit in the spring of 1912. The evidence falls far short of showing that this undertaking was not substantially performed. In the second place, there was no offer to follow the offer made with proof of the actual pecuniary damage which would result from the supposed delay in production to the extent of one year.

We are constrained to hold that the provision for the payment of \$60 an acre as provided in the contract must be construed as a penalty rather than as liquidated damages; that the appellants, having accepted partial performance of the contract with full knowledge of the conditions, cannot be heard to say that there was a total failure of performance; and that, having failed to prove or offer to prove pecuniary damages in any definite amount, they have failed in their proof.

The judgment is affirmed.

CROW, C. J., and CHADWICK, MAIN, and GOSE, JJ., concur.

BELSHEIM v. FIRST NAT. BANK OF WHITE SALMON.

(Supreme Court of Washington. Jan. 24, 1914.)

1. BANKS AND BANKING (§ 126*)—DEPOSITS —ACCEPTANCE OF CHECKS.

Where a check is deposited with a bank, the bank accepts it merely for collection, and, if it credits the depositor with the amount of the check, that is a matter of grace, and, if payment is stopped, the depositor is not entitled to claim the credit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305, 309; Dec. Dig. § 126.*]

2. BANKS AND BANKING (§ 126*)—DEPOSITS —GOOD FAITH OF BANK.

Where a bank notified a customer that payment on a check deposited by a third person, and in which the customer claimed some interest, could be stopped, its action did not constitute bad faith, prohibiting it from debiting the depositor's account with the proceeds of the check which had been credited to him before collection.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 305, 309; Dec. Dig. § 126.*]

Department 2. Appeal from Superior Court, Klickitat County; H. E. McKenney, Judge.

Action by A. G. Belsheim against the First National Bank of White Salmon. From a judgment for defendant, plaintiff appeals. Affirmed.

N. B. Brooks and W. B. Presby, both of Goldendale, for appellant. J. L. Sutherland, of Goldendale, for respondent.

MOUNT, J. This action was brought by the plaintiff to recover the sum of \$1,500 deposited to the checking account of the plaintiff in the defendant bank, and also to recover \$500 damages by reason of the refusal of the defendant to honor the plaintiff's check against the deposit. The cause was tried to the court without a jury. Judgment was entered in favor of the defendant. The plaintiff has appealed.

On the trial of the case the court found that a credit was given to the appellant on the books of the respondent bank in the sum of \$1,500; that this credit was a provisional credit for the accommodation of the appellant; that no consideration was paid or received for such credit; that the credit was canceled and charged off from the appellant's account; and that the appellant drew upon the credit after knowledge of the cancellation thereof.

[1] There is no serious dispute about the facts in the case. They are briefly in substance as follows: The appellant and one Wheeler were real estate agents doing business in different places. They were not partners. One Frank Moore had listed a tract of land for sale with these agents. The price of the land was \$8,000. It was agreed that the

agents should receive as their commission what they might obtain for the land above the \$8,000. Thereafter Casper W. Hodgson, a resident of New York, agreed to purchase the property at the price of \$10,000. The contract of sale was closed on August 8, 1911, and Mr. Hodgson drew his check on a bank in New York City, payable to the order of the respondent in the sum of \$3,900, which was the balance of the cash payment to be made upon the purchase price. Thereafter, on August 23d, a deed and mortgage securing the balance due were deposited in escrow in the respondent bank to be delivered upon payment of the check. The respondent bank received the check for collection only, and forwarded the same to New York for payment. Afterwards, on the same day, the appellant requested the bank to pass to his credit the sum of \$1,500, and to the credit of Mr. Wheeler the sum of \$450, being the amounts claimed as commissions upon the sale of the land. The appellant was then informed by the officers of the respondent bank that the proceeds of the Hodgson check had not been received. The appellant then assured the officers that there would be no trouble about the collection of the check. Thereupon the bank passed to the credit of the appellant \$1,500 and to the credit of Mr. Wheeler \$450. On the next day Mr. Wheeler went to the respondent bank and stated that he was not satisfied with the division of the commission which the appellant had made, and asked the officers of the bank if the payment of the check could not be stopped. He was informed that it could be. Mr. Wheeler thereupon caused the payment of the check to be stopped, and the bank was notified by wire from New York of that fact. Mr. Wheeler also notified the bank that payment of the check had been refused. Thereupon the respondent bank canceled the credits given on account of the check and notified the appellant thereof. Afterwards, on October 13, 1911, the appellant drew his check upon the respondent bank for the sum of \$1,500, and payment was refused. The Hodgson check was never paid, and no money passed through the bank on account of the transaction. On November 13, 1911, this action was brought by the appellant against the bank.

A mere statement of the facts shows clearly that the appellant was not entitled to recover. It is plain that the credit which was given by the bank to the appellant was for the accommodation of the appellant and was entirely without consideration. This case is controlled by *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912. That was a case very similar to this one, and, speaking to the point in this case, we there said, quoting from 2 Morse, Banks & Banking (4th Ed.) § 586: "Checks deposited and cred-

ited as cash do not become the property of the bank, so that it takes the risk upon itself, even though the depositor has been allowed to check against the deposit before the paper is collected, and the depositor can recover the check or other paper, if it is still in the possession of the depositor (depository). When a depositor deposits a check on another bank, without any special contract, the property remains in him, and the bank is his agent until it has notice that the correspondent bank has received the money and credited it. If the deposit is made and credited to recover an overdraft, or is drawn upon, the bank can hold the paper until the account is squared, but the property is in the customer. It is said that indorsement of the check to the bank, and credit on the books of the bank and on the passbook, are evidence of a contract by which the bank shall become owner of the paper; but (1) banks always claim and exercise the right of charging to the depositor all such checks returned unpaid, which is not consistent with the theory of an understanding that title passes absolutely. (2) The practice of allowing depositors to check against such paper is reckoned by the ablest text-writers as a mere gratuitous privilege." And further on in the same opinion, quoting from *Jefferson County Sav. Bank v. Hendrix*, 147 Ala. 670, 39 South. 295, 1 L. R. A. (N. S.) 246, it was said: "A bank which receives a check for collection and enters the face value of it as a deposit credit to its owner becomes the agent of the owner to collect it. If the collection is made, the relation of depositor and banker is consummated. If the collection is not made, the bank's right to charge off the deposit arises." This is clearly the law of the question and is conclusive of this case. The evidence is clear to the effect that the respondent bank credited the appellant's account with the sum of \$1,500 as an accommodation to him merely before the collection had been made. The collection, through no fault of the bank, was never made.

[2] It is urged by the appellant that the bank counseled Mr. Wheeler to stop payment. But the evidence shows that what the officers of the bank did was to advise Mr. Wheeler that, if he desired to do so, he could have the payment of the check stopped by wire. There was no collusion or fraud on the part of the bank. It was simply advising its customer as it had a right to do. It did not profit by the transaction in the slightest degree; it had no intention to do so.

The judgment of the lower court is clearly right under the facts and under the law, and is therefore affirmed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

STATE ex rel. CHICAGO, M. & P. S. RY. CO.
v. PUBLIC SERVICE COMMISSION
et al.

(Supreme Court of Washington. Jan. 23, 1914.)

1. RAILROADS (§ 216*)—APPLICATION FOR
SPUR TRACK—DEMANDS—WAIVER.

Where a shipper demanded that a railroad should install a spur loading track about 1,500 feet long, partly on its own right of way and partly on the shipper's land, and at the shipper's expense, and the road refused to do so, on the grounds that existing shipping facilities were sufficient, and that it was undesirable to cut the main line for such temporary spurs, and the Public Service Commission thereafter ordered a spur or side track for 300 feet on the railroad's right of way, the railroad by expressly admitting that a demand such as would have been sufficient would not have been complied with in any event, could not, on appeal from such order, question the sufficiency of the demand, but its right to insist upon a demand for the track as ordered was waived by its failure to question the sufficiency of the demand when made.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 713; Dec. Dig. § 216.*]

2. CONSTITUTIONAL LAW (§ 297*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—ORDER TO CONSTRUCT A SPUR TRACK.

Under the Public Service Commission Law (Laws 1911, c. 117, § 13), providing that a railroad upon the application of any shipper shall construct and operate upon reasonable terms a switch connection with its lateral line, or with the private sidetrack owned by the shipper whenever such connection is reasonable, practicable, can be made with safety and is justified by the business, and section 62, empowering the Commission upon a hearing and its finding of practicability, safety, etc., to order such connection, requiring the shipper to pay or secure the cost before construction, and that, where it may be done without unreasonable interference with the shipper, any person or corporation may use such track upon payment to the shipper of a reasonable part of the cost, a spur track, ordered to be built entirely upon the right of way held for railroad uses, after notice to the railroad and a full inquiry into the facts, though intended primarily for the use of a single shipper, is a public use in aid of the public service, to which the road and its right of way are devoted, and hence is not a taking of property for a purely private purpose without due process of law in violation of Const. U. S. Amend. 14, § 1, or Const. Wash. art. 1, § 8.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832-834; Dec. Dig. § 297.*]

3. COMMERCE (§ 58*)—REGULATION—CONSTITUTIONAL GRANT TO CONGRESS.

Where a spur track, ordered in by the Public Service Commission on application of a shipper, was found to be reasonable, practicable, and capable of operation with reasonable safety, and no such interference with the use and ordinary operation of the road was shown as to have an appreciable effect upon its interstate business, the order did not conflict with U. S. Const. art. 1, § 8, granting exclusive control of interstate commerce to Congress.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77-86, 100; Dec. Dig. § 58.*]

Department 2. Appeal from Superior Court, Thurston County; John B. Yahey, Judge.

Application by Miller & Short to the Public Service Commission, for an order directing

the Chicago, Milwaukee & Puget Sound Railway Company to construct a spur track. An order of the Commission granting the application was set aside by the superior court, and the petitioners Miller & Short and the Commission and its members appeal. Reversed, and order of Commission sustained.

W. V. Tanner and Stephen V. Carey, both of Olympia, Short & Gleysteen, of Cle Elum, and J. H. McDaniels, of Ellensburg, for appellants. F. M. Dudley, of Seattle, for respondent.

ELLIS, J. This is an appeal from a judgment of the superior court of Thurston county vacating an order of the Public Service Commission, requiring the respondent railway company to build and install, at the expense of the applicants, Miller & Short, a side track connecting with the main line of the railroad company at a point about .59 miles northwest of the flag station of Whittier in Kittitas county. For convenience we will throughout designate the parties as "appellants" and "respondent." The appellants Miller & Short own certain timber lands northwest of Whittier, and crossed by respondent's railway. They also own and operate a mill at Cle Elum on the Northern Pacific Railroad, which can only be reached by shipping over respondent's road to Easton, and thence over the Northern Pacific road to Cle Elum. In 1910 they made application to the respondent for the construction of a spur partially on the right of way and partially on the appellants' land. The railroad company, after repeated renewals of the request for the spur, finally, on August 31, 1911, refused the request, and the appellants filed their complaint with the Public Service Commission. After a hearing, on due notice, the Public Service Commission made findings of fact substantially as follows: That the complainants, Miller & Short, are the owners of about 10,000,000 feet of standing timber in the E. ½ of the N. W. ¼ and the W. ½ of the N. E. ¼ of section 22, township 21 north, range 12 east W. M., in Kittitas county, through which tracts the defendant's railway runs, and that the complainants had been shipping over the defendant's line from Whittier to Easton; that the complainants' timber lies principally on the east side of the track; that the nearest point on defendant's road at which complainants can load their timber is at Whittier; that the complainants' land east of the track is lower than the railroad track and, in moving the timber to Whittier, it is necessary to haul it over a heavy grade, cross the track, and then on another grade nearly a mile to Whittier, the total distance being from one to two miles; that it is impossible to haul the heavier timber on trucks to the station; that the cost of hauling in the manner necessary at present is \$1.50 to \$2 per thousand feet in excess of what it would

cost with more convenient loading facilities; that in January, 1910, the complainants applied to the defendant company for a loading spur on the northeasterly side of defendant's track near the center of section 22 on the defendant's railroad, about .59 miles from Whittier; that this was finally rejected by defendant August 30, 1911; that the spur asked for would pass over defendant's right of way for several hundred feet, then onto complainants' land, being about 1,500 feet in length; that defendant refuses to install the spur requested, claiming that the present facilities are adequate, and that the proposed spur would be impracticable and undesirable. The Commission further found that the present loading facilities at Whittier are inadequate, and that by reason of the poor roads and steep grades over which complainants have to haul, it is impossible to load the largest timber; that complainants intend to ship three cars a day during the logging season, weather permitting, if the spur is installed; that complainants are now paying from Whittier to Easton \$1 per thousand feet freight charge, with a minimum of \$7 per car; that the United States has a large amount of mature timber for sale on land near complainants', which is not now salable because of the difficulty of shipping it, and which could be shipped were the proposed spur installed; that defendant's right of way is 100 feet wide, and that there is ample room on which to construct the loading spur on the right of way; that complainants need a loading spur about 300 feet long near the point mentioned, which would cost \$575. The Commission found this cost by items, and found that the complainants were ready and willing to pay it; that two weeks' time is a reasonable time to allow for the construction of such spur; that such spur is reasonable and practical, can be put in and operated with reasonable safety, and that there is sufficient business to justify the installation of the spur without considering the timber held for sale by the United States government. A reading of the record convinces us that these findings are sustained by ample evidence. Upon these findings the Commission, on October 7, 1912, made an order which, omitting caption and immaterial parts, reads as follows: "This cause having been regularly heard and considered, and the Public Service Commission of Washington having made and filed its findings of fact herein, and being fully advised in the premises, now orders that the defendant, Chicago, Milwaukee & Puget Sound Railway Company be, and it is hereby, required within the time and upon the conditions hereinafter stated to construct a spur track 300 feet in length from head block to end of spur entirely upon its own right of way, for the use of the complainants and such other persons and corporations as may be entitled to the use thereof. Said spur track shall be located on the northeasterly side of defendant's main track

at a point near the center of section 22, township 21 north, of range 12 east W. M. in Kittitas county, Wash., and fifty-nine one-hundredths ($59/100$) of a mile east of the station of Whittier. Within 15 days from the date of this order, the complainants shall pay to the defendant the sum of \$575 in cash, to cover the cost and expense of constructing the said spur track, and the defendant shall, within 30 days from and after the payment to it of said sum, construct said spur track as hereinbefore provided. This order is made upon the condition that any person or corporation other than the complainants shall be entitled to connect with said spur or use the same, upon the payment to the complainants of a reasonable proportion of the cost thereof to be determined by this Commission after notice to the interested parties, provided that such connection can be made without unreasonable interference with the rights of the said complainants." Thereupon the respondent instituted proceedings in the superior court of Thurston county to review the order of the Commission. On that review, the respondent contended, and the trial court held: (1) That the evidence failed to show a sufficient demand on the appellants' part to install the spur as ordered by the Commission, in that the demand was for a spur 1,500 feet long, and partly off the right of way; (2) that the statute requiring railroad companies to install such side tracks is unconstitutional; (3) respondent now also contends that the order is an undue interference with interstate commerce. This appeal is prosecuted by the original applicants for the spur, and presents these three questions for our consideration.

[1] 1. The demand, as made, and the refusal of the respondent, is evidenced by a considerable volume of correspondence, which we deem it unnecessary to set out in full. It culminated in a letter of August 30, 1911, from the general counsel of respondent to the attorneys for appellants, which reads as follows: "Your letter of July 20th, referring to your application for a spur track, to be used for loading logs about one mile west of Whittier station, has been considered by the officials of the railway company and has been referred to me for reply. It appears that since the extension of the industry track or set-out track at Whittier station, by lengthening it and connecting it at each end with the passing track, reasonable facilities for loading logs have been afforded at that station. The physical condition of the ground is such as to facilitate the loading of logs onto cars. It should not be expected that the railway company will provide, at any point on its railroad where shippers may desire to load logs, spurs for such purpose; particularly, in a case where, as here, reasonable facilities exist at a station. It is not desirable to cut the main line for temporary spurs as would be the one you are asking for. After consideration of all these mat-

ters, and of the present facilities, the railway company has decided to decline the application of Miller & Short for the installation of a spur loading track at the proposed location." It is too clear for cavil that this letter was, in effect, and was intended to be, an absolute refusal to entertain further negotiations looking to the installation of any loading track or spur of any kind at or near the point in question. Moreover, the testimony of the superintendent of the respondent's coast lines was to the effect that he would, in no event, have recommended the installation of any spur of any kind, at the point in question, and that, in the absence of such a recommendation by him, no spur would have been authorized. The respondent is in no position to question the sufficiency of the demand while expressly admitting that a demand, such as it now claims would have been sufficient, would not have been met in any event. The demand as made was sufficient to include everything ordered. The refusal was not based upon the fact that the demand went beyond the terms of the statute. To hold that the demand and refusal must take the exact form and terms of the order as finally made by the Commission would be to render the statute ineffective in its practical operation. We deem it more consonant with reason and the plain purpose of the statute to hold that the right to insist upon a demand of the exact thing ordered may be waived by the failure to question the sufficiency of the demand when it is made, as in other cases where demand, tender, and the like are required as antecedent to a right of action. This court, in common with other courts, has held that, in such cases, the requirement is met by proof of facts showing that any different demand or tender from that made would be useless.

"We think it is the general rule that a demand is never necessary where it would be unavailing, if made." *Burrows v. McCalley*, 17 Wash. 269, 276, 49 Pac. 508, 510; *Chappell v. Woods*, 9 Wash. 134, 37 Pac. 286.

"It is a general rule that, when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted. Such is the doctrine established by this court in repeated decisions in regard to another branch of the law concerning the collection of taxes." *Hills v. Exchange Bank*, 105 U. S. 319, 321, 26 L. Ed. 1052; *St. Louis, etc., Ry. Co. v. Richards*, 24 Okl. 256, 102 Pac. 92, 23 L. R. A. (N. S.) 1032.

[2] 2. The respondent contended, and the trial court held, that the statute upon which the order of the Commission was based is void as violative of article 1, section 3, of the Constitution of the state of Washington, which declares "no person shall be deprived

of life, liberty or property without due process of law," and is violative of section 1 of the fourteenth amendment of the federal Constitution, which declares "nor shall any state deprive any person of life, liberty or property without due process of law." The argument proceeds upon the theory that such a side track as that provided for by the statute is private, and that the use contemplated is a private use, that the right of way of the railroad company is its private property, and that the taking of private property for a private use is the taking of property without due process of law. The statutory provisions under which the proceedings here in question arose are found in the public service commission law (Laws 1911, c. 117, p. 538 et seq.). Section 13 of that law is as follows: "A railroad company upon the application of any shipper shall construct, maintain and operate upon reasonable terms a switch connection or connections with a lateral line of railway or private side track owned, operated or controlled by such shipper, and shall upon the application of any shipper, provide upon its own property a side track and switch connection with its line of railway, whenever such a side track and switch connection is reasonably practicable, and can be put in with safety and the business therefor is sufficient to justify the same." Section 62, conferring upon the Commission powers intended to be adequate to compel public service companies to discharge the duties imposed by section 13 and other sections of the act, reads as follows: "Whenever the Commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that application has been made by any shipper for a switching connection or connections with a lateral line of railway or private side track owned, operated or controlled by such shipper, or that application has been made by any shipper for the installation of a side track upon the property of such railroad, and that such switch connection or side track is reasonably practicable, can be put in with reasonable safety, and the business therefor is sufficient to justify the same, and that the railroad company has refused to install or provide the same, the Commission shall enter its order requiring such connection or the construction of such side track: Provided, such shipper so to be served shall pay the legitimate cost and expense of constructing such connection or side track as shall be determined in separate items by the Commission, and before the railroad company shall be compelled to incur any cost in connection therewith the same shall be secured to the railroad company in such manner as the Commission may require. Whenever such lateral line of railway, private side track or side track upon the property of the railroad company shall be constructed under the provisions of this section, any person or corpora-

tion shall be entitled to connect therewith or use the same upon the payment to the shipper incurring the primary expense of a reasonable proportion of the cost thereof, to be determined by the Commission after notice to the interested parties: Provided, that such connection can be made without unreasonable interference with the right of such shipper incurring the primary expense." These are the provisions which the respondent attacks as unconstitutional. A careful consideration of these statutory provisions makes it plain that any order of the Commission, following the terms of the statute, is impressed with the following characteristics: The spur is to be built entirely upon the right of way of the railroad company, which is held for railroad uses. The order can be made only after notice to the railroad company, and a full investigation into the facts, upon a written complaint filed for the purpose. The spur, though constructed by the railroad company, is to be paid for by the shippers who use it. The spur, though intended for the immediate use of a particular shipper or shippers, is open to the use, upon reasonable terms, of all shippers who may desire to use it. No court, so far as we are advised, has ever held that an order, made under statutory authority, for a spur track impressed with all of these characteristics, was a taking of property without due process of law, or a taking of property purely for a private purpose.

The respondent relies mainly upon two decisions of this court involving the obligation of railroad companies to build spurs for the accommodation of industries. In the first case (*Northwestern Warehouse Co. v. Oregon Ry. & Nav. Co.*, 32 Wash. 218, 73 Pac. 388), it was held that a railroad company could not be required, under the statute then in force, to extend its track over lands which it did not own a distance of some 250 feet to a warehouse located beyond the end of the track. It appeared that the railroad company had never followed the policy of furnishing similar facilities to other shippers in the same line of business. The only constitutional question presented was that relating to section 15 of article 12 of the state Constitution, forbidding discrimination by common carriers, and section 22 of the same article, prohibiting contracts between companies limiting the production, or regulating the transportation, of any product or commodity. It was held that these sections of the Constitution were not self-executing, and that the application for the track extension was not within the terms of the statute passed pursuant to these constitutional provisions. No question touching the due process clause of the Constitution, either state or federal, was involved.

The second case was that of *Northern Pacific Ry. Co. v. Railroad Commission of Washington*, 58 Wash. 360, 108 Pac. 938, 28 L. R. A. (N. S.) 1021, known as the "Burn-

ham Spur Case." In that case Burnham, the applicant for the spur, owned and operated a sawmill tributary to the line of the railroad company at a point between the stations of Rainier and McIntosh, about 300 feet distant from the main line of the railroad. The company refused to construct the spur, and the millowner appealed to the Railroad Commission under the then existing railroad commission law. The Commission, after a hearing, ordered the railroad company to build a spur from its main line across its right of way and over certain private lands to the mill. The order required the applicant to do the grading and furnish the ties, but that all other expense should be borne by the railroad company. The superior court sustained the order, and an appeal was taken to this court. In reversing the decision of the trial court, this court said: "The order makes no provision for a right of way, and the evidence does not disclose who owns the land over which the spur track is to be constructed. * * * The appellant contends that the order is a taking of its property without due process of law, and that it contravenes the fourteenth article of amendment to the federal Constitution. We think this view must prevail. The sawmill is a private industry, and the effect of the order is to take the private property of the appellant and devote it to the private use of Burnham. *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 99 Am. St. Rep. 964." The opinion, after discussing certain decisions of the Supreme Court of the United States, to which we will presently refer, concludes as follows: "However desirable it may be for Mr. Burnham and others engaged in a like business to have switches and sidings extended to their mills, the fourteenth amendment to the federal Constitution, as construed by the highest federal court and by this court as well, presents an insuperable barrier against compelling such accommodations. The contention of the Attorney General that the order is promotive of the public convenience, and within the recognized police power of the state, cannot be upheld. We are persuaded, upon both principle and authority, that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way to afford him better and cheaper shipping facilities is, in substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the federal Constitution." From the parts of the opinion which we have quoted, and in fact from the entire opinion, it is manifest that the real holding of the Burnham Spur Case, when confined to the facts there involved, went no further than this: That where an order of the State Railroad Commission seeks to compel a railroad company, at its own expense in whole or in part, to build a spur track off of its own

right of way and over private property for the exclusive use of a single shipper, which spur does not become the property of the railroad company, and cannot be open to the public use because located on private property, such an order amounts to the taking of private property for a private use, and therefore contravenes the guaranty of both the state and the federal Constitution against the taking of private property without due process of law. Such a holding is, in no sense, determinative of the question here presented. That case does not hold that a railroad company may not lawfully be required, after hearing on notice as to the necessity and reasonableness of the application, to build entirely upon its own right of way, and at the expense of the applicant, a side track, giving to a private industrial plant access to the railway without which such private industry would be deprived of any practical participation in the public service to which the railroad is devoted, such a spur, when so constructed, to be open to the use of all members of the public on payment of an equitable proportion of the cost.

The decision in the Burnham Case was rested mainly upon the decision of the United States Supreme Court in *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489, and *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989. In the first of those cases the Nebraska state board of transportation, assuming to act under a statute prohibiting railroads from giving undue preferences or indulging in discrimination between shippers, made an order requiring the railroad company to grant to certain applicants the privilege of erecting and maintaining a private grain warehouse upon the railroad right of way. The Supreme Court of Nebraska construed the statute in question as authorizing the order. The Supreme Court of the United States held the statute so construed unconstitutional, using the following language: "The order in question was not limited to temporary use of tracks, nor to the conduct of the business of the railway company. But it required the railway company to grant to the petitioners the right to build and maintain a permanent structure upon its right of way."

* * * To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing, from time to time, the grain of the petitioners and of neighboring farmers is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected there-

on, to the railroad company for the accommodation of its own business, or for the convenience of the public. This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the Constitution of the United States." It will be noted from the above quotation that the court was careful to limit the language used to the facts there presented. The scope of the decision is also guarded and circumscribed by the following language found therein: "Nor does it [the record] present any question as to the power of the Legislature to compel the railroad company itself to erect and maintain an elevator for the use of the public, or to compel it to permit to all persons equal facilities of access from their own lands to its tracks, and of the use, from time to time, of those tracks for the purpose of shipping or receiving grain or other freight."

The offense of the statute lay in the fact that the warehouse, being a private warehouse, would not be open to the use of the public on equal terms. The railroad company would thus be required to relinquish all control over a part of its right of way to private individuals. The warehouse, when constructed, could not be used by the railroad company in aid of its public service. In the case before us, no such situation is presented.

After the last-mentioned decision, the Legislature of Nebraska passed a statute which required every railroad company, upon application, at its own expense, to construct and maintain a spur track on its right of way to reach every grain warehouse located on land contiguous thereto.

The second case above referred to (*Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989) arose under that statute. Holding the law unconstitutional, the Supreme Court of the United States said: "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases the initial cost is said to be \$450 in one and \$1,732 in the other; and to require the company to incur this expense unquestionably does take its property, whatever may be the speculations as to the ultimate return for the outlay. * * * This statute has no reference to special circumstances. It is

universal in terms. If we were to take it literally, it makes the demand of the elevator company conclusive, without regard to special needs and, possibly, without regard to place. * * * On the face of it the statute seems to require the railroad to pay for side tracks, whether reasonable or not, or, if another form of expression be preferred, to declare that a demand for a side track to an elevator anywhere is reasonable, and that the railroads must pay. Clearly no such obligation is incident to their public duty, and to impose it goes beyond the limit of the police power. * * * If the statute makes the mere demand conclusive, it plainly cannot be upheld. If it requires a side track only when the demand is reasonable, then the railroad ought, at least, to be allowed a hearing in advance to decide whether the demand is within the act. * * * We are of opinion that this statute is unconstitutional in its application to the present cases because it does not provide indemnity for what it requires."

It will be noted that these two decisions of the federal Supreme Court denounced statutes of Nebraska different from each other, both of them essentially different from our statute, and as offending in particulars not to be found in our statute. The first Nebraska statute, though authorizing the order after notice and a hearing, was held to violate the due process clause because it sought to compel the railroad company to devote property acquired and held for its public purposes as a transportation company to a use purely private and wholly private, in that the warehouse there in question was a private warehouse, owing no duty to the public, and not open to the use or service of any one save its owners.

The second Nebraska statute presented a typical case of offense against the due process clause, in that it purported to require any railroad in the state, at its own expense, and upon mere demand of the owner of any warehouse, to build a side track without any opportunity to be heard as to the necessity for the track or as to the reasonableness of the demand. It was held unconstitutional: First, because it provided no indemnity for what it required; second, because, being general in terms, it made no distinction between reasonable and unreasonable demands; third, because it made no provision whatever for a hearing in advance as to the requirements in any particular case. After noting these things, the court was careful to limit the decision as an authority by stating what it did not hold. The opinion concludes: "We are of opinion that this statute is unconstitutional in its application to the present cases because it does not provide indemnity for what it requires. We leave other questions on one side, and do not intend, by anything that we have said, to prejudice a later amendment providing for a pre-

liminary hearing and compensation, which is said to have been passed in 1907."

These two decisions may well be considered as ample authority for our decision in the Burnham Spur Case, since the order there involved, though made after notice and a hearing, provided no indemnity to the railroad company for what it exacted, required the railroad company, at its own expense, to lay down its own rails upon property not its own, but outside of its right of way, and neither the order nor the statute under which it was made contained any provision securing the use of the spur to the public on any condition equitable or otherwise. The statute here under consideration offends in none of these particulars.

Neither the Supreme Court of the United States nor of this state, nor any other court, so far as we are advised, has ever held that a railroad company may not lawfully be required, after a hearing on notice as to the reasonableness of the application, to build upon its own right of way, at the entire expense of the applicant, a spur track giving to a private industrial plant access to the railway, without which such private industry would be deprived of any practical participation in the public service which the railroad company is bound to give to all members of the public on equal terms, such spur, when so constructed, to be open to the use of all members of the public upon payment of an equitable proportion of the initial cost, and to be under the control of the railroad company, subject only to the same supervision and regulation of the state as that exercised over other parts of the railroad system. Such a spur is essentially a public spur. Such a use of the railroad right of way is essentially a public use, a devotion to legitimate railroad purposes.

As said by the Supreme Judicial Court of Maine, in a case involving the exercise of the right of eminent domain: "The tests decisive of this question as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission, but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one." *Ulmer v. Lime Rock Railroad Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387.

As said by the Supreme Court of Utah: "The test is, Will any and all persons and business institutions who may have occasion to do so be permitted to use it? That is, will the track be open to public use general-

ly? If so, then it is a public utility." *Stockdale v. Rio Grande Western Ry. Co.*, 28 Utah, 201, 209, 77 Pac. 849, 851.

As said by the Supreme Court of Iowa: "And we think that it makes no difference that the mineowner may be the only member of the public who may have occasion to use the way after it has been established. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small." *Phillips v. Watson*, 63 Iowa, 28, 33, 18 N. W. 659, 661.

And, as said by the Supreme Court of the United States: "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost." *Hairston v. Danville & Western Railway Co.*, 208 U. S. 598, 608, 28 Sup. Ct. 331, 335 (52 L. Ed. 637, 13 Ann. Cas. 1008).

That a spur track intended primarily for the immediate use of a single shipper, but open upon reasonable terms to the use of all members of the public who may have occasion to use it, is a public use is sustained by overwhelming authority. *C. & N. W. Ry. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918; *C. & B. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *De Camp v. Hibernia Railroad Co.*, 47 N. J. Law, 48; *B. & P. Ry. Co. v. M. U. Ry. Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508; *Chicago Dock Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Railway Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; *Kettle River Railroad Co. v. Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *National Docks R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755; *Hays v. Risher*, 32 Pa. St. 169; *Zircle v. Southern Ry. Co.*, 102 Va. 17, 45 S. E. 802, 102 Am. St. Rep. 805.

We can conceive of no sound reason to hold that a use sufficiently public to sustain the exercise of the delegated sovereign power of eminent domain by a railroad company to acquire a right of way as for a public use would not be equally a public use as applied to a use for the same purpose of a right of way already owned by the railroad company. It is merely speciously correct to say that a part of the railroad's right of way is appropriated to the use of the special industry. If, as is undoubtedly true, the owner of the given industry, as a member of the public, has a right to participate in the public service to which the railroad and its right of way are devoted, and the spur when built is open

to the use, on equal terms, of every other member of the public who may desire to use it, then the part of the right of way so used is, on all authority, appropriated to a public use.

The case of *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 63 L. R. A. 820, 90 Am. St. Rep. 964, has no application. That case merely held that a private logging road is not a public utility, and hence the power of eminent domain cannot be exercised in aid of it. Under a later statute (*Rem. & Bal. Code*, §§ 7106-7109), authorizing the organization of logging roads with the duty of general transportation of logs and other timber products, such a road is held to be a public utility, though its primary purpose is to conduct its own business as a logging company, and carry its own products. The mere fact that any member of the public may require the transportation of logs over the road on reasonable terms makes of it a public utility and, as such, capable of exercising the power of eminent domain. *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444. On the main principle, the case here is an exact parallel. The spur track, though primarily intended for the use of the applicant, will, when constructed, be open to the use of any member of the public desiring to use it. It will be just as much a public spur as that now found at Whittier. Both will be subject to the reasonable use of the public.

Such a side track as that contemplated by the statute and order here in question is, in no just sense, a mere private convenience any more than is the railroad itself. It is ancillary to, and in aid of, the public service. The statute proceeds upon the just and reasonable theory that, as a part of the public service undertaken by a common carrier, there is a duty to permit every member of the public, at the entire expense, but also at the least expense of that member, to provide the means indispensable to a participation in the public service, whenever such means do not unreasonably interfere with the general service or operation of the public utility, and whenever such means so provided are open to the use of the public on equal terms. The public service is but the aggregate of the service accorded to private enterprises and individuals. Any unreasonable restriction of the service as to any individual is therefore an unreasonable impairment of the public service. These considerations make it clear that the track, when built, becomes an integral part of the public utility, a portion of the railroad system. Nor does the fact that the initial cost, both of materials and of the construction of the spur, is to be borne by the person primarily to be served deprive the spur of its essential character as an integral part of the public utility. This does not make it a private track, nor change the

nature of its use. *Hairston v. Danville & Western Ry. Co.*, supra. The statute expressly prohibits such a result by providing that, subject to an equitable division of the initial cost, the track is at the service of the public as much as is any other part of the railroad system. The owner of the industry primarily served has no control over the spur, nor any interest in it other than the right of being served by it, and that right is shared equally by every other person who may desire to share it. The control of the railroad company over it is as complete as over any other part of its system, and is subject only to state control or regulation under the general laws.

Only one court of last resort, so far as we are advised, has been called upon to consider the validity of a statute similar to ours. The statute of Wisconsin is like that of this state in nearly every essential particular save that under it the railroad may be required, at the expense of the applicant for an industrial spur, to acquire a right of way for the spur not exceeding two miles in length. The Supreme Court of that state, in sustaining the statute, uses language so clearly applicable to our own statute that we quote from it at some length: "It will be observed from the first subdivision of the section that four facts must coexist before a railroad can be compelled to acquire a right of way, construct, maintain, and operate a spur track, namely: (1) The spur track must not exceed two miles in length; (2) it must be practically indispensable to the successful operation of the existing or proposed plant, industry, or enterprise; (3) its construction and operation must not be unusually unsafe and dangerous; and (4) it must not be unreasonably harmful to public interest. The Legislature has delegated to the Railroad Commission the power to determine whether or not these four facts coexist. If the Commission finds that they do, then, upon the statute being complied with, the railroad is required to build the track, otherwise not. The exercise of such power by the Railroad Commission is not the exercise of legislative power, and may therefore be delegated to it. *State ex rel. M., St. P. & S. S. M. R. Co. v. Railroad Commission*, 137 Wis. 80, 117 N. W. 846; *Wayman v. Southard*, 10 Wheat. 1, 6 L. Ed. 253; *State ex rel. Kenosha G. & E. Co. v. Kenosha E. Ry. Co.* [145 Wis. 337] 129 N. W. 600. Plaintiffs challenge the constitutionality of the statute on the ground that the side tracks provided for are private, and that land taken for right of way for such side tracks is taken for a private and not for a public use, contrary to the provisions of section 13, art. 1, of the Constitution of this state, and contrary to the provisions of the fourteenth amendment to the Constitution of the United States. If it be conceded that the side tracks are private, then the objections raised by plaintiffs must be deemed

well taken. But the case of *Chicago & Northwestern Ry. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918, negatives such a concession. It was there held that the taking of land for a side track under section 1831a, St. 1898, was a taking for a public use, even though the side track ran to a single industry and the owners thereof were to bear a large part of the expense. * * * Such track when built becomes a portion of the trackage of the railroad. The fact that its initial cost is borne by the party primarily to be served, with provisions for subsequent equitable division of such cost, does not make it a private track, nor change the nature of its use. Over it the products of the industry find their way into the markets of the world, and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. Subject to the equitable division of initial cost, the track is at the service of the public as much as any other, and it constitutes an integral part of the railroad system. The duty to maintain and operate it rests upon the railroad. Except that it is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it. And this is the crucial test as to whether or not the track is a private or public one. If it is open to the use of any one who may desire, upon equal or equitable terms, and is subject to state control under general laws, it is a public track, irrespective of the degree of the probability of any one else using it, or the extent of such use. *Chicago & N. W. Ry. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387. That such tracks are to be open to the use of the public generally is clearly evidenced by the statute, for it speaks of the industry primarily to be served, and makes provision for others securing the same service by sharing in the initial cost, thus evincing a clear intent to subject the track, upon equitable terms, to the use of any one who may require it. Its operation, too, is subject to state control under general laws, and neither the railroad nor the owner of the industry can, in any respect, interfere with such control." *Union Lime Co. v. Railroad Commission* [144 Wis. 523] 129 N. W. 605, 609, 610. Every element found by the Supreme Court of Wisconsin as making the act constitutional, namely, indemnity, reasonable-

ness, necessity, safety, right of public use, compatibility with public interest, and control by the railroad subject only to state control, is provided for, safeguarded, and guaranteed by our own statute and the order here involved. We are constrained to hold that this statute is not violative of the due process of law clause, either of the state or of the federal Constitution.

[3] 3. The respondent contends that the spur ordered will interfere with interstate commerce, and hence the order is void as in conflict with section 8 of article 1 of the federal Constitution. Whether the operation of the spur will so interfere is, of course, a question of fact. We have examined the evidence with care, and we think it wholly fails to show any such interference with the usual and ordinary operation of the road as to have an appreciable effect upon its interstate business. The Commission found, on what we deem sufficient evidence, that "such a spur is reasonable and practicable, and can be put into operation with reasonable safety." The trial court made no contrary finding, but tacitly accepted the findings of the Commission on questions of fact. There is no merit in the argument that if this spur can be established, then every industrial plant along the road may rightfully demand one. The answer is, of course, so if the demand, after a hearing on notice, be found reasonable in view of all surrounding conditions, including safety and the number, proximity, and accessibility of other spurs, and of course not if, on such hearing, the demand be found unreasonable from any cause.

The order of the Commission is sustained. The judgment of the trial court is reversed.

CROW, C. J., and FULLERTON, MAIN, and MORRIS, JJ., concur.

YOUNG v. YOUNG. (Civ. 1354.)

(District Court of Appeal, Second District, California. Nov. 14, 1913. Rehearing Denied by Supreme Court Jan. 13, 1914.)

DIVORCE (§ 184*)—APPEAL—CONFLICTING EVIDENCE—FINDINGS OF TRIAL COURT.

Findings of the trial court on conflicting evidence in an action for divorce will not be reversed on appeal, where there is some evidence to support them.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. § 184.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Suit by James F. Young against Kittle E. Young for divorce. From a decree denying the relief prayed for, plaintiff appeals. Affirmed.

Trask, Norton & Brown, of Los Angeles, for appellant.

JAMES, J. Plaintiff has appealed from a judgment denying him a decree of divorce.

Defendant did not make answer to the complaint, and after hearing the evidence offered by the plaintiff, and other evidence which was introduced upon the court's own motion, judgment was entered denying the relief prayed for.

The parties to the action were married in the year 1882, and there were born to them three children, the youngest of whom at the time this action came on for trial was 22 years of age. The wife was of the age of about 45, and was, so far as the evidence showed, with the exception of an item thereof which will be noticed later, a strong, vigorous, healthy woman. As cause for divorce plaintiff assigned the ground of extreme cruelty, and further charged that defendant had for more than a year prior to the commencement of the action been guilty of desertion by reason of her persistent refusal to have reasonable matrimonial intercourse with him. Without dispute at all, the evidence showed that for at least seven years the defendant had refused to live with the plaintiff as his wife, although during the whole of that time he had contributed to her support, and had in fact wholly supported her out of his earnings as a railway conductor, which amounted to about the sum of \$84 per month. While the plaintiff was being first examined as a witness, the trial judge inquired of him as to whether his wife was present in court, and he replied that she was not. Later when the judge stated that he desired to have the defendant present so that he might interrogate her and would continue the hearing for the purpose of securing her presence, the plaintiff then stated that she was in court. This conduct of the plaintiff in first denying that his wife was present and afterwards admitting that she was in the courtroom seems to have had great weight in determining the cause against him, although, as the record is here presented, there appears to have been abundant excuse for the plaintiff in first asserting that his wife was not in the courtroom. She came wearing spectacles which she was not in the habit of wearing, and wore a veil over her face. Plaintiff in explanation of his divergent statements told the court that he had not at first recognized his wife in that disguise, and her own daughter, who appeared to be more favorably disposed toward her mother than toward the plaintiff, testified to the same effect—that she did not recognize her mother when she first looked about the courtroom. The wife when called as a witness admitted that she had only had the spectacles about a week and had never during the whole period of her life prior thereto had any need to use articles of that kind. The evidence showed a most pronounced state of inharmony existing between plaintiff and defendant. This condition was attributable to the persistent refusal of the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant to live with the plaintiff as his wife. The general conduct of the defendant toward the plaintiff tended to show that she had no affection for him, and that she merely continued to occupy the home which he provided in order that she might be thus supported at his expense. In order to justify her attitude toward her husband, after having the admission drawn from her on the witness stand that she had practically lived separate from him for seven years, she testified that her physical condition was not such as to permit her to do otherwise. She further said: "I am never free from a woman's complaint." This testimony furnished the one single item of proof, and the only item of proof, upon which the trial judge could base a denial of the plaintiff's prayer for relief. As contradicting this bare assertion of the defendant as to her physical condition was the admission made by her that she had only needed the services of a physician once or twice during a period of many years; the statement of a neighbor who testified that the defendant had admitted to her that she was not acting toward plaintiff as his wife, stating as her reason therefor that she "hated him" (defendant first said that she did not remember whether she made this statement, but, when pressed for a more positive answer, replied that she had not so stated); there was the wife's further testimony that she weighed about 163 pounds, and the testimony of the husband that she had never had any severe sickness of any kind, and had never placed her refusal to live with him as his wife upon the ground of her physical inability so to do. Further, when defendant was asked whether she was willing to submit herself to the examination of a physician to be selected by the court, she demurred, and the court then interrupted and said that he would not order such examination in that kind of a case. It was upon this state of the evidence that the trial judge in summing up said: "They are conflicting about their testimony. So far as the testimony is concerned, I don't put very much credence in it, from the fact that plaintiff sat here on the witness stand and said he did not know his wife, although she had a thin veil on and glasses." So far as the matter of credibility of the plaintiff was concerned, his credibility was not called in question as to any of the main facts of the case, for upon such there was no dispute of any kind whatsoever. There was then only the statement of the wife, as before indicated, given in excuse for her conduct, that her physical condition was not such as to make a closer relation with her husband advisable. This is the one solitary issuable fact upon which, considering the charge of desertion, there can be said to have been a conflict. The rule, however, which precludes an appellate court from interfering with the

conclusions of a trial judge where there is any conflict of evidence must compel here an order affirming the judgment. While the evidence which created the conflict upon the point discussed, as presented by the record, appears meager and quite unsatisfactory, and while it does seem that the trial judge allowed the fact that plaintiff did not at once recognize his wife in the courtroom to influence his decision on the main issue, still it must nevertheless be said that there was some evidence which sustains the judgment. The charge of extreme cruelty has not been noticed in this discussion, and as to that charge, it is sufficient to say that the evidence offered in support of this count in the complaint was of such a nature as to entirely warrant the trial judge in determining that cause of action adversely to plaintiff.

For the reasons stated, the judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

BALDWIN v. WALLS, Town Treasurer.
(Civ. 1,141.)

(District Court of Appeal, Third District, California. Nov. 25, 1913.)

APPEAL AND ERROR (§ 102*)—ORDERS APPEALABLE—RULING ON DEMURRER.

An order sustaining defendant's demurrer to plaintiff's amended complaint is not appealable, or reviewable except on appeal from a judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 688-698; Dec. Dig. § 102.*]

Appeal from Superior Court, Modoc County; Clarence A. Raker, Judge.

Action by C. S. Baldwin against V. O. Walls, as Treasurer of the Town of Alturas. From an order sustaining defendant's demurrer to plaintiff's amended complaint, he appeals. Dismissed.

C. S. Baldwin and N. A. Cornish, both of Alturas, for appellant. Jamison & Wylie, of Alturas, for respondent.

BURNETT, J. The notice of appeal specifies that "plaintiff C. S. Baldwin, in the above-entitled action, hereby appeals to the Supreme Court of said state of California, from the order of the superior court of said county of Modoc, sustaining defendant's demurrer to plaintiff's amended complaint in said action."

It is well settled that such order is not appealable. Code Civ. Proc. § 939; Agard v. Valencia, 39 Cal. 292; Ashley v. Olmstead, 54 Cal. 616; Hadsall v. Case, 15 Cal. App. 541, 115 Pac. 330. As stated in the Agard Case: "The judgment is itself an adjudication upon the demurrer; and it is only from the judgment, and not from the order sus-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taining the demurrer, that the plaintiff could appeal."

The purported appeal must be dismissed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

In re WILLIAMS' ESTATE.
WILLIAMS et al. v. McDOUGALD.
(Civ. 1285.)

(District Court of Appeal, First District, California. Nov. 19, 1913.)

TAXATION (§ 895*)—INHERITANCE TAX—ASSESSMENT—PRIOR TAX—DEDUCTION.

Inheritance Tax Law (St. 1911, p. 713) § 1, requires that the tax be imposed on the transfer of any property by will or by the intestate laws, and subdivision 4 declares that it shall be imposed on the market value of such property. Section 15 provides that, in estimating the value of any inheritance, no allowance shall be made for any contingent incumbrance, nor on account of any contingency on the happening of which the estate may be abridged, provided that, in the event of such incumbrance taking effect, a return shall be made to the person properly entitled thereto of a proportionate amount of the tax on account of the incumbrance for so much as shall reduce the same to the amount which would have been assessed on account of the actual estate enjoyed. *Held* that, where a testator died, leaving his estate to his widow, who was subject to an inheritance tax which was not paid during her life, and she died, leaving an estate, the residuary legatees of which were also subject to an inheritance tax, the amount of the tax chargeable to the widow should be deducted from the shares of the devisees.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1714-1721; Dec. Dig. § 895.*]

Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Judicial settlement of the estate of Bethania Dunbar Williams, deceased. From an order on the application of John E. McDougald, treasurer of the City and County of San Francisco, assessing an inheritance tax against residuary legatees, Donald Ward Williams and Harry McFarland Williams, they appeal. Reversed, with instructions.

Percy E. Towne, of San Francisco, for appellants. Hartley F. Peart, of San Francisco (U. S. Webb, Atty. Gen., of counsel), for respondent.

RICHARDS, J. This is an appeal from an order settling an inheritance tax appraiser's report, and fixing the amount of the inheritance tax to be paid by the appellants as the residuary legatees and devisees of Bethania Dunbar Williams, deceased.

The facts are these: Abram P. Williams died testate in the city and county of San Francisco in October, 1911, leaving a will by which he devised his entire estate to his widow, Bethania Dunbar Williams. This will was duly admitted to probate, and the widow was appointed executrix thereof, and continued to serve as such until her death,

in April, 1912. She also left a will, of which Donald Ward Williams, one of the appellants herein, was named and thereafter duly appointed executor, and in which will, after numerous legacies, the said Donald Ward Williams and Harry McFarland Williams were named as the residuary legatees of her estate. An inheritance tax was duly appraised upon the estate of Abram P. Williams, and fixed at the net sum of \$18,475.03, chargeable against Bethania Dunbar Williams as the sole devisee of the estate, which said sum was paid by Donald Ward Williams as administrator with the will annexed of the estate of Abram P. Williams, deceased. The residuary interests of Donald Ward Williams and Harry McFarland Williams being also subject to an inheritance tax, the appraiser, John M. Burnett, in September, 1912, proceeded to appraise and fix such tax; and, in so doing, declined to deduct from his appraisal of the market value of said interests of said residuary devisees the amount of the first inheritance tax, namely, the sum of \$18,475.03, but, on the contrary, fixed the amount of their inheritance tax at a sum \$3,695 in excess of what it would have been if such first inheritance tax had been deducted. This report the lower court adopted, and, from its order approving the same, this appeal has been taken.

The sole question before the court for decision is this: Where a testator dies, leaving his estate to a devisee, who is subject to an inheritance tax, and he also dies, leaving in turn an estate, the residuary devisees of which are also subject to an inheritance tax, is the first inheritance tax to be deducted by the appraiser from the amount of the second estate upon which such second inheritance tax is to be computed?

This question would have been a simple one if Bethania Dunbar Williams had in her lifetime paid the inheritance tax of \$18,475.03 appraised against her as the sole devisee of Abram P. Williams, deceased; and it would seem to be immaterial whether she had so paid it personally, and out of her individual funds, or whether she had paid it as executrix of the estate of her husband, and out of the funds of the estate of which she was the sole devisee, and as, under the law, she was entitled and even bound to do. Inheritance Tax Law 1911, § 1, subd. 4; Stats. 1911, p. 713. It would seem obvious that, had she done this before her death, the amount of this inheritance tax so paid could never have come within the range of consideration as a part of the estate of the devisees of Bethania Dunbar Williams. The mere fact that Bethania Dunbar Williams died before paying the inheritance tax, which she was bound to pay as a condition precedent to receiving her interest in the estate of Abram P. Williams as the sole devisee thereof, and which tax was a fixed charge and lien upon her devisable interest in the estate, ought not to change

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the rule, for the simple reason that in either event her devisees could never be entitled to receive any portion of the said sum of \$18,475.03, which had already and before her death been laid hold upon and sequestered by law for the payment of said tax.

The foregoing chain of reasoning is sustained and strengthened by an examination of the inheritance tax law and the cases which have undertaken to construe its terms.

Section 1 of the inheritance tax law requires that the tax shall be imposed upon the transfer of any property by will or by the intestate or homestead laws of the state, and subdivision 4 of the same section provides "that the tax so imposed shall be upon the market value of such property." In a very early case it was held that the universal standard of value for purposes of taxation is the amount of money which can be realized by a sale of the property in the open market. *State v. Moore*, 12 Cal. 56. This is also the Code rule for admeasuring the value of property in actions for damages for its wrongful conversion. Civ. Code, §§ 3353, 3354.

Measured by this rule the market value of property which one receives by inheritance or devise should be the cash price for which it could be sold in the open market, and, if this be true, it would be idle to argue that the value of a devisee's interest in an estate would not in any sale thereof be discounted to the extent of any outstanding inheritance tax lien against it.

But the inheritance tax law goes further, and in section 15 provides that: "In estimating the value of any estate or interest in property, to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made on account of any contingent incumbrance thereon, nor on account of any contingency upon the happening of which the estate or property, or some part thereof or interest therein may be abridged, defeated or diminished, provided, however, that in the event of such incumbrance taking effect as an actual burden upon the interest of the beneficiary, or in the event of the abridgement, defeat or diminution of said estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax on account of the incumbrance when taking effect, or so much as will reduce the same to the amount which would have been assessed on account of the actual duration or extent of the estate or interest enjoyed. Such return of cash shall be made in the manner provided by section 12 hereof upon order of the court having jurisdiction."

Section 12 of the inheritance tax law further provides: "Whenever any debts shall be

proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator, or trustee, if the said tax has not been paid to the county treasurer or to the state treasurer, or by said county treasurer, or said state treasurer, * * * if it has been so paid."

From these sections of the act, the plain implication arises that, in making his appraisal of the market value of devised or inherited property, the appraiser is to allow for and deduct from the value of such property all ripened liens, fixed charges, and proven debts outstanding against it. This is evidently the view taken by our Supreme Court in the *Estate of Kennedy*, 157 Cal. 517, 108 Pac. 280, 29 L. R. A. (N. S.) 428, wherein, after a careful review of practically all of the cases cited by respective counsel in their briefs herein, the court says: "The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes, and never can be distributed to him."

It would seem to be equally absurd and unjust to refuse to allow for and deduct from the value of the share of the devisee of an estate the amount of an inheritance tax which had been affixed to said property while it was part of a preceding estate, and which was a lien upon it, and which the executor or administrator of the former estate was bound by law to pay, and which could therefore never come into the possession or enjoyment of the devisee.

This was what was done in the present case. We think the order of the court approving the report of the appraiser was erroneous, and should be reversed, with instructions to the court to enter an order assessing and fixing the market value of the property of the appellants subject to the inheritance tax herein, and the amount of such tax to which the same is liable, in conformity with the views expressed in this opinion; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

PEOPLE v. HORVATH. (Cr. 471.)

(District Court of Appeal, First District, California. Nov. 20, 1913.)

1. INDICTMENT AND INFORMATION (§ 154*)—OBJECTION—WAIVER.

Under the express provision of Pen. Code, § 1012, an objection to the indictment on the ground of its defect in form or its uncertainty is waived by the absence of a demurrer thereto.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 501; Dec. Dig. § 154.*]

2. RAPE (§ 20*)—SUFFICIENCY OF INDICTMENT.

An indictment for rape, drawn in substantial compliance with Pen. Code, § 261, defining that offense, is sufficient.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 23, 25; Dec. Dig. § 20.*]

3. CRIMINAL LAW (§ 1119*)—APPEAL—ASSIGNMENTS OF ERROR.

Where the record wholly fails to show alleged prejudicial remarks during argument, or any objection thereto at the time, or any request for instruction to disregard it, an assignment of error in failing to instruct the jury thereon will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.*]

Appeal from Superior Court, City and County of San Francisco; Wm. P. Lawlor, Judge. Geza Horvath was convicted of rape, and he appeals. Affirmed.

Frank Schilling, of San Francisco, for appellant. Attorney General Webb and C. M. Fickert, Dist. Atty., and Edward A. Cunha, Asst. Dist. Atty., both of San Francisco, for the People.

RICHARDS, J. This is an appeal from a judgment of conviction of the defendant of the crime of rape.

Appellant contends that the information is insufficient in the several particulars set forth in the briefs of his counsel upon this appeal. No demurrer was presented to the information, and the first objection to either its form or substance was that contained in appellant's application under section 1247 of the Penal Code for a transcription of the record, wherein the appellant, in stating the grounds of his appeal, asserts: First, that the information does not substantially conform to the requirements of sections 950 and 952 of the Penal Code; and, second, that the facts stated in said information do not constitute a public offense.

[1] In the absence of a demurrer, the first of these objections must be held to have been waived (Pen. Code, § 1012); and, as to the second objection, we find it to be without merit.

[2] The information is drawn in substantial compliance with section 261 of the Penal Code, which has always been held sufficient in this state. *People v. Burke*, 34 Cal. 661; *People v. Rangod*, 112 Cal. 669, 44 Pac. 1071.

The next objection of the appellant is that

the evidence is not sufficient to support the verdict of the jury. We are convinced from an examination of the reporter's transcript of the evidence that this contention is also devoid of merit, and that the defendant was properly convicted upon the evidence presented to the jury, unless we shall find that the court committed some prejudicial error of law during the course of the trial.

[3] As to the alleged errors of law in ruling upon the admission of evidence and in the instructions, which are specified in the appellant's brief, we find that they are all trivial and in the main not sustained by the state of the record; and, as to the asserted error of the court in failing to instruct the jury to disregard certain alleged prejudicial remarks of the district attorney during the argument of the case, the record utterly fails to show what such remarks were, or that any objection was made to them at the time, or that any request for an instruction to the jury to disregard them was ever made.

The judgment is affirmed.

We concur: **LENNON, P. J.**; **KERRIGAN, J.**

DENNEN v. JASTRO. (Civ. 1,325.)

(District Court of Appeal, Second District, California. Nov. 17, 1913. Rehearing Denied by Supreme Court Jan. 16, 1914.)

1. ELECTIONS (§ 164*)—CONTEST—"BALLOT."

A "ballot" is a single piece of paper containing the names of candidates and the offices for which they are designated.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 140; Dec. Dig. § 164.*]

For other definitions, see Words and Phrases, vol. 1, pp. 680, 681; vol. 8, p. 7587.]

2. ELECTIONS (§ 269*)—BALLOTS—INVALIDITY.

Where an irregularity in the printing of the names on a ballot renders the ballot void, there is no election, and the remedy is not by a contest as between the two highest candidates.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 245, 246; Dec. Dig. § 269.*]

3. ELECTIONS (§ 172*)—BALLOT—PREPARATION—FORM—STATUTES—DUPLICATION OF NAME OF CANDIDATE.

Pol. Code, § 1197, specifies the form of ballot, and declares that, in the same line in which the name of the candidate is printed, and at the right of the name, or immediately below it, shall be printed the designation of the political party or parties by which the candidate has been nominated. *Held* that, though such section impliedly prohibits the printing of the name of a candidate of two political parties more than once, yet such requirement is directory only, and a failure to comply therewith does not invalidate the election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 146; Dec. Dig. § 172.*]

Appeal from Superior Court, Kern County; J. J. Trabucco, Judge.

Election contest by C. L. Dennen against H. A. Jastro. Judgment for defendant, and plaintiff appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

E. L. Foster, of Bakersfield, for appellant. Borton & Thelle, of Bakersfield, for respondent.

SHAW, J. This is an election contest.

At the general election held in Kern county on November 5, 1912, H. A. Jastro was a candidate for supervisor of the Fifth supervisorial district of said county, having been duly nominated by both the Republican and Democratic parties of said district. His opponent for election was J. J. Fitzpatrick, who ran as an Independent candidate. The contest is brought pursuant to sections 1111 to 1127, Code of Civil Procedure, and prosecuted by plaintiff as a duly qualified elector of the district wherein said election was held. Its purpose, according to the prayer of the complaint, is to have the declaration of the board of supervisors of Kern county, wherein it declared that H. A. Jastro was the duly elected supervisor of said district, held illegal and void, and the certificate of election issued by the clerk of said district to Jastro canceled and annulled, and have J. J. Fitzpatrick declared the duly elected supervisor of said district for the term commencing January 1, 1913.

It is conceded that in form the general ballot supplied by the county clerk to the voters of said district complied in all respects with the law, save and except that upon all of the ballots used in said district, and under the designation "Supervisor, Fifth Supervisor District," the name of the contestee was printed twice thereon, as follows: "H. A. Jastro, Democrat," under which, and separated by a line, was "H. A. Jastro, Republican," and in each case followed by the required voting square. The name "J. J. Fitzpatrick, Independent," was likewise printed, followed by the required voting square. No question is raised as to the identity of persons; it being stipulated that the H. A. Jastro whose name appears upon the ballot as the Democratic candidate and the H. A. Jastro whose name appears thereon as the Republican candidate were and are one and the same person.

The sole ground urged by appellant for a reversal is that the name of Jastro should have been printed upon the ballot once only, followed by the designation of the political parties by which he was nominated, thus: "H. A. Jastro, Democrat, Republican," and that under the provisions of sections 1197 and 1211, Political Code, as amended in 1911, the printing of contestee's name upon the ballot in the manner stated rendered the ballot void.

[1, 2] "A ballot is a single piece of paper containing the names of the candidates and the offices for which they are designated" (People v. Holden, 28 Cal. 123); and, if this irregularity in the printing of the names rendered the ballot void, as suggested by appellant, then it must necessarily follow, we

think, that there was no election of a supervisor, and the remedy must have been other than that here followed, wherein contestant seeks to have Fitzpatrick declared the duly elected supervisor upon a ballot claimed to be void. However this may be, we are of the opinion that the case should upon the merits be determined against contestant.

[3] Under section 1196 of the Political Code, it was the duty of the county clerk to provide the printed ballots for use at the election. Section 1197 specifies the form of ballot, and, among other things, provides that, "in the same line in which the name of the candidate is printed and at the right of the name, or immediately below the name if there shall not be sufficient space to the right thereof, shall be printed * * * the designation of the political party or parties by" or on behalf of "which such candidate has been nominated. * * * The name of the candidate, and the designation of the political party or parties by which he has been nominated shall be printed in a space one-half inch in depth, and shall be defined by light horizontal ruled lines." Section 1211, Political Code, provides that "in canvassing the votes any ballot which is not made as provided in this act shall be void."

While there is no positive mandate in the statute against the name of a candidate appearing upon a ballot more than once, it may be conceded that it was the intention of the Legislature, as expressed in said section 1197, that, where a candidate is the nominee of two or more political parties, his name should appear upon the ballot but once, followed by appropriate words designating him as the candidate of such parties, and that therefore the ballot in question was irregular in form. This provision, however, like many other minute directions contained in section 1197, since it does not go to the substance or necessarily affect the result of the election, and is not essential to the validity thereof, should be held directory only. Moreover, the irregularity in the printing of the ballot was due to inadvertence or mistake of those officers whose duty it was to prepare and print it. The voters had nothing to do with the matter. "A ballot cast by an elector in good faith should not be rejected for failure to comply with the law in matters over which the elector had no control, such as the exact size of the ticket, the precise kind of paper, or the particular character of type or heading used." McCrary on Elections, § 538; Kirk v. Rhoads, 46 Cal. 398; People v. Holden, 28 Cal. 124. A failure to comply with some technical direction of the statute, where due alone to mistake or inadvertence on the part of those whose duty it is to prepare and furnish the ballot, should not disfranchise the entire vote of the district, and vitiate the election, unless it be made to appear that by reason of the irregularity the result was different from what it

would otherwise have been, or that it prevented the voter from freely, fairly, and honestly expressing his choice of the candidate for the office. *People v. Los Angeles*, 133 Cal. 346, 65 Pac. 749; *Inglis v. Shepherd*, 67 Cal. 469, 8 Pac. 5; *People v. Holden*, supra; *Murphy v. City of San Luis Obispo*, 119 Cal. 624, 51 Pac. 1085, 39 L. R. A. 444; *Murphy v. Curry*, 137 Cal. 479, 70 Pac. 461, 59 L. R. A. 97. The two cases last cited we deem particularly applicable to the facts of the case at bar. There is nothing in the record indicating that the result of the election was in any manner affected by the fact that Jastro's name appeared upon the ballot as "H. A. Jastro, Democrat," and "H. A. Jastro, Republican." The election was a fair and honest expression of choice of the voters of the district whereby each of 2,000 persons voted once only for the contestee. Whether they voted for him as a Democrat or as a Republican was immaterial.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

PEOPLE v. DADMUN. (Cr. 310.)

(District Court of Appeal, Second District, California. Nov. 19, 1913. Rehearing Denied by Supreme Court Jan. 17, 1914.)

LARCENY (§ 5*)—WHAT CONSTITUTES—"WRITTEN INSTRUMENT"—UNDELIVERED DEED—"GRAND LARCENY."

Pen. Code, §§ 484, 487, provides that the felonious stealing of the personal property of another, exceeding \$50 in value, constitutes grand larceny. Section 492 declares that, if the thing stolen consists of any written instrument, the amount of money due thereon or secured to be paid thereby, or which may be collected thereon, or the value of the property the title to which is shown thereby, is the value of the thing stolen. *Held*, that an undelivered deed executed to accused was not a written instrument within section 492, since the use of the word as to contracts and deeds of conveyance implies a delivery, without which the document is inoperative for any purpose; and hence such a deed was not the subject of larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 11-17; Dec. Dig. § 5.*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7544-7546.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

L. E. Dadmun was indicted for grand larceny of an undelivered deed, and, from a judgment sustaining a demurrer to the indictment, the People appeal. Affirmed.

U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen. (H. S. Utley, Dist. Atty., of San Diego, of counsel), for the People. E. S. Torrance, of San Diego, for respondent.

SHAW, J. An indictment presented by the grand jury against defendant charged him with grand larceny in that it is alleged that he "did willfully, unlawfully, and feloniously

steal and carry away a certain" grant deed signed and acknowledged by one George W. Webb, wherein defendant was named as grantee, which deed, if properly delivered, was sufficient in form and substance to convey to defendant the title of Webb to the property described therein, alleged to be of the value of \$10,000, which "grant deed and the said property therein described and the title to which was thereby shown and conveyed," as alleged, "was then and there the property of" said George W. Webb, and which said deed was "a written instrument showing and conveying the title to certain real property" therein described.

The sustaining of defendant's demurrer followed by judgment thereon, from which the people appeal, presents the question as to whether or not the stealing of a grant deed by one named therein as grantee (the value of the property described therein, and not the value of the deed, being alleged) constitutes grand larceny. The contention of appellant is that the indictment charges the offense of grand larceny under and pursuant to the provisions of section 492 of the Penal Code, which is as follows: "If the thing stolen consists of any evidence of debt, or other written instrument, the amount of money due thereupon, or secured to be paid thereby, and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence thereof, is the value of the thing stolen." This section does not purport to define any offense, but merely prescribes a rule of evidence for ascertaining and fixing the value of the article stolen. The offense, as defined by section 484 of the Penal Code, consists in "the felonious stealing, taking, carrying, leading, or driving away the personal property of another." When the property thus taken is of a value exceeding \$50, it constitutes grand larceny. Section 487, Pen. Code. If it be of a value of less than \$50, unless the act falls within the provisions of subdivisions 1 and 2 of said section 487, it is petit larceny. The value of the article stolen, as alleged in the indictment, fixes the grade of the offense.

If the deed was delivered, and respondent insists that such fact is implied from the allegation that it "showed and conveyed title to the real property therein described," then of course no offense is charged. On the other hand, assuming the deed was not delivered, was it "a written instrument" within the meaning of those words as used in the section quoted? If not, then it follows that the stealing of the deed was merely the unlawful taking of an article having no value other than that of the paper and labor performed in writing thereon, the value of which is not stated. In *Hoag v. Howard*, 55 Cal. 564, the word "instrument," as used in

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the Codes, is defined as "some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty." This definition is quoted with approval in *Foorman v. Wallace*, 75 Cal. 555, 17 Pac. 680, and *Warnock v. Harlow*, 96 Cal. 307, 31 Pac. 166, 31 Am. St. Rep. 209. The term "written instrument" means a written document delivered with the intention that it shall take effect in accordance with its purpose, as shown by the language used therein. The use of the word with respect to contracts and deeds of conveyance of real estate implies a delivery, without which the document is inoperative for any purpose. Sections 1626 and 1054, Civ. Code. Since the document was not delivered, it was not a written instrument, but merely a piece of paper with writing thereon, ineffectual and inoperative for the purpose of conveying the property described therein. It appears the Legislature recognized the fact that documents and writings inoperative for want of delivery could not, in the absence of positive law, be the subject of larceny as "written instruments," for section 494 of the Penal Code provides: "All the provisions of this chapter apply where the property taken is an instrument for the payment of money, evidence of debt, public security, or passage ticket, completed and ready to be issued or delivered, although the same has never been issued or delivered by the makers thereof to any person as a purchaser or owner." In this enumeration of undelivered instruments which are made the subject of larceny deeds are not designated therein, and applying the maxim that "the expression of one thing excludes another," they should not be included among the undelivered instruments to which the provisions of the section are said to apply.

The provision of the New York Code (Penal Law [Consol. Laws, c. 40] § 1303) with reference to larceny of written instruments, while almost identical with our own, is more favorable to respondent's contention in that the New York statute describes the instrument as one "being the transfer of or evidence of title to any property," and providing that the value of the article stolen shall be deemed "the value of the property transferred or affected, or the title to which is shown thereby." In the case of *People v. Stevens*, 38 Hun, 62, the question involved the alleged larceny from the maker thereof of a written instrument consisting of the satisfaction of a mortgage, and it was there held that the act of taking did not constitute larceny for the reason that an undelivered instrument of such nature is not the subject of larceny. In discussing the question the court said: "It is the general rule that, to constitute larceny of a written instrument, the paper must be effective and operative

when taken. Was this instrument effective and operative for any purpose when the defendant acquired the possession? I think not. It had never been delivered, nor was it intended to be used for the purposes therein mentioned until the performance of certain things thereafter to take place. The debt it was intended to secure remained unpaid. The possession of the paper by the defendant did not, nor did its record, and could not in law, release the debt nor discharge the land from the mortgage lien. Until the instrument was delivered to some one by the maker for the uses and purposes expressed therein, it possessed no value and was not personal property, in the sense and meaning of that term as defined by the statute. The instrument, although complete in form and bearing the signature of the mortgagee, and duly acknowledged, ready to be delivered and used according to its design, could not, while in this state, be the subject of larceny." The facts in the case at bar are almost identical with those under discussion by the New York court, and the language is peculiarly applicable thereto. See, also, *People v. Loomis*, 4 Denio (N. Y.) 380.

Counsel for appellant in support of their contention cite cases from other jurisdictions, but an examination of the statutes upon which such decisions are based shows that they have no application to cases arising under the provisions of our Code. Thus, in a Missouri case, defendant was indicted under a section of the Code of that state which provided that the felonious taking of any instrument in writing which was the act of another constituted larceny, and the court there held that the question of the delivery of the deed was immaterial.

The deed herein alleged to have been stolen, as shown by the indictment, had never been delivered, and hence was not a "written instrument" within the meaning of section 492 of the Penal Code. Defendant acquired no title to the property therein described, nor under the circumstances could it be considered competent evidence of any right whatsoever vested in him by the same.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

EMERZIAN v. ASATO. (Civ. 1161.)

(District Court of Appeal, Third District, California. Nov. 15, 1913.)

1. SPECIFIC PERFORMANCE (§ 68*)—NATURE OF CONTRACT—PERSONAL PROPERTY—SALE.

Where, on breach of a contract to grow and sell nursery orange trees, it appeared that trees filling the description in the contract could be bought and sold in the market, and that plaintiff could be fully compensated in damages, he could not maintain a suit for specific performance; it being presumed that breach of an agreement to sell personal prop-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erty can be relieved by pecuniary compensation, as provided by Civ. Code, § 3387.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. 199; Dec. Dig. § 68.*]

2. SPECIFIC PERFORMANCE (§ 73*)—NATURE OF CONTRACT—PERSONAL SERVICES.

Under the express provisions of Civ. Code, § 3390, a contract to render personal services cannot be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

3. INJUNCTION (§ 59*)—SPECIFIC PERFORMANCE (§ 73*)—SUBJECTS OF RELIEF—SALES TO THIRD PERSON.

Where defendant contracted to care for and sell certain nursery orange trees to plaintiff, plaintiff, on defendant's breach of such contract, could not enjoin defendant from selling the trees to another, nor could he compel him to perform personal service in holding and caring for the trees, and to "ball" them when delivered; plaintiff's sole remedy being to go into the open market and buy similar trees and sue defendant for damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114-116, 128; Dec. Dig. § 59.* Specific Performance, Cent. Dig. §§ 206-208; Dec. Dig. § 73.*]

4. TRIAL (§ 391*)—FINDINGS—ISSUES.

Where plaintiff sued defendant for specific performance of a contract to care for and sell to plaintiff a quantity of nursery orange trees, defendant, though having pleaded specific denials, was also entitled to rely on his offer to perform the contract; and, plaintiff's refusal to accept performance, and such defense having been pleaded and evidence having been introduced to support the same, it was error for the court to omit to make any finding with reference thereto.

[Ed. Note.—For other cases, see Trial Cent. Dig. § 914; Dec. Dig. § 391.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Suit for specific performance by Karl Emerzian against Sosei Asato. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. Cosgrave, of Fresno, for appellant. W. D. Crichton and C. K. Bonestell, both of Fresno, for respondent.

CHIPMAN, P. J. This is an action to enforce the specific performance of a written contract to deliver certain (nursery) orange trees; to enjoin defendant, during the pendency of the action, from disposing of said trees otherwise than as provided in said contract; for damages resulting from defendant's failure to properly care for said trees; and for such further relief as may be proper in the premises.

A jury, called to try the issues of fact, returned a general verdict for the defendant. On motion of plaintiff the court set aside the verdict and gave its decision in favor of plaintiff.

The contract of which specific performance was sought was entered into June 8, 1909, by which first party (plaintiff) agreed to buy and second party (defendant) agreed to sell "4,000 Washington orange trees, more or less,

for the sum of twenty-five cents per tree as follows, to wit: Party of the second part will immediately at his place of business in the town of Centerville, Fresno county, California, proceed to put, cultivate and care for said orange trees for a period of one year from date, whereon, and of which time, party of the first part will select from the body of the orange trees, so grown by the party of the second part 4,000 orange trees, all of which must be good strong healthy trees and over two feet high, after which time party of the first part shall pay the party of the second part reasonable value for any services necessary to care for said trees for one year more, whereby on and in the month of June, 1911, said party of the second part agrees carefully and in a workmanlike manner to ball the said trees and place the same in proper condition to be delivered to party of the first part. Party of the first part to arrange the sacks sufficient for said balling and party of the first part agrees to pay party of second part sum of twenty-five dollars cash on execution and delivery of this agreement, the sum of one hundred dollars, on or before ninety days from date, the remainder of the purchase price to be paid when the said trees are accepted and delivered to the party of the first part."

In plaintiff's second amended and supplemental complaint it is further shown: That defendant planted 4,000 orange trees pursuant to said contract, and proceeded to care for the same; that, in June, 1910, plaintiff was ready and willing "to select from the body of the orange trees so grown by" defendant; but that none of said trees were over one foot high, and "defendant requested plaintiff to wait another year to make such selection," defendant to continue the care of the same, "to all of which plaintiff agreed"; that, in June, 1911, plaintiff selected 2,600 from among said 4,000 trees, and agreed to take the same provided defendant would cultivate and care for the same until the month of March, 1912, and it was then agreed orally that the trees should remain in the ground, defendant to continue to care for them until March, 1912, and that plaintiff and defendant should enter into a written contract modifying the terms of the original agreement, extending the time one year, and thereafter defendant refused to sign said agreement, and refused to cultivate or care for said trees, or to deliver them or any of them, and threatened to sell to other parties; that plaintiff has at all times been ready and willing to pay the reasonable value of defendant's services in and about the planting and cultivating said trees, and has fully performed all the conditions of said agreement by him agreed to be performed; that defendant has failed to care for said trees, by reason whereof and by reason of damage from frost many have died; that the price

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—68

agreed to be paid was just and adequate, and that in the event plaintiff should "be unable to obtain said trees, he will be damaged in the sum of \$4,000, by reason of the fact that he will be hereafter unable to purchase trees of the same character as those agreed to be furnished to him by defendant, at less than \$1.00 each in the open market"; that defendant is insolvent and unable to respond in damages to a greater sum than \$500. Wherefore plaintiff prays the decree of the court directing defendant to deliver said trees to plaintiff as provided in said contract; that defendant be enjoined from disposing of any portion of said trees otherwise than as provided in said contract; "that defendant be compelled to pay such damages as may result from his failure to properly care for and cultivate said trees," and for such other relief as may be proper in the premises.

Defendant denied the material averments of the complaint except as to the making of the contract of 1908; denied that the price was adequate or just or reasonable; denied his insolvency, and alleged that he was responsible for any judgment plaintiff might recover; alleged, as a further defense, that plaintiff refused to pay him for work done after June, 1910; that plaintiff failed to furnish sacks for baling said trees; and that, in June, 1911, and again on December 13, 1911, defendant duly offered all of the trees, as required by the terms of his contract, and plaintiff then and there refused to accept them, or to pay defendant the reasonable value of his services. By way of cross-complaint defendant alleged that plaintiff refused, in June, 1911, and again on December 13, 1911, to accept the orange trees mentioned, and by reason thereof defendant was damaged in the sum of \$500.

The court found the facts much the same as alleged in the amended complaint. With regard to the oral agreement of 1910 and the agreement of June, 1911, to enter into a written agreement, the court found that defendant refused to sign said latter agreement, or to receive any money, and refused to deliver any of the trees at any time to plaintiff, "and has ever since refused to perform the terms of either of said agreements to be by him performed."

In its decree the court adjudged as follows: "First. That plaintiff is entitled to have and receive from defendant the 2,600 orange trees selected by plaintiff in June, 1911, from the body of the orange trees being grown by defendant in or near the town of Centerville, county of Fresno, state of California, as specified in the written contract set forth in the complaint. Second. That plaintiff furnish sacks sufficient to ball said trees. Third. That defendant thereupon ball the same in careful and workmanlike manner, and place the same in proper condition to be delivered to plaintiff and deliver the

same to him. Fourth. That thereupon plaintiff pay to defendant the sum of 25 cents for each tree delivered, and the further sum of \$40 for expenses incurred in the care of said trees from June, 1911, and the sum of \$10 being the rental value of the land upon which the same were being grown, from June, 1911. Fifth. In the event that the defendant shall be unable to deliver 2,600 trees by reason of any injury which has been suffered since June, 1911, the defendant shall deliver other trees of a quality and size equal to those selected by plaintiff in June, 1911, instead thereof, or shall pay to plaintiff for such shortage at the rate for which similar trees can be bought at or near the same place. Sixth. In the event that the parties hereto cannot agree as to the number of trees injured, or the amount of injury done, if any, or the size or quality of trees offered in lieu of injured trees, or the price of such trees as defendant shall fail to deliver, an application may be made to this court for the appointment of a referee to hear and determine such matters, and this case is left open for such purpose. Seventh. The defendant is enjoined from disposing of, or dealing with said trees in any manner other than herein provided."

Appellant makes the following points: (1) That the case is not one where specific performance can be adjudged; (2) the evidence does not support the findings, and the findings do not support the judgment; (3) the court had no jurisdiction to set aside the verdict, because it was stipulated by the parties that a general verdict should be had in the case; (4) there was no adequate consideration for the contract; (5) there was a failure to find on material issues. We do not think it necessary to consider all these points.

[1, 2] It seems to us that, in view of the undisputed facts and on the face of the pleadings, findings, and decree, it is apparent that plaintiff may be fully compensated in damages, and that his remedy is at law only. There is a presumption that the breach of an agreement to transfer personal property can be relieved by pecuniary compensation. Civ. Code. § 3387. And where the breach of a contract to transfer personal property can be thus compensated, an injunction cannot be granted to prevent the breach. Code Civ. Proc. § 526, subd. 4. Performance of an obligation to render personal service cannot be specifically enforced. Civ. Code, § 3390. Commenting upon sections 3387 and 3389 of the Civil Code, Mr. Justice Henshaw said, in *Glock v. Howard & Wilcox Colony Co.*, 123 Cal. 1, 6, 55 Pac. 713, 714 (43 L. R. A. 199, 69 Am. St. Rep. 17): "It is to be remembered that equity, designed but to supplement the deficiencies of the law, will withhold its aid where the law affords full redress. For both these classes of cases, then—that is to say, for those where the law is sufficient, and for those where equity is

seek legal redress."

"In general a court of equitable jurisdiction will not decree the specific performance of contracts relating to chattels because there is not any specific quality in the individual articles which gives them special value to the contracting party, and their money value recovered as damages will enable him to purchase others in the market of the like kind and quality." Pomeroy on Contracts, Specific Performance, § 11.

If the personal property has a market value, is bought and sold in the open market, and has no special or unique value, the remedy at law is sufficient, since with the unpaid purchase money and the moneys recovered by action the vendee can buy in the open market property of the same character as that contracted for, if the vendor is in fault; likewise, where the vendee is in fault, the vendor may sell in the open market and the purchase price obtained, together with his damages, will furnish full compensation. In such cases specific performance is denied, 3 Page on Contracts, § 1629. Mr. Page gives, as a common illustration of the denial of specific performance, cases where, though the remaining facts are sufficient to justify such equitable relief, the contracts involve continuous duties of a personal nature (*Id.*, § 1633); a principle embodied in section 3390 of our Civil Code.

We do not think the present case furnishes an exception to these general principles and, governed by them, we do not see how we can sustain the judgment.

The undisputed facts here are that orange trees (in nursery) were bought and sold in the open market, where this contract was made, and had a market value. Defendant himself had several thousand trees, besides the group of 4,000 mentioned, in an adjoining nursery from which plaintiff could have selected such trees as his contract called for, but declined to do so. The contract does not refer to any particular group of trees. Other persons in the neighborhood were growing orange trees for market, and testified to their market value. It is beyond dispute that plaintiff could have gone into the open market at Centerville and purchased all the trees he required. The complaint so alleges and states the market price. His allegation of defendant's insolvency was not supported by any evidence, nor was this issue found upon by the court. Defendant alleged his ability to meet any pecuniary demand of plaintiff, and nothing appeared to call it in question. It was shown that, in June, 1911, defendant refused to enter into the contract to hold and care for the trees until the following March, and in effect then and there repudiated his original contract except to allow plaintiff to take the 2,600 which he said he was willing to select. Plaintiff insisted that defendant should hold

March, and that a written agreement should be signed to that effect. Defendant refused to sign the agreement, and hence it was not obligatory upon him. *Fuller v. Reed*, 38 Cal. 99; *Spinney v. Dowling*, 108 Cal. 666, 41 Pac. 797.

[3] Plaintiff's cause of action accrued then and there. But there arose no right of action to enjoin defendant from disposing of trees; nor to compel him to perform personal service by holding and caring for them, and to "ball" them when delivered. Plaintiff's right was simply to go into the open market and buy the trees required by him and bring his action against defendant for damages. If there had been no Washington (navel) orange trees available, and plaintiff could not therefore supply his needs of this particular kind of tree, and it had appeared that defendant could supply them, there might have been some ground for holding defendant to the specific performance of his agreement. But no such state of facts was alleged nor proven. We cannot see that this case is any different from that where a farmer agrees to sell, but afterwards refuses to deliver, a certain number of tons of alfalfa hay or other product of his farm of which there is an abundance to be purchased in the open market. In such a case we do not think it would for a moment be contended that the vendee could go into an equity court and restrain this farmer from selling his hay to some other person, compel him to irrigate or otherwise care for it, and bale and deliver it to the vendee at some future time. Nor do we think that in such an action as the present one could the vendee "have a referee appointed to hear and determine" questions of disagreement as to the injury done to the trees, the number of trees injured, their size and quality, and the price should defendant fail to deliver them, as the decree provides, for all which purposes the case was left open.

Respondent cites 36 Cyc. 555, as follows: "A court of equity, therefore, will not, unless there is some special reason, specifically enforce a contract for the sale of ordinary articles of commerce"—and claims that, by the agreement of June, 1911, plaintiff acquired a special proprietary interest in the trees, and the agreement "established a sort of trust relationship between plaintiff and defendant." We have seen that the so-called agreement of June, 1911, was to have been reduced to writing, which was not done; defendant refusing to execute it. But had defendant agreed to these new terms, we cannot see that it would have changed the relationship of the parties from that of ordinary vendor and vendee, or have given plaintiff any proprietary interest in the trees, or made defendant his trustee in respect to them.

Attention has been called to the failure to find upon the issue of insolvency. In the

cases cited by respondent insolvency was a material factor. Insolvency of itself is not a ground of equitable interference, but, as said by Mr. Justice Thompson, in *Hellman v. Union Canal Co.*, 37 Pa. 100, referred to in *Livesly v. Johnston*, 45 Or. 30, 76 Pac. 946, cited by respondent: "In balancing cases, it is a consideration that gives preponderance to the remedy." In the present case it was alleged, and, we think, was a controlling factor and should have been proven and found by the court.

[4] While the defendant depended upon his defenses raised by his specific denials, he also had the right to rely upon his offer to perform his part of the contract and plaintiff's refusal to accept performance. There was evidence that the parties met at the nursery by agreement, in December, 1911, for the purpose of settling their differences. There was evidence that defendant offered to let plaintiff select the trees from the 4,000 patch, and, if he could not find enough there of the quality called for in the contract, he could take from the other groups of 6,000 or 7,000, as to which there was evidence that a majority of them were good, strong, healthy trees, not injured at all by frost. When the case went to the jury the court instructed them as follows: "But if you find from the evidence that the defendant did in July, 1911, or in December, 1911, offer in good faith to the plaintiff to perform all the terms of the contract to be performed, and that plaintiff refused to accept performance, in that case you will find for the defendant." If the issue was a proper one to go to the jury, and we think it was, it was also an issue on which the court should have made a finding. The real points at issue were whether there were enough trees of the kind and quality called for by the contract, and whether defendant was willing and offered to furnish them.

It need hardly be added that a failure to find on a material issue demands a reversal of the case, and a judgment based upon findings which do not determine all the material issues is a decision against law. *Knight v. Roche*, 56 Cal. 15; *Brown v. Burbank*, 59 Cal. 535; *Kaiser v. Dalto*, 140 Cal. 167, 73 Pac. 828.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

PEOPLE v. KING. (Cr. 448.)

(District Court of Appeal, First District, California. Nov. 17, 1913. Rehearing Denied by Supreme Court Jan. 16, 1914.)

1. CRIMINAL LAW (§ 369*)—EVIDENCE—OTHER OFFENSES.

Proof of an offense distinct from and wholly unconnected with the particular crime charged against a defendant is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

2. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES—GUILTY INTENT.

While evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible to show a guilty intent whenever in any given case the existence of such intent is material and is either disputed or doubted, yet in a trial for embezzlement, where the defense was that the money received by defendant had been returned, evidence of previous misappropriations was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.*]

3. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for embezzlement, where the only disputed fact was as to whether the money admitted to have been received by defendant had been returned, the erroneous admission of evidence as to previous misappropriations by defendant was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

J. E. King was convicted of felony embezzlement, and he appeals. Reversed and remanded for new trial.

Snook & Church and J. J. Rose, Jr., all of Oakland, for appellant. U. S. Webb, Atty. Gen., for the People.

LENNON, P. J. The defendant in this case, having been convicted in the court below of the crime of felony embezzlement, prosecutes this appeal from the judgment and from an order denying his motion for a new trial.

Minus minor matters, the facts of the case upon which the prosecution relied for a conviction are substantially these: The defendant at the time of the commission of the crime charged in the information was engaged in the real estate business in the city of Oakland, and had been employed by the complaining witness, Antonio Marciel, to negotiate the purchase of a piece of real property situate in the county of Sonoma. During the pendency of such negotiations, and as an incident thereof, Marciel was desirous of applying the sum of \$700 which he had in his possession to the satisfaction of a mortgage existing upon certain real property owned by him and situate in the county of Alameda. The defendant advised against this and persuaded Marciel to deposit said sum of \$700 in a safe deposit box rented and controlled by the defendant. When negotiations for the sale of the property were abandoned, demand was made upon the defendant, so the complaining witness said, for the return of the \$700 so deposited. It was developed as a part of the people's case that, when demand was made upon the defendant, he not only claimed that he had returned the money in question but produced a receipt therefor purporting to have been signed by Marciel. Marciel admitted that the signature to the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

receipt was in his handwriting, but insisted, nevertheless, that he had not received from the defendant, or any one else, the money mentioned therein.

The defense of the defendant, as against the specific crime charged in the information, rested entirely upon the recitals of the receipt referred to, and his testimony that he had returned the money in question upon the demand of Marciel.

But one point is presented for a reversal, and that involves the rulings of the trial court permitting the prosecution, over the objection of the defendant, to introduce evidence of other wholly independent and disconnected criminal offenses alleged to have been committed by the defendant. In this behalf the record shows that Antonio King Davila, a witness for the people, was permitted to testify that, as his agent, the defendant, in the latter part of the year 1911, had misappropriated and embezzled a certain sum of money. Again, the prosecution was permitted, over the objection of the defendant, to show that in 1908, some several years prior to the time of the commission of the offense charged in the present case, the defendant had rented a horse and wagon which he failed to return to the owner, and that as a consequence the defendant was arrested and subsequently pleaded guilty to a charge of misdemeanor embezzlement. Finally Joe Faria, a witness for the people, was permitted, in the face of objection, to testify in effect that, about a year previous to the trial of the case at bar, the defendant had embezzled the sum of \$3 which had been intrusted to him by the witness for the purpose of making the first payment on the purchase price of a horse.

All of the testimony just referred to was admitted by the trial court upon the theory that it tended to prove prior offenses similar in character to the crime charged in the information and for which the defendant was being tried, and was therefore admissible for the purpose of showing the guilty intent of the defendant in his dealings with the complaining witness in the present case. We are satisfied that the trial court erred to the prejudice of the defendant in admitting the testimony complained of.

[1, 2] It is a well-settled rule of evidence that proof of an offense distinct from and wholly disconnected with the particular crime charged against a defendant is not admissible in evidence. Unquestionably this general rule is subject to certain well-defined exceptions, one of which is that evidence of the commission of similar offenses, although separate and isolated from the crime charged, is admissible for the purpose of showing a guilty intent whenever, in any given case, the existence of such intent is material and either disputed or doubtful. For instance, in a case where a defendant admits the doing of the act charged in the information but defends upon the ground that such

act was free from felonious intent, proof of the commission of precisely similar acts, even though they be independent and disconnected, and were committed either before or after the commission of the crime charged, is relevant and competent for the purpose of showing a guilty intent. Such evidence is admissible as an exception to the general rule upon the theory that, if it be shown that a defendant has been repeatedly guilty of similar offenses, it may be reasonably and logically inferred that the act charged against him in the information was accomplished with a felonious intent. *Underhill on Crim. Ev.* (2d Ed.) §§ 87-89; *People v. Arnold*, 17 Cal. App. 68, 118 Pac. 729; *State v. O'Donnell*, 36 Or. 223, 61 Pac. 892; *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; *Jones on Evidence*, §§ 142-145.

Upon the oral argument in this court, the representative of the Attorney General contended that the evidence complained of was admissible under the exception to the general rule because, as he claimed, "It was always a question in this case, prior to the time that the prosecution rested, whether the defendant inadvertently retained this money or appropriated it knowingly." The facts of the case, as revealed by the record before us, do not sustain this contention, but show conclusively, we think, that at no stage of the case, and under no view of the evidence, could the exception to the rule stated be rightfully invoked and applied.

The evidence presented upon the prosecution's case in chief shows most clearly and unequivocally not only that the defendant at no time denied receiving the money in question, but, to the contrary, such evidence establishes that at all times, both before and after his arrest, he freely admitted having received the money, and persistently and consistently maintained that he had returned it to the complaining witness. Moreover, the case was defended entirely upon the theory that the defendant had received and returned the funds intrusted to him. Neither the facts of the main case as presented by the prosecution nor the defense relied upon contain the slightest suggestion that the defendant at any time sought to evade criminal responsibility for the alleged commission of the act charged against him upon the ground that he had innocently, through inadvertence, mistake, or otherwise, withheld the money of the complaining witness. This being so, it seems clear to us that the evidence complained of was erroneously admitted.

[3] After carefully considering the evidence adduced upon the main case, we are far from being satisfied that a verdict of guilty would have been had without the aid of the evidence erroneously admitted. We do not wish to be understood as intimating that the evidence upon the main case would not alone have supported a conviction. That evidence was in violent conflict as to whether or not the money in question had been re-

turned and receipted for as claimed by the defendant. This was the only disputed fact in the case; and of course, in the presence of a conflict of evidence, a verdict of guilty, if it had been obtained without the influence of erroneous evidence relating to collateral and prejudicial matters, could not have been successfully assailed upon the ground of the insufficiency of the evidence. What we mean to say is that upon a consideration of the cold record of the conflicting evidence adduced upon the main case, and without the opportunity of seeing and hearing the witnesses who testified on the trial, we are not convinced that the defendant would have been convicted without the aid of the evidence complained of. We are satisfied that such evidence not only tended to divert the deliberations of the jury from the main issue of the defendant's guilt or innocence of the crime for which he was being tried, but must have operated to create in the minds of the jury a prejudice against the defendant so pronounced as to preclude an unbiased consideration of the question as to whether or not, in its entirety, the evidence upon the main case left a reasonable doubt of the defendant's guilt. In short, it affirmatively appears to us that the defendant was substantially injured by the error complained of, and therefore we are in duty bound to order a new trial. *People v. Lawlor*, 131 Pac. 63.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: RICHARDS, J.; KERRIGAN, J.

MEDLIN v. SPAZIER. (Civ. 1,412.)

(District Court of Appeal, Second District, California. Nov. 14, 1913. Rehearing Denied Dec. 4, 1913. Denied by Supreme Court, Jan. 13, 1914.)

1. NEGLIGENCE (§ 3*)—WHAT CONSTITUTES.

"Negligence" is a comparative term, and the degree of care which in one case would be negligence might in another be deemed the exercise of more than prudence; the question usually being one of fact for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 5; Dec. Dig. § 3.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.*]

2. MUNICIPAL CORPORATIONS (§ 705*)—INJURIES TO PERSONS ON STREETS.

As every one may presume that others will obey the law in the absence of reasonable ground to think otherwise, a passenger alighting from a street car is not negligent in failing to look for approaching automobiles, where an ordinance prohibits them from running within four feet of the lower steps of a car.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.*]

3. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Under Code Civ. Proc. § 2061, providing that on all proper occasions the jury are to be

instructed by the court that a witness false in one part of his testimony is to be distrusted in others, such an instruction is applicable where the witnesses of plaintiff and defendant absolutely contradict one another.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 1067*)—REVIEW—HARMLESS ERROR.

In view of Code Civ. Proc. § 475, the improper refusal of the court to charge that a witness false in one part of his testimony is to be distrusted in others is harmless, for such an instruction pertains to a common-place matter about which the jury is supposed to know and act without instruction.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220; Dec. Dig. § 1067.*]

5. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL.

The refusal of requests is proper when they are covered by the instructions given.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

6. TRIAL (§ 251*)—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In a personal injury action by one who was run down by an automobile when she stepped from a street car, an instruction that defendant, who drove the machine, was entitled to assume that plaintiff was in full possession of her faculties was properly refused, where there was no claim that plaintiff was not in possession of such faculties, or that, by reason of the want thereof, any greater duty devolved on defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Kate Medlin against M. Spazier. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Davis, Lantz & Wood, of Los Angeles, for appellant. H. G. Redwine, of Los Angeles, for respondent.

SHAW, J. This is an action to recover damages for personal injuries alleged to have been sustained by reason of defendant's negligence in operating an automobile which struck plaintiff as she alighted from a street car. Defendant answered, denying the alleged negligence on his part, and as a separate defense alleged that plaintiff was guilty of contributory negligence. The case was tried by a jury, the verdict of which was in favor of plaintiff, in accordance with which judgment was entered in her favor. Defendant prosecutes this appeal from the judgment, and from an order denying his motion for a new trial.

About 2 o'clock in the afternoon, plaintiff was a passenger on a street car traveling north on Spring street in Los Angeles. At the intersection of Sixth street, where the car stopped, she with others alighted from the rear exit of the car on the east side of the street, intending to cross the driveway to the sidewalk, at which time she collided with an auto operated by defendant traveling north

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on said east side of the street, was knocked down, and sustained the injuries upon which the claim for damages is based.

[1, 2] There was evidence tending to prove that defendant in operating the auto gave no warning of his approach, and violated the city ordinance in that, while attempting to pass the street car, which had stopped for the purpose of taking on and letting off passengers, he neglected to keep his vehicle at least four feet from the lowest step of the car. Notwithstanding such showing of negligence on the part of defendant, appellant claims that the evidence as a matter of law shows that the injury to plaintiff was due to her own negligence, for the reason that she did not look down the street in the direction of the approaching auto when she got off the car. This contention is without merit. "Negligence" is a comparative term, and hence the degree of care which in one case would constitute negligence might in another be deemed the exercise of more than prudence. Of necessity the question presented is nearly always one of fact for the jury to determine from the circumstances surrounding the case. *King v. Green*, 7 Cal. App. 473, 94 Pac. 777. Moreover, the evidence clearly tends to prove that the car had stopped at the usual place, and passengers were getting on and off the same; that plaintiff was within four feet of the lower steps of the car, within which zone defendant was, by ordinance prohibited from running his auto; that the auto was being run within about two feet of such steps. "The general rule is that every person has a right to presume that every other person will perform his duty and obey the law; and, in the absence of reasonable ground to think otherwise, it is not negligence to assume that he is not exposed to danger which can come to him only from violation of law or duty by such other person." 29 Cyc. 516. Plaintiff had the right to assume that while within such zone she occupied a position of safety; and, in the absence of any warning or reason to believe that defendant would violate the city ordinance, she was not negligent in failing to look up and down the street when she alighted from the car to see if the drivers of approaching vehicles were operating same on that part of the street upon which they were prohibited from traveling. Contributory negligence cannot be predicated upon the assumption that one will violate the law; hence plaintiff was not negligent in failing to look in order to see if defendant was running his auto within what was prescribed as the zone of safety for passengers alighting from the car. Being lawfully there, she had the right to assume that for the time being she would be as safe from collision with automobiles as she would be upon the sidewalk.

[3, 4] The refusal of the court to instruct the jury that a "witness false in one part of his testimony is to be distrusted in others" is assigned as error. The testimony of plain-

tiff and three of her witnesses, to the effect that defendant's auto was running at the time when the collision occurred is flatly contradicted by defendant and three of his witnesses, who testified that at the time the auto was standing still, and that plaintiff was not struck by it, but fell in front of the auto. Section 2061, Code of Civil Procedure, provides that "on all proper occasions" the jury "are to be instructed by the court * * * that a witness false in one part of his testimony is to be distrusted in others." We entertain no doubt that the case at bar, by reason of a direct conflict of testimony adduced upon a material fact, was a proper occasion for the giving of the instruction requested, and the court erred in its refusal to give it. *Thomas v. Gates*, 126 Cal. 4, 58 Pac. 315. Such instruction, however, belongs to that class of instructions which are said to pertain to mere commonplace matters that jurors are presumed to know about and act upon in the absence of being instructed thereon. *People v. Delucchi*, 17 Cal. App. 96, 118 Pac. 935. Hence, if not prejudicial to defendant's case, neither the giving nor refusal of them will be held to be a ground of reversal. *People v. Corey*, 8 Cal. App. 728, 97 Pac. 907, and cases there cited. It is apparent from the verdict returned that the jury did not believe the testimony of defendant's witnesses, to the effect that when plaintiff alighted from the car the auto was not running, but standing several feet away by the street curb. Clearly the jury was satisfied that the testimony of defendant and his witnesses was willfully or otherwise false. This being true, it is impossible to perceive how defendant's substantial rights could have been prejudiced by the refusal to give the instruction. In our opinion, had it been given, the verdict must necessarily have been the same. Under section 475, Code of Civil Procedure, error is not presumed to be prejudicial, and it is made the duty of the court to disregard any error or instruction which in the opinion of the court does not affect the substantial rights of the parties.

[5, 6] The refusal of the court to give several instructions touching the question of contributory negligence, as requested by defendant, is assigned as error. In so far as these instructions stated the law applicable to the case, the matters contained therein were fully covered by instructions given upon the law of contributory negligence. Instruction M, to the effect that defendant had a right to assume that plaintiff was in full possession of her faculties of sight and hearing, unless he had notice to the contrary, was properly refused because there was no claim that plaintiff was not in full possession of such faculties, or that by reason of the want thereof any greater duty devolved upon defendant. Instruction C, to the effect that it was the duty of plaintiff when she alighted from the car to exercise her faculties of

sight and hearing in order to apprise herself of danger, and that to look in a careless manner was as negligent as not to look at all, and that if she could, by looking, have known of the approach of the automobile, it was negligent not to look, was properly refused because it failed to state the law applicable to the case. As we have seen, it was shown by the evidence that the collision occurred while the plaintiff was within the protected zone, within which defendant was prohibited by ordinance from running his auto, and hence imprudence and want of care cannot be predicated upon the fact that plaintiff did not assume a violation of law on the part of defendant.

The record discloses no prejudicial error, and the judgment and order appealed from are therefore affirmed.

We concur: CONREY, P. J.; JAMES, J.

NAHL v. ALTA IRR. DIST. et al.
(Civ. 1,124.)

(District Court of Appeal, Third District, California. Nov. 22, 1913.)

1. WATERS AND WATER COURSES (§ 262*)—IRRIGATION DITCH—OVERFLOW—OBLIGATION OF OWNER.

An owner of an irrigation ditch is not an insurer against all damages arising from the overflow thereof nor from overflows resulting from act of God or inevitable accident, but is only required to exercise reasonable or ordinary care in the construction, maintenance, and operation of the ditch, and will be liable for negligence.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 323; Dec. Dig. § 262.*]

2. WATERS AND WATER COURSES (§ 263*)—IRRIGATION DITCH—MAINTENANCE—OVERFLOW.

In an action by a landowner to recover damages for an overflow of defendant's irrigation ditch, evidence held to sustain a finding that the overflow was the result of an act of God consisting of torrential and unprecedented rainstorms.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 324; Dec. Dig. § 263.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by J. Nahl against the Alta Irrigation District and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Austin Lewis and R. M. Royce, both of San Francisco, for appellant. Power & McFadzean, of Visalia, and Joe E. Greene, of Dinuba, for respondents.

HART, J. In the month of March, 1911, the plaintiff's land, embracing 40 acres and situated in near proximity to one of the water ditches of the defendant corporation, in Tulare county, this state, was inundated by water, and a large number of eucalyptus trees which he had planted and was cultivat-

ing on said land was thereby destroyed. In his complaint, the plaintiff charges that the damage to his land and trees was caused by the inundation of said land from water running in and through the corporation's ditch, and that said overflowing of said water was entirely and directly due to the inexcusable negligence of the defendant corporation and the members of its board of directors, named above as the other defendants herein. The complaint alleges that the damage thus sustained by the plaintiff amounted in the aggregate to the sum of \$4,753.60, for which judgment is prayed.

The answer specifically denies the averments of the complaint, and alleges, by way of a special defense, that the ditch, from which the water overflowing the plaintiff's land is alleged in the complaint to have come, has been at all times, prior to the date of said overflow and damage, maintained in perfect condition, and that, if the land of the plaintiff was inundated as described in the complaint, it was "the result of superhuman causes, viz., extraordinary and unprecedented floods, which human foresight could not guard against or control, caused by extraordinary rainfall and unprecedented storms in the northern part of the county of Tulare, where plaintiff's land is situate, and the southern part of the county of Fresno, and particularly in the Sierra Nevada mountains, north and east of plaintiff's land, in the latter part of February and the early part of March, in the year 1911, which rains, storms, and resulting floods swept over and inundated a great part of the territory above described, including plaintiff's said land," etc.

The case was tried by the court without a jury, and the findings of fact are in accord with the special defense set up by the defendants. The court found that the land of the plaintiff was overflowed, and, as result thereof, the eucalyptus trees growing thereon were destroyed, in the month of March, 1911, but further found that the said overflow and the destruction of said trees thereby directly resulted from "the flood waters of a certain torrential stream known as Sand creek, which rises in the Sierra Nevada mountains in said county, and naturally flows through and across the defendant district and naturally spreads over said land of the plaintiff as well as other lands in the vicinity of the plaintiff's land in times of extraordinary flood; * * * that plaintiff's said land was not overflowed and the trees thereon were not injured, damaged, or destroyed by reason of any carelessness or negligence on the part of said defendants, or any of them, nor by reason of the overflowing or bursting of the ditch described in the complaint, but, on the contrary, the flooding of plaintiff's land and the destruction of his said trees, as aforesaid, was the result of in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

evitable accident which human foresight could not guard against or control," etc., here substantially following the allegations of the answer; "that the ditch of defendants referred to in said complaint was properly and carefully constructed in the year 1891, or the year 1892, and was in good repair and suitable for irrigation purposes at the time said flood occurred, and did not at all contribute to or bring about the flooding of plaintiff's said land or the destruction of his said trees, or any thereof; and that plaintiff was not, and has not been, damaged or injured by any act or omission of said defendants, or by reason of the construction or existence of said ditch, or by reason of the manner in which the same was kept or maintained by said defendants or otherwise in any of the sums or amounts specified in his complaint, or in any sum or amount whatsoever," etc.

In accordance with the foregoing findings, judgment was rendered and entered in favor of the defendants and against the plaintiff.

This appeal is prosecuted by the plaintiff from said judgment; the record having been made up in accordance with the new or alternative method of taking appeals.

[1] The plaintiff, in his briefs, declares that there are two questions presented by this appeal, to wit: "One of fact, How did the flooding of plaintiff's land occur? and one of law, Is the Alta Irrigation district liable?" But there is in reality but one question in the case, viz.: Does the evidence support the findings? There can, of course, be no question as to the duty and obligations resting upon the owner of an irrigating ditch in his relations as such with the public. He must so construct and maintain it as that, in its operation, by the exercise of reasonable or ordinary care, no damage will result to others. To him, as well as to all persons, must obviously be applied the principle that one must so use his own property as not to injure that of others, or, as that trite doctrine is otherwise more tersely and classically expressed, "Sic utere tuo ut alienum non laedas." "He is bound to keep his ditch in good repair, so that the water will not overflow or break through its banks and destroy or damage the lands of other parties, and if, through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the creek" and injures or destroys the land or property of others, the law will hold him responsible therefor. *Richardson v. Kier*, 34 Cal. 63, 74, 91 Am. Dec. 681. But he is not an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. He is, in other words, required to exercise reasonable or ordinary care only in the construction, maintenance, and operation of his ditches. 3 Current Law, p. 1125, notes 106 and 110; *King v. Miles City Irri. Co.*, 16 Mont. 463, 41 Pac. 431, 50

Am. St. Rep. 600; *Orchester v. Col. Ditch Co.*, 59 Cal. 197; *Grand Val. Irr. Co. v. Pitzer*, 14 Colo. App. 123, 59 Pac. 420; *Weil on Water Rights in the Western States* (2d Ed.) pp. 256, 257. Nor is a ditch or canal owner responsible for that which is solely the result of the act of God, or inevitable accident. It is only when human agency is combined with the act of God and neglect occurs in the employment of such agency that a liability for damage results from such neglect. *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115; *Chidester v. Consol. Ditch Co.*, 59 Cal. 197, 202; *Proctor v. Jennings*, 6 Nev. 83, 88-90, 3 Am. Rep. 240; *Jordan v. Mount Pleasant*, 15 Utah, 449, 49 Pac. 746; *Lisonbee v. Monroe Irr. Co.*, 18 Utah, 343, 54 Pac. 1009, 72 Am. St. Rep. 784, 786; *Mathews v. Kinsell*, 41 Cal. 512; monographic note to *McCoy v. Danley*, 57 Am. Dec. 690, 691; *McKee v. Delaware, etc., Canal Co.*, 125 N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740, and note.

Thus we have stated some of the general principles which apply to the owners of irrigation companies and by the light of which the court below no doubt considered and reached its conclusion upon the evidence.

Now, the single question submitted for determination by this court is, as before stated, whether the evidence supports the findings, and to this question we conceive it to be clear, after an examination of the record, that an affirmative answer must be returned, and the judgment cannot therefore justly be disturbed.

It is deemed unnecessary to present herein a detailed statement of the testimony, of which a large amount was heard by the court. It will be sufficient, for the purposes of this decision, merely to state, in a general way, the evidence produced before the court.

[2] Upon some of the main points the evidence is conflicting, but no proposition is more familiar to the profession than that where such a condition exists as to the evidence, and nothing appears upon the face of the testimony from which the findings must have been reached indicating the improbability of its verity, an appellate court, upon a review of the case, must abide by the decision of the trial court upon the ultimate result arrived at by it from such testimony.

The situation, as disclosed by the record, appears to be this: The defendant corporation is the owner of and maintains an irrigation system of considerable magnitude in Tulare county. This system consists of a number of main canals or ditches, one of which, as seen, runs in close proximity to the plaintiff's land which it is claimed was inundated by the water from said ditch. The source of the water supply for said irrigation system is King's river.

The plaintiff testified that the water which overflowed his land broke over and through the banks of the ditch at a point where a

bridge, comprising a part of a road, crosses said ditch a short distance west of said land. He further testified, as did some other witnesses testifying in his behalf, that the ditch at the point where the water broke through and over its banks was very shallow; that there was a ridge or "hump," as he termed it, at the bottom of the ditch at that point which was due to the fact that the soil thereat was of a hard-pan nature, difficult to dig into, and that the defendant, by reason thereof, failed to make it of sufficient depth to be capable of carrying the amount of water required for its use for irrigation purposes. He further declared, as did some of his other witnesses, that a large quantity of old tin cans and other debris or refuse matter had been dumped into the ditch near the bridge, thereby filling up the channel so that it obstructed the free flow of the water, and caused the banks to give way under the extraordinary pressure of the flood waters which passed through the ditch at the time of the overflow of his land. All this testimony, however, was directly contradicted by Mr. Rice, superintendent of the defendant corporation, and other witnesses produced by the defendants. They said that, at the point at which the water is alleged to have flowed from the ditch over the plaintiff's land, the channel of the ditch was of sufficient depth to safely hold and carry the usual amount of water turned into the ditch from King's river for the purpose of irrigating when necessary, all the lands in the district and situated within that part of the district in which the plaintiff's land is located; that no obstruction to the free and ordinary flow of the water in the ditch existed at the point near the bridge, as described by the plaintiff and his witnesses; that there were no old tin cans or other rubbish in the channel of the ditch, as stated by the plaintiff and other witnesses testifying for him. Rice further testified that the company, prior to the time of the inundation of the plaintiff's land, had turned no water from King's river into the particular ditch from which the water flowed over and upon the land of the plaintiff, and in this statement he was corroborated by other witnesses. It was further shown, as the court found, that, commencing in the latter part of February, 1911, and continuing up to the early days of March of that year, and previously to the flooding of the plaintiff's land, heavy and almost unprecedented rainstorms prevailed in the northern part of Tulare county, with the result that a number of creeks, having their source in the Sierra Nevada mountains and whose courses are southward, generally speaking, and through portions of the district of the defendant corporation, were surcharged with water. One of these ravines or creeks is known as Sand creek. This creek passes over the ditch to which the complaint attributes the direct

source of the inundation of the plaintiff's land at a point not far distant from said land, and when, as in the months of February and March of the year 1911, its channel is filled with water because of an unusual precipitation of rain, the water therein, after passing the ditch, spreads out and over the lands situated in the vicinity of that of the plaintiff. And, according to certain testimony produced by the defendants—testimony sufficient to support the findings in that regard—the overflow of the plaintiff's land, as well as a large area of other lands contiguous thereto, was occasioned entirely by the extraordinary quantity of water received into the channel of Sand creek by reason of the heavy rainstorms which prevailed in the latter part of February and the early part of March, 1911, throughout the watersheds from which said creek obtains its water, and that said overflow would have occurred even if the ditch had not existed.

There is evidence in the record that the ditch referred to in the complaint had been constructed some 20 years prior to the time of the flood in question here, and that during all of said period of time it had been in good condition and always sufficient in every respect to meet the requirements of the district and the water users. It was shown that, up to the time of the flood and immediately thereafter, the ditch was capable of carrying all the water required for irrigation purposes in the neighborhood of the plaintiff's land, and that it did so after the flood.

But it is conceived that a further review of the evidence is unnecessary. As stated in the beginning, there is an abundance of evidence upon which the court was justified in predicating its findings that the flooding of the plaintiff's land and the consequent destruction of his eucalyptus trees were not due to any fault or negligence of the defendants, but were occasioned solely by a superhuman cause or one beyond the control of human agency.

The judgment is accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

UNION COLLECTION CO. v. OLIVER. (Civ. 1,277.)

(District Court of Appeal, First District, California. Nov. 21, 1913. Rehearing Denied by Supreme Court Jan. 20, 1914.)

1. APPEAL AND ERROR (§ 821*)—TRANSCRIPT—FILING—TIME.

Defendant inadvertently failed to serve his notice of intention to move for a new trial within the time limited, but was relieved from this default by an order of the trial court, from which plaintiff appealed to the Supreme Court, where the order was reversed. Prior to the reversal, and within 60 days after the judgment was entered, defendant served and filed notice of appeal, and on the same day served his proposed bill of exceptions. Plain-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff, reserving its objections to the bill, proposed amendments, and the bill was in the course of settlement, when it was destroyed by the conflagration of 1906. The shorthand notes not having been destroyed, they were subsequently transcribed, and ultimately the bill of exceptions was settled and allowed. Defendant failed to file the transcript on appeal from the judgment sooner, depending on Supreme Court rule 2 (119 Pac. ix), providing that when a party appealing from a judgment has given notice of a motion for a new trial before perfecting the appeal, the time shall not begin to run until the motion for new trial has been decided or the appeal dismissed. *Held*, that the transcript, having been filed pending the decision of the motion for a new trial, was filed in due time regardless of the fact that the motion was ultimately denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2724-2731; Dec. Dig. § 621.*]

2. CORPORATIONS (§ 120*)—STOCK—SALE—REFUND OF PRICE.

Where defendant, who was president of a mining company, in order to sell certain of its stock to plaintiff's assignor executed a writing guaranteeing to refund in 12 months from date all moneys paid by the buyer in the event he was not satisfied with his investment, the buyer was entitled to express his dissatisfaction, and demand a fulfillment of the guaranty at any time during the life of the contract; and hence a demand made before the last day of the life of the guaranty was not premature.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 495, 504; Dec. Dig. § 120.*]

3. ASSIGNMENTS (§ 10*)—MATURITY OF DEBT.

That the obligee under a guaranty assigned his right to sue thereon to plaintiff before the money was due was immaterial, since the assignment authorized the assignee to collect the claim when it matured.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 34-38; Dec. Dig. § 10.*]

4. ASSIGNMENTS (§ 19*)—CLAIMS ASSIGNABLE—REPAYMENT OF PRICE OF CORPORATE STOCK.

A claim for money due under a contract to repay the purchase price of certain corporate stock on the buyer's becoming dissatisfied was not personal to the buyer and, not providing against assignment, was assignable.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. § 19.*]

5. ASSIGNMENTS (§ 58*)—NONASSIGNABLE CLAIM—RATIFICATION BY DEBTOR.

Though a guaranty to repay the purchase price of corporate stock on the buyer's becoming dissatisfied was nonassignable, the assignee's right to sue became fixed where the seller, with notice of the assignment, agreed with the assignee that the amount due under the contract was \$3,000, and agreed to pay such sum to the assignee.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 121-123; Dec. Dig. § 58.*]

6. APPEAL AND ERROR (§ 934*)—REVIEW—COMPLAINT.

Where a complaint contained two counts, one of which was good as against a general demurrer, a judgment for plaintiff would be referred to that count, and would not be reversed because the other count was fatally defective.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

7. CONTRACTS (§ 179*)—SIGNING—INDIVIDUAL OR REPRESENTATIVE CAPACITY.

Defendant, who was president of a mining company, to induce plaintiff's assignor to pur-

chase certain of its stock, wrote on one of the company's letter heads a guaranty to refund all moneys paid by the buyer for the stock in 12 months, in case the buyer should not be satisfied with his investment, and signed his name, with the word, "President" following it. The contract was in the first person singular, and in three extensions of time defendant signed his name without the addition of the word, "President." *Held*, that such facts, in connection with evidence of the buyer that defendant gave him the contract as his personal guaranty, were sufficient to show that defendant acted individually, and not solely as an officer of the company.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 777, 778; Dec. Dig. § 179.*]

8. APPEAL AND ERROR (§ 173*)—RIGHT TO ALLEGE ERROR.

Defendant having contracted to repay to plaintiff's assignor the purchase price of certain mining stock in case such assignor became dissatisfied, and he having given notice of his election to demand repayment, and having tendered the stock, defendant refused to comply with the demand, and repudiated the transaction, whereupon suit was instituted, the complaint making no reference to what should be done with the stock. Defendant, neither by answer nor in any other way, indicated that he was not satisfied to let the case go to trial without some disposition being made as to the stock. *Held*, that he could not object on appeal to a judgment for plaintiff because it failed to require that the stock be returned on payment of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Union Collection Company against Dew R. Oliver. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 162 Cal. 755, 124 Pac. 435.

Frank H. Gould and Vincent Surr, both of San Francisco, for appellant. Rufus H. Kimball, of San Francisco, for respondent.

KERRIGAN, J. This is an appeal from the judgment in an action based on a written contract.

Preliminarily plaintiff insists that the transcript was not filed within the time prescribed by law, and that therefore there is no bill of exceptions or statement of the case that can be considered on this appeal.

[1] Through an inadvertence the defendant failed to serve his notice of intention to move for a new trial (according to the claim of plaintiff) within the time limited therefor. Thereafter the trial court, upon notice and motion, made an order relieving the defendant from the consequences of his omission. From that order the plaintiff took an appeal to the Supreme Court, and that court reversed the same, holding that a motion for a new trial was collateral to the original action and in the nature of a new and independent proceeding to which the provisions of section 473, Code of Civil Procedure, were inapplicable. Union Collection Co. v. Oliver, 162 Cal. 755, 124 Pac. 435. Long prior to

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the reversal of said order, and within 60 days after the judgment was made and entered, defendant served and filed notice of appeal therefrom, and on the same day also served his proposed bill of exceptions. Subsequently the plaintiff, reserving its objections to the bill, proposed amendments thereto, and the bill was in course of settlement in April, 1906, when it was destroyed by the great fire which occurred in San Francisco on the 18th day of that month. The shorthand notes of the evidence and proceedings, however, were not destroyed, and they were subsequently again transcribed, and ultimately the bill of exceptions was settled and allowed. Defendant did not file the transcript on appeal from the judgment sooner, depending upon rule 2 of the Supreme Court (119 Pac. ix), which in part provides: "When a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time aforesaid (i. e., for filing transcript) shall not begin to run until the motion for a new trial has been decided or the proceeding therefor dismissed." And the question presented is, Was there under the rule a proceeding pending for the settlement of a bill of exceptions? There can be no doubt that there was. Whether or not such a proceeding was pending does not depend upon its ultimate success or failure. *Dernham v. Bagley*, 151 Cal. 216, 90 Pac. 543; *Curtin v. Ingle*, 155 Cal. 56, 99 Pac. 480; *White v. White*, 112 Cal. 580, 44 Pac. 1026. The transcript on the appeal from the judgment was filed pending the decision of the motion for a new trial; and the fact that the motion was ultimately dismissed does not preclude the use of the bill of exceptions on the appeal from the judgment. *Foley v. Foley*, 120 Cal. 37, 52 Pac. 122, 65 Am. St. Rep. 147; *Kelly v. Ning Yung, etc., Ass'n*, 138 Cal. 603, 72 Pac. 148.

We pass now to a consideration of the appeal. The complaint is in two counts, and is based upon the following written instrument: "San Francisco, Cal., July 3, 1902. Mr. H. J. Miller, City—Dear Sir: I hereby guarantee to refund all moneys paid by you for the purchase of Zublate stock in twelve months from date, in the event that you are not satisfied with your investment. Dew R. Oliver, President. Witness: J. R. Kenny." The life of this guaranty was extended by the maker in writing until June 22, 1904. A few days prior to that time the following writing, dated June 3, 1904, was delivered to the defendant: "Mr. Dew R. Oliver, San Francisco. I hereby notify you that I am not satisfied with my investment in Zublate mining stock referred to in your letter dated July 3rd, 1902, and I hereby exercise my right to demand that you comply with your guarantee of said date and that you pay to me not later than the 22nd day of June, 1904, the sum of \$3,000.00, the same being the amount of my investment in said stock, in-

cluding assessment on same. At the time of the payment of said sum, I shall endorse and transfer the whole of said stock to you or to any person you may name. H. J. Miller."

On June 21, 1904, Miller assigned and transferred all his right, title, and interest under the contract and the indebtedness owing thereunder to the plaintiff. Plaintiff also alleges that on the 22d day of June, 1904, an account was stated between plaintiff and defendant upon the aforesaid indebtedness, and upon such statement a balance of \$3,000 was found to be due from the defendant to plaintiff, and that the defendant then and there promised to pay the same.

This action was commenced in July following. It was tried by a jury, which rendered a verdict against the defendant for the sum of \$2,655, with interest, and judgment was rendered pursuant to the verdict.

[2] Defendant insists that the allegations of the complaint "preclude a cause of action." This contention is founded on a number of grounds. Answering the first of these, the defendant had a right to express his dissatisfaction, and make his demand for the fulfillment of the guaranty, at any time during the life of the contract (*Herberger v. Husman*, 90 Cal. 583, 27 Pac. 428); and, under a fair interpretation of the words of the contract, "I * * * guarantee to refund * * * in twelve months from date," the defendant had until the expiration of that period, or any extension thereof, in which to comply with Miller's demand, which would give him until June 22, 1904. The very language of the contract, giving the defendant the whole of the period of the guaranty in which to make it good, was equally effective in conferring upon Miller the right to make his demand at any time within that period; and we cannot agree with the contention of the defendant that Miller's demand was prematurely made, and therefore abortive, because made before the last day of the life of the guaranty.

[3] The fact that the assignment by Miller to the plaintiff was made before the money was due is also immaterial. It operated to authorize the assignee to collect the same when it should become due and payable. Assignments of future interests are valid. 2 Am. & Eng. Ency. of Law, 1027; *Bank of Yolo v. Bank of Woodland*, 3 Cal. App. 561, 567, 86 Pac. 820; *La Rue v. Groezinger*, 84 Cal. 281, 283, 24 Pac. 42, 18 Am. St. Rep. 179; *Field v. Mayor of N. Y.*, 6 N. Y. 179, 57 Am. Dec. 435; *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 333, 109 Pac. 499.

[4] Nor is there any merit in the argument of defendant that the contract was personal, and therefore unassignable. The contract does not provide that it shall not be assigned. Neither is it in its nature strictly personal, and therefore unassignable. 2 Am.

[5] Even if the contract were not assignable, its transfer could be ratified (Sharp v. Edgar, 3 Sanford [N. Y.] 381; 2 Am. & Eng. Ency. of Law, 1028); and this, according to the allegations of the first count of the complaint, was done; for it is there stated that the defendant, having notice of the assignment, agreed with the plaintiff on the 22d day of June, 1904, that the amount due under the contract was \$3,000, and agreed to pay to plaintiff that sum. This upon demurrer must be taken as true, and to establish a ratification of the assignment.

[6] This disposes of the points made against the complaint. We may add, moreover, that as the complaint embraces two counts, one of which without any doubt states sufficient facts to constitute a cause of action, it is good as against a general demurrer, and we could not reverse the judgment even if the other count were defective. *Bernstein v. Downs*, 112 Cal. 204, 44 Pac. 557; *Terrill v. Terrill*, 100 Cal. 413, 42 Pac. 137. For the sake of upholding it, the judgment will be presumed to be based upon the count against which there is no valid objection. *Nielson v. Provident Sav., etc., Society*, 139 Cal. 339, 73 Pac. 168, 96 Am. St. Rep. 146.

[7] Defendant strenuously insists that he acted throughout the transaction only in the capacity of an officer of the Zubiate Mining Company, and that therefore the action did not lie against him. The execution of the contract by the defendant by signing his name and adding thereafter the word, "President," did not make the contract the obligation of the corporation. *Bank v. Wallis*, 150 N. Y. 455, 44 N. E. 1038; *Gerding v. Funk*, 48 App. Div. 603, 64 N. Y. Supp. 423, 426; *Hall v. Jameson*, 151 Cal. 610, 91 Pac. 518, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137. Nor does the fact that the defendant used the letter head of the corporation carry any presumption that the contract was made by the corporation. *Menz Lumber Co. v. McNeeley & Co.*, 58 Wash. 223, 108 Pac. 621, 28 L. R. A. [N. S.] 1107; *Bank v. Clark*, 139 N. Y. 312, 34 N. E. 908, 36 Am. St. Rep. 705. The contract is in the first person singular, meaning the defendant; and in the three extensions of time the defendant signed his name without the addition of the word, "President." Besides this, in settling the account with the plaintiff, the defendant showed that he regarded the contract as his individual obligation. These circumstances, together with the evidence of Miller that the defendant gave him the contract as his personal guaranty, must be regarded as sufficient to support the verdict of the jury upon this point.

[8] There is no merit in defendant's assertion that the judgment, in failing to provide that the stock must be returned upon payment of the judgment, has left one of the is-

was made upon the defendant for the amount claimed to be due under the guaranty a tender of the stock was made. Defendant refused to comply with the demand, and repudiated the whole transaction, whereupon Miller or his assignee became vested with a cause of action against Miller for the amount due. The complaint makes no reference to what shall be done with the stock, but contemplates that upon payment of the amount due under the contract the stock shall be delivered to the defendant, and that in the meantime the plaintiff shall be the bailee thereof. The defendant neither in his answer nor in any other way indicated that he was not satisfied to let the case go to trial and judgment resting on that assumption; and he cannot now be heard to complain.

It is perfectly apparent that there was a consideration for the making of the contract, and that the evidence sustains the verdict of the jury that there was an account stated.

Other points have not been overlooked, but on examination they have been found to be without merit.

The judgment is affirmed.

We concur: LENNON, P. J.; RICHARDS, J.

BOSCHETTI et al. v. MORTON et al.
(Civ. 1,162.)

(District Court of Appeal, Third District, California. Nov. 22, 1913.)

1. GUARANTY (§ 82*)—ACTIONS—PARTIES—PRINCIPAL DEBTOR.

In an action on a guaranty of a lease, the lessee, who was the principal debtor, was not a necessary party, especially where it appeared that he was insolvent so that the obligees were relieved from suing him by Civ. Code, §§ 2800, 2801.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 97; Dec. Dig. § 82.*]

2. APPEAL AND ERROR (§ 1042*)—RULINGS ON PLEADINGS—PREJUDICE.

Denial of a motion to strike out probative matter in a complaint was not ground for reversal, where it did not appear that defendants were in any wise prejudiced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.*]

3. ABATEMENT AND REVIVAL (§ 8*) — OTHER ACTION PENDING.

An action by a lessee to recover damages from the lessors for defective construction of the building and consequent injuries to his goods, to which defendants, who were guarantors of the lease, were not parties, could not be pleaded in abatement of a suit by the lessors on a guaranty of payment of the rent for the term.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 39-56, 58-63, 68-72; Dec. Dig. § 8.*]

4. JUDGMENT (§ 601*)—ACTION ON GUARANTY—JUDGMENT FOR PRIOR DEFAULT.

In an action on a guaranty of payment of the rent for a term, accruing after May 15,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1907, a judgment for plaintiffs in a suit in a justice court to recover against defendants for the rent from April 15th to May 15th was immaterial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1116; Dec. Dig. § 601.*]

5. LANDLORD AND TENANT (§ 184*)—RENT—ACTION ON GUARANTY—EVIDENCE.

In an action on a guaranty of payment of rent to accrue under a lease for a term, it was material to show that plaintiffs accepted possession of the premises from the lessee because of nonpayment of rent and that there was no eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 743-750; Dec. Dig. § 184.*]

6. LANDLORD AND TENANT (§ 184*)—SURRENDER—ACCEPTANCE.

Where, during a term, the lessee surrenders the key and abandons the premises, the lessors are entitled to take possession and manifest their acceptance of the surrender, and in doing so cannot be charged with eviction releasing the lessee from liability for future rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 788, 789; Dec. Dig. § 194.*]

7. GUARANTY (§ 53*)—RELEASE OF GUARANTOR—CHANGE IN OBLIGATION—PAYMENT OF RENT.

Where a lessee voluntarily surrendered the premises and the lessors accepted the abandonment, but there was no eviction, a guarantor of the rent for the term was not discharged under Civ. Code, § 2819, providing that a guarantor is exonerated if, by any act of the creditor without the consent of the guarantor, the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal in respect thereof are in any manner impaired or suspended.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 64, 66; Dec. Dig. § 53.*]

8. GUARANTY (§ 39*)—GUARANTY OF RENT—SURRENDER OF PREMISES—NOTICE TO GUARANTORS.

Where a guaranty of payment of rent under a lease provided that the guarantors, on failure of the lessee to pay the rent, would forthwith pay the same without previous demand, etc., the guarantors were not entitled to notice of the lessee's surrender of the premises during the term and its acceptance by the lessors.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 48; Dec. Dig. § 39.*]

9. GUARANTY (§ 46*)—DEFAULT—NOTICE.

Civ. Code, § 2807, provides that a guarantor of payment or performance is liable immediately on default of the principal and without demand or notice, and section 2808 declares that, when the guaranty is of a conditional obligation, the guarantor's liability is commensurate with that of the principal, and he is not entitled to notice of the principal's default unless he is unable, by the exercise of reasonable diligence, to acquire information thereof and the creditor has actual notice. Held that, where defendants guaranteed payment of rent by a lessee, they were not entitled to notice of the lessee's default within a reasonable time in order to fix their liability.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 56, 57; Dec. Dig. § 46.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by E. Boschetti and another against Thomas J. Morton and others. Judgment for

plaintiffs, and defendant Morton and intervenor, P. L. Badt, appeal. Affirmed.

William J. Herrin, of San Francisco, for appellants. Rufus Hatch Kimball, of San Francisco, for respondents.

CHIPMAN, P. J. The action is against defendants as guarantors under a certain lease in which intervenor, Badt, was the lessee of the premises and plaintiffs were the lessors. The undertaking was attached to the lease and in terms covenanted that the lessee will pay all rents monthly and execute other agreements, failing in which the guarantors "will forthwith pay unto them (plaintiffs) without previous demand on us all rents accrued and all damages incurred by reason of such failure, including attorney's fees actually incurred or expended by them (plaintiffs) or their agents, Burnham & Marsh."

It is alleged that the lessee entered into possession of the premises (a building on the northerly side of Bush street near Franklin street in the city of San Francisco) and paid the rent, \$160 per month, to plaintiffs to and including April 14, 1907, and so continued in possession until and including June 1, 1908, on which last-named date plaintiffs "accepted possession thereof from said Badt * * * for the sole reason that the said Badt and the defendants, each and all, refused to pay the rent of said premises or any portion thereof"; that, except as hereinafter stated, Badt neglected and refused to pay rent after April 15, 1907, by reason whereof plaintiff commenced an action in the justice's court against the defendants herein to recover rentals for the month commencing April 15, 1907, and recovered judgment therein which, on appeal to the superior court, was affirmed, and the said judgment in said superior court was paid and the judgment satisfied; that the whole of the rent accruing since May 15, 1907, is unpaid, and defendants have refused to pay the same. Judgment was demanded for the sum of \$2,080, with interest and \$520 attorneys' fees. A motion was made by defendants to strike from the complaint the said proceedings in the justice's court and the superior court some 60 or more folios, as redundant and immaterial, which motion was denied. Defendant Basillo Assente made default. Defendant Morton answered, denying that plaintiffs accepted possession of the premises from Badt because of the nonpayment of rent, but that they wrongfully entered into possession June 1, 1908, and evicted Badt in violation of the lease. As a second defense, defendant Morton alleged that plaintiffs, without the consent of defendants or of Badt, on June 1, 1908, wrongfully took possession of the premises, "tore out and removed all of the fixtures, shelving and counters placed, constructed, used, and owned therein by said P. L. Badt," by rea-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

leased, and discharged from said agreement and undertaking" to pay plaintiffs. Wherefore defendant prays that plaintiffs recover nothing and that he be "exonerated, discharged, and released from said guaranty annexed to said lease."

Intervener, Badt, by leave of court, filed a complaint in intervention in which he made denials of the averments of plaintiff's complaint much the same as did the defendant. He set up several separate defenses entitled, third, fourth, and fifth defenses. A demurrer was sustained as to these, and, no objection being made in the briefs to this order, these defenses need not be set out. In his second defense, intervener alleges the making of said lease; that at its date, June 11, 1906, the building on said premises was in course of erection; that said building was to be used in carrying on a hardware business and was to be suitable for that purpose; that it was not completed until about August 1, 1906, on which date intervener took possession and placed therein a stock of hardware of the value of \$5,000; that, in violation of said agreement, plaintiffs did not erect a building suitable for mercantile purposes or said hardware business; that, by reason of the defective and faulty construction of said building (as to which the particulars are set out), "when the rainy season began in the month of October, 1906, seepage, percolating, and surface waters oozed through said floor, walls, sidewalk, and foundations, and dampened and rusted said stock of hardware in said building to such an extent" as to render it unsalable; that said defects were unknown to intervener and could not be discovered by him by the use of ordinary diligence, but that plaintiffs could have discovered such defects during the construction of the building had they used ordinary care in its supervision; that, about the ——— day of October, 1906, intervener gave plaintiffs notice in writing pursuant to section 1942 of the Civil Code, notifying them of said defects, and plaintiffs thereupon commenced repairs on said building, but said defects could not be and were not repaired, "and shortly thereafter intervener did remove his stock of hardware from said building whereby intervener suffered damage in the sum of \$5,000, no part of which has been paid." Intervener also alleged that at all the times set forth in the complaint he was and now is "wholly insolvent and unable to indemnify defendant Thomas J. Morton for any judgment that may be obtained against him."

Defendant Morton asked leave to file a proposed amendment to his answer, as a third defense, setting forth by way of plea in abatement the pendency, in the superior court, of another action "between defendant's principal P. L. Badt and the plaintiffs in this action; that in said action a copy of the process has been duly served upon defendant's principal P. L. Badt and he has ap-

to said Badt and undetermined." In support of the motion all the papers in the case are appended thereto, and it is claimed that the said action was between the same parties as in this action and involved the same issues. The motion was denied.

The court found the averments of the complaint to be true except as to the amount of the alleged attorney's fee, \$520, and reduced the amount to \$250; that the denials in paragraphs 1 and 2 of the answer of defendant Morton are untrue; that the lease set up by Morton is the same lease set forth in plaintiff's complaint; that plaintiffs did not oust Badt from the building and did not wrongfully or without the assent of Badt or the defendants go into possession or oust or eject Badt or wrongfully withhold the possession from him or defendants without his consent; that defendant Morton is not exonerated or released from said agreement; that intervener, Badt, has no good or substantial defense to the action; that plaintiffs took possession of the premises with Badt's consent and in accordance with his wish; that at all the times set forth in the complaint in intervention the said intervener was and is wholly insolvent.

The conclusions of law were: That plaintiffs are entitled to judgment against the defendants and Badt, the intervener, in the sum of \$1,720, with interest upon the sums monthly as they accrued, from May 15, 1907, and also \$250, attorney's fees, and costs of suit. Judgment was entered accordingly.

[1] 1. Appellants' first point is that their special demurrer for misjoinder of parties should have been sustained because the lessee, Badt, was not made party defendant. In *Carver v. Steele*, 116 Cal. 116, 119, 47 Pac. 1007, 1008 (58 Am. St. Rep. 156), the court said: "In general, unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor." Furthermore, in the present case, Badt was wholly insolvent, and hence it was not necessary to sue him. Civ. Code, §§ 2800, 2801. Besides, Badt was allowed to make himself a party.

[2] 2. The court refused to strike out the alleged redundant matter in the complaint setting forth the action in the justice's court. The facts were probative and had no proper place in the complaint and should have been stricken out, but the refusal of the court to grant the motion is not ground for reversal of the judgment. It does not appear that defendants were in any wise prejudiced by the retention of this redundant matter. *Sloane v. Southern Cal. Ry. Co.*, 111 Cal. 668, 684, 44 Pac. 320, 32 L. R. A. 193.

[3] 3. It is claimed that the court erred in

denying defendant Morton's motion to file an amended answer. It is contended that the action sought to be pleaded in abatement involved the same parties and the same issues and that had a judgment been rendered in the case "it would have been offered as a plea in bar of this action," citing *Hall v. Susskind*, 109 Cal. 203, 41 Pac. 1012; *Code Civ. Proc.* § 1908, subd. 2. The action of Badt against the plaintiffs here was to recover damages for the defective construction of the building and the consequent injury to intervenor's goods. The guarantors, defendants here, were not parties to that action, and the action did not involve the payment of rentals. The question of the liability of the sureties not having been involved, a judgment in the action of Badt v. these plaintiffs would not necessarily be a bar to this action. The rule laid down in *Hall v. Susskind* is not met by the facts pleaded in Badt v. Boschetti and Magnani.

4. Error is claimed of the court's refusal to sustain defendant's motion for a nonsuit for the reason that certain material averments of the complaint are not supported by any evidence, viz., that the lease was not offered in evidence; that the execution of the guaranty by defendant Morton was not shown; that there was no evidence to sustain the averment "that plaintiffs accepted possession for the sole reason that the defendant Morton, or either of them, refused to pay the rent"; that there was no evidence in support of the averments relating to the proceedings and judgment in the justice's court for a month's rent and the payment of the judgment.

[4] The execution of the lease and the guaranty appeared both by failure to deny and by the averments of the answer and the complaint in intervention. So far as the proceedings for the recovery of one month's rent are concerned, we cannot see that they were material to the issues in this case. At most, they tended to show what otherwise appeared, namely, that the lease and guaranty were executed as alleged, and whether that judgment was or was not paid is not material, since the present action excludes any claim for that month.

[5] It was material to show, which was denied, that plaintiffs accepted possession of the premises from Badt, the lessee, and that their reason for doing so was the nonpayment of the rent. The court found: "That plaintiffs accepted and took possession of the premises described in the lease set forth in the complaint herein on the first day of June, 1908, in accordance with the consent of P. L. Badt." Badt testified that he gave up the key of the premises to Burnham & Marsh, plaintiffs' agents. "I left the key with Mr. Merriman (in the agents' office). When I handed him the key, I told him I had moved out of the premises. * * * The key I handed him was the key to the front door.

There was no key to the back door. I had dealt with Burnham & Marsh before as the agent of the plaintiffs. It was that fact that took me back again, and that caused me on that occasion to go there and give up the key to Mr. Merriman. I may have told Mr. Merriman that the business was not paying me and that therefore I moved out. After I gave the key to Mr. Merriman I never asked for it back. I never went after that." He testified that he never asked the plaintiffs or either of them for the key and never told them that he wanted possession again; that he had no further use for the premises and did not want to be liable for further rent and took that means of relieving himself. It appeared that Badt passed the premises after plaintiffs took possession and saw them taking down a partition and some shelving. He did not then object or make any inquiry as to why plaintiffs were in possession.

[6] Boschetti, one of the plaintiffs, testified that he removed a partition in the rear of the storeroom, took down some shelving, and loosened the counter from the floor; that "those fixtures are lying there now. Mr. Badt never asked me to give him those fixtures. I never withheld them from him, and nobody ever asked me for them." There is some conflict as to Badt's intention after moving out, and there was some evidence tending to show that he made an effort to rent the premises, thus negating the idea of an abandonment of the lease or surrender of possession. We think, however, there was sufficient evidence to justify the finding of the trial court. Upon the surrender of the key and abandonment of the premises plaintiffs had a right to take possession and thus manifest their acceptance of the surrender. *Welcome v. Hess*, 90 Cal. 507, 27 Pac. 369, 25 Am. St. Rep. 145; *Adams v. Weaver*, 117 Cal. 47, 48 Pac. 972. *McAlester v. Landers*, 70 Cal. 79, 84, 11 Pac. 505, cited by appellant, was a case of undisputed eviction and took place prior to default in payment of rent for which the guarantor was sued. The point there was that, because the lessee could recoup his damages from the unpaid rent, the lessor's rights against him were thus so impaired as to release the guarantor; but the case does not apply here, first, because there was no eviction, and, second, the alleged eviction took place after the liability had accrued for which the action was brought. Releasing the lessor from liability for future rent did not affect the lessee's liability for rent already accrued. *Boyd v. Gore*, 143 Wis. 531, 128 N. W. 68, 21 Ann. Cas. 1263. The facts do not show exoneration of the guarantors under section 2319 of the Civil Code, for there was no act of the lessors altering the obligation of the lessee, or in any way impairing or suspending the rights of the lessors against the lessee. Respondents cite *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 31, 80

eviction could not impair a matured obligation of the lessee and hence could not discharge the guarantors to make good on such an obligation. The case cited appears fully to sustain this contention. It is not necessary to rest the decision upon this proposition. Where a tenant, not under compulsion but voluntarily, gives up the premises, and the landlord accepts the abandonment, there can be no eviction. 24 Cyc. 1180.

[7, 8] 5. It is urged that, because defendant Morton had no notice of the action of the lessors, the guarantors had no opportunity to relet the property or to take other steps to recoup their loss. This contention is based on Morton's second defense that his principal, Badt, was ousted by plaintiffs and such ouster released the guarantors under section 2819 of the Civil Code. As already stated, there having been no ouster, this section and the cases cited cannot avail appellant. Furthermore, the guaranty expressly provides that the guarantors, on the failure of the lessee to pay his rent, "will forthwith pay unto them (the lessors) without previous demand on us all rents accrued and all damages incurred by reason of such failure, including attorney's fees."

6. The foregoing is sufficient also to answer appellant's contentions in support of his appeal from the order denying a new trial.

[9] 7. It is further urged that the complaint fails to state a cause of action and the demurrer thereto should have been sustained, because it failed to state whether the plaintiffs notified defendant Morton within a reasonable time that default had been made in the payment of rent. Section 2807 of the Civil Code would seem a sufficient answer. "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." When the guaranty is of a conditional obligation, the guarantor's "liability is commensurate with that of the principal, and he is not entitled to notice of the default of the principal, unless he is unable, by the exercise of reasonable diligence, to acquire information of such default, and the creditor had actual notice thereof." Civ. Code, § 2808. As was said in *American Bonding Co. v. Pueblo Investment Co.*, supra: "The contract of suretyship is not that the obligee will see that the principal pays his debt or fulfills his contract, but that the surety will see that the principal pays or performs." We have already shown that by the terms of the guaranty the guarantors were not entitled to notice of the lessee's default.

We discover no points made in intervenor's brief not covered in considering the appeal of defendant Morton. Both Badt and Mor-

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

THIRD STREET IMPROVEMENT CO. v. McLELLAND et al. (Civ. 1,189.)

(District Court of Appeal, First District, California. Nov. 28, 1913. Rehearing Denied Dec. 28, 1913. Denied by Supreme Court Jan. 23, 1914.)

1. PAYMENT (§ 89*)—RECOVERY—PAROL EVIDENCE—VARYING WRITTEN STATEMENT OF ACCOUNT—PLEADING MISTAKE.

Where, overlooking \$500, which plaintiff had paid defendant, they stated their account in writing, and plaintiff paid the balance, as so shown, this cannot be shown, and the \$500 recovered, in the absence of a pleading of the mistake.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 291-296; Dec. Dig. § 89.*]

2. PLEADING (§ 248*)—AMENDMENT—CHANGING CAUSE OF ACTION.

The amendment of a complaint to recover \$500 had and received by defendants for the use and benefit of plaintiff, by alleging that, overlooking \$500, which plaintiff had paid defendants, they stated their account in writing, and plaintiff paid the balance as so shown, does not change the cause of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 686, 687, 689-703, 708½, 709; Dec. Dig. § 248.*]

3. PLEADING (§ 245*)—AMENDMENT—DISCRETION.

It appearing defendants would not be prejudiced in their defense by permitting an amendment, at the trial, of the complaint, in an action to recover \$500, to allege that, overlooking \$500, which plaintiff had paid defendants, they stated their account in writing, and plaintiff paid the balance as so shown, it was an abuse of discretion not to allow it.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 635, 653-675; Dec. Dig. § 245.*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by the Third Street Improvement Company against Robert McLelland and another. From a judgment of nonsuit, plaintiff appeals. Reversed.

Frohman & Jacobs, of San Francisco, for appellant. Peter A. Breen, of San Francisco, for respondent McLelland. Arthur W. Perry, of San Francisco, for respondent Smith.

KERRIGAN, J. This is an appeal from a judgment of nonsuit. The action was for money had and received by the defendants for the use and benefit of the plaintiff. The answers of the defendants denied the receipt of the money.

Upon the trial of the case the secretary of the corporation plaintiff testified that the defendants, as copartners, erected a building for the plaintiff in San Francisco, and that at or about the time of the completion of the building there was an agreement of settle-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—69

ment in writing between the parties. This agreement was introduced in evidence, and consisted of an itemization of sums paid by plaintiff to the defendants, and an agreement as to the mode of payment of the balance still remaining due, the amount of which was found and fixed by the writing. The witness testified that the balance so agreed upon was subsequently paid. He also testified that about four months prior to entering into the written settlement the plaintiff paid to the defendants the sum of \$500, which, by inadvertence, was not entered in the books of the plaintiff, and consequently was not taken into consideration in the negotiations for settlement, nor had the plaintiff received credit for the same. This testimony was objected to by the defendants, but was admitted by the court subject to a later ruling; and, upon the plaintiff closing its case, the defendants renewed their objection to and moved to strike out all testimony relating to the payment of this \$500, upon the ground that it was incompetent, irrelevant, and immaterial, that the said payment was made prior to the making of the account stated, that it was an attempt to correct the written account stated by parol in the absence of proper pleading for that purpose, and that the account stated was conclusive upon all matters embraced within it, and moved for a nonsuit, upon the ground that plaintiff had failed to prove the allegations of its complaint. The court granted the motion to strike out, and also the motion for a nonsuit, and, as before stated, it is from the judgment entered thereupon that plaintiff appeals.

After argument of the motion to strike out and for an order of nonsuit, the plaintiff asked leave to amend its complaint by adding a count thereto, in which it would allege the mistake of fact in the agreement of settlement, and pray that the contract be reformed, and for the recovery of the \$500 overpaid. This motion was also denied.

In support of its appeal, plaintiff claims that the court erred in striking out the testimony admitted subject to the objection; that it also erred in refusing permission to amend the complaint, as also in its order granting defendant's motion for nonsuit.

[1] Under the issues framed by the pleadings the testimony stricken out by the court was clearly inadmissible for the reasons stated in the objection thereto. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings. * * *" Code Civ. Proc. § 1856. "The execution of a contract in writing, whether the law requires it to be writ-

ten or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." Civ. Code, § 1625.

A contract which does not express the intention of the parties cannot be enforced according to their intention without first re-forming it to make it express such intention. *De Witt et al. v. Duncan*, 46 Cal. 342, 346; *Irving v. Cunningham*, 66 Cal. 15, 4 Pac. 766. The written contract must control as to all the terms expressed in it, and, if there is any difference between it and the oral contract, the written document must be referred to in order to preserve the rights of the parties. *Linton v. Unexcelled Fireworks Co.*, 128 N. Y. 672, 28 N. E. 580.

In the case of *Bush v. Tilley*, 49 Barb. (N. Y.) 599, the rule is thus stated: "If the alleged previous oral arrangement is declared upon as the subsisting agreement, * * * the subsequent written agreement duly executed, the moment it is presented in evidence, destroys the oral one, and takes away its character as an agreement entirely."

In the case at bar, the moment it appeared that the parties had stated their account in writing, a presumption arose that the payment of the \$500 made prior thereto, together with all previous oral negotiations, were merged in the written agreement.

[2, 3] Coming now to the main point in the case, we think the court, in the exercise of a sound discretion, should have permitted the proposed amendment, and that its denial must be regarded as an abuse of discretion. The case for the plaintiff was very brief; the defendants did not claim to be taken by surprise, or ask for a postponement, or the imposition of terms. Nor does it appear that, if the account were ordered corrected and reformed, a complete readjustment or a wholly new settlement would be necessary. Apparently all that would follow, if plaintiff established its case, would be to give it judgment for the \$500 sued for. The defendants seemed to rely wholly on the theory that the proposed amendment would wholly change the cause of action, and that the trial court, therefore, was without any power to permit it. We do not think this is the correct view. Plaintiff, in the proposed second count of the complaint, would be merely alleging in effect the facts of the case as disclosed by the evidence, which facts, if the court found them to be true, would entitle the plaintiff to recover what it sought to obtain by the original complaint, i. e., the \$500 overpaid the defendants by reason of a mistake of fact. In both counts the cause of action would be the same, viz.: The recovery of the \$500 paid by the plaintiff to the defendants through an oversight or mistake. The allowance of the amendment would not change the cause of action, but would merely permit the pleading of the appropriate allegations—which may be done. *Frost v. Witter*, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; *Born v. Castle et al.*

134 Pac. 347. The purpose of the law allowing amendments is, of course, to permit the correction of errors and omissions on the part of a pleader; and, since it cannot be successfully denied that the plaintiff, in its original complaint, could have properly sought a reformation of the contract, and, if reformed, a recovery thereon as reformed (34 Cyc. 994, 999; 24 Am. & Eng. Ency. of Law, 615; 4 Pom. Eq. Jur. 1376; Walsh v. McKeen, 75 Cal. 519, 17 Pac. 673), and as it appears, also, that the defendants would in no way have been prejudiced by permitting the amendment in presenting their defense, it follows, it seems to us, that the court erred in disallowing the proposed amendment.

The judgment is reversed.

We concur: LENNON, P. J.; RICHARDS, J.

MERCHANTS' MUT. ADJUSTING AGENCY v. DAVIDSON. (Civ. 1258.)

(District Court of Appeal, Second District, California. Nov. 18, 1913.)

1. CORPORATIONS (§ 252*)—STOCKHOLDERS—LIABILITY TO CREDITORS.

A creditor's claim against a corporation must be reduced to judgment and execution issued and returned unsatisfied before he can invoke the aid of equity in enforcing collection against a stockholder who has not fully paid for his stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.*]

2. CORPORATIONS (§ 269*)—INDEBTEDNESS—ENFORCEMENT AGAINST STOCKHOLDER—EVIDENCE.

A judgment against a corporation and execution unsatisfied are evidence of insolvency and of inability to collect, but not the only evidence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 980, 1149-1159, 2277; Dec. Dig. § 269.*]

3. CORPORATIONS (§ 252*)—REMEDY OF CREDITORS—ENFORCEMENT AGAINST STOCKHOLDER—CONDITION PRECEDENT—RETURN NULLA BONA.

Where a corporation is shown to be wholly insolvent and without any assets other than claims against certain stockholders for unpaid stock subscriptions, which the judgment creditor has made a futile attempt to reach by execution, liability thereon being denied, he has done all that he is required to do as a condition precedent to an action to enforce a stockholder's liability to the corporation on his unpaid subscription and in such case the return of a general execution against the company unsatisfied as a mere matter of form is not a prerequisite to the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1016-1023; Dec. Dig. § 252.*]

4. CORPORATIONS (§ 269*)—REMEDIES OF CREDITORS—ENFORCEMENT AGAINST STOCKHOLDER—SUFFICIENCY OF EVIDENCE—PAID-UP STOCK.

Evidence, in an action by a creditor of an insolvent corporation to enforce a creditor's liability upon his unpaid stock, held not sufficient to show that the stock was sold to defend-

ant and the certificate therefor issued as "paid-up" stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 887, 888, 980, 1149-1159, 2277; Dec. Dig. § 269.*]

5. CORPORATIONS (§ 99*)—CAPITAL STOCK—ISSUE AS PAID-UP STOCK—ESTOPPEL TO RECOVER.

A corporation issuing stock as "paid-up" stock is thereby estopped from enforcing payment of the difference between the amount actually paid and the full par value of such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. § 99.*]

6. CORPORATIONS (§ 232*)—REMEDIES OF CREDITOR—ENFORCEMENT AGAINST STOCKHOLDER.

A judgment creditor of an insolvent corporation may enforce payment to it of the full par value of the stock less the price actually paid for it by the stockholder; such right resting on the theory that the assets of an insolvent corporation are held in trust for its creditors, it being immaterial that the corporation sold its stock in good faith at less than par to procure capital necessary to conduct its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by the Merchants' Mutual Adjusting Agency against Moses Davidson. Judgment for plaintiff, and defendant appeals. Affirmed.

E. I. Feemster, of Visalia, for appellant. Lamberson & Lamberson and James M. Burke, all of Visalia, for respondent.

SHAW, J. This is an action by a judgment creditor of the Visalia Publishing House, a corporation, to collect from defendant as a stockholder therein an unpaid balance alleged to be due from him to the corporation upon shares of the stock therein, the corporation being insolvent. Defendant appeals from a judgment rendered in favor of plaintiff.

While the corporation was a going concern defendant purchased from it shares of its capital stock of the par value of \$1,000, for which he paid \$250 and has paid no more.

The first point urged by defendant for a reversal is that, by reason of the fact that the issuance of an execution upon the judgment obtained against the corporation and a return of nulla bona thereon by the sheriff is not alleged, the complaint fails to show that plaintiff prior to the bringing of this action had exhausted its legal remedies in an effort to collect the judgment obtained against the publishing house, and therefore the general demurrer interposed by defendant should have been sustained. While it is true the complaint did not allege the return of an execution nulla bona, it did allege that on the 15th day of February, 1910, plaintiff obtained judgment against the corporation for the sum of \$1,514.63; that at the time of the recovery of said judgment and at all

times thereafter said publishing house was insolvent and neither owned nor had any property whatsoever, save and except the sum of \$750 due from defendant herein on account of the alleged balance due for the purchase of shares of capital stock of said publishing house, and a similar debt due from one J. H. Butler in the sum of \$850 (for the recovery of which an action was pending); that on May 21, 1910, plaintiff caused a writ of execution to be issued upon said judgment so obtained against said publishing house and delivered it to the sheriff of the county, directing him by virtue thereof to levy upon all moneys, goods, and effects in the possession or under the control of or due from said defendant Davidson and J. H. Butler, together with all sums due and owing from them or either of them to said publishing house upon the capital stock of said Visalia Publishing House held or owned by them; "that said sheriff made due and legal service of said writ of execution, together with a notice of garnishment, upon the said Moses Davidson, the defendant herein, and the said J. H. Butler; that the said defendant Moses Davidson and the said J. H. Butler each separately made answer to said writ of execution and notice of garnishment in writing, and therein denied he was indebted to the said Visalia Publishing House in any sum, or that he had any moneys, goods, or effects due or owing to the said Visalia Publishing House in his possession or under his control," which said execution the sheriff returned with said written denials of Davidson and Butler attached thereto.

[1] It seems to be the general rule that a creditor's claim must be reduced to judgment and execution thereon issued and returned unsatisfied before he can invoke the aid of equity in enforcing collection. *Cook on Corporations*, § 200; *Pomeroy's Eq. Jur.* § 1415. That one adopting such course has exhausted his legal remedies admits of no doubt.

[2, 3] Where, however it appears, as here, from the allegations of the complaint that the corporation is wholly insolvent and without any assets other than those which the judgment creditor has made a futile attempt to reach by execution, he has done all that he should be required to do as a condition precedent to maintaining the action. As was said by Chancellor Kent: "It is one of the maxims of the common law, which is a dictate of common sense, that the law will not attempt to do an act which is vain, or to enforce an act which would be fruitless." The basis of the action is the insolvency of the corporation. "A judgment and execution unsatisfied are evidence of insolvency, of inability to collect. They are, however, evidence only; and the fact may be established as well by other evidence, among other modes, by an assignment and continued suspension of business, or other notorious indications." *Terry v. Tubman*, 92 U. S. 158, 23 L. Ed. 537. In *Andrews v. O'Reilly*, 25

R. I. 231, 55 Atl. 688, the Supreme Court of Rhode Island, in discussing a question identical with that involved here, said: "We think, in the action to enforce the stockholder's liability, it is sufficient to allege that the creditor has exhausted all remedies which could have been fruitful, and not necessarily all remedies of mere form. The remedy of attempted levy of an execution, when it is certain in advance that nothing can come of it, is not required by the reason of the rule. The plaintiff here has alleged that a judgment against the corporation is unsatisfied because the corporation is insolvent and has no property on which an execution can be levied. If he proves this at the trial, why should he not recover his debt of the stockholder? The best and conclusive proof of the fact that the corporation has no property is the return of an officer to that effect, but he may be able to offer other proof which will be convincing. The thing involved is the impossibility of recovering the judgment from the principal debtor. The means by which this impossibility is demonstrated are of minor consequence. Even where the statute expressly provided that 'no suit shall be brought against any stockholder,' etc., 'until an execution against the company has been returned unsatisfied in whole or in part,' it was held by the Supreme Court of the United States, in *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966, following *Shelington v. Howland*, 53 N. Y. 371, that an adjudication in bankruptcy of the company excused a compliance with this condition." To the same effect is *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah, 423, 45 Pac. 200, and *Hodges v. Silver Hill Min. Co.*, 9 Or. 200. In our opinion, the return of an execution nulla bona as a prerequisite to maintaining an action of this character is not required, where the complaint shows that the corporation is wholly insolvent and has no assets upon which to levy an execution. Since it appears that plaintiff exhausted all legal remedies which, under the circumstances alleged, could have been fruitful or availed it in any manner, its right to pursue the stockholder upon his liability for the unpaid balance due the corporation is not affected by the fact that it failed in a matter of mere form to do a vain and idle act.

[4-6] Appellant attacks the finding "that neither the whole nor any part of the balance of \$750 remaining unpaid upon his said purchase of the capital stock of said corporation, as above set forth, has ever been paid, and that the whole of said amount, to wit, the \$750, has been, ever since the date of said purchase, and is now, due, owing, and unpaid from said defendant to said Visalia Publishing House," claiming that it is wholly without support. The evidence shows that, at the time of the purchase of the shares of stock by defendant, the corporation was badly in need of cash wherewith to conduct its business; that of its original capital it sold

to Davidson, one of its stockholders, 1,000 shares of stock, of the par value of \$1,000, for the sum of \$250 paid in cash. As shown by the minutes of the proceedings of the board of directors, the secretary, who negotiated the sale, reported to the board of directors "the sale to M. Davidson of Porterville of 1,000 shares of the stock of the corporation at 25 cents, for the purpose of raising money to meet a bill of one of the San Francisco paper houses. * * * On motion of B. U. Heberling, duly seconded and carried, the sale to M. Davidson was duly ratified." While the secretary testifies that the stock was issued as "paid-up" stock, no indorsement of such fact appeared upon the certificates, and, so far as disclosed by the record, nothing whatever was said by Davidson, the corporation, or any of its officers touching the question of his liability for further payments, or which could be construed as an agreement releasing him from the obligation implied by such purchase, though one of the directors testifies: "My recollection is that he was not expected to pay more than that." Davidson says that he did not in terms agree at the time to pay more than \$250 for the stock. In effect, the evidence shows that defendant bought from the corporation shares of its stock, paying therefor 25 per cent. of its par value, nothing whatever being said touching the question as to payment of the balance. While, in our opinion, the evidence fails to establish an agreement whereby the shares were sold and certificates therefor issued to defendant as "paid-up" stock, nevertheless, while conceding such agreement, if made, binding upon the corporation, it could not affect the rights of plaintiff as a judgment creditor of the insolvent corporation to enforce payment to it of the full par value of the stock less the price actually paid therefor. This upon the doctrine of the so-called trust fund theory, first announced by Judge Story in the case of *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944, namely, that the assets of an insolvent corporation in whatever form are held in trust for its creditors. Among such assets are unpaid balances consisting of the difference between the par value of the stock and the amount actually paid therefor by the purchaser from the corporation, as to the payment of which, so far as the creditor is concerned, the obligation is unconditional, even though the corporation has in selling the stock accepted a qualified liability whereby it is estopped from enforcing payment of the balance. *Herron Co. v. Shaw*, 133 Pac. 491; *Vermont, etc., Co. v. Declez, etc., Co.*, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143; *Cook on Corporations*, § 42; *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731; *Upton v. Tribilcock*, 91 U. S. 48, 23 L. Ed. 203; 2 *Thompson on Cor-*

porations, §§ 1564, 1567; *Morawetz on Corporations*, § 842. Appellant lays much stress upon the fact that the corporation had pressing obligations and that the stock was sold at its full market value for the purpose of raising money to meet its financial necessities. His claim, based upon *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227, *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, and *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 478, 35 L. Ed. 104, is that, where a corporation sells its stock in good faith at less than par in order to procure necessary capital wherewith to conduct its business, creditors, in the event of the insolvency of the corporation, cannot enforce payment of unpaid balances from such purchasers. The cases relied upon by appellant were based upon peculiar facts which, in the opinion of the court, constituted an exception to the general rule. We confess our inability to perceive any ground for the distinction drawn or reason why the creditor of an insolvent corporation should be precluded from recovery because the corporation, when it sold the stock, was in financial straits and the sale made in good faith to relieve its embarrassment. Such ruling if adhered to must necessarily lead to great and inevitable confusion. Moreover, in view of the California citations, the cases cited cannot be deemed authority in support of such contention. It is worthy of note that in the later case of *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363, the author of the opinion in *Handley v. Stutz*, said: "It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And, while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark v. Bever*, *Fogg v. Blair*, or *Handley v. Stutz*, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock." As to the right of creditors of an insolvent corporation to enforce such payment, no distinction can be drawn between the case of one who in form subscribes for original stock, agreeing to pay less than its par value therefor, and one who purchases original stock at less than its par value.

Our conclusion renders it unnecessary to discuss other points made by appellant.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

FISHER et al. v. FISHER. (Civ. 1426.)
(District Court of Appeal, Second District, California. Nov. 20, 1913.)

1. PLEADING (§ 8*)—FACTS OR CONCLUSIONS—DELIVERY OF DEED.

In an action to establish a trust in real estate on the ground that the deed thereof had never been delivered to defendant, a complaint, alleging that there had been no "valid" delivery, that the grantor never intended to convey the property except upon condition, and that defendant "unlawfully," and with intent to deceive and defraud plaintiffs, obtained possession of the deed "without right," was insufficient, as against a demurrer, to sufficiently allege a nondelivery of the deed; the use of the words "valid," "without right," "unlawfully," etc., being allegations of legal conclusions which would be disregarded on demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

2. PLEADING (§ 34*)—CONSTRUCTION—PRESUMPTION AND INFERENCE.

Where a complaint, in an action to establish a trust in real estate, fails to sufficiently allege a nondelivery of the deed to defendant it may be assumed, construing the pleading most strongly against the pleader, that there was some sort of a delivery, qualified or otherwise.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 5½, 66-74; Dec. Dig. § 34.*]

3. DEEDS (§ 60*)—DELIVERY—STATUTE.

Under Civ. Code, § 1056, providing that delivery of a deed to the grantee is absolute, and the instrument takes effect at once discharged of any condition attached to the delivery, the delivery of a deed to the grantee with the intent that it should convey title only upon the event that the grantor should not survive an operation was absolute and final.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 124; Dec. Dig. § 60.*]

4. DEEDS (§ 194*)—TRUSTS (§ 371*)—PLEADING—DELIVERY—PRESUMPTION.

There is a presumption that a deed found in the hands of the grantee was rightfully delivered; and, in an action to establish a trust in the land on the ground that it had not been delivered, plaintiff must expressly allege nondelivery, or facts as to the grantee's possession, showing that there could have been no delivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. § 194;* Trusts, Cent. Dig. §§ 588-599; Dec. Dig. § 371.*]

Appeal from Superior Court, Los Angeles County; Eugene P. McDaniel, Judge.

Action by C. W. Fisher and others against Anna Mae Fisher. Judgment for defendant, and plaintiffs appeal. Affirmed.

Murphey & Poplin, of Los Angeles, for appellants. Drew Pruitt and L. D. Collings, both of Los Angeles, for respondent.

JAMES, J. One W. J. Fisher, now deceased, was the brother of all of the parties who appear as plaintiffs in this action. Anna Mae Fisher, the defendant, was his wife. In the complaint it is alleged that on the 7th day of September, 1903, the decedent was the owner in fee of certain real property, and that, being about to have an operation performed upon his person of a serious nature which

might result in his death, he "made and executed deeds of conveyance of various properties owned by him to various persons, said deeds to be delivered to the grantees therein named in the event of the death of said Fisher as a result of said contemplated operation." It is then alleged that among the conveyances so made was one wherein the said Fisher "signed and acknowledged a certain deed of conveyance, conveying to his then wife, Anna Mae Fisher, the following described property." (Here follows a description of a certain tract of ground situated in the county of Los Angeles.) Further allegations of the complaint set out that the said Fisher recovered from the effects of the operation, and that he did not die until several years thereafter, to wit, on the 4th day of June, 1911. It is also alleged that after recovering from the effects of the operation, he continuously up to the time of his death remained in possession of the real estate mentioned in the deed made to his wife, claimed the same as his own separate estate, and exercised acts of dominion over it. Plaintiffs then allege that three days after the death of said Fisher his wife caused the deed "so executed by decedent on the 7th day of September, 1903," to be recorded in the office of the county recorder, and that she since said date has claimed to own and be in possession of the premises described in the deed. This allegation then follows: "That there never has been a valid delivery of said deed of conveyance from said W. J. Fisher to said defendant, Anna Mae Fisher, and the said W. J. Fisher never intended to convey said property in said deed described to said defendant, except and upon the conditions hereinbefore stated in paragraphs III and III½ hereof; and the plaintiffs are informed and believe, and upon such information and belief allege, that said defendant fraudulently and unlawfully, and with intent to deceive and defraud the plaintiffs and each of them of their just rights or proportions in the property described in said deed, obtained possession thereof without right; and plaintiffs allege that whatever record title may appear to be vested in said defendant by reason of said purported conveyance is held in trust by said defendant as constructive trustee for all the heirs of said W. J. Fisher, deceased." In a second count are further allegations, purporting to state a cause of action to set aside a judgment obtained by defendant against the administrator of the estate of W. J. Fisher, by which judgment the title of the defendant to the real estate described in the aforesaid deed was quieted. The prayer was for a decree determining that the judgment referred to in the second cause of action had been fraudulently obtained, and that the defendant be decreed to hold the real property described in the deed referred to in the first count as the trustee for the

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiffs and defendant as heirs at law of decedent. A demurrer was interposed to the complaint on the part of defendant, by which several grounds of objection were stated. The demurrer was sustained, and, plaintiffs declining to amend their complaint, judgment of dismissal followed. This appeal was then taken.

[1] The general ground of objection stated in the demurrer, to wit, that the complaint in either count failed to state facts sufficient to constitute a cause of action, will be the only one necessary to be considered. In paragraph VII of the complaint, which has been quoted fully in the foregoing, the plaintiffs first allege that there had been no "valid delivery" of the deed of conveyance; second, "that the said W. J. Fisher never intended to convey said property * * * except upon the conditions hereinbefore stated"; and, third, "that said defendant, with intent to deceive and defraud the plaintiffs, and each of them, of their just rights or proportions in the property described in said deed, obtained possession thereof without right." Plaintiffs have not by these allegations sufficiently stated the fact, if it was a fact, that there was no delivery of the deed by W. J. Fisher to his wife. To say that there was no "valid delivery" was not an allegation of nondelivery, and to say that the defendant obtained possession of the deed "without right" did not sufficiently show that her possession was not such as resulted from an actual delivery to her of the deed. The use of the words "valid," "without right," "unlawfully," etc., were allegations of legal conclusions on the part of the pleader, and were similar to words and phrases so denominated in the decision of the case of Callahan v. Broderick, 124 Cal. 80, 56 Pac. 782, where the Supreme Court said: "The necessity for a statement of the facts essential to a right claimed is not obviated by averments of legal conclusions (Aurrecochea v. Sinclair, 60 Cal. 532); for allegations of conclusions of law will be disregarded in considering objections raised by demurrer. Ohm v. San Francisco, 92 Cal. 437, 28 Pac. 580. A conclusion of law tends no issue, and a complaint which depends upon such allegations is insufficient and demurrable." Nor is the cause of action saved to plaintiffs by the allegations that "said W. J. Fisher never intended to convey said property in said deed described to said defendant, except and upon the conditions hereinbefore stated in paragraphs III and III½ hereof" (the paragraphs referred to being those which set out the facts concerning the making of the deeds immediately prior to the time the operation was performed upon the said Fisher).

[2] If the complaint fails to sufficiently allege a nondelivery of the deed, then it may be assumed, in considering the pleading most strongly against the pleader, as is the rule,

that there was some sort of a delivery of the instrument, qualified or otherwise.

[3] Section 1056 of the Civil Code provides as follows: "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon discharged of any condition on which delivery was made." So that, if Fisher did deliver the deed to his grantee with the intent that it should convey title only upon the event that he should not survive the operation, the delivery under such condition was governed by the provisions of the section of the Civil Code cited, and became absolute and final. It is not alleged that at the time decedent made the deeds in 1903 he retained them in his possession, or that he did not then deliver them, and it is not alleged as to when the defendant became possessed of the deed which she afterwards recorded.

[4] There is a presumption that a deed found in the hands of the grantee was rightfully delivered; and, in an action of this kind an express allegation of nondelivery is necessary to the statement of a good cause of action, or facts must be alleged touching the obtaining of the possession of the deed by the grantee which show in themselves that there could have been no delivery of the deed. As to the second count of the complaint, that count rested for its support upon the main allegations contained in the first count, which were referred to and made a part of the second alleged cause of action. If the first count stated no cause of action, then it must follow that the second count was defective in its statement of sufficient facts to warrant a recovery. For the reasons given, it appears that the demurrer was properly sustained.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

TAYLOR v. SIMI CONST. CO. (Civ. 1877.)
(District Court of Appeal, Second District, California. Nov. 20, 1913.)

CONTRACTS (§ 213*)—PERFORMANCE.

Where defendant had agreed to construct a water plant and deliver water to certain farmers, its abandonment of such plan would not postpone the maturity of its obligation under a writing by which it agreed to pay another \$1,000 within three days after water was turned on the first 25 acres subscribed by such farmers.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 957-977; Dec. Dig. § 213.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by W. H. Taylor against the Simi Construction Company. From a judgment for the plaintiff, defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Chase, Overton & Lyman, of Los Angeles, and P. B. Plumb, of S. Pasadena, for appellant. Chas. T. Howland and Bernard Potter, both of Los Angeles, for respondent.

JAMES, J. A demurrer, assigning the general ground that sufficient facts were not stated to constitute a cause of action, was interposed to plaintiff's complaint and overruled by the trial court. Defendant, failing to answer within the time allowed by the court, judgment was entered in accordance with the prayer of the complaint.

The contract upon which the action was brought, and which was set out in the complaint, was as follows: "Los Angeles, Cal., December 26, 1911. For value received, Simi Construction Company promises to pay to John W. Sharpe the sum of one thousand dollars, without interest, at its office in Los Angeles, California; said payment to be made within three days after water is turned on the first twenty-five or more acres of land subscribed by stockholders of the Moorpark Irrigation Company, other than the Simi Construction Company, itself. [Seal] Simi Construction Company, by R. S. Masson, President; Leta Masson, Secretary."

It will be noted that the contract was upon a consideration executed, the only uncertain condition being as to the date of its maturity. Not being complete in its statement of the conditions upon the performance of which the money would become due, plaintiff set out in his complaint other facts as follows:

"III. That at the time of the execution and delivery of the said note the said Simi Construction Company had agreed and was proposing to construct a water plant and a pipe line and to pipe water and deliver the same to certain farmers in the vicinity of Moorpark, under an arrangement or association to be known as the Moorpark Irrigation Company, and it was proposed and understood that the said water plant and pipe line should be completed and water turned therein within three months from the date of the execution of the said note, and plaintiff further alleges that three months was a reasonable and ample time for the construction and equipment of said pipe line and for the turning of the water on the first land subscribed by the stockholders of said Moorpark Irrigation Company.

"IV. That the defendant has not constructed the said pipe line, nor has it made any effort or attempt so to do, but that the defendant has abandoned the construction and delivery of water to the subscribers, as hereinbefore mentioned."

For the purposes of a consideration of the ruling on the demurrer, the allegations in paragraph III may be disregarded wholly, in so far as they refer to the matter of what constituted a reasonable time for the construction of the water plant and the turning

of the water on the land referred to in the contract. It sufficiently appears by appropriate allegations that defendant had agreed to construct a water plant and pipe line, and that this plan prior to the commencement of this action had been abandoned. If the defendant, by abandoning its plan to construct the water plant, could postpone the date of the maturity of the debt evidenced by the writing, then the plaintiff, having parted with the consideration for which reimbursement was agreed to be made, could never enforce payment under the contract. It seems quite plain that no such contingency was contemplated by the parties. The defendant, having agreed to make payment within a stated time after the happening of an event, could not, by refusing to permit that event to occur, escape liability upon its contract.

The complaint appears very clearly to state facts sufficient to constitute a cause of action, and hence the demurrer was properly overruled.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

WATERMAN v. VISALIA ELECTRIC R. CO. (Civ. 1127.)

(District Court of Appeal, Third District, California. Nov. 25, 1913.)

1. STREET RAILROADS (§ 114*) — ACTION FOR INJURIES—SUFFICIENCY OF EVIDENCE.

In an action for the death of an infant son killed by an electric car alleged to have been negligently managed by defendant's servant, and not equipped with proper brakes, evidence held to support a verdict for plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 288; Dec. Dig. § 114.*]

2. STREET RAILROADS (§ 95*) — OPERATION — GROSS NEGLIGENCE.

A motorman who carelessly failed to observe the perilous position of a child in time to prevent injury was guilty of gross negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 261-265; Dec. Dig. § 95.*]

3. NEGLIGENCE (§ 136*) — QUESTION FOR JURY — IMPUTED NEGLIGENCE.

On evidence in an action against a street railroad for the death of an infant son killed upon a track, held, that the question of imputed contributory negligence was for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

4. NEGLIGENCE (§ 96*) — INJURIES TO CHILD — NEGLIGENCE OF PARENT.

Parents are chargeable with the exercise of ordinary care in the protection of their minor children.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 157-161; Dec. Dig. § 96.*]

5. NEGLIGENCE (§ 83*) — ACTIONS FOR INJURIES — LAST CLEAR CHANCE.

The doctrine of last clear chance is based upon the fact that defendant actually knew of the danger, so that a defendant who did not actually see or know of the danger is not lia-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ble on the ground that, in the exercise of ordinary care, he ought to have seen or known.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

8. TRIAL (§ 253*)—INSTRUCTIONS—NEGLIGENCE—IGNORING ISSUES.

In an action against a street railroad for death of an infant son killed on the track, where plaintiff alleged defective brakes, by reason of which the car could not be properly controlled, an instruction authorizing a verdict for plaintiff, on the ground that, if defendant had furnished suitable brakes, it might have avoided the injury, was erroneous as eliminating the doctrine of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

7. STREET RAILROADS (§ 114*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—NEGLIGENCE.

Evidence in such action held not to show that the brakes on defendant's car were inadequate, or that defendant was negligent in respect to the condition thereof.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 288; Dec. Dig. § 114.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by William A. Waterman against the Visalia Electric Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. McKinley and Frank Karr, both of Los Angeles, and Power & McFadzean, of Visalia, for appellant. Lamberson & Lamberson and J. M. Burke, all of Visalia, for respondent.

BURNETT, J. The appeal is from a judgment in favor of plaintiff, and from an order denying the motion of defendant for a new trial in the action by the father to recover damages for the loss of earnings of an infant son who was killed by an electric car operated by servants of the defendant corporation. The complaint alleged that the death of the child was caused by the negligence, wantonness, and willfulness of the servants of defendant, and that the defendant neglected to equip the car with proper or adequate brakes, and that "said defendant carelessly and negligently permitted said car to become and remain out of repair, in that the brakes thereon had become weakened and unserviceable, so that said car could not be stopped with reasonable certainty or celerity." The material allegations of the complaint were put in issue by the answer, and contributory negligence was also set up.

The contentions of appellant may be reduced to three: (1) The verdict is not supported by the evidence; (2) the court misdirected the jury to the prejudice of appellant; and (3) the court erred in refusing certain instructions requested by defendant.

As to the first of these it is insisted that there was no substantial showing of negligence on the part of those in charge of the car. It appears that the accident occurred approximately on the crossing at the inter-

section of B and Walnut streets in Exeter, a town of probably 1,000 inhabitants. The tracks are on Walnut street, running east and west, and the car approached the crossing from the east. B street extends north and south, and the Waterman house was a short distance and north from Walnut street, and on the east side of B street. There is a curve in the track a little less than 400 feet from the crossing. At the time of the accident the car was traveling at the rate of about 20 miles an hour. It is the claim of appellant that, being uncontradicted, the following testimony of the motorman must be accepted as true: "As I proceeded down the road, and toward Exeter, I saw a little child. As near as I could determine his location was at the west side of the crossing. He was on the track. When I first saw him, I was about 150 feet from him, I should judge. When I first saw it, it was just getting up on its hands and knees." He further testified that the sun was "right in my eyes," and: "I then put on my brakes as quickly as I could, whistled, and kept whistling. Besides that, I reversed my car. The brakes that I threw on were the emergency brakes. That was done as soon as I discovered that there was a child there." From this, it is argued that the only reasonable inference is that the motorman, upon seeing the child, did everything possible to stop the car, and that he used ordinary care in detecting the child's presence on the track.

[1, 2] On the other hand, respondent calls attention to the fact that the motorman had a full opportunity to see the child when the car came upon the straight track, but nevertheless the car traveled the 400 feet east of the crossing, and went on nearly 200 feet west of the crossing before coming to a stop after striking the child. While the motorman, it is true, claims that the sun was "in his eyes," he nowhere asserts that this fact actually prevented him from seeing the child. Indeed, in one part of his testimony he states: "Before I got off the curve, I could see the track down to where the child was." At the coroner's inquest, also, he said he was just coming on the straight track when he first saw the boy. He afterwards modified this statement by saying that he was not sure that it was just when he was coming onto the straight track, and, further on in the examination, that he was about 200 feet from the crossing; but, in view of his inconsistent statements, we cannot say that the jury was not justified in adopting the theory that he did see, or by the exercise of ordinary care could have seen, the child in time to avoid the accident, the evidence showing that it required about 300 feet in which to stop the car when it was running at the rate of 20 miles per hour. If through carelessness he failed to observe the perilous position of the child in time to prevent the in-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury, of course it would follow that the motorman was properly chargeable with gross negligence.

[3] Neither can it be said, we think, that the jury was bound to find that contributory negligence must be imputed to the mother for permitting the child to wander upon the track. The accident occurred about 6 o'clock p. m., and the child had been out of doors about half an hour. The mother was busy with her household duties; but during this time she made frequent trips to the door to watch the child, going four or five times. She said, "I kept watch on the baby;" and she saw him not more than 15 minutes before he was killed, and at that time he was by the steps with the oldest boy, who was 9 years of age. The question of the mother's negligence, under the circumstances, we regard as debatable, and therefore concluded by the finding of the jury.

[4] The following quotation from *Fox v. Oakland Consolidated Street Railway*, 118 Cal. 55, 50 Pac. 25, 62 Am. St. Rep. 216, we consider applicable here: "Parents are chargeable with the exercise of ordinary care in the protection of their minor children, and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from 15 to 20 minutes, without satisfying herself of his whereabouts, was, under all the circumstances, a want of ordinary care was, we think, a fairly debatable question. *Schierhold v. North Beach, etc., R. R. Co.*, 40 Cal. 447; *Meeks v. Southern Pac. R. R. Co.*, 56 Cal. 513 [38 Am. Rep. 67]; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504 [18 N. E. 108]."

But respondent contends that, regardless of the question of contributory negligence, there was sufficient evidence to justify the verdict upon the theory that defendant had a clear opportunity, by the exercise of ordinary care, to avoid the accident. It is insisted that the doctrine is correctly declared in the *Fox Case*, *supra*, where it is said: "But, were defendant's contention sustainable in this respect [as to contributory negligence], it would not necessarily determine the plaintiff's right to recover. There was evidence tending to show that, when the child went upon the railroad track, he was a sufficient distance in advance of the approaching car to have enabled those in charge thereof, by the exercise of ordinary care, to have stopped before striking him. This evidence, if believed by the jury, and their verdict implies that it was, would tend to show a gross negligence on the part of defendant's servants, and justify a finding for plaintiff, notwithstanding the negligence of the parents in permitting the child to be in the street. This is upon the principle, now firmly established in this state, that a party having an opportunity, by the exercise of proper care, to avoid injuring another must do so, notwithstanding the latter has

placed himself in the situation of danger by his own negligence or wrong" (citing cases).

This quotation suggests one of the most important questions involved herein, and which has received careful attention from counsel. By respondent it is contended that, under the peculiar circumstances, if the motorman saw, or by the exercise of ordinary care could have seen, the child on the track in time to avoid the injury, we have a case for the application of what is known to the profession as "the last clear chance" principle. Appellant contends that it can be invoked only when the servant has *actual knowledge* of the dangerous situation. The matter is important, for the reason that the court adopted respondent's view, and gave to the jury this instruction: "But should you find that defendant was guilty of some negligence, and should you further find from the evidence that the negligence of defendant contributed directly or proximately to the death of said child, and should you further find from the evidence that the said child, or his father, or the person or persons charged with the care and control of said child at the time were also guilty of negligence which contributed directly or proximately with the negligence of defendant to his death, then I instruct you that your verdict must still be in favor of defendant, unless you also find that, notwithstanding plaintiff's negligence, defendant could, with reasonable care, have avoided injuring said child." And also: "If said child was killed through the mutual fault of himself, or those having the care and control of him at the time of the accident, and of the servants or agents of the defendant company, directly or proximately contributing thereto, then your verdict must be for the defendant, unless it appears that injury to the child could have been avoided by the exercise of reasonable diligence on the part of defendant."

[5] It is apparent that, under these instructions, the jury, believing that the mother of the child was chargeable with contributory negligence, would still be justified in finding a verdict for plaintiff, if it was believed that the motorman, by the exercise of ordinary care, could have seen the child in time to avoid the accident, and it may be that the verdict was based upon that theory.

Many cases from other jurisdictions and some from our own state and various textbooks are cited by respondent in favor of his contention. They have been examined, and, it must be said, they lend support to his position; but the question has been set at rest in this state by the recent decisions of the Supreme Court of which it will only be necessary to refer to the case of *Thompson v. Los Angeles & San Diego Beach Railway Co.*, 134 Pac. 709. The lower court in that case gave the following instruction: "I instruct you that one having knowledge of the dangerous situation of another, and hav-

ing a clear opportunity, by the exercise of proper care, to avoid injuring another, must do so, notwithstanding the latter has placed himself in such situation of danger by his own negligence. If, therefore, you should find from the evidence that the motorman of defendant's car which collided with the automobile saw, or by the exercise of reasonable care and prudence should have seen, the situation in which plaintiff was before the collision, and had the opportunity, by the exercise of proper care, to avoid the collision, and avoid injuring the plaintiff, and failed to exercise such care, or to do what reasonable prudence would dictate he should have done to avoid injuring the plaintiff, the defendant is liable, and your verdict must be for the plaintiff."

In passing upon the correctness of this, the Supreme Court, through Mr. Justice Sloss, said: "This instruction is manifestly erroneous, in so far as it attempts to apply the last clear chance doctrine to a defendant who is not actually aware of the fact that plaintiff has negligently put himself in a position of danger. The italicized portion of the quotation declares a proposition that has been repeatedly repudiated by the decisions of this court. In *Herbert v. S. P. Co.*, 121 Cal. 227 [53 Pac. 651], the court said that the liability under the doctrine in question 'is based upon the fact that defendant did actually know of the danger—not upon the proposition that he would have discovered the peril of the plaintiff but for remissness on his part. Under this rule, a defendant is not liable because he ought to have known.' The same views are expressed in *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 656 [62 Pac. 308, 64 Pac. 993], and *Bennichsen v. Market St. Ry. Co.*, 149 Cal. 18 [84 Pac. 420]. See, also, *Esrey v. S. P. Co.*, 103 Cal. 541 [37 Pac. 500]." The same rule was recognized by this court in *Zipperlen v. S. P. Co.*, 7 Cal. App. 206, 93 Pac. 1049.

But there is another objection to the instruction which we regard as insuperable.

[8] Plaintiff, as we have seen, based his cause of action upon the negligence of defendant in furnishing defective brakes as well as upon the said carelessness and indifference of the motorman, and in the brief here respondent argues that the verdict may be sustained upon either ground. We must assume that the same argument was made to the jury, and they may have adopted the theory that the negligence of defendant consisted in its failure "to equip the said car with proper or adequate brakes." Having taken this position, the jury may have concluded that, if the car had been properly equipped with brakes, it would have been stopped in time, and the accident avoided. They would then apply said instruction to that contingency and necessarily reach the conclusion that, though the child's mother was guilty of negligence that contributed di-

rectly to the injury, yet, since defendant, if it had furnished suitable brakes, might have avoided the accident, plaintiff was entitled to recover. This would be, of course, to set at naught and completely nullify the doctrine of contributory negligence. It would be in effect that the prior negligence of defendant, if contributing to the accident, would render defendant liable, notwithstanding the succeeding negligence of plaintiff which contributed directly and proximately to the injury. In other words, contributory negligence would be entirely eliminated from the case. We cannot say that the jury did not make this erroneous and prejudicial application of said instruction, although we do not agree with respondent that the verdict can be justified on the ground of defective brakes.

[7] As we read the record, the evidence all shows that there was no negligence in that respect. There is much positive testimony similar to that of the witness Robert N. Richardson, who declared: "I inspected that car that morning before it went out, and it was in good condition. The brakes were all right. I inspected that same car again the next morning, and I found the brakes in good condition." There is no evidence to the contrary, and the only reasonable inference is that the brakes worked properly; but, unfortunately, they were not operated in time.

We think, therefore, that the court should have given this instruction proposed by defendant: "I instruct you that there is no evidence in this case to the effect that the brakes in defendant's car were inadequate, or that defendant was negligent in respect to the braking equipment of said car or the condition thereof."

We find no other error in the record.

As to the amount of the verdict, we feel satisfied it is not excessive. But, for the reasons stated, we are satisfied the defendant is entitled to a new trial, and the judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

LOYALTON ELECTRIC LIGHT CO. v.
CALIFORNIA PINE BOX &
LUMBER CO. (Civ. 1163.)

(District Court of Appeal, Third District, California. Nov. 25, 1913.)

1. CONTRACTS (§ 322*)—BREACH—EVIDENCE—SUFFICIENCY.

In an action for breach of a contract whereby plaintiff was entitled to use for fuel refuse from defendant's box factory not needed for its own engines, evidence held insufficient to show a breach by defendant.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1534; Dec. Dig. § 322.*]

2. CONTRACTS (§ 220*)—CONSTRUCTION.

Where a box factory and an electric light company entered into a contract whereby the light company was to be entitled to use as

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fuel such refuse as the factory did not need for its own use, and the light company was to furnish lights at a special rate, the light company cannot compel the box company to continue its plant in operation and recover damages for breach of the contract because there was no refuse while the factory was shut down.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1013; Dec. Dig. § 220.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Loyalton Electric Light Company, a corporation, against the California Pine Box & Lumber Company, a corporation. From a judgment for defendant, and an order denying its motion for new trial, plaintiff appeals. Affirmed.

See, also, 133 Pac. 323.

W. E. F. Deal, of San Francisco, and Curler & Martinson, of Reno, Nev., for appellant. Pillsbury, Madison & Sutro, of San Francisco, for respondent.

BURNETT, J. The appeal is from the judgment and order denying a motion for a new trial. On April 20, 1904, appellant's assignor was engaged in operating an electric lighting plant, and respondent was operating a box factory at Loyalton, in Sierra county. The power house for both plants was the same, and was owned by respondent and contained the dynamo and engine of appellant. On that date the parties entered into a written contract whereby it was agreed that respondent should keep employed a fireman for the purpose of keeping up steam in the boilers in the power house during the hours when the box factory should not, and the lighting plant should, be in operation, and appellant was to be allowed the use of so much of the steam as might be necessary for the operation of its plant. Additional help, if needed, was to be employed by appellant. The right was accorded appellant to use the room in which was situated its dynamo and engine, and to erect and maintain on and over the land owned or occupied by respondent such poles as might be necessary for the proper support and conduct of its wires used in connection with its lighting plant. Appellant agreed to furnish respondent with such electric lights as it might require in its factories, power house, and other buildings, yards, and premises at Loyalton, not to exceed, however, in all 200 lights for the price of 10 cents per month for each of said lights. The main controversy, though, is over the following provision in said agreement: "The second party [appellant] shall have the right to use for fuel any refuse of the box factory which the first party [respondent] may not require for generating steam for its own purpose, and any additional fuel which may be required for the purpose of generating steam for the use of the second party

shall be supplied by the second party at its own expense."

[1] An alleged violation of this provision by respondent is the basis for the action, plaintiff alleging: "That on or about the 1st day of September, A. D. 1904, the defendant, in violation of the said contract, refused to permit plaintiff to use the refuse of the box factory for the purpose of generating steam, and ever since said day, and up to the 1st day of July, A. D. 1908, has sold and disposed of all of the refuse of said box factory not required by it for generating steam for its own purposes. * * * That by reason of the said violation of the said contract by defendant, plaintiff has been damaged in the sum of \$7,200." This was positively denied by respondent, and the court found against appellant. The vital point in the case involves the sufficiency of the evidence to support this finding. And as to this, the contention is confined to the refusal to furnish block wood; it being claimed as a part of the refuse.

Respondent points out in the record certain testimony which, it is contended, is amply sufficient to support the finding of the court, and with this contention we agree.

C. E. Horton and R. W. Bender were the two witnesses called by appellant to prove the alleged refusal of respondent to comply with its agreement. The former testified that he was manager of respondent's plant from the fall of 1904 until December 30, 1906, and during that period he was there about three-fourths of the time. He was asked by appellant's counsel this question: "What, if any, objection was made at any time while you were there to the use of the blocks, as well as of sawdust and shavings, by the defendant in this action, or any of its officers?" and he answered: "There was no objection made by any one at all at any time." The witness repeated the declaration that there was no objection made by defendant or any of its officers during the entire period to the use by appellant of any of the refuse not needed by respondent.

The other witness, Mr. Bender, did testify that he had an altercation on several occasions with respondent's engineer about the use of the fuel, that the latter had refused to let him have it after a certain time at night, saying he had to keep up fire for the steam, and that they would run short if they let the witness have the fuel. There is no evidence that the engineer made any misstatement as to the necessities of respondent in that regard. To the contrary, our attention is called to the following testimony of the witness: "Mr. Madison. Q. You heard Mr. Horton's testimony here this morning, did you, to the effect that the plaintiff in this case never was refused block wood? A. Yes, sir. Q. Do you mean to contradict him on that point? A. No, sir, I do not; but

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

when I made the statement that I had been refused the use of the blocks, it was the engineer's refusal to give them to me; and, also, when the engineer would refuse to give them to me, I called on the bookkeeper, and he said, yes, that they didn't have enough to run on, and I couldn't use them. Q. And he was actually using them for generating the steam? A. Yes, sir; he was using the blocks and the sawdust both. Q. And that is what he refused you? A. Yes, sir. Q. And that is all he refused you? A. Yes, and I had to go out and get my own wood, my own fuel."

Mr. Horton also explained the controversy with the engineer by stating that he found out by investigation that the engineer wanted the blocks "for work on the following day to make steam until he could make more blocks and fuel for the use of the box factory." Mr. Horton further testified that: "There was no objection by any one to using the blocks. It was a shaving bin, and it was in the fireroom in front of the boiler, and when the factory run right through the day, and the engineer said there wouldn't be enough shavings and sawdust to start the box factory the next morning, until he could get enough shavings to keep running during the day he at times would allow them to use the shavings out of the bin; but no one ever refused to allow the blocks to be used." He further testified, when recalled, that the only complaint ever made by appellant was that it could not get the blocks from the "Roberts blockhouse after the lease running from the Roberts Company to the California Pine Box Company had ceased, and the Roberts people had taken the property back again and then had refused to let the electric light company have the blocks."

It furthermore appears that respondent was not chargeable with any act or omission of the said Roberts Company, and that appellant was in the habit of obtaining its block wood from the Roberts blockhouse, as the arrangements for obtaining the same were more convenient than from respondent's blockhouse.

As to the sale by respondent of block wood it was declared by Mr. Horton that this was done only as to the surplus after the requirements of appellant and respondent were met.

We deem it unnecessary to go further into this branch of the subject. After reading the entire record we are satisfied that the court's conclusion is a rational inference from the evidence and therefore supported within the contemplation of law.

[2] Indeed, about the only serious controversy is as to the period when respondent's plant was not in operation. It seems that it was shut down early in 1907, and it so remained for two years. As to this we are in entire accord with respondent's view as follows: "That the contract did not obligate the respondent to operate its box fac-

tory merely for the sake of producing refuse which appellant might use, if it wanted to, would seem to be clear. The contract, neither expressly nor impliedly, contains any language imposing such an obligation upon the respondent, nor indeed any language which shows that the parties even expected such operation to be continuous, although expressions showing their expectation to that effect, if there had been any, would not be the equivalent of a covenant."

The learned trial judge, it may be stated, so construed the contract in another action between the same parties, covering a later period, and the judgment was affirmed by the District Court of Appeal for the First District, the opinion being written by the late Mr. Justice Hall, and reported in 133 Pac. 323. Therein it was said: "The theory of appellant is that under the contract respondent was and is obliged to operate its box factory in order to produce refuse of the box factory, to the end that appellant may use for fuel any such refuse as respondent may not require for generating steam for its own purposes. This theory is entirely untenable." We think the reasons assigned by said court for its conclusion are sound.

Appellant urges that this construction makes the contract quite unequal, and results in great detriment to its interests. From the record, however, we cannot estimate the relative value of the various covenants of the contract, nor determine the diminution of the expense for the lights caused by the inaction of the box factory, nor, indeed, can we say that appellant was required to furnish respondent with any lights while its factory was not in operation. These considerations are, in fact, not before us. We are dealing simply with what was at issue in the case at bar.

We think the judgment and order should be affirmed and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

BERKELEY BANK OF SAVINGS & TRUST CO. v. MILLER et al. (Civ. 1305.)

(District Court of Appeal, First District, California. Nov. 21, 1913. Rehearing Denied by Supreme Court Jan. 20, 1914.)

1. APPEAL AND ERROR (§ 883*)—WAIVER OF ERROR.

In an action to foreclose a mortgage, defendants admitted that their interest in the premises was subsequent to the mortgage, and stipulated that all claims, other than those of the appealing defendants to the surplus above plaintiff's mortgage, might be determined in another action pending between defendants to determine the extent and priorities of their claims. The decree provided that any surplus from the sale of the mortgaged premises should be deposited in court until the judgment in the other action. *Held*, under the rule that a party cannot assert an error which he has formal-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ly waived or in which he has knowingly acquiesced, the appealing defendants could not claim error in the judgment for not disposing of the rights of all of the defendants in the present action.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

2. MORTGAGES (§ 581*) — FORECLOSURE — AMOUNT OF ATTORNEYS' FEES.

The court, in an action to foreclose a mortgage, could find that the sum allowed as attorneys' fees, which was within the limitation provided in the mortgage, was reasonable even in absence of evidence on the question.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 1669-1679; Dec. Dig. § 581.*]

3. MORTGAGES (§ 438*)—PAYMENT—SUBROGATION.

Where, in an action to foreclose a mortgage, a defendant holding an inferior lien tendered to plaintiff the sum due for principal and interest upon the secured note, together with the attorneys' fees provided for in the mortgage, which was accepted, such defendant was properly subrogated to plaintiff's interest and substituted as plaintiff under Code Civ. Proc. § 385.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1291; Dec. Dig. § 438.*]

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by the Berkeley Bank of Savings & Trust Company against William Miller and others. From a judgment for plaintiff and an order denying a new trial, defendants Herman Murphy, Ella M. Murphy, and the Progressive Investment Company appeal. Affirmed.

Welles Whitmore and Thos. C. Huxley, both of Oakland, for appellants. Daniel O'Connell, of San Francisco, for respondent.

LENNON, P. J. This is an appeal by the defendants Herman Murphy, Ella M. Murphy, and the Progressive Investment Company from a judgment and order denying a new trial in an action wherein a decree was made and entered, foreclosing a real property mortgage executed by the defendant Herman Murphy to the corporation plaintiff, as security for the payment of a promissory note in the sum of \$6,500. All of the other defendants were made parties to the action because, as alleged in the complaint, they had or claimed to have some interest in the mortgaged premises which was subsequent and subordinate to the lien of the mortgage.

The execution and nonpayment of the note and mortgage were admitted by the answers of each and all of the defendants. The defendants William Miller, G. A. Murphy, George C. Richards, and the Black-White Company by their answers admitted that whatever interest they had in the mortgaged premises arose subsequent to the execution of the mortgage out of attachments or judgment liens in other actions which they had instituted against the defendant Herman Murphy.

When the case was called for trial, each

and all of the defendants stipulated in open court that any and all claims other than those of the appealing defendants to the surplus, if any, that might remain after the satisfaction of the mortgage need not be determined and disposed of in the present action, and that such claims should await and be subject to adjudication in another action instituted and then pending between the several defendants for the purpose of determining the extent and priorities of their respective claims and liens against the mortgaged premises. Accordingly the lower court proceeded to a hearing of the action only upon the issues raised by the joint answer of the appealing defendants, but in its findings and decree of foreclosure provided that the surplus, if any, remaining from the sale of the mortgaged premises should be deposited with the court to await judgment in the other action pending.

[1] The question of the sufficiency of the findings and judgment, in so far as they affect the rights of the nonappealing defendants, is not before us upon this appeal; and obviously such question cannot concern the appealing defendants. The judgment as a whole is not inherently void; and assuming, without so deciding, that the rights of the nonappealing defendants could have been considered and disposed of in the present action if the appealing defendants had so insisted, the failure to do so was the fault of all of the parties to the action rather than the mistake of the court. The judgment in respect of its provision requiring the impounding of any surplus which might remain from the proceeds of the foreclosure sale after satisfaction of the note and mortgage, etc., was made and entered by and with the consent of all of the parties to the action; and therefore the appealing defendants are in no position to complain of that feature of the judgment, or of the failure of the lower court to find upon and adjudicate the issues presented by the answers of the nonappealing defendants. This is so because of the well-settled principle of appellate procedure which denies to a party in a civil action the assertion of a right which he has formally waived, or the advantage of an error in which he has knowingly acquiesced. *Holmes v. Rogers*, 13 Cal. 191; *Spinetti v. Brignardello*, 53 Cal. 281; *Thompson v. Connolly*, 43 Cal. 636; *Crosby v. North Bonanza*, 23 Nev. 70, 42 Pac. 583; *Erlanger v. S. P. Company*, 109 Cal. 395, 42 Pac. 31.

[2] The attorney fee allowed for foreclosure was within the limits of the same provided in the mortgage. The trial court found such sum was reasonable, and this it had the right to do even if no evidence had been adduced on the subject. *Alden v. Pryal et al.*, 60 Cal. 215; *O'Neal v. Hart*, 116 Cal. 69, 47 Pac. 926; *Edwards v. Grand*, 121 Cal. 254, 53 Pac. 796; *Hotaling v. Monteith*, 123 Cal.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

556, 61 Pac. 95; Bonestell v. Bowie, 128 Cal. 511, 61 Pac. 78.

[3] During the pendency of the action the defendant Miller tendered to the corporation plaintiff the sum due for principal and interest upon the note and mortgage in suit, together with a sum sufficient to cover the accrued costs and the attorney's foreclosure fee provided for in the mortgage. Such tender and its acceptance were subsequently shown to the lower court upon the hearing of a motion by the defendant Miller to be subrogated to the interests of the plaintiff; and upon the showing made the defendant Miller was rightfully subrogated to the interests of the corporation plaintiff, and then properly substituted as the plaintiff in the action. Code Civ. Proc. § 385.

Upon examination we find that the remaining points presented in support of the appeal do not warrant discussion, much less a reversal.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

DOUGLAS v. SPANGENBERG. (Civ. 1218.)
(District Court of Appeal, First District, California. Nov. 20, 1913.)

1. BROKERS (§ 57*)—CONTRACT—PERFORMANCE.

A broker's contract for the sale of real estate is not performed so as to earn his commission until he has procured a purchaser ready, willing, and able to buy the property offered for sale on the terms and conditions and at the price fixed by the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

2. BROKERS (§ 48*)—SERVICES—PERFORMANCE—PROOF.

To show performance of a broker's contract to sell real property so as to entitle him to commissions, it must appear that he procured from a prospective purchaser an enforceable contract binding him to purchase the property at the price and on the terms specified by the owner or assented to by him, or, in the absence of such a contract, that the broker brought the owner and prospective purchaser together to consummate a contract of sale at the price and on the terms proposed or assented to by the owner, and that he then declined to proceed with the sale on such terms.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.*]

3. BROKERS (§ 86*)—CONTRACT—PERFORMANCE—EVIDENCE.

In an action for broker's commissions, evidence held insufficient to show that the broker procured a purchaser ready and willing to buy on the terms prescribed by defendant.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 116-120; Dec. Dig. § 86.*]

Appeal from Superior Court, City and County of San Francisco; B. V. Sargent, Judge.

Action by A. L. Douglas against F. Spangenberg. From a judgment for plaintiff, and

from an order denying defendant's motion for a new trial, he appeals. Reversed.

F. J. Castelhun, of San Francisco, for appellant. Percy E. Towne, of San Francisco, for respondent.

LENNON, P. J. This is an appeal from the judgment and from an order denying a new trial. The plaintiff had judgment against the defendant in the sum of \$1,690, alleged to have been earned by the plaintiff as a broker's commission in procuring a purchaser for certain real estate belonging to the defendant.

The facts in the case as revealed by the pleadings and proof are substantially these: On December 5, 1910, the defendant, by an instrument in writing, authorized the plaintiff to offer for sale a tract of land, in Tehama county, containing 340 acres. By the terms of the authorization the plaintiff was empowered to offer the entire tract for sale at \$52.50 per acre, upon the express condition that "not less than \$7,500 cash in United States gold coin" should be paid down, and the "balance as may be mutually agreed upon."

The complaint proceeded upon the theory that plaintiff had procured a purchaser for defendant's lands at \$55 per acre, who was ready, willing, and able to buy, and who, as an evidence of good faith had deposited with the plaintiff the sum of \$1,000 in cash as the first payment on account of the purchase price. The complaint further alleged that the plaintiff had reported to defendant the procurement of this particular purchaser and the payment of \$1,000 in cash, and that the defendant in writing had approved the acceptance by plaintiff of the \$1,000 cash deposit, and ratified in writing the other terms and conditions of the sale, notwithstanding that they were at variance with the terms and conditions of sale specified in the original authorization.

The trial court found as a fact that the plaintiff had sold the defendant's lands at the price of \$55 per acre to a prospective purchaser, who had paid \$1,000 on account of the purchase price, and that such purchaser was ready, able, and willing to complete the purchase upon the terms proposed by plaintiff and assented to in writing by the defendant. The insufficiency of the evidence to justify this finding is one of the grounds for defendant's motion for a new trial and is now urged as a reason for reversing the judgment. In this behalf it is the defendant's contention that plaintiff's evidence fails to show, as plaintiff alleged, that he had procured a purchaser for defendant's lands who was ready, able and willing to purchase them upon the terms originally proposed by the defendant, or upon other and different terms proposed by the plaintiff, and which were subsequently accepted and ratified in writing

by the defendant. This contention must be sustained.

[1, 2] A broker's contract for the sale of real estate is not performed, nor is his commission earned, until it affirmatively appears that he has procured and secured a purchaser ready, willing, and able to buy the property offered for sale upon the terms and conditions and at the price fixed by the owner. Such a showing can be made only by proof of the fact that the broker procured from the prospective purchaser an enforceable contract binding him to purchase the property offered for sale at the price and upon the terms specified by the owner or assented to by him, or, in the absence of such a contract, by proof of the fact that the broker brought the owner and prospective purchaser together for the purpose of consummating a contract of sale at the price and upon the terms proposed or assented to by the owner, and that the owner declined to proceed with the sale upon such terms.

[3] No such showing was made in the present case. On the contrary, the evidence shows without conflict that the plaintiff procured a purchaser named Ordway for the defendant's land upon terms essentially different from those originally authorized by the defendant. Clearly the original authorization to plaintiff did not empower him to accept any sum less than \$7,500 in cash on account of the purchase price, nor authorize him to make any terms with reference to the time and manner of payment of the balance of the purchase price which would not meet with the approval of the defendant. Notwithstanding the express limitation upon the authority of the plaintiff, he procured and accepted from Ordway, the prospective purchaser, a contract to purchase, which provided for a first payment on account of the purchase price of only \$1,000, and prescribed conditions for the payment of the balance of the purchase price regardless of the terms and conditions contained in the authorization from the defendant. Of course if the plaintiff had proved, as he pleaded, that the contract procured from Ordway was subsequently accepted and ratified by the defendant, there would be no question but that the plaintiff would be entitled to the commission sued for. The evidence, however, fails to show any such acceptance and ratification. True, it does appear in evidence that subsequent to the execution of the original authorization a paper writing was signed by the defendant and delivered to the plaintiff, addressed, "To whom it may concern," and purporting to be an offer by the defendant to sell the same land described in the original authorization to plaintiff upon terms which in several particulars were identical with those specified in the contract previously procured by plaintiff from Ordway. This

paper writing, however, neither expressly nor by implication purported to affirm or ratify such contract; and furthermore it appears to be an undisputed fact in the case that said paper writing was never finally accepted by the plaintiff either as a ratification of the contract with Ordway or as a new and independent authorization for the sale of defendant's lands. Upon this point the evidence without conflict is to the effect that said paper writing was returned to the defendant unaccepted because plaintiff was dissatisfied with some of its terms, and upon the understanding that a new agreement upon different terms, authorizing the plaintiff to make a sale of the defendant's property, would be entered into. This new agreement, as the evidence shows without conflict, was never executed.

Under these circumstances, it must be held that the evidence does not support the finding that the defendant in writing accepted and ratified the contract of purchase which the plaintiff procured from Ordway. This being so, plaintiff's case must stand upon the original authorization; and upon that phase of the case the evidence shows without conflict that the plaintiff failed to procure a purchaser who was ready, able, and willing to buy upon the terms and conditions imposed by the defendant.

In any view of the case it is clear that the evidence does not support the findings, and therefore the judgment and order appealed from are reversed.

We concur: RICHARDS, J.; KERRIGAN, J.

STRANGE v. STRANGE et al. (Civ. 1273.)
(District Court of Appeal, First District, California, Nov. 19, 1913. Rehearing Denied Dec. 19, 1913; Denied by Supreme Court Jan. 17, 1914.)

1. NEW TRIAL (§ 123*)—MOTIONS—NOTICE.

One seeking a new trial cannot, 33 days after the entry of judgment, and 21 days after serving and filing her notice of intention to move for a new trial, amend her notice of intention by supplying specifications of the particulars in which the evidence was insufficient to support the verdict and also specifications of errors of law which will be relied upon.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276-281; Dec. Dig. § 123.*]

2. NEW TRIAL (§ 128*)—MOTIONS—SPECIFICATIONS.

A motion for new trial will be denied, where it does not comply with Code Civ. Proc. § 659, by specifying the errors of law relied upon and the insufficiency of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

3. NEW TRIAL (§ 128*)—MOTIONS—SPECIFICATIONS.

Neither the amendment to Code Civ. Proc. § 647, whereby it is made unnecessary to take exceptions to the rulings of the court during trial, nor the adoption of section 953a, enabling an appellant to present to the appellate court the reporter's transcript of all the testimony

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

taken and all the rulings made, relieves a defeated party from the duty of specifying the errors of law and the insufficiency of the evidence in his motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257-262; Dec. Dig. § 128.*]

4. NEW TRIAL (§ 140*)—MOTIONS—AFFIDAVIT.

Where a defeated party moved for a new trial on the grounds of accident, surprise, and newly discovered evidence, affidavits to support those grounds must be filed within ten days after the service and filing of the notice of intention or the time must be extended by stipulation.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284-287, 289, 302, 306; Dec. Dig. § 140.*]

5. APPEAL AND ERROR (§ 222*)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.

Where affidavits filed in support of a motion for new trial were not objected to below, although they were filed too late, they will be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1156, 1333-1336; Dec. Dig. § 222.*]

6. QUIETING TITLE (§ 44*)—BURDEN OF PROOF.

In a suit over land, where defendant's claim of title was that she acquired the property by deed from plaintiff executed in 1908, it was unnecessary for plaintiff to offer evidence to show his title before that time.

[Ed. Note.—For other cases, see Quietting Title, Cent. Dig. §§ 89-92; Dec. Dig. § 44.*]

7. APPEAL AND ERROR (§ 1011*)—REVIEW—VERDICT.

A finding of the court on sharply conflicting testimony will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, City and County of San Francisco; H. D. Burroughs, Judge.

Action by Benjamin F. Strange against Marguerite A. Strange and others. From a judgment for plaintiff and from an order denying her motions for new trial and to amend the notice of intention to move for a new trial, the defendant named appeals. Affirmed.

John H. Crabbe, of San Francisco, for appellant. James H. Boyer, of San Francisco, for respondent.

RICHARDS, J. The appellant prosecutes herein three appeals; one from an order denying appellant's motion for leave to amend her notice of intention to move for a new trial; one from an order denying appellant's motion for a new trial; and one from the judgment. They will be considered in the above order.

[1] The order of the trial court refusing appellant leave to amend her notice of intention to move for a new trial was based on the objection that appellant's notice of motion for leave to amend her notice of intention was served and filed 83 days after appellant had duly received written notice of the entry of judgment, and 21 days after appellant's notice of intention to move for a new trial

had been served and filed; and that since, by said motion for leave to amend her notice of intention to move for a new trial, appellant sought to supply specifications of the particulars in which the evidence was alleged to be insufficient, and also specifications of errors of law upon which the appellant would rely, and both of which specifications were entirely omitted from her original notice, the proffered amendment came too late, and that the court had no longer jurisdiction to grant leave to amend her notice of intention to move for a new trial in the respects sought by said motion. It is to be noted that appellant's motion for leave to amend was not made upon the ground of mistake, inadvertence, surprise, or excusable neglect. That the court committed no error in sustaining the respondent's objection and refusing appellant leave to amend her notice of intention to move for a new trial in the respects indicated would seem to be the settled law of this state. *Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435; *Little v. Jacks*, 67 Cal. 165, 7 Pac. 449; *Packer v. Doray*, 98 Cal. 317, 33 Pac. 118; *Salisbury v. Burr*, 114 Cal. 451, 46 Pac. 270; *Estudillo v. Security Loan Co.*, 158 Cal. 67, 109 Pac. 884; *Nat. Bank of Cal. v. Mulford*, 17 Cal. App. 551, 120 Pac. 446.

[2] Appellant's motion for a new trial, being thus based upon a notice which failed to contain any specification of particulars in which the evidence was alleged to be insufficient, could not have been granted upon that ground. Code Civ. Proc. sec. 659.

[3] Said notice of intention also failed to specify the particular errors of law occurring at the trial and excepted to by the appellant. Counsel for the appellant contends that since the adoption of the alternative method of appeal provided for in section 953a of the Code of Civil Procedure, which enables the appellant to present to the appellate court the reporter's transcript "of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate," and which also provides that such transcript is to be considered on appeal in lieu of a bill of exceptions, the reason for the specification of the particular errors of law required by section 659, Code of Civil Procedure, no longer exists, and that the decisions of the court requiring such specifications rendered prior to the adoption of section 953a, Code of Civil Procedure, no longer apply. We have read the elaborate, insistent, and extended argument of counsel in support of this contention, but we cannot give our concurrence to its conclusions. On the contrary, it would seem that the amendment of section 647 of the Code of Civil Procedure so as no longer to require exceptions to the rulings of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—70

the court during the trial to be taken or noted, when read in connection with the change in method of preparing the record on appeal worked by the adoption of section 953a of the same Code, would furnish an additional and stronger reason for a strict adherence to the rule that the moving party on a motion for a new trial should be required to specify in his notice of intention the particulars in which he intends to urge that during the trial the court has erred in matters of law. An examination of the cases decided since the adoption of section 953a of the Code of Civil Procedure will show that the courts have consistently adhered to the former well-established rule. *Union Collection Co. v. Oliver*, 162 Cal. 755, 124 Pac. 435; *Nat. Bank of Cal. v. Mulford*, 17 Cal. App. 551, 120 Pac. 446.

The motion for a new trial, in so far as it was based upon unspecified errors of law, was also properly denied.

[4] The appellant's motion for a new trial was also to be based upon the grounds of accident, surprise, and newly discovered evidence. It was incumbent upon the appellant, within ten days after September 9th, the date of the service and filing of her said notice of intention, to either serve and file her affidavits in support of this branch of her proposed motion, or to obtain a stipulation or order granting her further time so to do. Such affidavits were not served nor filed until September 25th—18 days after the service and filing of the notice of intention—and no stipulation or order extending the time within which to serve and file these affidavits was ever applied for or made. It is clear, therefore, that they came too late to be available upon the motion for a new trial over an objection to their use.

[5] The record, however, shows that not only was no objection made to the use of these affidavits, but that they were in fact offered, read, and considered by the court upon said motion. This being so, we have considered them here; but, having done so, we fail to find in their contents any sufficient ground for granting a new trial. This leaves the appeal from the judgment as the only matter remaining for consideration in this case.

The contention of the respondent that the notice of intention to appeal was filed too late is without merit; and the only substantial question presented upon the appeal is as to whether the evidence is sufficient to sustain the judgment.

[6, 7] The sole claim of title which the appellant asserts to the property in question in her answer and cross-complaint is that derived by a deed from plaintiff to her and her co-defendant dated October 20, 1908. This being so, it was not required by plaintiff that he should prove title in himself prior to the date of said deed; and hence the only real issue in the case was as to the intention of the

grantor with respect to the delivery of the deed. The grantor of the instrument being the plaintiff in the case, and having affirmatively testified that he had never delivered nor intended to deliver said deed, nor to part with his title or control over the property during his lifetime; and his testimony in these respects being strongly supported by other evidence in the case, we are satisfied that there is such a substantial conflict in the evidence as to preclude us from disturbing the findings and judgment of the court below.

The judgment and several orders appealed from herein are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

MULVEY et al. v. WANGENHEIM, Park Com'r, et al. (Civ. 1411.)
(District Court of Appeal, Second District, California. Nov. 18, 1913.)

1. APPEAL AND ERROR (§ 917*)—REVIEW—QUESTION OF FACT—DEMURRER.

Allegations in a complaint to which a demurrer has been sustained must be assumed to be true in passing on the correctness of the ruling.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.*]

2. MUNICIPAL CORPORATIONS (§ 721*)—REGULATION OF PUBLIC PLACES—PARKS—PUBLIC RIGHTS.

Where legislative acts of the city and of the state dedicated and set apart certain lands to be held in trust forever for the sole purpose of a public park, and other land was held by the city by deeds on condition that it remain a part of the public park, the city's act in extending a street through such park for commercial purposes, at the instance of owners whose property would be increased in value, was a violation of the trusts upon which it was held, since it could not divert the land from the uses to which it had been dedicated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1542-1544; Dec. Dig. § 721.*]

3. EMINENT DOMAIN (§ 274*)—PUBLIC PARKS—DIVERSION OF USE—INJUNCTION.

Where the extension of a street over land held by the city solely for park purposes would be a violation of the trusts upon which the land was held, and would incidentally damage the property of an owner abutting on such proposed street, by reason of its application to a new and different public use, plaintiff was not required to wait until the injury had been done and then rely upon his right to recover damages, but was entitled to anticipate the injury and to prevent it by injunction.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 753, 765-768; Dec. Dig. § 274.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Injunction by Martha E. Mulvey and others against Julius Wangenheim, as Park Commissioner of the City of San Diego, and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Ward & Ward and Crouch & Harris, all of San Diego, for appellants. W. R. Andrews and A. H. Sweet, both of San Diego, for respondents.

CONREY, P. J. Judgment of dismissal in this case was entered following an order sustaining demurrers to the amended complaint. Plaintiffs appeal from the judgment.

The object of the action is to obtain an injunction to prevent the construction and grading of a street through Balboa Park, a public park in the city of San Diego. The complaint states facts showing the existence of the park, and that the land across which the proposed street is to be established is a portion of the park; that part of the land in question is included in pueblo lots belonging to the city, which lots have been by certain legislative acts of the city and of the state duly declared to be dedicated, set apart, and held in trust forever by the municipal authorities for the use and purposes of a free and public park and for no other or different purpose; that the remainder of the land in question is held by the city under a deed whereby the grantor sold and conveyed the same for the purpose and upon the condition that it be dedicated to and forever remain a part of the public park of the city and for no other purposes whatever. The defendants are certain persons constituting the board of park commissioners of the city, and certain individual defendants.

[1] The following facts appear from the complaint, which for the purposes of this record must be assumed to be true as stated: There is a park drive along the west line of the park extending southerly to a point some distance north of the point where, for a short distance, plaintiffs' property abuts upon the said westerly line of the park, and thence bears away from the west line and extends in a southeasterly direction through the park to the south line thereof. Sixth street in the city of San Diego runs in a north and south direction, and the northerly portion thereof extends to the southwest corner of the park, and is a public street existing for general street uses. In January, 1912, the defendants, other than the members of said park commission, petitioned the board of park commissioners for permission to open and improve a street along the west side of Balboa Park from the south line of the park northerly to said park drive, so as to connect Sixth street on the south and said park drive on the north; said petitioners agreeing to pay the cost thereof. That petition having been granted by the board of park commissioners, the said individual defendants entered into a contract with the defendant Goodbody to do the work of opening said street, and he commenced the performance of said contract in accordance with plans and specifications which had been submitted with said petition and approved by the board of park commissioners in connection with its action

in granting said petition. It is alleged: That "said street is not to be built or constructed for park purposes or for the accommodation or use of the lands dedicated as aforesaid for a public park, and is not needed or necessary or convenient for park purposes, or for the use of said lands, but that the same is to be built and constructed for commercial purposes, to wit, to enhance the value of property on Sixth street south of the south line of said park belonging to said defendants and others. Said street is to be constructed in order to continue Sixth street in a straight and direct line northerly from the south line of said public park to a connection with said park boulevard at Juniper street, and thence northerly to the north line of said public park, thereby to construct and establish a public street and highway as a continuation of Sixth street through said Balboa Park in order to make Sixth street accessible to the northerly portion of said city, and thereby to divert business to Sixth street and enhance the value of property thereon. That such use of said public park is a violation of the trusts upon which the title is held."

The lots belonging to plaintiffs and fronting for a distance of 150 feet along the west line of the park as aforesaid are improved, having thereon a dwelling house and a barn, which are situate immediately next the east line of their property and adjacent to the west line of the park. Said premises are otherwise improved for residence purposes and have been so occupied by the plaintiffs and their predecessors. Hawthorn street adjoins the property of plaintiffs on the south and extends from the west line of the park in a westerly direction. Ivy street lies a short distance north of the property of plaintiffs and extends from the west line of the park in a westerly direction.

The natural surface of the ground as now existing in the western portion of the park adjacent to said streets and property is approximately at the same elevation as said property of plaintiffs and as the existing official and actual grade of said Hawthorn and Ivy streets. The construction of said proposed street, according to said plans and specifications, will make a cut below the official grade of Hawthorn street of about 13 feet, and below the official grade of Ivy street of about 6½ feet, and will prevent ingress and egress to said park from both of said streets, as well as to and from plaintiffs' property, and will make a cut of from 11 feet to 7½ feet along the east line of plaintiffs' property, "thereby removing the lateral and subjacent support of plaintiffs' land and forming a perpendicular declivity and wall from the plaintiffs' east line down to the surface of said street, thereby injuring and damaging plaintiffs' property. * * *

The soil along the east line of plaintiffs' property and where said cut is proposed to be made is of such a nature that it will fall of its own weight into the excavation made

for said street and will by the winter rains and storms be washed down therein, when the lateral and subjacent support shall have been removed therefrom, to the injury and damage of plaintiffs' property." Upon the removal of its natural support in the construction of said street, the plaintiffs' property will not support the improvements located thereon, and the drainage from plaintiffs' property will be so increased that additional care and irrigation thereof will be required. Said plans and specifications for the construction of said street do not provide for the construction of a retaining wall along the east side of plaintiffs' property, or for holding the soil of plaintiffs' property in place after the removal of said lateral and subjacent support, and make no provision for strengthening the foundations of plaintiffs' buildings or otherwise; and said contract does not provide for any such retaining wall or for any support to hold plaintiffs' land and soil in place, or for strengthening the foundations or otherwise holding the plaintiffs' buildings in place upon the removal of said lateral and subjacent support from plaintiffs' land; and the defendants have not provided for and do not intend to construct any retaining wall or provide any means for said purposes of support. The plaintiffs purchased said property with respect to its location abutting upon said portion of said park and in reliance upon the uses and trusts upon which the title to said park lands is held. No compensation has been provided to be paid to plaintiffs on account of the damage which they claim that they will suffer by the opening and construction of said street.

[2] Upon the facts herein stated we are of the opinion that the acts complained of constitute a diversion of a portion of the park property from the uses to which it has been dedicated, and will be in violation of the trusts upon which said property is held by the city. It is well established that where a grant is made for a specified, limited, and definite purpose, the subject of the grant cannot be used for another and a different purpose. *Price v. Thompson*, 48 Mo. 361; *Village of Riverside v. MacLain*, 210 Ill. 308, 71 N. E. 408, 66 L. R. A. 288, 102 Am. St. Rep. 164; *Seward v. City of Orange*, 59 N. J. Law, 331, 35 Atl. 799. In *Village of Riverside v. MacLain*, supra, the court said: "It is not altogether clear that the roadway, if extended * * * across this park, will be a pleasure driveway. * * * There is nothing to show that West avenue, if extended across this park, would be restricted, in the use to be made of it, to a mere pleasure driveway." And it was held that as the premises were originally dedicated for the purposes of a park, and not for the purposes of a traveled roadway, they could not be diverted to such street purposes. In *Seward v. City of Orange*, supra, the same rule was enforced, the court saying that such a traveled way as

there described was not for the use of the park as a park; that, on the contrary, it diverts a portion of the park to a wholly different use and a use to which it was not donated.

In the cases above cited the parks were small and the proposed streets affected a much larger proportion of the park area than in the present case; otherwise the cases are parallel, and we see no reason why the same principle should not be applied here.

In this state an important case bearing upon the subject is *Spire v. City of Los Angeles*, 150 Cal. 64, 87 Pac. 1026, 11 Ann. Cas. 465. There the city owned pueblo land and dedicated it "as a public place forever for the enjoyment of the community in general." Under this dedication, the property having been for a long time in use as a public square or park, it was proposed to construct in the center thereof a public library building. The Supreme Court held that the establishment of such public library, to which visitors to the park have access, is consistent with the public enjoyment of the park and the construction of the building was permissible. But it was also held that the building must be constructed for strictly library purposes, and that no part of it could be devoted to the establishment of municipal offices therein, or for municipal administration purposes, other than as a meeting place for the board of library directors.

The application to this case of the rule above stated does not in any degree interfere with or deny the full extent of the powers of the board of park commissioners to use the discretion vested in them in the management and control of Balboa Park. For all purposes of administration of the park property, that board has the right to make or change the improvements appropriate to the park and to determine upon the expediency or necessity of measures relating to the administration thereof. We simply hold that upon the facts, which must be considered as admitted for the purposes of this decision, the proposed work is essentially outside of the scope of any measure of administration of the park, and its execution would constitute fraud in the sense that it would be a violation of a trust.

[3] Plaintiffs further contend that the construction of said street, under the circumstances and in the manner proposed, will be in violation of the provisions of section 14 of article 1 of the Constitution of the state of California, which prohibits the taking or damaging of private property for public use without just compensation having been first made to or paid into court for the owner. Counsel for respondents reply that, with respect to the properties described in the complaint, the plaintiffs and the city of San Diego occupy the relation of coterminous owners, and that the city through its board of park commissioners has the right, under

section 832 of the Civil Code, "to make proper and usual excavations" on its land "for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other." In view of the conclusions above stated on the other question here discussed, the rule ordinarily applying between coterminous owners is modified with respect to this case. Since the proposed work, when undertaken for the purposes and in the manner shown by the complaint in this action, will result in a damaging of the property of plaintiffs, and since such damage will be incidental to the use by the public of land adjoining the property of the plaintiffs and an application of such adjacent property to a public use not heretofore existing with respect thereto, it follows that the plaintiffs are not required to wait until the injury has been done and then rely upon their right to recover damages therefor. They are entitled to anticipate the impending loss and injury and to have the same prevented by an appropriate order of injunction. *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. 834; *Geurkink v. City of Petaluma*, 112 Cal. 306, 44 Pac. 570; *Sievers v. Root*, 10 Cal. App. 337, 101 Pac. 925; *Wilcox v. Engebretsen*, 160 Cal. 288, 116 Pac. 750.

The judgment appealed from is reversed.

We concur: JAMES, J.; SHAW, J.

PARSONS v. CASHMAN et al. (Civ. 1271.)
(District Court of Appeal, First District, California. Nov. 20, 1913. Rehearing Denied by Supreme Court Jan. 19, 1914.)

1. SPECIFIC PERFORMANCE (§ 25*)—CONTRACT TO MAKE WILL.

Before specific performance of a contract to make a will will be enforced, it must appear that the contract was *prima facie* fair, that it was founded upon an adequate consideration, that it was definite as to the conditions imposed; and, if the consideration be personal services, the agreement for such services must be definite not only as to their character but as to the time of their continuance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 56-58, 60; Dec. Dig. § 25.*]

2. SPECIFIC PERFORMANCE (§ 28*)—CONTRACT TO MAKE WILLS—DEFINITENESS.

A decedent's agreement to make a will in favor of plaintiff, in consideration of plaintiff's becoming an inmate of decedent's home and assuming the obligations of a son and assisting her in her business and domestic affairs, cannot be specifically enforced; the time for the continuation of plaintiff's services not sufficiently appearing.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 61-68; Dec. Dig. § 28.*]

3. SPECIFIC PERFORMANCE (§ 51*)—CONTRACTS—WILLS—FAIRNESS.

A contract whereby an unmarried woman agreed to make a will in favor of plaintiff, if he would enter her home and assume the obligations of a son towards her, is not so fair as to warrant specific performance, where it did not appear that plaintiff lost anything of value or

that his services equaled the protection and support he received.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 153, 154; Dec. Dig. § 51.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Henry B. Parsons against W. E. Cashman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Rehearing denied by Supreme Court, 137 Pac. 1111.

Frank H. Gould and Vincent Surr, both of San Francisco, for appellant. W. E. Cashman and J. W. Dorsey, both of San Francisco, for respondents.

LENNON, P. J. The plaintiff in this action prayed for a decree declaring him to be the owner of and entitled to all of the property of which one Jemima Parsons died possessed, and that the defendants, as devisees and distributees under the will of the decedent, held said property in trust for the plaintiff.

The plaintiff's cause of action was founded upon a contract alleged to have been entered into between the plaintiff and the deceased, Jemima Parsons, whereby she agreed that at her death she would by will bequeath to plaintiff all of the property of which she might die possessed.

The defendants' demurrer to plaintiff's second amended complaint was sustained upon the ground primarily that the complaint did not state a cause of action. Thereupon judgment was rendered and entered for the defendants, from which plaintiff has appealed upon the judgment roll.

The demurrer was well taken and rightfully sustained. With reference to the material matter of the making of the contract in suit, the allegations of the second amended complaint are as follows: " * * * Plaintiff is the natural son of a deceased brother of said decedent, and was born in the year 1849 in England; that at the time of the birth of plaintiff said decedent resided in the city and county of San Francisco, state of California; that in the year 1874, when plaintiff was of the age of 24 years, he came from England to the said city and county of San Francisco, and there made himself known to the said decedent; that said decedent thereupon caused investigations to be made to determine the relationship of plaintiff to her, and upon the conclusion of the said investigations, to wit, about three months subsequent to the arrival of plaintiff in California, acknowledged the said plaintiff as the natural son of her brother, William Parsons, and as her nephew; that a short time thereafter, at the urgent request of said decedent, the said decedent and plaintiff entered into an agreement whereby plaintiff agreed to become an inmate of the home of

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

said decedent, to assume the duties and obligations of a son to said decedent, to assist her in all of her business and domestic affairs, as would her own son, and to give to said decedent the affection, support, confidence, and society that a son should give a mother; that at said time the said decedent was a single woman, and thereafter and until her death remained single and unmarried; that in consideration of the said agreement on the part of the plaintiff, hereinbefore set out, the said decedent agreed to perform the part of a mother to the plaintiff, and upon her death to leave to the said plaintiff the property of which she might then be possessed, as though the said plaintiff were in fact the son of the said decedent; that in accordance with the said agreement plaintiff did thereupon enter the household of said decedent, and did perform toward the said decedent all of the conditions of the said agreement, and did, so long as the said decedent remained at liberty to accept the society, affection, support, and confidence of the said plaintiff, render the same at all times and without measure, with all the kindness, consideration, respect, and devotion that a son of the said decedent could have given, and the said decedent continually thereafter promised and agreed to leave to the said plaintiff her property as hereinbefore set forth upon her death." The complaint then proceeded to describe in detail numerous and varied acts of kindness and personal attention alleged to have been bestowed by plaintiff upon the deceased during the many years of life which remained to her subsequent to the making of the contract.

[1] It will be seen at a glance that the action is one for relief in the nature of specific performance. Such an action is essentially equitable, and therefore the contract under consideration may not be specifically enforced unless it fully conforms in all of its essentials to the well-recognized principles of equity jurisprudence, which, in so far as they are applicable to the cause of action attempted to be here pleaded, are generally and substantially these: (1) The contract *prima facie* must be fair; (2) it must be founded upon an adequate consideration; (3) it must be definite as to the conditions imposed and the obligations assumed; and (4) if the purported or claimed consideration for the contract be personal services, the agreement for such services must be definite and certain not only with reference to their nature and character but also with reference to the time of their continuance. *Owens v. McNally*, 113 Cal. 444, 45 Pac. 710, 33 L. R. A. 369; *McCabe v. Healey*, 138 Cal. 81, 70 Pac. 1008.

[2] The contract sought to be enforced in the present case does not conform to all of these requirements. It seems to be the theory of plaintiff, as indicated by the recital in the complaint of many minute matters of personal attention alleged to have been rendered the deceased, that the contract called par-

ticularly for the personal services of the plaintiff. Conceding this to be so, and that the terms of the contract indicate with sufficient certainty the nature of the services to be performed thereunder, nevertheless the contract as pleaded is silent as to the length of time for which such services were to be continued, and to that extent at least is obviously indefinite in an essential particular. *Owens v. McNally*, *supra*.

[3] But, aside from this, the contract is not susceptible of specific performance because neither the allegations of the complaint nor the terms of the contract as pleaded disclose a sufficient consideration for its making.

The sufficiency of a purported or claimed consideration for a contract of the character under discussion must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments. Such consideration, before it may be declared sufficient, must disclose not only a benefit conferred or agreed to be conferred upon the promisor, but must reveal as well some prejudice, detriment, or disadvantage suffered or agreed to be suffered by the promisee as an inducement for the promise which forms the basis of the contract. Civ. Code, § 1605.

In the present case neither the pleaded contract nor the circumstances alleged to have attended its execution show or tend to show, either expressly or impliedly, that the promise of the deceased operated as an inducement to the plaintiff to relinquish, wholly or partly, anything of present or prospective value or advantage. To the contrary it appears, by implication at least, that the obligation assumed by the plaintiff as the consideration on his part for the making of the contract did not require him to abandon any particular position of present or prospective profit. The plaintiff apparently had everything to gain and nothing to lose by acceding to the wishes of the deceased. The alleged circumstances of his meeting with the deceased indicate that it was to his profit rather than his detriment to be provided with all of the comforts of a home in return for the duties and obligations naturally resulting from the assumed relation of a son to the deceased.

Therefore, under all of the circumstances of the transaction, and from the contract itself as pleaded in the plaintiff's complaint, it cannot be fairly said as a matter of equity that the contract in controversy was founded upon a sufficient consideration; and, this being so, the promise of the deceased to leave all of her property by will to the plaintiff must be held to be incapable of enforcement in an action for specific performance. *Baumann v. Kuslan*, 164 Cal. 582, 129 Pac. 986, 44 L. R. A. (N. S.) 756.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; KERBIGAN, J.

PARSONS v. CASHMAN et al. (S. F. 6155.)
(Supreme Court of California. Jan. 19, 1914.)

CONTRACTS (§ 50*)—CONSIDERATION—WHAT CONSTITUTES.

Under Civ. Code, § 1605, it is sufficient to the validity of an executory contract if there is either a benefit to the promisor or a detriment to the promisee.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 146; Dec. Dig. § 50.*]

In *Bank*. On motion for rehearing in the Supreme Court. Rehearing denied.

For former opinion, see 137 Pac. 1109. See, also, 159 Cal. 425, 114 Pac. 570.

PER CURIAM. The petition for a rehearing of this case is denied. Under section 1605 of the Civil Code a consideration is sufficient to support a contract if there appears to have been either a benefit to the promisor or a detriment to the promisee. The statement of the opinion of the District Court of Appeal that both alternatives are necessary is erroneous. The proposition, as stated by that court, is not necessary to the decision, which is sufficiently supported by the proposition that it is not shown that the contract sought to be enforced was fair.

PEOPLE v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (Civ. 1,171.)

(District Court of Appeal, Third District, California. Nov. 7, 1913. Rehearing Denied by Supreme Court Jan. 6, 1914.)

1. BANKS AND BANKING (§ 152*)—CERTIFICATES OF DEPOSIT—EFFECT.

Bank certificates of deposit are but acknowledgments of the bank that it has received from specified persons certain sums of money and are simply receipts of the bank in negotiable form evidencing an indebtedness and creating no trust relation between the depositor and the bank but merely the relation of debtor and creditor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 836, 465-482; Dec. Dig. § 152.*]

2. BANKS AND BANKING (§ 80*) — CERTIFICATES OF DEPOSIT — SPECIAL DEPOSIT — INSOLVENCY—PREFERRED CLAIM.

Petitioner's attorneys, having collected certain funds for her, deposited the money to the credit of their general account in defendant bank, and later one of them drew a check for \$847.50, presented it to defendant's paying teller, and informed him that he desired to send the amount to petitioner in another city. He was informed that the best way to accomplish the transfer was to send her a certificate of deposit, and for this purpose the bank issued to petitioner a certificate of deposit for the same amount and handed it to the attorney, by whom it was at once forwarded to petitioner; but, the bank later on the same day having closed its doors, payment of the certificate was refused on presentation. *Held*, that the transaction did not constitute a special deposit of funds for petitioner's benefit but made her only a general creditor of the bank; and hence she

was not entitled to preference in the distribution of the bank's assets.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

3. BANKS AND BANKING (§ 129*)—DEPOSITS —“GENERAL DEPOSIT”—“SPECIAL DEPOSIT.”

A general bank deposit exists where the bank is given custody of the money deposited with the express or implied intention that the bank is not required to return the identical money but only its equivalent, in which case the legal title to the money passes to the bank. A “special deposit” is where the bank merely assumes charge or custody of the property without authority to use it; the depositor being entitled to receive the identical thing deposited, in which case the title remains with the depositor, and, if the subject is money, the bank has no right to mingle it with its own funds.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 312-315, 326, 388; Dec. Dig. § 129.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3061, 3062; vol. 7, pp. 6574, 6575; vol. 8, p. 7802.]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceeding by the People, by U. S. Webb, Attorney General, against the California Safe Deposit & Trust Company and others. Intervening petition by Emma J. White to establish the amount of a certificate of deposit as a preferred claim against Frank J. Symmes, as receiver. From a judgment of nonsuit and from an order denying petitioner's motion for a new trial, she appeals. Affirmed.

Rehearing denied by Supreme Court, 137 Pac. 1115.

Aitken & Aitken, of San Francisco, for appellant. J. V. de Laveaga and E. De Los Magee, both of San Francisco, for respondents.

CHIPMAN, P. J. The action is to recover the sum of \$847.50, alleged to be held by defendant, said trust company, as a special deposit and as the property of petitioner, Emma J. White. At the close of petitioner's evidence, the motion for a nonsuit, made by said receiver, was granted. The appeal is from the judgment of nonsuit and from the order denying motion for a new trial.

The facts in the case appear from the testimony of Frank W. Aitken as follows: “On or about October 14, 1907, Aitken & Aitken received \$1,000, the property of Emma J. White, in the form of a check on a bank in Oakland, under instructions from her to obtain payment thereof, compromise and pay certain claims, and forward the balance to her, and deposited said check with the California Safe Deposit & Trust Company, Fillmore street branch, to the credit of Aitken & Aitken. I am, and on and since said date have been, one of the members of said firm of Aitken & Aitken. On October 30, 1907, at about half

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

past 12 o'clock, noon, I presented to the California Safe Deposit & Trust Company, Fillmore street branch, a check on said account, drawn to the order of said bank, in the sum of \$847.50. I presented that check to G. Chevassus, who was the accountant and acting as the paying teller. I told him that we wanted to have the money sent to Tacoma; that it was to be paid to Mrs. Emma J. White at that city. He referred me to Mr. Dawson, who was one of the bank clerks. I told Mr. Dawson that I had given Mr. Chevassus a check for \$847.50 and that the money was to be sent to Tacoma and paid to Emma J. White at that city. He said the most convenient way would be to have a certificate of deposit issued, payable to Mrs. Emma J. White, and that she could indorse the certificate and deposit it in a Tacoma bank, and upon its return to the California Safe Deposit & Trust Company it would be paid. I told him that that way would be satisfactory, and the California Safe Deposit & Trust Company then issued its certificate of deposit for \$847.50 and delivered it to me. Said certificate of deposit was as follows: 'Uptown Branch, California Safe Deposit & Trust Company, 1740 Fillmore Street, South of Sutter. San Francisco, California, Oct. 29, 1907. No. 585. This is to certify that Aitken & Aitken have deposited with California Safe Deposit & Trust Company of San Francisco, California, the sum of eight hundred forty-seven $\frac{50}{100}$ dollars (\$847.50). Payable to the order of Mrs. Emma J. White in lawful money of the United States on the return of this certificate properly indorsed. [Signed] S. H. Patterson, Accountant. G. Chevassus, Branch Manager. Not subject to check. Certificate of deposit. Payable without interest. Payable only through San Francisco Clearing House.' We sent the certificate to Mrs. White at once. It was presented to the California Safe Deposit & Trust Company, through a bank at Tacoma, but payment was refused."

He testified further: "I did not get back the check from Mr. Chevassus, the paying teller. When I gave it to him he kept it and informed Mr. Dawson of it. I walked down the aisle to another part of the bank where Mr. Dawson was. I told him I had given the check to Mr. Chevassus. The check was returned to us afterward. It was perforated with the word 'paid' and the figures '10-30-07.' We afterward received a statement from the California Safe Deposit & Trust Company showing that the \$1,000 had been received from the bank in Oakland on or about October 14, 1907, and that the check referred to, for \$847.50, had been withdrawn and deducted from the account on October 30, 1907."

It was admitted by the receiver "that the check was duly charged to the account and entered as paid on October 30, 1907."

It seems to be conceded that the bank suspended business at some hour after the

transaction above narrated. The certificate is dated October 29th, which was probably an inadvertence, as it was issued on October 30th. No question arises out of the fact that the bank suspended on the day the certificate was issued.

Appellant states her position thus: "On these facts it seems clear that the \$847.50 constituted a deposit for a specific purpose, payment to Mrs. White at Tacoma, through whatever bank might present the certificate after she had indorsed it. Such a deposit, described by several courts as a 'special' deposit or as a 'specific' deposit (or deposit for specific purpose), is uniformly considered a trust deposit, which does not become the property of the bank but may be recovered in full, after insolvency, in preference to the claims of general depositors." Again: "It is not material that the deposit in this case was not in actual money and did not at the moment add actual visible assets. A check on an existing sufficient balance, drawn to the bank's order, and taken by the bank as cash, must be considered equivalent to actual money; and, as such check could have been cashed and the money handed over the counter, it is immaterial that the bank assumed, instead, to cash it behind the counter instead of demanding the useless formality of having the money handed out and forthwith handed back again."

Respondent's position is thus summed up: "First. No specific deposit for a definite purpose was made; hence no trust fund was created by the issuance of the certificate of deposit to appellant. Second. No actual deposit of money was made at the time the certificate of deposit was issued; hence the assets of the bank were not increased by the transaction in question, and without an actual increase of assets no preferred claim could possibly arise."

The original deposit of the \$1,000 on October 14th was a general deposit and created the relation of debtor and creditor between the bank and the depositors, Aitken & Aitken. 2 Morse on Banks and Banking, § 568. In point of fact, they were Mrs. White's agents and the money belonged to her.

The case, therefore, is simply that of a depositor desiring to have a portion of her deposit remitted to her at a distant place. Did her agents, in accomplishing this purpose, so conduct the transaction as to convert the \$847.50 into a special or specific fund or to make the bank a trustee of Mrs. White and a holder in trust of that money for her? Mr. Aitken's testimony simply shows that the depositors, Aitken & Aitken, wanted to send the money to Mrs. White at Tacoma, and were told that the most convenient way would be to take a certificate of deposit payable to her and she could indorse it and get her money through a Tacoma bank upon the return of the certificate. Mr. Aitken adopted this method. Unfortunately the

bank became insolvent and the certificate was not paid. We cannot discover any request made of the bank to send the money, or any agreement by it to send the money. The same result might have been accomplished had the bank certified the check given by Aitken & Aitken, and had they sent it to Mrs. White, or by a draft upon some bank at Tacoma or elsewhere.

There was no money in fact deposited by Mrs. White, and there was no withdrawing of any money from the bank. The check for \$847.50 was marked paid and reduced the credit account of her agents, Aitken & Aitken, by that much, and on the bank books the amount was doubtless charged to outstanding certificates of deposit account. There is no evidence that the bank expressly or impliedly agreed to hold this money in trust for Mrs. White or her assignee, nor did it agree to transmit the money to her. True, it is our duty, in case of judgment on non-suit, to give to the evidence the most favorable interpretation of which it is reasonably susceptible in support of petitioner's claim. If it could be reasonably inferred from Mr. Aitken's testimony that, notwithstanding the fact that the certificate of deposit strongly rebuts the idea of a trust relation, his intention was to create such trust, and what he said and did was so understood by the bank or must be presumed to have been so understood by it from what was said and done, we think the rules of law would require of us to accept such understanding of the parties. But we fail to discover in anything said or done by Mr. Aitken at the time from which he had a right to assume that the bank officers understood the bank's relation to Mrs. White to be other than that created by the certificate of deposit. The certificate of deposit has none of the earmarks of a special deposit of money which the bank had no right to mingle with its funds or treat as its own. On its face it creates the relation of debtor and creditor between itself and Mrs. White. Aitken & Aitken were her agents in the matter and for her consented that the transaction should take this form, and it seems to us the certificate is very significant, if not conclusive, as showing what the understanding was.

[1] Mr. Morse says such certificates are but acknowledgments of the bank that it has received from certain persons certain sums of money. "In form they are substantially simple receipts of the bank, in negotiable form, for so many dollars, and so are only evidence of an indebtedness, like the bank book." 1 Morse on Banks, § 297. "They create no trust relation between the depositor and the bank, but merely that of debtor and creditor." Id. § 298. See, also, *Murphy v. Pacific Bank*, 130 Cal. 542, 62 Pac. 1059.

[2, 3] In our opinion the money involved continued to constitute a part of the general funds of the bank, subject to claims of its

creditors without any preference in favor of Mrs. White. Such would seem to us to result from the views taken by the courts and law writers, some of which we will notice. The definitions given of general and special deposits do not differ materially. In *Butcher v. Butler*, 134 Mo. App. 61, 114 S. W. 564, the court said: "A general deposit is where the bank is given custody of the money deposited with the intention, expressed or implied, that the bank is not required to return the identical money, but only its equivalent; the legal title to the money in such cases passing to the bank. A special deposit is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive back the identical thing deposited, in which case the title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds." Our own Supreme Court has said: "Whether the special deposit be under a contract of bailment for the better protection of the bailor's property, or under a contract of pledge as security for some specific obligation of the pledgor, title does not pass to the bailee or pledgee, but remains in the pledgor. The pledgee acquires no right to make general use of the property." *Anderson v. Pacific Bank*, 112 Cal. 601, 44 Pac. 1063 (32 L. R. A. 479, 53 Am. St. Rep. 228). The Supreme Court of Arkansas thus defines a special deposit: "If the agreement between a bank and its depositor is that the identical coin or currency shall be laid aside and returned, it is a special deposit, but if the money is to be returned, not in the specific coin or currency deposited, but in an equal sum, it is a general deposit." *Warren v. Nix*, 97 Ark. 374, 135 S. W. 896.

"In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and if it fail to apply it at all, or misapply it, it can be recovered as a trust deposit." 5 Cyc. 515. Mr. Morse says: "When money is deposited to pay a specified check drawn or to be drawn, or for any purpose other than mere safe-keeping or entry upon a general account, it is a specific deposit, and title remains in the depositor until the bank pays the person for whom it is intended, or promises to pay it to him. * * * A deposit of money to pay a specified note is a specific deposit." 1 Morse on Banks and Banking, § 185. "A deposit is general unless expressly made special or specific." Id. § 186.

An extended note is found in the report of *Plano Manufacturing Co. v. Auld*, 14 S. D. 512, 86 N. W. 21, in volume 86 Am. St. Rep. at page 775 et seq., giving a very full discussion of the question, "When a bank does not take title to money deposited with or collected by it and the right to recover such money upon the insolvency of the bank." Among other propositions supported by numerous decisions is the following: "It is well

settled that the estate of the insolvent bank must actually be augmented by the money or property which it is sought to recover as a trust fund. If the transaction amounted to no more than an exchange of creditors, the mere canceling of one liability and the assumption of another, or if the money was used in the discharge of an indebtedness, it is obvious that the assets in the hands of the receiver have not been increased thereby, and there can be no recovery as of a trust fund." Page 806. Again, as to what constitutes a special deposit: "It is in many cases a very doubtful question whether a deposit is general or special. The distinction is theoretically plain. A general deposit is one which is to be repaid on demand in money. A special deposit is one in which the depositor is entitled to the return of the identical coin or other article deposited. The difficulty lies in the determination of what was intended by the parties to the deposit. Whether a deposit is general or special depends, of course, upon the intention of the parties. A deposit will, however, always be deemed to be general, unless made special by agreement." Page 778. Something more than the intent of one party to the deposit is necessary; the intent of both parties must be shown to concur either expressly or by implication.

Appellant, in applying the rule laid down by Mr. Morse, claims that "the certificate of deposit was the note of the bank to Mrs. White." While some courts have so held, most of the courts and our Supreme Court hold otherwise. *Murphy v. Pacific Bank*, 130 Cal. 62 Pac., supra. Appellant, in confirmation of her application of the rule, cites numerous decisions. But, with one or two exceptions, which will be noticed, they are clearly distinguishable from the case here. For example, one bank sent a note to another bank for collection; the note was collected; but before the money was remitted the latter bank failed. *Capital National Bank v. Coldwater National Bank*, 49 Neb. 786, 69 N. W. 115, 59 Am. St. Rep. 572. In another case the bank received the money for the express purpose of paying it to the holder of a note. *Ryan v. Phillips*, 3 Kan. App. 704, 44 Pac. 909. In another the bank received the money, in its trust capacity, for the specific purpose of security for the benefit of a third person. *Woodhouse v. Crandall*, 197 Ill. 104, 64 N. E. 292, 58 L. R. A. 387. Again, in *Star Cutter Co. v. Smith*, 37 Ill. App. 215, the money was deposited for the express purpose of paying a particular check when presented. The money was not credited to the general account of the depositor. In *St. Louis v. Johnson*, 5 Dill. 241, Fed. Cas. No. 12,235, money was sent to a bank in New York City to pay certain bonds of the city of St. Louis. In *Shopt v. Indiana Savings Bank*, 41 Ind. App. 474, 83 N. E. 515, money was deposited for the express purpose of paying a third party the purchase price of a machine.

In all these cases the deposit was made subject to an agreement by the bank that the money would be used in some particular manner or to pay some specified third person. Where, however, the deposit is for the credit of the depositor or some other person, as in the case of a certificate of deposit, there is no intent to make a payment of some specific claim of a third person, as in the cases cited. There was here no agreement by the bank to pay the specific claim of Mrs. White. Its agreement was to pay the certificate of deposit according to its terms, and it implied no obligation to hold as a trust fund the amount called for in the certificate. The distinction is aptly stated by the United States Supreme Court in *Libby v. Hopkins*, 104 U. S. 303, 26 L. Ed. 769: "When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, though B. be a banker. The reason is plain; the consent of A. that it was to be considered as a deposit and not a payment is necessary and is wanting." If Mrs. White may be treated as the owner of the money originally deposited, which was the fact, there was no change in the deposit save as to its form. The relation of the bank did not change but it remained her debtor. Had Mr. Aitken purchased a draft and remitted it, his check being charged to his account, no trust fund would have resulted. *People v. The Merch. & Mech. Bank*, 78 N. Y. 269, 34 Am. Rep. 532.

Respondent contends, with much earnestness, that, as there was no increase of assets of the bank, a preferred claim could not possibly arise. Attention is called to the fact that the deposit of appellant's money was made more than two weeks before the bank closed its doors, admittedly a general deposit, title to which money passed to the bank. On the day the bank closed, and when the form of appellant's claim was changed to that of a certificate of deposit for a portion of her account, no money whatsoever was deposited. Obviously, it is contended, no new assets to the bank were added, and no additional \$847.50 was received by the bank, and hence no fund of that amount was ever added to the assets of the bank or ever reached the hands of the receiver. That the claimant of a trust fund must trace and identify his property in order to establish a preference is stated as a proposition established and fully demonstrated in *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504. Other cases are cited to the proposition. See, also, note in 86 Am. St. Rep., supra.

Appellant relies on two cases which she claims controvert the proposition just stated and also sustain her right to recover in this action. One of these is *People v. City Bank*, 96 N. Y. 32, and the other is *Stoller v. Coates*, 88 Mo. 516. In the New York case, the firm of Hartwell, Hough & Ford had a deposit in the City Bank of Rochester. It gave the bank certain checks drawn against its ac-

count in that bank, to be applied in payment of certain notes discounted by the bank. The opinion states that: "The checks of the petitioner were money assets in the hands of the bank and were so treated by all of the parties. They were delivered to it with specific directions to apply the proceeds on payment of the notes. Those directions were assented to by the bank officer and the checks collected from that fund. From that moment the bank was bound to hold the money for and apply it to that purpose, and no other, or failing to do so, return it to the petitioner. As to it the bank was bailee, or trustee, but never owner"—and it was held that the notes should be paid out of the assets in the hands of the receiver. Here was a clear agreement by the bank to apply the proceeds of the checks to a specific purpose. In the present case we find no such agreement.

In a subsequent case (*Cavin v. Gleason*, supra), speaking of *People v. City Bank of Rochester*, supra, it was said that the court in that case "did not decide that the petitioner would have been entitled to a preference in case the proceeds of the checks had been used by the bank, and were not represented in its assets in the hands of the receiver."

Stoller v. Coates, supra, is cited as illustrating a transaction substantially the same as the one here. One Earnest, of Colorado, consigned to plaintiff, under the firm name of *Stoller & Hill*, of Kansas City, ten car loads of cattle, to be sold for his account. *Stoller & Hill* were requested, by instructions accompanying the consignment, to deposit the proceeds of sale in the Exchange Bank of Colorado to his (the assignor's) credit. The gross proceeds amounted to \$3,769.75, in the form of a draft. *Stoller & Hill* took the draft to the Mastin Bank for the purpose of carrying out their instructions. The net proceeds due the consignor were a little less than the draft. They deposited the draft to their credit and immediately drew a check for the net proceeds to be transmitted to the consignor in Colorado. With the check they requested the bank to place the proceeds in the Exchange Bank of Denver, in Colorado, to the credit of Mr. Earnest, the consignor. The Mastin Bank agreed to do this. The Mastin Bank failed before the money was paid, and it was held that a special deposit was constituted. The court said: "When *Stoller & Hill* drew their check for \$3,757.56 on the Mastin Bank and delivered the same to the bank, payable to the bank or indorsed over to it, they placed a specific fund in the hands of the bank. The bank was also advised sufficiently that Mr. Earnest was the ultimate owner or beneficiary of the fund. The bank agreed to transmit this fund to the Exchange Bank of Denver, to be received by said bank for the use of Earnest." There was not only in that case a deposit of what was treated as money at the moment of drawing the check but an agreement of the bank to trans-

mit the fund. Both of these features are wanting in the present case.

It was perhaps not necessary for the Aitkens to enact the idle and useless ceremony of receiving the money on their check and immediately passing it back to the bank in order to have impressed the fund with a trust and to have made the bank the agent of Mrs. White for the transmission of the money. *British, etc., Co. v. Massey*, 63 Iowa, 468, 471, 19 N. W. 319. But they should at least have clearly placed the responsibility upon the bank of remitting the money, as was done in the Missouri case, in order to constitute it a specific fund in its hands.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

PEOPLE v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (S. F. 6,284.)

(Supreme Court of California. Jan. 8, 1914.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

On rehearing. Rehearing denied.

For opinion of District Court of Appeals, see 137 Pac. 1111.

Aitken & Aitken, of San Francisco, for appellant. J. V. De Laveaga, of San Francisco (E. De Los Magee, of San Francisco, of counsel), for respondent.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing, not because I am convinced that the judgment of the District Court of Appeal is erroneous, but because the question involved is a new one in this state, upon which the authorities in other jurisdictions are not in harmony, and more particularly because the case is not, as stated in the opinion of the appellant court, "simply that of a depositor desiring to have a portion of her deposit remitted to her at a distant place." The transaction was in fact of a radically different character. The certificate of deposit was not an ordinary certificate of deposit importing the ordinary relation between the bank and the holder of the certificate. Mrs. White did not make the deposit either by herself or an agent. Aitken & Aitken had been her agents for the settlement of certain claims against her, but the money furnished them for that purpose had been deposited to their credit, and they had become her debtors for the balance remaining after deducting the amount of the claims paid and the value of their services. When an agent is accounting to his principal and paying over the balance due his principal, he is not acting in the character of agent, but in that of a debtor paying his creditor; and such was the

transaction here. Not only was that the real transaction, but it was precisely in the character of a debtor to Mrs. White that Mr. Aitken presented the matter to the bank. He made no pretense of agency. All he asked was that the bank should accommodate him by paying \$847.50 of his money to Mrs. White at Tacoma. By drawing and delivering his check in favor of the bank on his account, he gave the bank that amount of his money, and the agreement of the bank was that Mrs. White, a stranger to the transaction, should get the money. The failure to pay her was a violation of its agreement with Aitken & Aitken, acting for themselves, not acting for her.

Whether this view of the case would alter the result I am not prepared to say, not having had the time to examine the numerous authorities cited in the opinion and briefs of counsel, but I am convinced that it would render inapplicable many of the authorities cited in the opinion as to the rights of the holder of an ordinary certificate of deposit.

In a case so novel and important, and so easily distinguishable from the ordinary transaction to which it has been likened, I think further consideration is due.

NORTHWESTERN PAC. R. CO. v. LAMBERT. (S. F. 6514.)

(Supreme Court of California. Dec. 30, 1913.)

1. RAILROADS (§ 85*)—CONSTRUCTION—STATUTES.

Civ. Code, § 468, providing that every railroad corporation must, within two years after filing articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation five miles of road until the same is complete, and, upon a failure, its right to extend the road beyond the point then completed is forfeited, does not apply to branch lines which are only a part of a general railroad system, and hence, where a railroad company was authorized to construct one entire system consisting of a trunk line and branches, the yearly construction of five miles of railroad on the trunk line was sufficient to preserve its rights to build the branches.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

2. RAILROADS (§ 85*)—CONSTRUCTION — ARTICLES OF INCORPORATION.

Even though the articles of incorporation described a proposed branch, which was part of a general system, as a line of railroad, yet, where it was plain that the line was merely a feeder, it will be treated as such, and not as an independent railroad, five miles of which would have to be constructed each year under Civ. Code, § 468, to preserve the right to continue construction.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

3. RAILROADS (§ 85*)—CONSTRUCTION.

Statutes declaring a forfeiture are not to be extended by implication.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

4. RAILROADS (§ 85*)—CONSTRUCTION—STATUTES.

Civ. Code, § 468, provides that every railroad company must begin construction within two years after filing articles of incorporation, and that a failure to complete five miles of road each year will forfeit the right to extend the road beyond the point then completed. Section 473, as amended in 1901 (St. 1901, p. 327), requires the articles of a consolidated railroad corporation to state the terminus of its road and branches. Originally this section did not prescribe the form of the articles of incorporation, leaving that matter to be controlled by section 291, which then required the articles of incorporation to state the places from and to which the road is intended to be run, and all the intermediate branches. *Held*, that the amendment of 1901 did not extend the provisions of section 468 to the branch lines of a general railroad system, even though the word "road" as used in that section includes not only the main line but branches.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

5. EMINENT DOMAIN (§ 186*)—CONDEMNATION—CONDITIONS PRECEDENT.

As Civ. Code, § 1001, gives the right of eminent domain to any person seeking to acquire property for any of the uses specified in Code Civ. Proc. § 1233, and that section specifies railroads as one of the public uses for which property may be taken, the filing of a map and profile of the land to be acquired, required by Civ. Code, § 468, providing that such map and profile must be filed within a reasonable time after the railroad is finally located, is not a condition precedent to condemnation; this being apparent from the language of the section itself.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 500-504; Dec. Dig. § 186.*]

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by the Northwestern Pacific Railroad Company against W. S. Lambert. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Leppo, of Santa Rosa, and E. M. Norton, of Healdsburg, for appellant. Jesse W. Lillenthal and Albert Raymond, both of San Francisco, and T. J. Geary, of Santa Rosa (Lillenthal, McKinstry & Raymond, of San Francisco, of counsel), for respondent.

SHAW, J. The appeal herein was taken to the District Court of Appeal of the Third Appellate District; it being a proceeding in eminent domain. A decision was there rendered upon an opinion by Mr. Justice Hart of that court, affirming the judgment of the superior court. Upon application of the appellant to this court the decision of the district court was vacated, and the cause transferred to this court for rehearing.

[1] Upon further consideration we are satisfied with the conclusion of the district court that the judgment appealed from should be affirmed. The determination that no cause of forfeiture existed makes it unnecessary, in our opinion, to decide whether or not the statutory forfeiture declared in section 468 of the Civil Code is self-executing. The fol-

lowing passages from the opinion of Justice Hart clearly state the case and the main reasons showing that no cause of forfeiture existed:

"This is an action brought by the plaintiff to condemn a certain strip of land belonging to the defendant for the right of way for the railroad of the former. Judgment, upon the verdict of the jury, passed to the plaintiff, and this appeal is prosecuted by the defendant from said judgment upon a bill of exceptions.

"It appears: That the plaintiff, in the year 1906, duly incorporated for the purpose of constructing and operating a railroad for the carriage of passengers and freight. That its main line or track, as located by it, extends from the city of San Francisco to the city of Eureka, in Humboldt county. That at the time of such incorporation it acquired and became the owner of all the railroad properties, stocks, equipments, franchises, contracts, etc., of the following corporations: The Northwestern Railway Company, the Eureka & Klamath River Railroad Company, North Shore Railroad Company, the San Francisco & North Pacific Railway Company, California Northwestern Railway Company, Fort Bragg & Southeastern Railroad Company and San Francisco & Northwestern Railway Company. That the first-named company, at the time of said consolidation, was the owner of all the capital stock of the other corporations. That the main line or track of the plaintiff begins at the city of San Francisco, and ends at the city of Eureka, in Humboldt county. That most of the lines of railroad thus acquired by the plaintiff were branches of its main line, and that among these is the line which constitutes the particular subject of this litigation, and which commences at a place called Albion, in the county of Mendocino, and runs to and connects with the main line of the plaintiff's railroad at a point at or near the town of Healdsburg, in Sonoma county. The land which the plaintiff seeks to condemn for the purpose of constructing its railroad is situated on the line last referred to.

"The answer of the defendant, besides certain denials, sets up as a special defense the failure of the plaintiff to comply with the requirements of section 468 of the Civil Code, which, among other things, provides: 'Every railroad corporation must, within two years after filing its original articles of incorporation, begin the construction of its road, and must every year thereafter complete and put in full operation at least five miles of its road, until the same is fully completed; and upon its failure so to do, for the period of one year, its right to extend its road beyond the point then completed is forfeited.'

"It was stipulated by the plaintiff and the defendant, at the trial, 'that, since the said filing of plaintiff's original articles of incorporation, on December 31, 1906, plaintiff had

constructed and completed that part of said line of railroad between Wendling and Christine, a distance of 2.90 miles; that the part of said railroad between Albion and Wendling, a distance of 22.85 miles, had been constructed, completed, and was in full operation at the time plaintiff acquired it, on December 31, 1906; that no other part of said line of railroad than above mentioned, and no part thereof southerly from Christine to the southerly terminus at or near Healdsburg, has ever been in full or any operation, or completed, or constructed, nor has the construction thereof ever been begun; that the right of way over defendant's lands which it is sought to condemn in this proceeding is for a use as a part of said line of railroad, and between said Albion and Healdsburg, and southerly of said Christine; that the length of said part of said lines of railroad southerly from said Christine to its southerly terminus at or near Healdsburg is 44.25 miles, and is all of said line of railroad other than said portion between said Albion and said Christine.'

"One C. W. Edes, for many years the plaintiff's chief engineer, testified that he was familiar with the work done on the lines of railroad mentioned in the complaint, and that 'said plaintiff had every year since the filing of its original articles of incorporation constructed, completed, and put in full operation at least five miles of the railroad firstly described in paragraph 2 of plaintiff's complaint (referring to the main line), and, also, that the line of railroad secondly described in paragraph 2 of plaintiff's complaint (referring to the line here involved) was a branch of the railroad firstly described in said paragraph 2 of said complaint.'

"The foregoing, with the plaintiff's articles of incorporation, constituted all the evidence offered and received upon the special defense interposed by the defendant. The latter thereupon moved for an abatement of the action, and also for a nonsuit, which motions were denied.

"The court found that, as to the line of road from Albion to Healdsburg and the branch therefrom referred to, the plaintiff did not comply with section 468 of the Civil Code, but that said line of road 'is, and at all times in defendant's amended answer mentioned was, a branch of plaintiff's other line of railroad firstly described in paragraph 2 of plaintiff's complaint,' referring to the plaintiff's main road. The court further found: 'That said plaintiff has each year since the filing of said original articles of incorporation constructed, and completed, and put in full operation at least five miles of said railroad so firstly described in paragraph 2 of plaintiff's complaint, and by reason thereof plaintiff's right to extend said line of railroad southerly from said Christine to said point at or near Healdsburg has not been forfeited.'

"The contention of the defendant is, as is evident from its special defense, that the line of railroad running from Albion to a point near Healdsburg, and there intersecting the plaintiff's main line, is an independent line of railroad—that is, independent of its main line—in so far as the provisions of section 468 of the Civil Code are concerned. In other words, the claim is that, although the Albion line is owned by the plaintiff, and connects with its main line, it was nevertheless necessary for plaintiff, in order to have avoided the forfeiture of its right to construct or extend the first-mentioned line, to have completed and put in full operation every year after the commencement of the construction of said road at least five miles of road on that particular line.

"But the position of the plaintiff is (and the findings of the court sustain it) that the Albion line is merely a branch or a part of the entire railroad system of the plaintiff, and that the provisions of section 468 are fully satisfied if the requirements thereof are complied with as to the main line—that is to say, if at least five miles of road have been completed and put in full operation on the main line every year after the commencement of the construction thereof, then the branches or laterals referred to in the plaintiff's articles of incorporation are thus saved from the forfeiture prescribed by said section, notwithstanding that none of the work required has actually been put on such branches.

"We are inclined to the opinion that, where, as here, a railroad company is by its charter authorized to construct and maintain one entire railroad system, consisting of a main or trunk line with branches extending from such main line to various other points, the latter to operate as 'feeders' of such main line, the commencement of the construction of the main line and the completion and operation of such line in obedience to the mandates of section 468 of the Civil Code will satisfy the provisions of that section as to the entire system. It is readily perceivable that it would be impracticable, and, indeed, result in casting a very burdensome obligation upon a corporation organized for the purpose of inaugurating and carrying out a vast railroad system, embracing a main or trunk line of great length and a large number of branches, to require it to build and put in operation in each year after its construction has been commenced five miles of road, not only upon its main line, but upon every branch thereof as indicated in its articles of incorporation. In many, if not in most, instances the branches could afford no profit to the corporation until they were connected with the main line when the latter was in actual operation. The construction which the defendant places upon section 468 would in many cases necessitate the building and

putting in operation of a 'branch' road before the main line was completed to the point at which the former was to connect with the latter. It is not conceived, therefore, that the section referred to contemplates or intends, in such a case as this, that more shall be done than the construction and putting in operation each year of five miles of road anywhere upon the whole system provided for by the corporation's charter."

[2] Some additional points remain to be noticed. The articles of consolidation and incorporation, constituting the plaintiff's charter, designate some of the numerous roads comprising its railroad system as "a branch," and others as "a line of railroad," and still others as "a branch" from some one of these "lines." The line extending from Albion to Healdsburg, over the defendant's land sought to be condemned, is designated in said articles as "a line of railroad," and is described in the same manner in the complaint. From this, the plaintiff argues that it is not a branch line, but a road entirely independent of the main trunk line from Eureka to San Francisco, with which it is to connect at Healdsburg. We do not think these words were intended to have such significance. The articles of incorporation must control upon this point, and they should be considered as an entirety. So considered, it is plain that the line from Eureka, in Humboldt county, to San Francisco is what is usually designated the main trunk line of the company, and that the other lines, whether denominated "a line of railroad" or "a branch," are in truth mere parts of the general railroad system which the company proposes to complete, maintain, and operate as a whole. The terms "line of railroad" and "branch" are simply convenient terms of description. The former was not used to convey the idea that the lines to which it is applied were to be, or were, in any sense, independent of the trunk line and general system described.

[3, 4] Section 473 of the Civil Code, as amended in 1901 (St. 1901, p. 327), requires the articles of a consolidated railroad corporation, such as the plaintiff is, to state "the termini of its road and branches," and "the estimated length of its road and branches." In the original section, as enacted in 1872, the part of section 468 here applicable was in the same language as it is now; but section 473 did not then prescribe the form of articles of incorporation, leaving that matter to be controlled by section 291, which then required, and now requires, articles of incorporation of a railroad company to state "the place from and to which it is intended to be run and all the intermediate branches." It seems clear that the term "road," as used in section 468, was intended to include the main line and all branches of the company, and that this applied both to original com-

panies and to consolidated companies. We find nothing in the terms of the amendment of 1901 to section 473 indicating an intent to change the law in this respect. Statutes declaring a forfeiture are not to be extended beyond their direct meaning by implication, unless such implication is imperatively necessary by reason of the subject-matter or terms of the statute. We find nothing requiring such extension in the statute under consideration. The system described in the articles of incorporation of the plaintiff must be deemed to be the "road" of which, by section 468, five miles must be constructed each year in order to escape the forfeiture therein declared.

[5] The appellant also sets up as a defense by way of abatement that the plaintiff, at the time the action was begun, had not filed in the office of the county clerk any map and profile of the part of the road within the county, "and of the land acquired for the use thereof," as required by section 466 of the Civil Code, and this the court found to be true. This filing, it is claimed, is by that section made a condition precedent to the existence of a right in the company to acquire land in that county by proceedings in condemnation. The section provides that such map and profile must be so filed "within a reasonable time after its road is finally located." There is nothing indicating that the right to resort to eminent domain to acquire land for the use of the road was to be dependent on the previous filing of such map and profile. The requirement that the map and profile must include "the land acquired for the use thereof" rather implies the contrary. Other reasons lead to the same conclusion. No condition of that character is stated in section 1001 of the Civil Code, giving the right of eminent domain to any "person" (which includes a corporation) seeking to acquire property for any of the uses specified in section 1238 of the Code of Civil Procedure. Section 1238 specifies railroads as one of the public uses for which property may be taken, and it prescribes no such condition as is here contended for. There is nowhere in the statute relating to this subject any express statement of such condition, or any language from which such condition can be fairly implied. In such a case the court cannot reasonably supply the condition by construction. There is nothing in the statute to show that the provision of section 466 requiring the filing of such map and profile has any relation to the maintenance of an action to condemn property.

This embraces all the questions presented in the case.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

NORTHWESTERN PAC. R. CO. v. SNIDER.
(S. F. 6515.)

(Supreme Court of California. Dec. 30, 1913.)

In Bank. Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Condemnation by the Northwestern Pacific Railroad Company against Jane Snider. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Leppo, of Santa Rosa, and El M. Norton, of Healdsburg, for appellant. Jesse W. Lillenthal and Albert Raymond, both of San Francisco, and T. J. Geary, of Santa Rosa (Lillenthal, McKinstry & Raymond, of San Francisco, of counsel), for respondent.

PER CURIAM. This is an action to condemn lands for a right of way for the plaintiff's railroad. Judgment was given for the plaintiff, and the defendant appeals therefrom. The cause was submitted upon the arguments made and the briefs filed in the case of *Northwestern Pacific Railroad Co. v. Lambert* (S. F. No. 6514) 137 Pac. 1116; the questions involved in the two causes being practically the same. In the cause mentioned an opinion has been filed affirming the judgment. For the reasons stated in that opinion, the judgment in this cause is affirmed.

PACIFIC TELEPHONE & TELEGRAPH
CO. v. ESHLEMAN et al. (S. F. 6499.)

(Supreme Court of California. Dec. 20, 1913.)

1. TELEGRAPHS AND TELEPHONES (§ 28*)—
REGULATION BY COMMISSION—REVIEW—JUDICIAL ACTS.

Under Const. art. 12, § 22, providing that the Railroad Commission may hear and determine complaints against railroad and other transportation companies, issue subpoenas and all necessary process, and send for persons and papers, administer oaths, take testimony, and punish for contempt, and Public Utilities Act (St. [Ex. Sess.] 1911, p. 18), the Commission, in acting on the petition of a telephone company for an order to compel another telephone company to permit a physical connection between its telephone lines and the lines of the petitioner, acted judicially.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 16, 17; Dec. Dig. § 28.*]

2. RAILROADS (§ 9*)—RAILROAD COMMISSION—
REVIEW BY COURTS.

Under Const. art. 12, § 22, providing that no provision of the Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind, or different from those conferred therein, not inconsistent with those conferred upon the Commission by the Constitution, and that the authority of the Legislature to confer such additional powers is plenary and unlimited by any provision of the Constitution, and section 23 also providing that the right of the Legislature to confer powers upon such Commission respecting public utilities is plenary and unlimited, and that nothing therein shall be construed as a limitation upon any power conferred on the Commission by any provision of the Constitution, and Public Utilities Act (St. [Ex. Sess.] 1911, p. 55) § 67, providing that no court of the state except the Supreme Court, to the extent therein specified, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission, or to suspend or delay the execution or operation thereof, or

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

to enjoin, restrain, or interfere with the Commission in the performance of its official duties, no court other than the Supreme Court, and the Supreme Court only to the extent therein specified, may review or otherwise control the action of the Commission, as the Legislature had power to limit the jurisdiction of the courts in this respect.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

3. RAILROADS (§ 9*)—RAILROAD COMMISSION—POWERS.

Under such provisions of the Constitution the Legislature may, subject only to the provisions of the federal Constitution, confer on the Railroad Commission any powers cognate and germane to the subject of regulation and control of public utilities, and the legality of such powers as the Legislature has or may confer upon the Commission may not be questioned under the state Constitution.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. § 9.*]

4. EMINENT DOMAIN (§ 2*)—REGULATION BY COMMISSION—NECESSITY OF COMPENSATION.

An order of the Railroad Commission, requiring a telephone company having both long-distance and local lines to permit a physical connection to be made between its long-distance lines and the local lines of companies competing with it locally, with no provision for compensation being first made, the only compensation provided for being an apportionment of tolls, constitutes a taking of such company's property without compensation, in violation of the federal Constitution; such order being an exercise of the power of eminent domain and not of the police power.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 3-12; Dec. Dig. § 2.*]

Angellotti, J., dissenting in part.

In Bank. Application by the Pacific Telephone & Telegraph Company for a writ of review against John E. Eshleman and others, as members and constituting the Railroad Commission of the State of California. Order of the Commission annulled.

H. D. Pillsbury, of San Francisco, and Hunt Chipley, of Atlanta, Ga. (Pillsbury, Madison & Sutro, of San Francisco, of counsel), for petitioner. Max Thelen, of San Francisco, for respondent. Ralph C. Harrison, of San Francisco, and H. P. Andrews, of Red Bluff, Amici Curiae.

HENSHAW, J. The Tehama County Telephone Company and the Glenn County Telephone Company lodged with the Railroad Commission separate petitions or complaints, seeking orders of the Railroad Commission compelling the Pacific Telephone & Telegraph Company to permit a physical connection or physical connections to be made between its telephone lines and the lines of the complaining companies. The proceedings were consolidated, and, after hearing, the Railroad Commission made certain findings, upon which was based its order in accordance with the prayers of the petitioners. The Tehama County Telephone Company may be described as a telephone company doing a local business in the county of Tehama. In like

manner the Glenn County Telephone Company is engaged in the same business in the county of Glenn. The Pacific Telephone & Telegraph Company does a similar local business in each of those counties, and in addition thereto conducts a long-distance business, reaching into many, if not all, of the counties of the state. The order of the Railroad Commission gives to the Tehama County Telephone Company and the Glenn County Telephone Company and their subscribers the use of all the extended long distance service maintained by the Pacific Telephone & Telegraph Company within the state of California, excepting therefrom an interchange for use of the Pacific Company's lines between the two counties of Tehama and Glenn; the petitioning companies between themselves having established such communication.

In conformity with the provisions of section 67 of the Public Utilities Act (St. [Ex. Sess.] 1911, p. 55) the Pacific Telephone & Telegraph Company made application to this court for a writ of review. Hon. Ralph C. Harrison, as amicus curiae, filed a brief presenting to the attention of this court constitutional questions touching, not only its own jurisdiction in the matter, but as well the jurisdiction of the superior court. Those questions demand first consideration, not alone from their gravity, but because their determination, the one way or the other, will greatly limit or enlarge the scope of the inquiry now before us. The argument of the learned friend of the court may be thus epitomized: Article 6 of the Constitution of the state vests judicial power in certain designated tribunals, and apportions the exercise of the judicial power between and amongst them. Section 4 of this article gives to the Supreme Court certain appellate jurisdiction and original jurisdiction to issue named writs, including the writ of certiorari or review. Section 5 of the same article confers upon the superior court original jurisdiction of great extent, in fact, and generally speaking, over all matters of consequence in law and at equity involving the enforcement of public or private rights or the redress of public or private wrongs. Next, so proceeds the argument, it is to be remembered that the jurisdiction thus conferred upon these judicial tribunals is not subject to legislative control; that is to say, that jurisdiction cannot be either enlarged or curtailed. "It is a well-recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the Legislature cannot either limit or extend that jurisdiction." *Chinn, v. Superior Court*, 156 Cal. 478, 105 Pac. 590; *Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60. It is then pointed out that at the time of the adoption of the present Constitution the writ of certiorari had a limited and well-un-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

derstood scope, defined by sections 1068 and 1074 of the Code of Civil Procedure, and illustrated and expounded in conformity with these sections by many decisions of this court. The availability of its employment and the limitations of its scope may be thus summarized: (1) It is a writ issued by a superior judicial tribunal to an inferior officer or tribunal exercising judicial functions, and the proceeding sought to be brought up for review must in its nature be a judicial proceeding; (2) to justify its issuance by a superior tribunal it must appear that the applicant for it has no other plain, speedy, and adequate remedy; (3) when issued, the superior tribunal reviews the action of the inferior officer or tribunal only to the extent of determining whether the inferior board or tribunal has exceeded its jurisdiction. *People v. Bush*, 40 Cal. 346; *Quinchard v. Board of Trustees*, 113 Cal. 664, 45 Pac. 856; *Cook v. Civil Service*, 160 Cal. 589, 117 Pac. 663. Thus in *C. P. R. R. Co. v. Placer County*, 46 Cal. 671, it is said: "A writ of certiorari is not the appropriate proceeding for the correction of mere errors of judgment, in respect either to the facts or the law of the case, in determining questions within the jurisdiction of the board." In *Sherer v. Superior Court*, 96 Cal. 654, 31 Pac. 565, it is said that: "It must be deemed to be the settled law of this state that the writ of certiorari brings up for review but one question, and that is, whether the inferior tribunal or court exceeded its jurisdiction." And in *Spring Valley Water Co. v. Bryant*, 52 Cal. 138, this court declared: "The resolution and ordinance sought to be annulled * * * may be obnoxious to the criticism that they were attempts to deprive the corporation of its rights and property without due process of law, and violative of constitutional principles; but neither this, nor the circumstance that they were not authorized by the city charter to pass them, can justify a review of the action of the board and mayor by certiorari." And, finally, the indisputable proposition is advanced that the Legislature cannot enlarge the scope of any writ named in the Constitution beyond that which it had at the time the Constitution was adopted. *Camron v. Kenfield*, 57 Cal. 550. *

Such being the law, it is argued that the conclusion is irresistible that the Legislature's attempt to enlarge the purview of the writ of certiorari when, in section 67 of the Public Utilities Act, it declares that "the review shall not be extended further than to determine whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California," is null and void, and that the attempt of the Legislature to confer upon the Supreme Court the power to include in its determination under the writ of review the question of the viola-

tion of constitutional rights is nugatory and in direct violation of the principle of the decision of *Spring Valley Water Co. v. Bryant*, supra. Next it is insisted that the attempt to confer exclusive jurisdiction upon the Supreme Court to review the proceedings of the Railroad Commission, to the impairment of the general jurisdiction of the superior court is itself violative of the Constitution, in that it is a plain legislative attempt to curtail the jurisdiction vested in the superior court by the Constitution. The language of the legislative act in this regard is that, "No court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties." Public Utilities Act, § 67; Stats. Ex. Sess. 1911, p. 55. Therefore, concludes the argument of the learned friend of the court, it is conceded that this court has the constitutional power to issue a writ of review. In the case at bar, admitting that the Railroad Commission in the matter in question was exercising judicial functions, this court's consideration is limited to the single proposition whether or not the Commission has exceeded its jurisdiction, or, what is the same thing in other words, "has regularly pursued its authority"; that this court will not, under the writ, undertake to determine whether constitutional rights have been violated or other errors have been committed, but must leave those questions to the superior court which, under the Constitution, has authority to determine them under proper application to enjoin the enforcement of the order complained of, and that it is the manifest duty of this court so to hold and to declare.

[1] A minor branch or corollary of the main argument upon these jurisdictional questions rests upon the proposition that in the matter here under review the Railroad Commission was not exercising judicial functions, but that its acts were purely legislative or legislative administrative. As the Public Utilities Act is here for the first time before this court, as the question is thus fairly within this case, and as to ignore it is but to necessitate its consideration in subsequent litigation, it is proper to say that we hold the powers and functions of the Railroad Commission in many instances, and in the present one, to be of a highly judicial nature. That judicial powers were with deliberation vested in the Commission the language of the Constitution and of the legislative enactments following the Constitution leave no doubt. Thus the Constitution itself declares: "The Commission shall have the further power * * * to hear and determine complaints against railroad and other transportation companies; to issue subpoenas and all necessary process and send for persons and papers; and the

Commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record." Section 22, art. 12. While, without quoting, a reading of sections 22 and 23 of article 12 of the Constitution and of sections 53 to 81 of the Public Utilities Act will establish beyond doubt that the Railroad Commission is empowered to sit, and in the performance of its most important duties must sit, as a tribunal exercising judicial functions of great moment. It may be said that the final order of the Commission in many instances is legislative administrative in character, but none the less the ordained procedure by which this result is to be reached, the determination of controverted facts between private litigants and disputants, and the decision upon these controverted matters, are strictly judicial. *Robinson v. Sacramento*, 16 Cal. 208; *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 14, 120 Pac. 780.

The answer of the Commission insists that certiorari is not only a proper remedy, but is the sole remedy provided by law. It points out that in other jurisdictions, as in New York (*Steward v. R. R. Commissioners*, 160 N. Y. 202, 54 N. E. 697), the writ of certiorari has been employed "to correct errors of law affecting property rights." But these decisions, showing a broader use of the writ in other jurisdictions, can have no pertinency to the consideration of the laws of this state where the writ has never been used with such latitude, and where its use, defined by our very statutes, is restricted to questions of jurisdiction alone. To the argument that section 67 of the Public Utilities Act in providing for a writ of certiorari before this court has unconstitutionally enlarged the scope of the writ by including within it "a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California," respondent makes answer that this was not the legislative intent, for if the Legislature had intended to add to the function of the writ of review, it would have said, "and also a determination," or "in addition thereto a determination," etc. But in consideration of the fact that the proceeding, and the only proceeding, as defined by the legislative enactment under which the action of the Railroad Commission can be considered at all, is under this writ of review, and as under the constitutional writ of review only the question of excess of jurisdiction can be considered, and as under the writ of review provided for by section 67 much more than this is to be considered, it is not a satisfying answer to say that the Legislature did not mean to broaden its scope when by apt and precise language it actually has broadened its scope. As was said by this court in *Camron v. Kenfield*, 57 Cal. 554: "The new Constitution was framed in

view of the construction of the language used in the former Constitution, unanimously concurred in by the members of the highest tribunals of the state. Yet the framers of the present Constitution repeated the words employed in the former. We are forced to the conclusion that they used these words in the sense which had been attributed to them by the Supreme Court." It matters not, therefore, that the Legislature used the word "including," and might have used the words, "and also" or "in addition thereto." The legal effect is necessarily the same in each instance, and that effect is to broaden beyond all former definitions, rulings, and decisions in this state the scope of the writ of review.

To the argument of the unconstitutionality of the act in curtailing the jurisdiction and powers of the superior court, which jurisdiction and powers themselves have their origin in the Constitution, the sole answer made is that because this court has the power to issue a writ of review and in this case has done so, the question here is a moot question and will be met when it properly arises. This response, too, fails of completeness in view of the fact, as above pointed out, that the proposition presented is one strictly within the case, and that proposition is that, in the performance of its duties, it is compulsory on this court to declare what scope pertains to the writ of review which it has issued, and if it shall hold that its inquiry is limited to the question of jurisdiction alone, it must further declare whether or no the superior courts of the state are open to the redress of asserted wrongs which this court is incapable of correcting. In short it must declare whether the doors of the superior court are closed to petitioners of this class, and whether the Constitution and laws of this state leave an applicant for justice under such circumstances to the limited relief which this court may grant.

The questions thus presented are of great public moment and of equal private consequence. The answer to them should not be postponed or evaded. The demand is immediate and insistent for their careful consideration and complete solution. In this consideration the first established fact is that section 67 of the Public Utilities Act does, in violation of all precedent and decision, seek to enlarge the purview of the writ of review. If the Legislature has done this without sanction of the Constitution, it would result merely in compelling a declaration from this court that the legislative attempt was unwarranted, and that the writ of review must remain as defined at the time the Constitution was adopted. The second fact, which cannot be blinked and must be faced, is that the Legislature has with deliberation restricted and curtailed the jurisdiction vested in the superior courts of this state by the Constitution. And upon this but one thing can be said. If there be not in the Constitution itself warrant and power to the Legislature to do this thing,

its effort must be declared illegal. Our inquiry is thus immediately brought to the constitutional amendments upon the authority of which the Public Utilities Act was adopted.

[2, 3] Article 12 of the Constitution relating to corporations was, upon October 10, 1911, amended by the people of the state in important particulars. A constitutional body known as the Railroad Commission was created. The appointment of the members by the Governor and their terms of office were provided for.

Upon this Commission was conferred specified powers in the establishment of rates and charges for transportation companies. This was done by section 22 of article 12, which further declared as follows: "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution." Section 23 of the same article defined "public utilities," and brought all such utilities under the control of the Railroad Commission. Section 23 then declared: "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. * * * Nothing in this section shall be construed as a limitation upon any power conferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith."

Pursuant to this grant of power by the Constitution to the Legislature, the Public Utilities Act was passed and adopted. The act is altogether too long to be set forth in extenso, but, summarized, it provides for the organization of the Commission, confers upon it large powers of control over all public utilities, prescribes heavy penalties in the way of fines upon public utilities violating the orders of the Commission, and declares guilty of a misdemeanor the person who so violates or aids in violating an order, with punishment fixed by a fine not exceeding \$1,000, by imprisonment not exceeding one year, or by both. Power to punish for contempt is likewise conferred, and the act contains a legislative declaration as follows: "If any section, subsection, sentence, clause

or phrase of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The Legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more other sections, subsections, sentences, clauses or phrases be declared unconstitutional."

Two constructions of the constitutional provisions above quoted have been presented to the consideration of the court. First, that the Constitution itself has designedly conferred upon the Legislature the fullest possible powers to legislate concerning public utilities through the board of railroad commissioners; that it was designed that upon the board of railroad commissioners should be conferred whatsoever powers the Legislature saw fit, and that nothing in any other provisions of the Constitution should hamper the Legislature in so doing; that the board of railroad commissioners itself was especially exempted from the operation of the recall, to the end that it might exercise such powers as the Legislature might confer upon it without possible embarrassment; that the Railroad Commission differs from all other officers of the state in that the Legislature alone, and not the people, is authorized to unseat any of its members (Const. art. 12, § 22); that this constitutional meaning is precisely and aptly evidenced by section 22, when it declares that "no provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred"; that there is the fullest possible grant of authority, to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the Legislature in the Commission shall not be inconsistent with the constitutional powers conferred; that this means, and can only mean, that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, but that the legislative authority, to confer any kind of additional power is, and is expressly declared to be, "plenary and unlimited by any provision of this Constitution"; further, that the people in enacting these constitutional amendments designedly and deliberately did this thing, to the end that the Railroad Commission thus constituted should have its labors unvexed and their results untrammelled by the courts of the state; that the Legislature itself adopted this view in the Public Utilities Act, which was framed with much care, and passed with due deliberation; that this is shown in many passages of the act itself, not alone in that which deprives the superior courts of their constitutional jurisdiction, but as well in that which deprives this court of

a jurisdiction which otherwise it would have. For it has universally been held by all courts, and specifically by the Supreme Court of the United States in reviewing the orders of the Interstate Commerce Commission—a kindred board to our Railroad Commission—that the question of discrimination and reasonableness is always subject to judicial review. *I. C. C. v. N. P. R. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. Our Public Utilities Act in terms declares that the determination of the Commission shall not be open to review upon the subject of “reasonableness and discrimination.” When the Legislature vested in this court alone this limited power of review, and included therein the duty by this court to determine whether a petitioner’s constitutional rights were violated, it meant, so far as the Constitution of the state is concerned, only those constitutional rights of which the petitioner had not been deprived by legislative enactment. While, so far as the Constitution of the United States is concerned, it being a law paramount in dignity and force even to the state Constitution, the state, not having the power to deny a petitioner the protection of the Constitution of the United States, simply made recognition of that fact.

This view is certainly borne out by the language of the Constitution itself, by the action of the Legislature under it, and by the position taken by Mr. Thelen, a member of and representing the Railroad Commission, at the oral argument. The grant of power to the Legislature being that it may confer upon the Railroad Commission any additional power that it sees fit, the limitation upon this grant being merely that the powers shall not be *inconsistent* with those conferred by the Constitution itself, the declaration of the Constitution being that the Legislature’s power is plenary and unlimited, it necessarily and conclusively follows that the Legislature may confer upon the Railroad Commission in the matter of the management and control of public utilities, in the making of its orders and decrees, in the punishment for the violation of its orders and decrees (all of which subject-matters are cognate and germane to and not inconsistent with the constitutional powers conferred) whatsoever authority it may see fit, and that that authority may be exercised without the slightest restraint; every constitutional protection and guaranty, civil and criminal, which the Constitution has accorded to all other kinds of property and the owners thereof, are or may be denied to this class of property and its owners.

That this was the view of the law to which the respondent inclined at the oral argument is manifest from the inquiries put by the Justices of this court and by the answers thereto. Thus, the CHIEF JUSTICE said:

“I don’t think there is any more important question in this case than the question whether there is anything in any provision of the

Constitution of this state which limits the power of the Legislature to confer powers upon the Railroad Commission, and, if there is any limitation, I would like Mr. Thelen himself, as a member and representative of the board of commissioners, to state where he thinks that limitation is—if there is any provision of the state Constitution of California to which the powers conferred by this act are in opposition.”

“Mr. Thelen: No. It seems to me—my own personal view is they are absolutely clear.”

Again:

“Mr. Thelen: I think the Constitution has given to the Legislature every possible authority on this question.

“Mr. Justice HENSHAW: It would seem the sole recourse is the federal Constitution.

“Mr. Thelen: That is my point. * * * My view is that the Legislature has the right, irrespective of other provisions of the Constitution of this state, to confer power upon the Commission, * * * subject to the federal Constitution.”

The second construction of these constitutional provisions is one which would limit the power which the Constitution authorizes the Legislature to confer upon the Railroad Commission strictly to the matter of “supervising and regulating” public utilities. Thus all “additional and different” powers which the Legislature is authorized to confer upon the Commission must be powers within this defined and circumscribed limit. The learned attorney for the Railroad Commission in his printed brief recedes from the position which he took upon oral argument, and contends for this latter construction, basing his contention upon “further study of the section and conference with some of the men who drew the section, and who were instrumental in having it submitted to the Legislature and having it adopted by the people of the state.” But this court in construing a constitutional enactment is limited to the language of the enactment itself. In this instance, as in all others, we may not be governed by what the framers of the amendments meant to say. We are of necessity controlled by what they did say. But, so far as respondent is concerned, the concession yields too much, for, under the first view, the Legislature, acting in the matter without any constitutional restraint, was perfectly justified in conferring any powers that it saw fit upon the Railroad Commission. It could have declared that its decisions were not reviewable by any court of the state, and, of course, having that power, it could limit the scope of review to any particular court, and, still further, limit the hearing before that court. This is precisely what the Legislature has done under the sanction of the Constitution as first construed. If, however, the view last advanced by the Railroad Commission is to prevail, and the leg-

islative power is pent up and confined to matters of regulation only, then it necessarily follows that its clearly expressed attempt to deprive the superior court of all jurisdiction, its clearly expressed attempt to limit and circumscribe the jurisdiction of this court in some particulars, its further attempt to enlarge the scope of the writ of review, its declared intent to deprive all the courts of the state of the power to say whether a specific order of the Commission is reasonable or discriminatory, are one and all violative of state constitutional provisions. More important still, many of the powers expressly conferred upon the Commission by sections 40 and 41, giving to the Railroad Commission the unrestricted right, based upon public convenience and necessity, to compel a physical surrender of the properties of one public utility for use by another, upon "a reasonable compensation and reasonable terms and conditions for the joint use" fixed by the Railroad Commission itself, themselves do violence to article 1, § 14, of the state Constitution, which forbids such a taking or injury without compensation fixed by a jury, first made and paid. For the taking of property devoted to a public use from the control of the owners, even though in so doing it be devoted to another public use, is a taking of property within the meaning of the Constitution. Chicago, etc., Co. v. Chicago, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979.

In view of these considerations we regard the conclusion as irresistible that the Constitution of this state has in unmistakable language created a Commission having control of the public utilities of the state, and has authorized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the Constitution to all other kinds of property and its owners. And while, under our republican form of government (a form of government under which the three departments—administrative, executive, and judicial—have in the past one and all been controlled by the limitations of a written Constitution, *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. 573, 35 L. Ed. 219), it is perhaps the first instance where a Constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions, nevertheless this is but a reversion to the English form of government which makes an act of Parliament the supreme law of the land. It was at one time argued as to such acts of Parliament that, while not otherwise invalid, they would be decreed invalid if "contrary to natural justice or to natural right." But as this determination itself involved a resort to the courts, and thus made the decision of the courts to that extent superior to the law of Parliament, the present day jurisconsults are agreed that an act of Parliament is not controlled by natural right

or natural justice, but is controlled solely by what is deemed to be expedient and wise to the lawmaking power itself. Bryce Am. Com., c. 23. So here, the state of California has decreed that in all matters touching public utilities the voice of the Legislature shall be the supreme law of the land.

Therefore the following conclusions appear to be irresistible: That when the Constitution itself, as here, declares that a legislative enactment touching a given subject shall not be controlled by any provisions of the written Constitution, such a legislative enactment addressed to that subject *ex proprio vigore* carries with it all the force of an act of Parliament. Therefore the same power vested in the Legislature which admittedly authorizes it to limit or destroy the jurisdiction of the courts of this state must necessarily authorize it to confer upon such courts such jurisdiction as it sees fit. To say that the Legislature may deprive the courts of all jurisdiction, but may not in any respect enlarge their jurisdiction, where the acts of the Railroad Commission are involved, is but a stickling over words. There can be no question but that the Legislature meant to enlarge the jurisdiction of this court by enlarging the scope of the writ of review, since, if it intended merely that the writ of review should remain within the scope which this court and the statutes had previously given it, the act need have said no more than that a writ of review should issue. But the declaration in the act itself that the judgment under the writ of review, besides determining "whether the Commission has regularly pursued its authority," shall "include" a determination "whether the order or decision under review violates any rights of the petitioner under the Constitution of the United States or the state of California" is either deliberately designed to enlarge the purview of the writ of review, or else the language is utter and meaningless surplusage. It is true that the question whether or not an inferior tribunal has exceeded its authority may depend upon whether or not a constitutional right has been violated. If that was all that the Legislature meant by its language, it was unnecessary to have added the including clause, since the original scope of the writ of review always has embraced the consideration of such a problem. But it is equally true that many cases arise where constitutional rights are violated, or where it is asserted that they are violated, and where the inferior board and tribunal in so doing has in fact "regularly pursued its authority." This is in precise words declared in *Spring Valley Water Co. v. Bryant*, 52 Cal. 138, where it is said: "The resolution and ordinance sought to be annulled * * * may be obnoxious to the criticism that they were attempts to deprive the corporation of its rights and property without due process of law, and violative of constitutional principles; but neither this nor the cir-

circumstance that they were not authorized by the city charter to pass them, can justify a review of the action of the board and mayor by certiorari." So, to repeat, if the Legislature had meant that only those constitutional questions which may legitimately arise under the writ of review should be considered, there was no occasion for its saying so. Such questions have always been considered. But if it did mean this, why did it with deliberation add the including clause, and declare that under the writ of review which it authorized and prescribed there should be an inquiry as to whether *any* constitutional right of the petitioner had been violated?

Therefore, there is the clearest evidence that the Legislature did mean to enlarge the scope of the writ of review, and so to enlarge the jurisdiction of this court in reviewing proceedings under this writ. And it may not be said that the Legislature cannot do this, if it has, as is unquestioned, the power to take away all jurisdiction, which power, equally with the power to enlarge jurisdiction, is safeguarded by the general provision of our Constitution and our decisions under them. Could not the Legislature have declared that in any case the Railroad Commission may demand and obtain from the Supreme Court a writ to review the legality of its orders and decrees, under which writ the court shall determine whether the constitutional rights of any of the parties interested have in any respect been violated? It is not to be perceived how such a provision, if it were contained in the act, could be denied efficacy upon the ground that it was enlarging the jurisdiction of this court, and equally difficult is to see how it can be said how the Legislature has not done this precise thing by other but equally apt words.

This constitutional decree is, of course, binding upon this court, and under it it becomes the duty of this court to lend its aid in giving effect to every power and prerogative with which the Legislature may vest or clothe the Railroad Commission. This, however, is subject to one all-important limitation. There is still the Constitution of the United States—the supreme law of this state, supreme over its Constitution and over its Legislature—and of no protection accorded by that instrument to a litigant before this court can that litigant be deprived. Therefore, if it shall be that among the powers conferred by the Legislature upon the Railroad Commission are those whose exercise by that Commission do violence to a petitioner's rights under the Constitution of the United States, protection under that Constitution will be awarded him. The fourteenth amendment to the Constitution of the United States prohibits a state from depriving any person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws. The petitioner here insists that by the order of the

Commission it is deprived of the equal protection of the laws of this state in violation of its rights under the Constitution of the United States.

[4] To that inquiry we are next brought. The subject-matter of that inquiry may be thus stated: The Constitution of the state of California (article 1, § 14) guarantees that private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court, and that this compensation shall be ascertained by a jury in a court of record, unless a jury be waived. The petitioner insists that the execution of the order of the Railroad Commission in the case at bar involves a plain taking of its property; that compensation for this taking has not been made or paid in advance as the Constitution provides, has not been made by a jury as the Constitution contemplates, and has not been made at all, saving as the Railroad Commission may see fit in the future to apportion rates or tolls for the use of the property which is taken away from the petitioning company and given to its rivals in business. The petitioner thus asserts that the railroad commissioner's order is an exercise of the right of eminent domain, in violation of the state Constitution, in that as to every other class of property and the owners thereof these constitutional guaranties are in full force; that this exceptional exercise of the power of eminent domain by the Railroad Commission denies to the petitioner the equal protection of the law. The Railroad Commission makes answer that its order and the fulfillment of its order are referable solely to the police power of the state, and not at all to the power of eminent domain, and that its order amounts to no more than a reasonable regulation touching the use of property held in private ownership but devoted to a public use. (Is the order of the Railroad Commission properly referable to the police power, or does it involve, under the guise of a regulatory measure, the taking of petitioner's property?)

The courts, even the highest court of the land, have despaired of giving a satisfactory definition to the police power of a state—a definition which will delimit the boundaries of that power. Thus, by Mr. Justice Brewer of the Supreme Court of the United States, it has been said that "by reason of its undetermined extent, it is the *bête noir* of the courts." By this court, many years ago, it was declared: "So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the Legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant." *Ex parte Jentzsch*, 112 Cal. 468, 44 Pac. 803, 32 L. R. A. 664. But

within the legitimate exercise of this great power comes the unquestioned right to place restrictions upon personal liberty and limitations upon the use of private property. One conspicuous example of the legitimate exercise of the police power is evidenced by the right of regulatory control exercised by courts, boards, and commissions over property held in private ownership, but devoted by the owners to a public use. Over against the undue or illegitimate exercise of the police power is set the limiting and protecting shield of the Constitution both of the United States and of this state, that property shall not be taken for public use without compensation to the owner. It must be apparent that in the exercise of the sovereign police power many important questions will arise as to the reasonableness of the law or order. For, if reasonable, then the law or order is but a fair exercise of the sovereign power. If unreasonable it transgresses the constitutional provisions against the taking of private property for public use and unlawfully restricting personal liberty. It is for these reasons that, as has been previously said, the courts have declared it to be a part of their manifest duty to inquire into the question of reasonableness, which right of inquiry, as has also been said, has, by the Public Utilities Act, been denied to the courts of this state.

But in the exercise of the police power in the regulation of public utilities, while each case which is rested upon the exercise of that power must be subject to its own individual consideration, there are certain fundamental principles which are not disputed, and which govern all. The first of these is that this power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation, it amounts to a taking of the property, and the order is then referable, not to the police power, but to the power of eminent domain. The second of these is that this regulatory power falls into three natural subdivisions: (1) The right to regulate tolls and charges, to the end that fair compensation may be returned and excessive charges be forbidden; (2) the right to prevent discrimination upon the part of the public utility directed against those who employ it, or make use of its agencies, or the commodity which it furnishes; (3) the right to make orders and to formulate rules governing the conduct of the public utility, to the end that its efficiency may be built up and maintained and the public be accorded desirable safeguards and conveniences. Beyond these matters regulation, as regulation, does not and from the very meaning of the word cannot go. Nor is it of consequence that the law or order be in terms and in form regulatory, if, in effect, it is a taking of property or a deprivation of the use of property within the meaning of the Constitution. No public convenience, no public necessity, however urgent, will justify such a taking. Thus, it

might be to the great convenience of the public that a hundred foot strip of a railroad's private right of way should be made into a public crossing and highway. The order of a commission regulating the use upon the part of the railroad of its right of way by exacting of it that it grant permission to the public to cross and recross would not be a regulation, but a confiscation, and this, notwithstanding the fact that the right of way itself was devoted to one public use, and the only effort made was to subject it to another public use. *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. In the case cited the order was not even the order of a commission, but was the judgment of a court, yet it was held that the proceedings were in eminent domain, and that the railroad company for this new use of its right of way, which amounted to a taking of its property, was denied the compensation to which the Constitution entitled it.

Another principle, quite as important and quite as fundamental, is that "taking" of property within the meaning of the Constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use. The principle is thus stated by Lewis on Eminent Domain as follows: "If property then consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property, and hence that his property may be taken in the constitutional sense though his title and possession remain undisturbed, and that it may be laid down as a general proposition, based upon the nature of property itself, that whenever the lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the power of eminent domain, his property is *pro tanto* taken, and he is entitled to compensation." 2d Ed., § 56; 3d Ed., § 65. "It is also clear that to take the use of property is to take property within the meaning of the Constitution. It follows that one company cannot be authorized to take the joint use of another's tracks, except by an exercise of the eminent domain power. All the cases practically concede this by holding that compensation must be made. That it is competent for the Legislature to authorize a railroad company to take the right to use the tracks of another railroad jointly, upon making compensation as required by the Constitution, is a proposition almost unanimously supported by the authorities." 3d Ed., § 423.

Wyman thus states the principle: "The principles discussed do not go so far as to give one common carrier the right to demand the use of the facilities of rival common carriers in order to compete against them. Thus it seems plain that one railroad

cannot be required to make physical connection with its rival so that it may take its business away from it." Wyman on Public Service Corporations, § 698.

And Dillon: "But whatever may be the extent of legislative power in this respect, it is clear that the Legislature cannot, without compensation to the first company, authorize the second company to take or use the track of the first, although with compensation this might be done under the power of eminent domain if in its judgment the public good required it." Dillon on Mun. Corp. (4th Ed.) § 727; Id. (5th Ed.) § 1280. This principle, it is to be noted, is not that the Legislature, acting directly or through its authorized mandatories, may not subject property devoted by its owners to a public use to another public use, or to the same public use by its rivals, but that the doing of this is an act referable to the power of eminent domain, and not to the police power, and that compensation must be made accordingly. Herein lies the vital distinction between the legitimate exercise of the police power and the exercise of the power of eminent domain. In the former, uncompensated obedience to the order is imperative. In the latter, the order may not be enforced without compensation first made. And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership, and does not vest title to the property in the public use as to justify, under the exercise of the police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would better be served thereby, or that the owners themselves have proven false or derelict in the performance of their public duty. Any law or order seeking to do this passes beyond the ultimate limits of the police power, however vague and undefined those limits may be.

With these indisputable principles before us, we may come directly to the consideration of the order in question. But, at the outset, that consideration is somewhat embarrassed by a very radical change of view upon the part of the attorney of the Railroad Commission. In oral argument that position seemed to be in consonance with the interpretation which we have put upon the constitutional amendment, namely, that the Legislature had the power, and had exercised the power, to confer upon the Railroad Commission the right of eminent domain, and in bestowing upon the commission that power had likewise authorized it to fix the compensation when its orders involved a taking of property. Thus, upon oral argument, the record shows the following:

"Mr. Justice SHAW: Your position is that the Commission, if empowered by the Legislature, could direct one railroad to turn

over its whole plant to another railroad without any compensation at all so far as the state Constitution is concerned?

"Mr. Thelen: Yes, sir. But the Legislature has provided in that case that compensation shall be recovered. I hardly assume any Legislature would ever make such a provision, but it might."

Again, the discussion being addressed to the effect of the order here under consideration:

"Mr. Thelen: I may have to concede that it is a taking of property, but if it is a taking of property, it is a taking of property under an order of an administrative tribunal, and I will refer your honors to a large number of cases where they hold the state has the right to provide that compensation shall be fixed by an administrative tribunal and not by a jury. As long as the party gets his compensation, he gets as much as he is entitled to.

"Mr. Justice SHAW: Their claim under the Constitution is that if they are entitled to compensation at all—this old company—they are entitled to it in advance.

"Mr. Thelen: If that is their claim we would have to combat that claim under the statute. There was no provision made for compensation. They are going to get a share of the tolls. For all they know they are going to get all, or nearly all, of them. Their own local exchange is not affected at all. That is certainly sufficient compensation. They are going to get compensation in the shape of a portion of the tolls they are going to get."

In the printed brief of respondent, however, the sole argument is based upon the following declaration: "The Railroad Commission's order is a regulation under the state's police power of the use of property by a public utility for the purpose to which it has been dedicated and is not a taking of property in the constitutional sense." It would seem, therefore, that the Commission's first interpretation of the law was that which the court has here given, and that subsequent reflection had prompted a modification of this view. We repeat, however, that we are still satisfied that it is the only view which can be justly taken of the constitutional provisions, and certainly it is the only view which would give to the legislative enactments the efficacy and power which were meant to be theirs. But, of course, it does not follow, because the Legislature has authorized the Railroad Commission to exercise the power of eminent domain and take property for public use, that in this particular instance the Commission has actually done so. That still is to be determined by the language of the order, under the restrictions imposed upon this court denying it the power to consider the reasonableness of the order. For this discussion must be had, so far as this court is concerned, under the limitations imposed

upon it by the Public Utilities Act. We cannot consider the reasonableness of the order, but can and must determine whether any of petitioner's rights guaranteed it by the Constitution of the United States have been violated. But while the reasonableness of the order may thus not be questioned, resort is permitted to the findings of the Commission to aid in determining the meaning and effect of the order.

These findings disclose that for many years the Pacific Telephone & Telegraph Company had maintained a long-distance service in the state of California which passed through the counties of Glenn and Tehama, and in connection with this long-distance service maintained an exchange service in certain of the towns; but that the local service in each county and the exchange service between these counties, as maintained by the company, was incomplete and inefficient. The company for a long time failed to develop the local territory of these counties. This poor quality of service and failure to develop the local business of the counties resulted in the formation of two companies, the one in Glenn, the other in Tehama county, one commencing operations in 1908, the other in 1911. They developed the territory and gave a local service superior to that of the Pacific Company. After January, 1912, but before this Railroad Commission came into existence, the Pacific Company took steps itself to develop the territory, and prior to March 23, 1912—the effective date of the Public Utilities Act—it proceeded to parallel “with feverish haste,” and to a considerable extent, the lines of the other companies “in an apparent effort to crush them.” It not only paralleled existing lines of the other companies, but gave free exchange service between towns which theretofore had not received such service. Upon April 29th the Tehama county company had 698 subscribers, of whom 457 did not have a Pacific Company telephone. The Glenn county company had 889 subscribers, of whom 570 did not have a Pacific Company telephone. The Pacific Company operated 870 telephones in Glenn county, and 1,003 telephones in Tehama county. This company's investment in each of these counties is greater than that of its competitors. It asserted that it served the same territory that the rival companies do, and was ready and able to furnish telephone services to every one of their subscribers at the rates charged them. The finding upon this is that the Pacific Company, while it had duplicated the major portion of the lines of the independent companies, had not duplicated all, and that to serve all the subscribers of the independent companies would require further extensions of its lines. The Glenn and Tehama companies made demand upon the Pacific Company for telephonic connections which would enable their subscribers to use the long-distance service of the company, and,

upon refusal, lodged their complaints. The findings further declare that the Pacific Company had failed to do its duty in the matter of extending its service and affording convenient local communication. This, of course, is not a finding of its present unwillingness or refusal to perform this duty, for it expressed its willingness, and urged that it be allowed to perform whatever duties the Commission thought incumbent upon it to perform, and it will not be contended, and could not successfully be contended, that a failure to perform a duty is a justification for the taking of property without compensation. The finding is that the local service of the Glenn county and Tehama county companies is superior to that of the Pacific Company. An order requiring the Pacific Company to improve its service to the standard fixed by the Commission would unquestionably be regulatory in its nature. But the inferiority of service actually rendered is not, of course, a justification for the taking of property. It would undoubtedly, as the Commission finds, be a great public convenience, and there was great public need for long-distance service on behalf of the subscribers of the Glenn and Tehama county companies who did not have the advantage of the long-distance service of the other company. But no necessity, however urgent, justifies a taking of property without compensation, and, as is said in *Evansville, etc., Co. v. Henderson, etc., Co.* (C. C.) 134 Fed. 973, quoted with approval in 1 *Wyman Public Service Corporations*, par. 699: “One water company, or one telephone company, or one telegraph company, or one street railway company, or one railroad company, while bound appropriately to serve the general public, cannot, unless under express statutory enactment and by due process of law thereunder, be compelled to give its property to the uses and benefits of a rival, except by some form of condemnation. The rival is not, ordinarily, to be included in the term ‘general public.’”

These findings of fact have thus been reviewed not at all as touching the *reasonableness* of the order which the Commission made which we repeat is not within our purview, but to make plain the proposition that no one nor all of these findings of fact are sufficient to sustain the legality of the order, if in truth it amounts to a taking of property within the constitutional inhibition.

In precise terms then, what is the order and what is its legal effect? It is not an order that the Pacific Telephone & Telegraph Company should improve its own service in these counties up to the standard fixed by the Railroad Commission—an order which would be unquestionably regulatory. It is not an order that the Pacific Company should develop and extend its service to meet the existing demands of the public within the territory it has undertaken to supply—an order which would certainly in its nature be regula-

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tory, and a compliance with which would meet every possible demand which the public could rightly urge. But it is an order compelling the Pacific Company to permit a connection between its long-distance lines and the local lines of the petitioning companies, under which, by the use of the switchboards, operators, and lines of the Pacific Company, its property and its agencies, the petitioning companies and their subscribers should have the same rights to all the long-distance instrumentalities of the Pacific Company as its subscribers and patrons. That the order is not primarily designed to benefit the public is made plain from the fact that it is not an order directing the Pacific Company to make betterments and extensions for the service of the public though admittedly such betterments and extensions could and would by it be made. That it is primarily designed to benefit the rivals of the Pacific Telephone & Telegraph Company in the local business of the two counties is plain from a consideration of the circumstances, and was admitted by the learned attorney for the Railroad Commission upon argument, when he declared: "If they [the petitioning companies] cannot get long distance in this way, I assume, unless long-distance connection is made, that eventually the local companies will have to give up business." It would appear, therefore, that it is not the necessities of the public, but the necessities of and benefits to the rival companies, which have prompted an order devoting the property of the Pacific Company to the uses of the rival companies.

But it is argued that this use imposed upon the Pacific Company for the benefit of the petitioning companies is not a new use, but is a use for which the telephone company had already dedicated its property to the public. But to this the telephone company makes answer, which is unquestioned, that it has never dedicated its property to the use of rival and competing companies; that it has dedicated its property to telephone service conducted by itself for the benefit of its own patrons; and of local companies in noncompeting territory; that it is prepared within reason to furnish telephone service to all who are or may desire to become such patrons, and that it has never permitted a connection and use such as here ordered upon the part of a rival company doing a competitive business in a local field and seeking to maintain and improve that business at the cost of the Pacific Company by the advantage which would fall to it from the use of the Pacific Company's long-distance lines and service.

Again it is said that the order does not involve a taking of property or the use of property, but is to be likened in principle to those cases where a regulatory order requiring direct connections between two intersecting or contiguous railway companies has been upheld as a not improper exercise of the police

power. Finally, the proposition is advanced that, conceding the effect of the order to be a taking of the property, it is a taking by administrative order, referable to the police power—a taking where the injury or damage follows as but an incident to the legitimate exercise of that power, and where, accordingly, under the august authority of the Supreme Court of the United States, the taking is not such as is inhibited by the Constitution unless compensation be made therefor.

In these contentions respondents greatly rely upon the exact analogy and precise parallelism which they assert exist between this case and those upholding orders for railroad connections. A consideration of the more important of these cases is thus demanded.

The first, and that upon which supreme reliance is placed, is that of Wisconsin, *Minnesota & Pacific R. R. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194. By statute the state of Minnesota had ordered common carriers to provide, and had ordered its railroad commission to see that they made provision for, connecting tracks for the interchange of traffic. Such an order was made for a connection between the Wisconsin, etc., Railroad Company and the Sioux Falls Railroad Company. From the judgment of the Supreme Court of Minnesota sustaining the order the case went to the Supreme Court of the United States upon writ of error. The Supreme Court pointed out that the power exercised by the Railroad Commission could not have been exercised by the courts at common law, and thus primarily depended for its validity upon constitutional or legislative enactment. Next it was pointed out that a fundamental prerequisite to the legality of such an order was its reasonableness, into which the courts would always inquire. Next, again, that to be sustained it must have its foundation in public convenience, welfare, or necessity in the exercise of the police power. The plaintiff in error insisted that the execution of the order would involve a taking of its property without compensation by virtue of the fact that it did business in the transportation of cattle and wood, and that this business would be opened to competition and subjected to serious loss at the hands of the competing railroad. The Supreme Court of the United States did not say that such a competition resulting in loss would not amount to a taking within the constitutional inhibition, but it did declare that such competition did not exist. As to the cattle, its language being: "It may be said, therefore, that competition between the roads for the transportation of such cattle to Sioux Falls does not exist." And as to wood: "To furnish facilities therefor at Hanley Falls so that the wood from the forests of Northern Minnesota may be brought there on the Willmar road and transferred in cars to the road of the plaintiff in error, and transported to

stations west of Hanley Falls, is not in fact to compete or to provide for competition with the plaintiff in error in the article of wood." And again, after a statement of the facts which plaintiff in error urged in support of its contention, "that to enforce the judgment would compel it to pay its share in the cost of the construction of a track to be used for the purpose of depriving the company of its traffic and transferring it to its competitor," the Supreme Court sums up the matter in a single sentence as follows: "The facts do not afford a fair foundation for the argument." And, further, the court says: "We think this case is a reasonable exercise of the power of regulation in favor of the interests and for the accommodation of the public, and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the plaintiff in error." And, finally, the opinion concludes: "Although to carry out the judgment may require the exercise by the plaintiff in error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of defendant in error." We have been at pains to make these quotations because the decision itself and the language of the opinion is made the foundation for many declarations to the effect that loss by competition is not an element in considering the reasonableness of an order, and that property may be taken under such an administrative order without compensation. Thus the Supreme Court of the United States itself appears to have overstated the decision in the Jacobson Case in at least one instance (Oregon R. R. Co. v. Fairchild, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863), where it is said, discussing that case, that "the advantage to the public was so great that the order requiring the track connection was sustained in spite of the fact that one of the roads was thereby deprived of the revenue which it would otherwise have received for the longer haul." Such is not the Jacobson decision, which is, as above quoted, that there was no competition between the two roads in the matter of hauling cattle or wood. No court will question the justice of the Jacobson decision under the facts declared by the Supreme Court. But just criticism may be directed against an attempt to extend the decision beyond the court's own statement of the facts and the law, and beyond what could, by any possibility, have been in the minds of the jurists who pronounced it. The decision itself amounts to a declaration that under the authority of the state Constitution or statute, a commission or court authorized to exercise the police power in the matter of the regulation of public utilities may, in a proper case, order a physical connection to be made between the tracks of two nearby or intersecting rail-

ways, and that, though the execution of this order may involve the expenditure of money, and may result in the modification of the use of a portion of the railroad right of way over which the connecting track or tracks be carried, such an expenditure of money, when reasonable, and such a limited change of use of the right of way, on the demand of public interest or convenience, are but the outcome of a legitimate exercise of the police power, and do not constitute a taking of property without due process of law. Such is the decision and the whole of the decision of the Jacobson Case. See *Grand Trunk Ry. Co. v. Michigan Railroad Commission* (D. C.) 198 Fed. 1009. There is in this no declaration that the question of undue competition and injury to business will not be considered, any more than there is a declaration that one railroad may use the tracks of another. There is the distinct declaration that competition was not within the facts of the case.

With the decision of the Supreme Court in the Jacobson Case before us, we may proceed to a brief consideration of the other railroad cases which respondent insists support its contention that an order such as this does not involve a taking of property, within the constitutional inhibition. The first of these is *Grand Trunk Ry. Co. v. Michigan Ry. Co.* (D. C.) 198 Fed. 1009. This case did not even involve the question of the right to order track connections. That was conceded. The contentions were, however, that an intractly switching duty was imposed, and that this switching duty was in no real sense a part of transportation, the language of the court being: "The taking of complainant's property without due process is said to result because, as contended, the required services are merely switching services as distinguished from transportation services." The court held the distinction to be visionary and the contention unsound. The second contention was that transportation over the lines of the one road by the cars of the other was equivalent to giving the use of the tracks and terminal facilities to the other road. This contention, too, was held to be without substantial support.

The next case is *State v. Jacksonville Terminal Co.*, 41 Fla. 377, 27 South. 225. The Railroad Commission of Florida made an order requiring the Jacksonville Terminal Company to admit the Atlantic, etc., Co. with its engines, cars and trains to the use and benefit of its terminal facilities and Union Depot in the city of Jacksonville to the like extent accorded by the Terminal Company to other railroad companies. The Atlantic, etc., Company was required to pay \$1,275 quarterly for the use of the terminal facilities, and to bear its equitable proportion of the expense of maintenance of the terminal property. The arguments advanced by the Terminal Company against the validity of the order were based upon the ground that its property was taken without due process

of law, and that it was a private corporation engaged in a private business, devoting its property to private uses and receiving no franchise or privilege from the state and performing no public or governmental function, and that it could not therefore be compelled to devote its property to the use of another private corporation. To this the court made answer that the facts disclosed that it was a corporation which had devoted its property to a public use, and that public use was the providing of terminal facilities for railroads; that, having so devoted its property to that use, it could not discriminate in favor of one and against another company seeking connection with it for terminal facilities, and that the order of the Commission was therefore not a taking of property, but was a regulation of the use of property within, and not contrary to, the use for which it had been dedicated, was strictly regulatory, and within the due exercise of the police power in preventing unjust discrimination. The following quotations will fully substantiate this: "We have no doubt that property devoted to the uses for which the pleadings show this terminal is devoted is affected with a public interest, and that the state has power to regulate such use by requiring the owner to serve equally and fairly all railroad common carriers which the public welfare may require, and to confine its charge therefore to reasonable rates of compensation, and that the exercise of this power does not deprive the defendant in error of its liberty or property without due process of law under the Constitution of this state or of the United States. * * * The regulation made by the Commissioners, under the power conferred upon them, in this case is in no sense an 'appropriation' of any private property or right of way within the meaning of section 29, art. 16 of the Constitution, so as to require the compensation therefor to be ascertained by a jury of 12 men. The defendant in error, as we have seen, has devoted its property to a use essentially public, is performing service of a public nature, and is subject to be controlled by the public for the public welfare. That use to which it has voluntarily devoted its property is to furnish passenger terminal facilities to railroad common carriers. * * * There is a very clear distinction between a taking or an appropriation of property for a public use and regulating the use of property devoted to a use in which the public has an interest. The latter is an exercise of the 'police power,' as it is called; the former of the power of eminent domain. The state in the former case compels the dedication of the property, or some interest therein, to a public use, or, if already devoted to one public use, then to another. In the latter, the owner has voluntarily, or in pursuance of the provisions of the charter, dedicated the property to a use in which the public has an interest, and the use of that property so dedicated is merely

regulated and controlled for the public welfare. In this case the regulation complained of does not compel the defendant in error to dedicate its property to the public use, or to a different public use. * * * The regulation complained of does not appropriate property; it merely prevents abuses, prohibits unjust discriminations and excessive charges, and is therefore valid."

The foregoing quotations must make it apparent that here is no intimation that property may be taken for a public use without compensation, but, to the contrary, a distinct affirmation that it cannot be so taken, coupled with a declaration, manifestly just, that there was no taking, but a mere regulation addressed to the public use to which the property had been dedicated—a regulation to prevent discrimination.

In *Pittsburg, etc., Ry. Co. v. Railroad Commission of Indiana*, 171 Ind. 189, 86 N. E. 328, the Railroad Commission of Indiana had made its order requiring track connections between two roads. The Supreme Court of Indiana declared that the reasonableness of the order would be considered, that the railroad's property was devoted to a public use, and that it was therefore subject to due regulation, and that, if the order was not an unreasonable regulation, it did not amount to the taking of property in violation of the Constitution. The court held that the order, referable to the police power, was a reasonable regulation touching the use of property.

Finally, in the case of *State of Washington v. Fairchild*, 224 U. S. 510, 32 Sup. Ct. 535, 56 L. Ed. 863, respondent contends that it finds the fullest support for the proposition that it may actually take property without compensation, or without compensation first made and paid as our Constitution requires. In the last-cited case the order of the Washington Railroad Commission required the Oregon Railway & Navigation Company and the Northern Pacific Railway Company and the Spokane & Inland Railroad Company to connect their tracks at a number of named towns and stations. The *decision* of the Supreme Court reversed this order for its unreasonableness. The *opinion* employs language which gives rise to uncertainty, and which, if not properly understood, must result in great confusion. Thus, in the opening sentence of the opinion, it is said: "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes the land on which the tracks were to be laid." And further declares the opinion: "So that where the taking is under an administrative regulation, the defendant must not be denied the right to show that, as matter of law, the order was so arbitrary, unjust, or unreasonable as to amount to a deprivation of property in violation of the fourteenth amendment."

Elsewhere the court states the proposition to be "the contention that as a matter of law the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law."

If these expressions should be construed as respondent seeks to have them construed, as meaning that the Supreme Court of the United States has decided that, in the exercise of the police power, private property may be lawfully taken for public use without compensation made to the owner, it must be said that it is the first and only declaration of the Supreme Court of the United States to that effect, and that the statement itself means the elimination from the Constitution of the United States of the last clause of the fifth amendment of that Constitution, declaring that private property shall not be taken for public use without just compensation. In a sense, every exercise of the police power which calls for the expenditure of money by the owner of property, or limits, or otherwise regulates the use which an owner may make of his property, whether or not that property be dedicated to a public use, is a taking of property. Thus the requirement that fire escapes be placed upon buildings which have them not necessitates the expenditure of money by the owners of such buildings, and in that limited sense is a taking of their property. The requirement that one maintaining a nuisance shall abate it may necessitate upon his part the expenditure of money in so doing, and in that narrow sense is a taking of his property. The well-recognized legal restrictions upon the use of property, prohibiting the use for slaughter houses, powder mills, and the like are all in a limited sense a taking of property. So, too, the requirement of track connections obviously involves the expenditure of money and a limitation upon the original use, for the original use of the right of way was for the tracks alone of the railroad which owned it. By the track connection, a portion of that right of way is subjected to the use of the connecting track, which is owned perhaps—operated in common certainly—by the two railroads. But, unless we have read the law to no purpose, the vitally essential principle limiting the exercise of the police power and distinguishing it from the exercise of the power of eminent domain is that private rights in the former case must, for the benefit of society, yield to reasonable regulations controlling the use of property, in the case of public utilities, *within the use* to which the property has been dedicated. The law has the power to regulate the use to increase efficiency and prevent abuses, and such regulations, though they involve an expenditure of money or a modification of the use, are regulations which the lawmaking power may impose by virtue of the very fact that the property has been dedicated to that public use. Therefore it is that the decisions declare either that such

a regulation is not a taking within the constitutional inhibition, or declare that, the regulation being legal, the mere fact that the expenditure of money is involved in no sense amounts to a taking. But when, however, the regulation exceeds the just limits of the police power, that regulation is void, whether or not it amounts to a taking of the property within the Constitution. Many such orders do, under the guise of regulations, invade the province of eminent domain and work an uncompensated taking of property which is confiscation. Such orders are, of course, void. Others, without necessitating the expenditure of money, so unreasonably restrict or so unreasonably enlarge the use of property for the supposed benefit of the public as to accomplish the same results. We think it certain that it is in the light of these fundamental principles that the language of the Supreme Court in the Oregon Railway Case must be read; for if construed in any other way, there is an obliteration of all distinction between the power of eminent domain and the police power and the equivalent of a declaration that a railroad commission may take property for public use without compensation to the owner. Therefore, as we construe the decision under consideration, the meaning of what the Supreme Court said was either that, under the guise of an administrative police regulation, the Commission had taken property in violation of the Constitution, or that the effect of upholding the regulation in question would be sanctioning such a taking in violation of the Constitution. It was as though the Supreme Court had declared that this administrative order for track connections is so unreasonable as to pass beyond the limits of the police power in the matter of regulation, and to enter the field of the power of eminent domain. In the latter field it is a taking of property without compensation. If by any possibility this court can be wrong in the construction which it thus puts upon this language, this informing knowledge must come from the Supreme Court of the United States itself.

But that what we have above set forth has been the distinction uniformly drawn by the federal courts between the police power and the power of eminent domain, a view from the many cases will abundantly establish. Thus in *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.* (C. C.) 53 Fed. 687, it is said: "The use of five blocks of the roadbed of a street railway in the hands of a receiver by another street railway company materially impairs the just enjoyment of the property, and will be enjoined, at the instance of the receiver. One public corporation cannot take the franchise of another, which is in use, unless expressly authorized by the Legislature, and then only by regular condemnation, and cannot take it at all if this will materially affect its use. A franchise for a right of way is, in its very nature, exclusive, and

dispossession of any portion thereof in actual use is a taking of the franchise pro tanto." And to the same purpose and like effect are *Missouri Pacific Ry. Co. v. Nebraska*, 164 U. S. 403, 17 Sup. Ct. 130, 41 L. Ed. 489; *Missouri Pacific Ry. Co. v. Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, 18 Ann. Cas. 989; in which cases it was held that an order directing a railway company to allow a warehouse to be constructed on its right of way to aid transportation facilities was a taking of property which could not be sustained as a police regulation. And, finally, may be quoted the language of the court in *Grand Trunk Ry. Co. v. Michigan* (D. C.) 198 Fed. 1009, as follows: "That requirements of track connections and interchange of traffic between railroads, imposed by the Michigan statutes previous to 1911, do not amount to the taking of property without due process needs no extended reference to authority." See, also, *Int. Com. Comm. v. Union Pacific R. R.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308. That the state courts are a unit upon the same proposition, if not sufficiently established by the citations of authority already made, will be further shown by a reference to *Junction Creek, etc., v. City of Durango*, 21 Colo. 194, 40 Pac. 356; *Commonwealth v. Norfolk Ry. Co.*, 111 Va. 59, 68 S. E. 851; *Missouri, etc., Ry. Co. v. Richardson et al.*, 25 Okl. 640, 106 Pac. 1108; *Canal, etc., Co. v. Orleans R. Co.*, 44 La. Ann. 54, 10 South. 389; *Norfolk & Western Ry. Co. v. Tidewater Co.*, 105 Va. 129, 52 S. E. 852; *Toledo, etc., Ry. Co. v. Toledo Electric, etc., Co.*, 50 Ohio St. 603, 36 N. E. 312; *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; *Attorney General v. Boston & A. R. Co.*, 160 Mass. 62, 35 N. E. 252, 22 L. R. A. 112; *Mississippi R. R. Co. v. Yazoo, etc., R. Co.*, 100 Miss. 595, 56 South. 668; *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494.

Therefore, it must be said that the conclusion may not be evaded that the authorities are unanimous in declaring that, in dealing with public utilities, regulation of use within the dedicated use is as far as the police power may be extended, and that when the regulation exceeds this, it is always void for unreasonableness, and may, depending upon the form and character of the order, be also void as an attempt to take property without compensation in violation of the constitutional protection. This does not mean that a board or commission authorized there-to may not itself exercise the power of eminent domain and so take property for public use. But when such board or commission attempts to do this, it must do it after compensation paid to the owner.

From this consideration of the railroad cases we pass to a review of the telephone cases which it is asserted support the commissioner's order. They are but two in number. The first of these is *Billings Mutual*

Telephone Co. v. Rocky Mountain Bell Telephone Co. (C. C.) 155 Fed. 208. The circuit court had before it the application of the *Mutual Telephone Company*, doing a local business in Billings, Mont., for an order compelling the defendant telephone company to permit it to make connections and use the latter's long-distance lines and service. The action was in eminent domain, plaintiff seeking a decree of the court "upon such terms and for such compensation as the court may deem just," and praying that "the court may proceed by law to determine the right to connect and the value of the services and use of defendant's lines." The defendant itself was operating a competing local line in Billings, and pleaded this and other facts declaring that public convenience did not require the connection; that the result of the order would be a taking of defendant's property for no higher public use, and therefore, a taking unauthorized by law. Many other matters of special defense were urged, but the foregoing statement is sufficient for the purposes of the present consideration. At the outset, then, it is to be noted that the action was not addressed to the consideration of any regulatory measure under the police power, but that it was a judicial action where the power of eminent domain was sought to be exercised. Thus the case is founded upon the fundamentals that defendant's property was to be taken, and that compensation should and would be made for such taking. The defenses, one and all, were grounded upon the proposition that, even in eminent domain proceedings, defendant's property could not be taken excepting for a higher use, and that the use contemplated was not a higher use. The decision of the court quotes section 14, art. 15 of the Constitution of Montana, as follows: "Any association or corporation, or the lessees or managers thereof, organized for the purpose, or any individual, shall have the right to construct or maintain lines of telegraph or telephone within this state, and connect the same with other lines; and the legislative assembly shall by a general law of uniform operation provide reasonable regulations to give full effect to this section." Following this constitutional authorization, the Civil Code of Montana reaffirmed the constitutional declaration as to the right of telephone companies to connect with each other's lines, and further declared that in case they could not do this by agreement, proceedings might be taken "and the damages assessed and the right of connection granted, as provided in the Code of Civil Procedure." It is argued by respondent that the Legislature so declared because there was in existence no administrative board vested with power to fix or withhold compensation. We cannot of course judicially know this to be true, but certain it is that the Legislature of Montana regarded such a use as a taking of property referable to the power of eminent domain, and made

provision accordingly. This, moreover, was the view of the learned circuit judge, as will abundantly appear from the language of his opinion. His holding was that the defendant had "erected its system subject to the reasonable impositions that might be put upon it by the Constitution and laws of the state," and that it was therefore under a duty "to allow such a connection and use." And, says the court, "the spirit of the Constitution and the letter of the laws of the state in which defendant operates its lines compel it, under its primal duty to the public, to yield to the right of plaintiff company to connect its lines with the defendant's, and to enjoy the use thereof in a reasonable and effective way, *provided of course damages are paid as required by law.*" We are unable to perceive how this case can successfully be called to the support of an administrative order which respondent earnestly insists is referable to the police power alone, and which refuses to recognize any right of compensation for the taking of the use. The only other case cited by respondents is *Pioneer Telephone & Telegraph Co. v. Grant Rural Telephone Co.* (Okla.) 119 Pac. 968. The Supreme Court of Oklahoma granted a rehearing in the case, and for this reason undoubtedly the decision does not appear in the authorized volumes of the Oklahoma reports, but it may be treated as an existing decision meriting consideration for the principles which it may announce, and the reasoning upon which they may be based. The application was by the Grant County Rural Telephone Company to compel the Pioneer Telephone & Telegraph Company to permit it to make connections. The petitioning company was a mutual company operating locally. Both companies were organized under the Constitution and laws of Oklahoma. Section 5 of article 9 of that Constitution provides that: "All telephone and telegraph lines, operated for hire, shall each respectively, receive and transmit each other's messages without delay or discrimination, and make physical connections with each other's lines, under such rules and regulations as shall be prescribed by law, or by any commission created by this Constitution, or by any act of the Legislature for that purpose." Section 18 of article 9 of the Constitution authorized the creation of a commission having "the power and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this state." This corporation commission had ordered the appealing company to permit connection to be made. The court of Oklahoma found and declared: "The appellant is engaged in a general public telephone business throughout the state, furnishing exchange telephone service from various exchange plants located in many cities and towns within the state, including the city of Pond Creek, and also furnishing toll or long-distance service over its

toll or long-distance lines constructed generally throughout the state, including toll or long-distance service to and from the city of Pond Creek." The decision of the court declares: "When appellant procured its charter and its franchise to engage in this public service business, it did it with the full knowledge that it thereby became an agency of the state, subject to its control and regulation, under the exercise of its police power, for the comfort and convenience of the citizens of the state (31 Cyc. 902), subject to the condition that appellant's property should not be taken, except by due process of law. When a fair and just compensation is afforded for such convenience, facility, and service, that constitutional requirement is satisfied. The order of the Commission as modified, must be affirmed." What, then, is this decision? It is that the appellant company had taken its franchise from the state of Oklahoma, and had engaged in business subject to its Constitution and its laws; that the Constitution required such telephone companies to permit connections with others and the use by such others of their instrumentalities; moreover, that this precise thing was the business in which the appellant company was engaged. It had dedicated its property to the public use of furnishing such long-distance service to local companies. Therefore the order compelling the company to permit a connection with the Grant County Rural Company was not the taking of appellant's property for a new use, but was a mere regulation of the use, which it was obliged by its charter, accepted under the Constitution of Oklahoma, to acknowledge, and the use to which in fact it had publicly dedicated its property. Herein the case is similar to the *Florida Terminal Railway Case* above discussed and distinguished from *Louisville & Nashville Railway Co. v. Central Stockyards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, where the demand for the right to occupy and use the terminal facilities of a railroad company which had not dedicated its property to such a public use was held to be an effort to take that property within the meaning of the Constitution. And, finally, it is to be noted that the Supreme Court of Oklahoma in the last two sentences quoted from its opinion, itself makes distinct recognition and affirmation of the fact that fair and just compensation must be granted to comply with the constitutional requirement against unlawful taking. Again we fail to perceive any force to this decision as applied to the present case, where the charter of the petitioning company was not subjected to any such right of connections, and where the company had never dedicated its property to such use by competing lines.

The principles to be deduced from the authorities may be thus summed up: Such a use by physical connection between two telephone companies could not be decreed by any court or commission, in the absence of an

authorizing statute. Where the Constitution or laws of a state declare that such use shall be permitted, it will be held that a corporation or an individual which thereafter enters upon the business does so, having in law dedicated its property to this public use; that is to say, to the use of allowing even competing lines to make connection with and use of its telephone service. Where, regardless of such constitutional or statutory provision, a company has actually dedicated its property to such use, it will not be allowed to indulge in unjust discrimination by arbitrarily refusing to one the connection and use which it has permitted to others. In these two classes of cases there is no change of use, and consequently no taking of property, but there is a regulation of use, and the compensation to be allowed need not necessarily be a compensation paid in advance other than such as will equitably compensate for the cost of connection, but will be a compensation for the future service which may be fairly adjusted by rates and tolls. In all other cases such an order for a physical connection does involve a taking of property within the Constitution, for which compensation must be made. It would seem that the matter would become quite apparent if the order in this case had decreed that for the transmission of messages the Pacific Telephone Company should turn over its agencies and instrumentalities to the Glenn county and Tehama county companies for 1 hour out of each 24. That the order actually made requires the Pacific Telephone Company to do this same thing for five minutes or ten minutes at a time during any and every hour of the day may tend to obscure the fact that it is a taking, but does not change it.

In this connection we cannot do better than to quote at some length from the well-considered case of *State v. Cadwallader*, 172 Ind. 619, 87 N. E. 644, 89 N. E. 319; where the Supreme Court of Indiana had under consideration some of these very questions: "By analogy and by statute, where they are constructed or maintained for the public for profit, or charges are made for their use, individuals conducting telephone exchanges are subject to the same obligations as corporations with respect to equal facilities and equal charges and freedom from discrimination and partiality as against any person, persons, or corporations in like situation, conducting a lawful business. Burns' Ann. St. 1908, § 5802. This duty does not amount to an absolute requirement that one company or individual shall furnish the patrons of another the use of its or his exchange and lines, unless it has been voluntarily undertaken, so that he or it may not afterward discriminate in classification. Patrons of the corporation or individual contracted with are bound to know that, in the absence of an undertaking so to do, another corporation or individual is not bound to subject its or his property to their use by direct or unrestricted

ed use of their lines. Telephone exchanges conducted for the benefit of the public for compensation may fairly be said to be impressed with a public interest, but their public character depends upon the nature, and not the extent, of their business. Each agency or exchange conducted by a corporate entity or individual is separate and distinct from all others with respect to the conduct of its business and in its relation to the public, and owes duties of an impartial character, and free from discrimination to all who are like circumstanced. The fact that it is a quasi public agent, by reason of being impressed with a public interest, is only so to the extent that it owes an impartial duty to all with respect to its particular capacity and undertakings from its or his own initiative agreement or consent. If this were not true, it will readily be seen that any one who saw fit could, by establishing a telephone exchange and procuring few or many patrons, or if a once extensive field of operations had existed when the relation began, which furnished the consideration, but had dwindled to small proportions, so that there would be practically no return to the one for the service to the other, could insist on connection with and service through indefinite extensions, and produce an inequality which in itself would be inequitable and lacking in consideration. If the right to such connection were once admitted to exist, as an abstract right, it would not depend upon the number of patrons, but upon the question of individual right, and it must be based upon that right if it exists at all, in the absence of contract, express or implied, for there would be no means of determining where the particular plant, exchange, or property becomes or ceases to be impressed with a public interest. It could only be thus impressed by the character of the use, and not by the number of users. The effect would be the destruction of the private right of contract, and would amount to practical confiscation of another's property. When a business becomes that of a common-carrier, it becomes impressed with the common-law duty of receiving from a connecting carrier and transporting commodities, the same as if offered by an individual, and so here relator and his patrons through him, upon compliance with the reasonable rules and regulations and payment of the compensation which is ordinarily charged to others, would be entitled to have his and their messages handled and transmitted by appellee's exchange; but that is a very different thing, in the absence of contract, from the demand that a physical connection shall be maintained involuntarily, and as of right, when from the character of the business itself the control of appellee's plant would be, in a measure, wrested from him and subjected to the administration of another, or many others. The private right of property and of contract may not thus be interfered with, and we are treating now

only of the relations of these quasi public utilities, where there is no statutory regulation and no contractual relation, express or implied."

There can be no escape then from the conclusion that the order here before us involves a taking of the property within the meaning of the Constitution, and that the taking, without regard to the authority of the commissioners to exercise the power of eminent domain, is a taking without compensation, respondent itself insisting upon this view of the case, saying: "The Commission has at no time contended or admitted that any compensation is due petitioner for a taking of its property. The compensation referred to is compensation to be paid to petitioner for services rendered in receiving and transmitting long-distance telephone messages." It, therefore, stands admitted, as indeed it must, that for the taking no compensation whatsoever is made. And of course it cannot be contended, and is not contended, that an apportionment of rates or tolls for a service to be rendered in the future is a compensation for the present taking of property, and as little can it be said that the allocation of such rates and tolls to be earned in the future can ever measure up to the constitutional requirement that property shall not be taken without compensation first made and paid to the owner. *Attorney General v. Old Colony Railroad*, 180 Mass. 62, 35 N. E. 252, 22 L. R. A. 112.

This consideration has been addressed principally to the proposition of the taking of property by the subjection of it to a new use. There is, however, within this case, as has previously been outlined, the further contention that there is an additional taking, in that the property of the company is turned over to the use of a competing company, to the manifest and proved injury to petitioner's local business. We need not dwell upon this further than to say that it is well established by the quotations and citations above given that this is an added element of injury in the taking and a proper matter for compensation.

There is left for consideration one other proposition which is not presented in argument, but which necessarily arises under the interpretation which we have given to the amended provisions of our Constitution. That interpretation, as we have said, makes paramount even to the Constitution itself the powers which the Legislature may see fit to confer upon the Railroad Commission. Amongst those powers is that which authorizes the Commission to sit as a tribunal in the exercise of the power of eminent domain and to fix compensation under its awards. This clearly is a power at variance with that constitutional provision above quoted, which declares that compensation for the taking of property shall be assessed by a jury and paid into court. It is the equivalent of saying

that in the case of public utilities the power of eminent domain shall be exercised and damage assessed by the Railroad Commission, while the owners of all other kinds of property shall have this assessment made in court by a jury. Conceding this discrimination to be valid so far as the state Constitution is concerned, either because it is an amendment superior to all constitutional provisions, or because from the nature of public utilities and the difficulties in assessing damages for the taking, a distinction may be drawn and a different mode provided, there is still left the problem whether or no the rights of public utilities are violated, in that this would be a denial to them of the equal protection of the law. This problem is of no practical consequence in the present case, for, as has been said, there is no contention upon the part of the respondent that it allowed any compensation whatever for the taking of property.

In the consideration of this problem our Constitution (article 1, § 14) is to be read as though amended by the proviso that in the case of all public utilities the power of eminent domain may, by authority of the Legislature, be vested in the Railroad Commission, with power to that body to determine the public convenience or necessity and make an award for damages without the intervention of a jury. The requirement of a jury and of a prepayment of damages is not a part of the federal Constitution, nor of that of many of our states. It is in those jurisdictions quite a common practice to create boards and commissions to exercise the power on behalf of the state, and to make awards between litigants. It is certainly true that in the vast modern development of public utilities in their multifarious activities, in their complicated interrelations, where a taking of property is involved, a great saving of time, and a more just award may be expected from a learned, skilled, and dispassionate tribunal such as the Railroad Commission than can ever be hoped for from the haphazard verdicts of juries. And very good reasons therefore appear why, for the benefit of the state as well as for the benefit of the public service companies, awards as to the latter should be made by this body, and not by a jury. It is therefore concluded that no violence is done to the rights of petitioner under the Constitution of the United States by this proviso of the state Constitution authorizing the Railroad Commission to exercise the power of eminent domain and assess damages for a taking of property.

But while the compensatory award in such cases rests with the Railroad Commission, it is still the duty of that Commission to make compensation for such a taking. This not only by virtue of article 1 of section 14 of the Constitution, but as well by the provisions of the Public Utilities Act itself. For example, in section 41, dealing with the taking of

property through the use thereof, the act declares that the railroad Commission shall "prescribe a reasonable compensation and reasonable terms and conditions for the joint use." We do not find in the public utilities act any intent to deprive a public utility, whose property is so taken, of the compensation *in advance*, which is the due, under our state Constitution, of the owner of any other kind of property. So that, while in this class of cases, the jury is eliminated and the award of the Railroad Commission substituted for the jury's verdict, it still remains as a part of our Constitution that the compensation decreed to the public utility for a taking of its property shall be paid in advance of such actual taking.

We may now sum up our conclusions as follows:

1. The Constitution has, in the Railroad Commission, created both a court and an administrative tribunal.

2. The Constitution has authorized the Legislature to confer additional and different powers upon this Commission touching public utilities unrestrained by other constitutional provisions.

3. The legality of such powers as the Legislature has or may thus confer upon the Commission, if cognate and germane to the subject of public utilities, may not be questioned under the state Constitution.

4. That therefore the deprivation of jurisdiction of the courts of the state may not be questioned.

5. That therefore the reasonableness of the Railroad Commission's orders and decrees may not be inquired into by any court of this state, and consequently is of federal cognizance only.

6. That the right to exercise the power of eminent domain in matters involving public utilities has been vested by the Legislature in the Railroad Commission, and that the exercise of this power and the making of awards thereunder without the intervention and verdict of a jury are not in violation of the Constitution of this state or of the United States.

7. That payment of such awards must be made in advance of the actual taking.

8. That the order in question involves an exercise of the power of eminent domain and not of the police power.

9. That the order in question admittedly gives no compensation for the taking of petitioner's property, and is therefore void by force and virtue of the Constitution of the state and of the United States.

10. That the order in question must therefore be, and it hereby is, annulled.

We concur: LORIGAN, J.; MELVIN, J.

SLOSS, J. (concurring). I agree with the conclusion that the order under review should be annulled, and concur in the judg-

ment so declaring, but cannot assent entirely to the reasoning by which this result is reached. Important as is the determination of the right of the Railroad Commission to order the physical connection which it has here directed to be made between the lines of the petitioner and those of the Glenn and Tehama companies, more important still is the correct ascertainment of the extent of the power of this court to review orders of the Railroad Commission under the writ provided for in section 67 of the Public Utilities Act, or otherwise. What orders may be reviewed, what claims of right may be examined here? The correct determination of these questions lies at the base of the decision, not only of the particular case before us, but of the similar proceedings already pending, and numerous others which will undoubtedly be brought to test the exercise by the Railroad Commission of the authority vested or believed to be vested in it. I think it proper, therefore, to state, in some detail, my views on these fundamental questions, and to point out how far those views are not in complete accord with the conclusions expressed in Justice HENSHAW'S opinion.

The courts of this state derive their powers and jurisdiction from the Constitution of the state. The constitutional jurisdiction can neither be restricted nor enlarged by legislative act. An attempt to take away from the courts judicial power conferred upon them by the Constitution, or to impose upon them judicial powers not granted or authorized to be granted by the Constitution, is void. This declaration is not only in accord with the decisions elsewhere (*Marbury v. Madison*, 1 Cranch, 137, 2 L. Ed. 60), but has been held by this court from the early history of the state (*Thompson v. Williams*, 6 Cal. 88; *Hicks v. Bell*, 3 Cal. 219; *Burgoyne v. Supervisors*, 5 Cal. 9; *Parsons v. Tuolumne Water Co.*, 5 Cal. 43, 63 Am. Dec. 76; *People v. Applegate*, 5 Cal. 295; *Fitzgerald v. Urton*, 4 Cal. 235; *Wilson v. Roach*, 4 Cal. 362; *Zander v. Coe*, 5 Cal. 230; *Haight v. Gay*, 8 Cal. 297, 68 Am. Dec. 323; *People v. Peralta*, 3 Cal. 379; *Caulfield v. Hudson*, 3 Cal. 389; *In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; *Tulare v. Hevren*, 126 Cal. 226, 228, 58 Pac. 530; *Chinn v. Superior Court*, 156 Cal. 479, 105 Pac. 580). It is still the rule except in so far as it may have been modified by changes in the Constitution itself.

By the amendment in 1911 of section 22 of article 12, creating a Railroad Commission, it is provided that: "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to

confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution." And section 23 of the same article, defining public utilities and declaring that they are subject to the control and regulation of the Railroad Commission, provides that "the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution." To the extent, then, that the Legislature has acted in conferring powers (germane to the subject of the regulation and control of public utilities) upon the Railroad Commission, it necessarily follows that the validity of such grant of powers is not to be questioned by reason of any other provision of the state Constitution. This position is fully developed in Justice HENSHAW'S opinion. It would seem to follow, too, that if a legislative grant of power to the Railroad Commission is so extensive in terms as to exclude or limit the power of any court to question or review the order of the Commission, such exclusion or limitation must be recognized as valid, although it amounts to a restriction of a part of the jurisdiction conferred upon the courts by other parts of the Constitution. If the Legislature has plenary power to confer powers upon the Railroad Commission, it may declare that the orders of the Railroad Commission shall be final and conclusive, and not subject to review by any court of this state. Such declaration would be an exercise of the unlimited power of the Legislature to confer additional powers upon the Railroad Commission. If the Legislature may, as a part of its grant of powers to the Railroad Commission, take away all right of the courts to review the orders of the Commission, manifestly it may take away a part of such right by providing that the acts of the Commission shall be subject to only a limited and specified review. There can, then, be no objection, under the Constitution of this state, to the provision of the Public Utilities Act (section 67) that "no court of this state (except the Supreme Court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decision of the Commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain or interfere with the Commission in the performance of its official duties; provided, that the writ of mandamus shall lie from the Supreme Court to the Commission in all proper cases." I fully agree therefore, with Justice HENSHAW'S view that section 67 of the Public Utilities Act is valid and effective in so far as it takes from every court, except the Supreme Court, the power to review or suspend any order of the Commission, and in so far as it takes from the Supreme Court the power to review such orders in any mode other than

those specially permitted by the act, to wit, by writ of review or mandamus.

But the conclusion that the amendments to sections 22 and 23 of article 12 of the Constitution authorize the Legislature to take away or to *limit* the jurisdiction of the courts with respect to orders and decisions of the Railroad Commission does not carry with it the conclusion that the Legislature is authorized to *enlarge* the constitutional jurisdiction of any court of this state. These amendments do not give to the Legislature any right to alter the jurisdiction of the courts except to the extent that such alteration is involved in a grant of power to the Railroad Commission. To say that the orders of the Railroad Commission shall not be subject to review is to confer upon the Railroad Commission a greater or more absolute power than it would have if its orders were subject to review in the regular course of judicial procedure. To say, however, that any court shall have a jurisdiction beyond that conferred upon it by the Constitution to review, annul, or modify an order of the Railroad Commission is not to grant additional or other powers to the Railroad Commission. It is, on the contrary, to limit the power of the Railroad Commission and to grant additional powers to the courts. There is nothing in the amendments of 1911 which authorizes such extension by the Legislature of the jurisdiction of the courts. The rule must therefore be now, as it has always been, that any legislative attempt to confer upon the courts powers beyond those conferred by the Constitution is void.

The jurisdiction of the Supreme Court is carefully defined by the Constitution. The court has jurisdiction on appeal from the superior court in certain cases. It also has appellate jurisdiction in matters pending before a district court of appeal which shall be ordered by the Supreme Court to be transferred to itself, and it has original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. The Public Utilities Act does not attempt to confer upon this court any appellate jurisdiction. Under the views already expressed it is not competent for the Legislature to confer upon the Supreme Court any original jurisdiction which is not embraced within one or the other of the writs above mentioned, i. e., mandamus, certiorari, prohibition, and habeas corpus and all other writs necessary or proper to the complete exercise of its appellate jurisdiction.

Section 67 of the act provides that the party against whom a decision is rendered by the Railroad Commission may apply to the Supreme Court for a writ of certiorari or review for the purpose of having the lawfulness of the order inquired into and determined. The writ of review (certiorari)

is one of the writs which, under section 4 of article 6 of the Constitution, is within the original jurisdiction of the Supreme Court. To the extent, then, that certiorari is an appropriate remedy to review the orders of the Commission, this court would have had power to issue such a writ if the Public Utilities Act had been silent on the subject of the right of the courts to examine the acts of the Commission. And, considering the settled rule with respect to the power of the Legislature to enlarge the constitutional jurisdiction of the courts, the power to issue a writ of review and to dispose of the questions arising under it is to be regarded as derived primarily from the Constitution, rather than from section 67 of the Public Utilities Act.

The writs embraced in the grant of original jurisdiction contained in section 4 of article 6 of the Constitution are the designated writs as they were understood and defined at the time the Constitution was adopted, and the Legislature has no power to extend the scope of the writs as thus limited. *Maurer v. Mitchell*, 53 Cal. 291; *Camron v. Kenfield*, 57 Cal. 550. The writ of review, as is well settled in this state, is issued only to an officer or tribunal exercising judicial functions. It lies for the purpose of reviewing only judicial or quasi judicial proceedings. *People v. Bush*, 40 Cal. 346; *Quinchard v. Board of Trustees*, 113 Cal. 664, 45 Pac. 856; *Cook v. Civil Service Comm.*, 160 Cal. 589, 117 Pac. 663. It does not lie to review errors of fact or law, but only to determine whether an officer, board or tribunal has exceeded his or its jurisdiction. This is the purpose of the writ as declared by section 1068 of the Code of Civil Procedure. The provision of section 1074 of the same Code (enacted prior to the adoption of the Constitution of 1879) that the review cannot be extended further than to determine whether the inferior tribunal, board, or officer "has regularly pursued the authority of such tribunal, board, or officer" did not assume to enlarge the range of inquiry. This court has expressly held that the clause "whether the tribunal has regularly pursued its authority" is the equivalent of "whether it has exceeded its jurisdiction." *C. P. R. R. v. Placer County*, 43 Cal. 365; *Quinchard v. Board*, supra.

It follows that the inquiry which we may make under the writ issued in this case is limited to determining whether or not the Railroad Commission has exceeded its jurisdiction in making the order complained of. If section 67 of the act undertakes to give to this court any broader power than that, the attempt so to do must be disregarded as in violation of the Constitution. I think, however, that, properly construed, section 67 does not assume to authorize anything more than a search into the jurisdiction. It provides that the review shall not be extended further than to determine "whether the Commission has regularly pursued its authority." This is the very language of section 1074, and is

synonymous with determining whether the Commission has acted within its jurisdiction. The words "including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the state of California" do not extend the inquiry as thus defined. The examination of constitutional rights is, under the terms of the Public Utilities Act, *included* in the inquiry whether the Commission has regularly pursued its authority. It is not made a separate and distinct subject of judicial scrutiny. Whether or not the Commission is acting within its jurisdiction may or may not depend upon constitutional questions.

I do not understand, as seems to be held in Justice HENSHAW'S opinion, that *Spring Valley Water Co. v. Bryant*, 52 Cal. 138, decides that the question whether the petitioner's constitutional rights have been invaded can never be inquired into on certiorari. The declaration quoted from the opinion in that case was made and is to be read in connection with the determination of the court that the order sought to be reviewed was not a judicial order. This being so, it was not a proper subject of a writ of certiorari, whether or not constitutional rights were claimed to be invaded. If the constitutional question raised is one that goes to the jurisdiction of the lower tribunal, I do not see why it, as well as any other jurisdictional question, cannot be considered and decided under such a writ. If, for example, the Legislature should undertake to give to the justice's court original jurisdiction of an action in equity, I do not doubt that a judgment rendered by such court in an action of that character could be reviewed and annulled upon certiorari, upon the ground that the legislative attempt to confer jurisdiction was in violation of the Constitution. Be this as it may, the inquiry in this case cannot extend further than to determine whether or not the Railroad Commission has acted within its jurisdiction in making the order complained of. I do not go specifically into the question whether the order complained of is judicial in character, and therefore subject to review, as I think that question is virtually determined in favor of the petitioner by the decision in *Imperial Water Co. v. Supervisors*, 162 Cal. 14, 120 Pac. 780.

What, then, are the grounds of objection to the order here made? It is said that the order is, in effect, one for the taking of private property for public use without compensation, and that such order, therefore, violates the provisions of both the state and federal Constitutions.

I do not see how it can be said that there is any violation of the state Constitution. The procedure of the Railroad Commission and the order made by it were in strict conformity with section 40 of the act. That section gives the Commission power to do just what it has done. If this amounts to a

taking of private property for public use without compensation, it is a taking authorized by the terms of the act. Under the provisions of sections 22 and 23 of article 12 of the Constitution above quoted, the powers granted to the Commission by the act are not controlled by any provisions of the state Constitution. Hence it cannot be said that an order made under a power expressly conferred by statute upon the Commission violates that Constitution. Section 40 names the conditions on which the order can be made, viz., that it can reasonably be made, that the lines can be made to form a continuous line of communication, that public convenience and necessity will be subserved thereby, and that the purpose is not primarily to secure local transmission. Finding these conditions, the Commission is authorized to order the connection under rules and regulations established by it and, if the companies do not agree, to fix the division of the cost of connection and of the rates. Evidently no compensation except such as may inhere in a division of tolls is contemplated. It is, then, the law, and not any order made outside of the law, that takes property without compensation, if property is thus taken. I do not find in the act any provision authorizing the Railroad Commission to exercise generally the power of eminent domain, or to assess damages on condemnation. The only section authorizing it to allow a compensation for property taken is section 41, which refers solely to the case of one public utility using the conduits, subways, tracks, wires, etc., of another *on, over or under a street or highway*. This section has no pertinency to the case at bar. There is no provision which requires or authorizes the Railroad Commission, in a case like the one before us, to award to one of the two telephone companies directed to make a physical connection between their lines any compensation as such for the taking of its property. The Commission, therefore, has strictly pursued the powers which the Legislature, acting under the plenary power conferred upon it by the state Constitution, has granted, and the provisions of other parts of that Constitution seem to me to be out of the case.

The other ground of attack is that the order is a violation of the rights of the petitioner under the federal Constitution. The fifth amendment to the Constitution of the United States, providing that private property shall not be taken for public use without just compensation, has no bearing upon the case, as it is well settled that this amendment is a limitation upon the power of the federal government, and not upon that of the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. Ed. 672. If, however, the order in question does amount to a taking of private property for public use without just compensation, such taking is a violation of the rights of the petitioner under the fourteenth amend-

ment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property without due process of law. "A law which authorizes the taking of private property without compensation or for other than a public purpose cannot be considered as due process of law in a free government." 1 Lewis, *Eminent Domain* (3d Ed.) § 11. And this doctrine is fully elaborated and clearly laid down in *C., B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979. See, also, *Martin, Ex parte*, 13 Ark. 198, 53 Am. Dec. 321; *Harness v. C. & O. C. Co.*, 1 Md. Ch. 248; *Staton v. N. & C. R. Co.*, 111 N. C. 278, 16 S. E. 181, 17 L. R. A. 838.

Upon the remaining question—whether the order of the Commission amounts to a taking of the property of the petitioner without compensation—I agree with the conclusion reached in Justice HENSHAW'S opinion, and, in substance, with the reasoning upon which that conclusion is based. It is plain that the answer to this question depends upon an ascertainment of the precise nature of the governmental power which has been called into use in making the order before us. If the Commission has merely exercised the power of regulation conferred upon it—if, in other words, it has, as an instrument of the state, used the police power of the state—no right under the federal Constitution is invaded, unless the order is so arbitrary and unreasonable as to amount to a confiscation of property. The order, viewed as a pure regulation, can hardly be so characterized. Even if it could, it is doubtful whether, in view of the provision of the Public Utilities Act that the findings and conclusions of the Commission on questions of fact, including reasonableness and discrimination, shall be final and not subject to review, the order could be attacked on this ground in any court of this state, however assailable it might be in the federal courts. If, on the other hand, the Commission, pursuing the power attempted to be granted to it, has made an order which amounts to a taking of the petitioner's property for public use, the Commission, as an agency of the state, was exercising the power of eminent domain. If that power was sought to be exercised without at the same time making provision for compensating the petitioner for the property taken, the order was one which the state was, by virtue of the fourteenth amendment to the federal Constitution, precluded from making. It may be that, if the statute contained proper provision for an assessment and payment of compensation for the taking, the failure of the Commission to fix and allow adequate compensation could not be made the basis for assailing the order on certiorari. In such event, it might be said that the statute vested jurisdiction in the board, and that an order which omitted to provide compensation would merely con-

stitute error in the exercise of jurisdiction. See *Bishop v. Superior Court*, 87 Cal. 228, 25 Pac. 435.

But, as already stated, the statute itself fails to provide for the assessment or payment of damages, and such statute must therefore be held to be in conflict with the federal Constitution to the extent that it assumes to authorize the taking of private property without compensation. A void statute—and one which conflicts with either the federal or the state Constitution is void—is not effective to confer jurisdiction on any court or board whose authority to act in the particular case is not granted except by that statute. This is well illustrated by the case of *Conn. River R. R. Co. v. County Commissioners*, 127 Mass. 50, 34 Am. Rep. 338, where it was held that a writ of prohibition would lie to prevent proceedings in eminent domain under a statute which did not make adequate provision for compensation to the party whose property was sought to be taken.

I think it cannot be doubted that an order, compelling the owner of private property, against his will, to subject that property to the use of the public or of an individual, amounts to a taking of property. For property consists, not of the tangible things, whether realty or chattels, over which dominion is claimed, but of the right to possess or use those things. An order requiring the owner of a house to permit others to occupy and use it, is a taking of that house, although the legal title remains in the owner. So an order compelling the owner of a telephone line, or of any other property adapted only to a particular use, to surrender it, in a greater or less degree, to such use by others, is clearly a taking of that property. Where the particular property has been dedicated to a public use, where the property, in other words, is employed in a public service, the owner has consented that the public may use his property within the limits to which the dedication extends. Within those limits, the use by the public does not constitute a taking, or, if it be a taking, it is one which has been invited by the owner. But the fact that property has been offered for one public use does not authorize the public to use it for other and different purposes. The purveyor of a public service—whether that of a carrier or an innkeeper, a light or power company, a telephone or a telegraph company—is not bound to undertake a service different from that which he has professed to render. *Wyman, Pub. Serv. Corp.* § 251. Thus a railroad which has undertaken to carry passengers only could not be compelled to accept freight offered for shipment, and it can hardly be doubted that a law directing it to undertake the new service would amount to a taking, pro tanto, of its property, for which compensation would have to be made. On like reasoning, an order compelling a telephone company to subject its lines and ap-

pliances to the burden of a service substantially different from that which it has offered to perform is a taking of its property. It seems clear to me that the physical connection ordered in this case does compel the petitioner to allow a use of its lines beyond the use which it professes to extend to the public. It is more than a regulation of a public service undertaking; it is a direction to perform a kind of service which has not been undertaken. The petitioner has established lines of long-distance communication, and has connected them with local exchanges, so that its customers served by the various local exchanges may have the benefit of the long-distance lines. The long-distance advantages are also at the service of those who apply for them at pay stations of the company. No doubt the petitioner could not arbitrarily exclude any member of the classes to which its service has thus been offered. Any one desiring a telephone installed within a district to which local service has been offered, or one applying at a pay station for a long-distance connection, would be entitled to the service demanded. But these are very different things from compelling a physical connection with the lines of a company competing with the petitioner in a local field, to the end that the competing company's patrons may have the benefit of long-distance service from their homes. Of course, if the Pacific States Company had dedicated its long-distance plant to this use—if it had held itself out as prepared to make and had made connections with such rival companies—it would be bound to treat all alike. An order requiring a connection would in such case be a mere regulation of the service within the scope of the professed service. But such is not the case here.

It is true that the findings of the Commission refer to the fact that the petitioner had, under agreement, connected with other companies. Mention of this circumstance was made in answer to the claim that there were practical difficulties in the way of making a physical connection. It is not claimed, however, and under the evidence there was no room to claim, that the petitioner had ever made connections with competing companies. All it had done was, upon terms and for a consideration (or compensation) satisfactory to it, to connect with companies operating in territories where it offered no local service. The fact that the service here is directed to be given to competing companies seems to me to be a most essential factor in the conclusion that the petitioner is called upon to subject its property to an additional and different use. Rival companies are not within the class of the public to which it has offered its facilities for use. *Wyman Pub. Serv. Corp.*, § 698. If there were two companies furnishing electric light or power to the inhabitants of a city, could one of such companies, having a surplus of current beyond that required for its existing

contracts, be compelled to furnish that surplus to the rival company, for no other compensation than a rate fixed by public authorities, to the end that the rival might be enabled to compete with it more effectively? It would seem fairly clear that this was not a service which the first company had undertaken or professed to perform. The case at bar is, I think, the same in principle. By installing its long-distance plant for the use of subscribers to its local systems, the petitioner has developed an element of great value in the conduct of its local business at various points. It has thereby built up for itself an advantage, and a perfectly legitimate one, over competitors who, with a much smaller investment and at far smaller risk, have created only a local system. It has never offered to share this advantage with rival companies. To be compelled to so share it is to subject its property to a new use—and thus, in part, to take it. If the public interest requires the connection, appropriate provision for estimating and paying the damage occasioned thereby must be made. A mere division of the tolls, even though the entire toll may be allotted to the petitioner, is not the compensation required as a condition to the taking of property for public use. In the first place, it is uncertain, both, as to amount and time. *Conn. River R. R. Co. v. County Com'rs*, 127 Mass. 50, 34 Am. Rep. 338. In the next place, the division of tolls will only pay the company for the service actually rendered by it from time to time. It will not afford any compensation for the damage occasioned by the taking, i. e., by the subjecting of its property to the demands of a public service to which that property was not dedicated. What the measure of such damage is I do not attempt here to define, but it is plain that it includes elements not covered by a mere apportionment of tolls.

The conclusions reached may be summarized as follows:

1. This court has no power to review the orders of the Railroad Commission except by means of a writ of certiorari, or to control its action except in appropriate cases by mandamus. No other court of the state has any power to review the orders of the Commission or to control its official action.

2. Upon a writ of certiorari against the Railroad Commission this court must inquire whether the Railroad Commission has acted within its jurisdiction, and if this inquiry be answered affirmatively the proceeding must be dismissed.

3. If the Railroad Commission has acted in conformity with the powers granted to it by the Legislature, the validity of its order cannot be questioned in this court or elsewhere under a claim of violation of any provision of the state Constitution other than the provisions relating to the Railroad Commission. This statement is, however, to be taken subject to the qualification that the powers con-

ferred by the Legislature on the Railroad Commission must be such as are cognate and germane to the purposes for which the Railroad Commission was created; i. e., the regulation and control of public utilities.

4. Where the Commission has acted within the powers conferred upon it by the Legislature, the only recourse of one affected by its action is to the guaranties of the federal Constitution. And in cases where the violation of the right guaranteed by the federal Constitution does not involve an excess of the jurisdiction of the Railroad Commission, the federal courts are the only ones in which he may assert his rights under those guaranties.

5. If the Railroad Commission, acting within the powers granted to it by the Legislature, makes an order which amounts to a taking of private property for public use without compensation, such order does not violate any provision of the Constitution of this state.

6. If in making such order private property is taken for public use without compensation, such taking is a violation of the provisions of the fourteenth amendment to the Constitution of the United States.

7. Any provision of the Public Utilities Act is void to the extent that it purports to grant to the Railroad Commission power to take private property without compensation, and the act confers no jurisdiction on the board to make an order having this effect.

8. Section 40 of the act, authorizing the ordering of physical connections between telephone companies, is void in so far at least as it purports to require a company having long-distance and local service, to make a physical connection for long-distance service with a company competing locally, where the first company has not professed to render this kind of service. An order for physical connection is, in such a case, a taking of the property of the complaining company without compensation.

9. The order under review was in excess of the jurisdiction of the Commission and should be annulled.

I concur: SHAW, J.

ANGELLOTTI, J. (dissenting). I am unable to concur in the judgment annulling the order of the Railroad Commission, and, in view of the importance of the case, deem it proper to state very briefly my conclusions upon what I consider the material questions presented.

I concur in the conclusions reached by Mr. Justice SLOSS in his concurring opinion, numbered in the summary at the end thereof as 1, 2, 3, 4, and 5, and in the reasoning upon which the same are based. Nor can there be any doubt that the conclusion in said summary numbered 6 is correct. It is not so clear to me, however, that, even if we assume

that under the facts of this case, the execution of the order in question involves a prohibited taking of private property without compensation, any *excess of jurisdiction* on the part of the Railroad Commission is shown, or anything other than such a violation of a right guaranteed by the federal Constitution, as, in view of the provisions of our state Constitution and those of the Public Utilities Act, can be alleged and determined only in the federal courts.

However this may be, I am not convinced that there is shown by the facts of this case any "taking" of petitioner's property within the meaning of that term as used in our law prohibiting the taking of property without compensation to the owner. Not being satisfied of the correctness of the conclusion that such a taking is shown, I am unable to concur in the judgment.

It is clear enough to me that the Legislature in enacting section 40 of the Public Utilities Act considered that it was simply providing for the regulation, under the police power of the state, of the use of property by the owner thereof for the purposes to which it had been dedicated for public use, and that it was not at all providing for the taking of private property for a public use, or the taking of property already subjected to a certain public use for a different public use. The absence of any provision at all for the ascertainment of the compensation to be made for the taking of any property, and the limiting of such matter to compensation for the *service* to be rendered, when considered in connection with the language of the section, would appear to sufficiently indicate this. Clearly section 40 does in terms effectually authorize anything specified therein that amounts to no more than a reasonable regulation, under the police power of the state, of the use of property by the owner thereof for the purposes to which it has been dedicated.

While the question presented is one not entirely free from doubt in my mind, it seems to me that the situation presented by the facts of this case is analogous to that presented where two railroad companies are required to connect their tracks, and each company is required to receive at the point of connection for transportation over its route cars delivered to it for such transportation at such point, proper compensation for such service of transportation being made to it. The validity of orders requiring this, where authorized by constitutional or statutory provisions of a state, appears to have been declared by decisions of the United States Supreme Court, on the theory that there is no prohibited taking of property, and that the order is a lawful exercise of the police power of regulation, demanded by the public interest. The carrying company in such a case is simply engaged in using its line of railroad *for the purposes to which it has dedicated it*, the carrying of

passengers and freight presented for transportation at a point on its route, receiving proper compensation for its *service*; and the fact that it is compelled to do this with cars delivered to it by another company involves no prohibited taking of any part of its property. Such appears to me to be the theory of the decisions of the ultimate tribunal upon this point, the United States Supreme Court. Such a case is very different from one where it is sought to compel one railroad to admit another to the use of its tracks by trains operated by and under the control of the employes of the other road, involving, as it does, a physical occupation and control of the property of the road by the other road for its own purposes. It is urged that such is the situation here. To me this conclusion appears to be based upon an entirely immaterial factor, which is necessarily incidental to the use of the telephone, viz., that the exclusive use of a wire of the petitioner is essential to the carrying on of a conversation between a subscriber of one of the independent companies and the person on petitioner's system with whom the conversation is being had. This, as I understand it, is claimed would render the order one constituting a taking of petitioner's property by the independent company for the period of the conversation. But this is the same kind of a taking that any member of the public conducting a conversation from a public exchange of petitioner in Willows or Red Bluff, with a person anywhere on petitioner's system, would enjoy. It is simply an essential part of the *service* for the rendition of which, for a proper compensation, the property of petitioner is dedicated, and, as long as proper compensation for the *service* is made, there is no prohibited taking. It cannot be claimed that petitioner could lawfully refuse to allow any of the subscribers of the independent companies who present themselves, personally or by agent, at their public exchange in Willows or Red Bluff, to use its system upon paying the toll prescribed for the service demanded. Except in so far as the mere matter of convenience is concerned, is there anything more involved here, material on the question of a "taking" of petitioner's property? The independent companies may well be said to be simply the agents of their subscribers for the purpose of procuring at the exchanges of petitioner, Willows and Red Bluff, respectively, the long-distance service offered to the public generally at those points by petitioner. They propose to so physically connect their systems with that of petitioner at the points named, at their own expense, that their subscribers may at those points, upon payment by such companies to petitioner of the prescribed rate therefor, obtain the service offered to the public generally. The petitioner's system remains under the exclusive control of petitioner through its own employes. They alone, so far as any service

over petitioner's system is concerned, furnish the service. Without their co-operation, not an inch of petitioner's system may be used for such service by the independent companies or by any subscriber thereof, and such use is at all times under their exclusive control. The service is to be furnished in precisely the same way that it is furnished to any other person obtaining such service, the subscribers of the independent companies having no preferential right over any other person in the matter of such service. There is no question properly presented in this proceeding as to inadequacy of the rate to be paid for the service.

I do not dispute the proposition made in the opinion of Mr. Justice SLOSS to the effect that if the physical connection ordered in this case compels petitioner to allow a use of its lines for other purposes than those for which it may fairly be held to have been dedicated, which is held to be the fact in the prevailing opinions, a very different situation would be presented. My difficulty is in seeing that such will be the effect of the physical connection ordered. It seems to me that the dedication of the property of petitioner includes the use here ordered, which is, as I look at it, simply the use by itself of its own system for the transmission of long-distance telephone messages of the public, for a compensation, the order of the Commission confining the use under the physical connection solely to long-distance messages. And I cannot see that the fact that each of the independent companies is a rival of petitioner in the matter of local business in the particular locality served by it is at all material upon the question whether there is a "taking" of petitioner's property in the prohibited sense. That fact might be material in determining whether, under the circumstances of this case, the regulatory order of the Commission was reasonable and without discrimination, a question which the state courts appear to be precluded from considering in view of certain provisions of the Public Utilities Act, and as to which petitioner's only recourse is the federal courts.

The question of a prohibited taking, which I have briefly discussed, is, as I have said, one not entirely free from doubt. My own opinion, in the light afforded by the decisions of the United States Supreme Court, is that there is here no such taking of petitioner's property. I deem it unfortunate that a decision of this court holding to the contrary precludes a consideration of the question by the United States Supreme Court, the final authority on such questions. This result, however, is due solely to what I consider a serious defect in the law, and in no degree to this court, the members of which are bound to decide the question in accord with their conclusions thereon, regardless of whether or not there is a power of review

lodged anywhere. But that a decision of this court to the effect that a person's rights under the federal Constitution are not violated by the enforcement of a state statute may be reviewed by the United States Supreme Court at the instance of the party complaining, and that one to the effect that such rights are violated may not be so reviewed at the instance of the state, with the result that the decision of the state court is final and conclusive against the state on a purely federal question, appears to me to present a situation that is not only most unfortunate, but also one for which there is no warrant. Yet such appears to be the law as it now stands.

E. W. McLELLAN CO. v. EAST SAN MATEO LAND CO. (S. F. 5,914.)

(Supreme Court of California. Dec. 27, 1913.)

1. CORPORATIONS (§ 521*)—ACTIONS—FINDINGS—CONSTRUCTION.

In an action on an account stated between plaintiff's assignor and defendant corporation through O, its president and general manager, the evidence showed that O, throughout the transaction acted entirely in his official capacity. The court found that no account was stated between plaintiff's assignor and the corporation, but that there was an account stated between plaintiff's assignor and O, "the president and manager" of defendant. *Held*, that such finding should be construed to mean that O, stated the account claiming to do so for the company, but that he had no authority to so act for it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2094-2098; Dec. Dig. § 521.*]

2. APPEAL AND ERROR (§ 931*)—FINDINGS—INTERPRETATION—REVIEW.

The rule that findings must be interpreted to support the judgment if reasonably possible is controlled on appeal by the further requirement that the findings must be so interpreted as to be within the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

3. CORPORATIONS (§ 432*)—PRESIDENT AND MANAGER—AUTHORITY—ACCOUNT STATED—EVIDENCE.

Evidence *held* to require a finding that the president and general manager of defendant corporation was authorized to bind it by consenting to the statement of an account between the corporation and plaintiff's assignor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1721, 1723-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

4. CORPORATIONS (§ 432*)—OFFICERS—AUTHORITY—EVIDENCE—BY LAWS.

Where, on an issue as to the authority of the president and general manager of a corporation to agree to the statement of an account between plaintiff's assignor and the corporation, plaintiff offered a resolution of the directors appointing O, as general manager, with power to make all contracts in its behalf, by laws of the corporation making it the duty of the president, who was also such general manager, to sign all contracts and other instruments in writing which had been first approved by the directors, etc., but not assuming to limit

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the manager's power with respect to parcel contracts, were inadmissible.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726-1735, 1737, 1743, 1762; Dec. Dig. § 432.*]

5. WITNESSES (§ 272*)—CROSS-EXAMINATION.

Where, in an action on an account stated between plaintiff's assignor and defendant corporation, defendant claimed that no agreement had been reached for the payment of a fixed sum, but that the only proposition made by defendant's president had been to pay the major portion of any sum that might be found due on certain contracts for the sale of lots by defendant to various purchasers, the contracts, out of which the claims forming the basis of the account stated arose, were properly admitted as a part of the cross-examination of plaintiff's assignor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 961; Dec. Dig. § 272.*]

6. ACCOUNT STATED (§ 8*)—SCOPE OF ISSUE.

The rule that, in an action on an account stated, the items of the original demand cannot be examined does not apply where defendant has raised an issue regarding his assent to the alleged account stated, to support which he may introduce any evidence tending to show want of assent.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. §§ 50-56; Dec. Dig. § 8.*]

In Bank. Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by the E. W. McLellan Company against the East San Mateo Land Company. Judgment for defendant, and, from an order denying plaintiff's motion for new trial, he appeals. Reversed.

S. J. Hankins, J. S. Reid, and Rufus H. Kimball, all of San Francisco, for appellant. Archibald Barnard, of San Francisco, for respondent.

PER CURIAM. The action was brought by plaintiff, as assignee of E. W. McLellan, against East San Mateo Land Company, a corporation, to recover \$10,727.19, alleged to be due on an account stated. The complaint was in two counts; the first alleging in paragraph 3 that an account had been stated between McLellan and the land company at the city and county of San Francisco, the second alleging, likewise in its paragraph numbered 3, that the account had been stated at the county of San Mateo. The defendant answered, denying the stating of any account. The cause was tried without a jury, and the court made findings and rendered judgment in favor of the defendant. The plaintiff moved for a new trial, and now appeals from the order denying his motion.

McLellan, plaintiff's assignor, was a contractor. The defendant was engaged in subdividing a tract of land in San Mateo for purposes of sales. McLellan had made two contracts with the defendant for grading streets and doing other work on the tract, and claimed that the defendant was indebted to him for labor and materials furnished under the contracts. W. H. Obear was the

president and general manager of the defendant corporation. A meeting took place between McLellan and Obear at San Mateo, at which, as McLellan claimed, an account was stated, and the sum sued for agreed to be due from the defendant to McLellan. Shortly thereafter there was a second meeting at San Francisco. McLellan and Hankins, his attorney, called upon Obear, and there was, according to their testimony, a second agreement to the effect that \$10,727.19 was due from East San Mateo Land Company to McLellan.

The finding of the court was in these words: "That no account was stated between the assignor of plaintiff and the defendant as set forth in paragraph 3 of the first and second causes of action herein or at all, and in this behalf the court finds that, at the times and places stated in paragraph 3 of the first and second causes of action herein, there was an account stated between E. W. McLellan, the assignor of plaintiff herein, and W. H. Obear, the president and manager of defendant herein." The finding that no account was stated between McLellan and the defendant is assailed as unsupported by the evidence.

The evidence clearly shows that Obear had the requisite authority to bind his corporation; therefore the first part of the finding might only be sustained upon the theory that the court believed the statements of Obear, whose testimony was in direct conflict with that of McLellan and Hankins, and disbelieved their testimony. But this theory is contradicted by the finding that there was an account stated between E. W. McLellan and "W. H. Obear, the president and manager of defendant." This shows that the court believed the testimony of McLellan and Hankins, and that the first part of the finding must have been made under the mistaken belief that Obear lacked the authority to act for the defendant.

Respondent's position may be thus summarized: The findings must be given such a construction, if a reasonable one, as will support the judgment. *Breeze v. Brooks*, 97 Cal. 72, 31 Pac. 742, 22 L. R. A. 257. A finding capable of two reasonable constructions must be interpreted according to that one which sustains the judgment. *Brisson v. Brisson*, 90 Cal. 334, 27 Pac. 186. The first part of the finding should be read as a general negation of all allegations of the paragraph numbered 3. The latter part may be interpreted as one to the effect that McLellan and Obear personally stated an account between themselves, but that the latter did not act on behalf of his company in so doing; the words "president and manager of defendant herein" being mere descriptio personæ. A statement of account between them as individuals not being within the issues, the latter part of the finding may be disregarded,

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the first part may then be attributed, not merely to the court's theory of Obear's lack of authority, but to the acceptance of the truth of his testimony that he had stated no account on behalf of the corporation defendant.

[1] The trouble with such an interpretation is that there is not a word of testimony to support the theory that Obear and McLellan had any personal dealings. The evidence shows that whatever Obear did was done as president and manager of the corporation and *not* in his individual capacity. A finding that an account was stated between McLellan and "Obear, the president and manager of the" land company, might possibly under some circumstances have been intended as a finding that it was stated by him personally in his own behalf; his titles being added merely by way of description. But that would have been directly contrary to the evidence. Whether he was authorized to act for his corporation or not was a question of law, but the evidence without contradiction shows that whatever he did was done not for himself but for the company. It was not intended to be in his own behalf. Taken in connection with the evidence, the finding cannot be understood otherwise than as a declaration that he stated the account as president and manager, purporting to act for the company. The other finding that no account was stated between McLellan and the land company is a part of the same sentence. The two together were obviously intended to declare that Obear stated the account, claiming to do so for the company, but that he had no authority to act for it in that manner.

[2] The rule that findings must be interpreted so as to support the judgment, if reasonably possible, is here controlled by the rule that findings must be interpreted on appeal, so as to be within the issues. They are presumed to have been intended as findings upon the issues, and not as findings of irrelevant facts. The final clause of this finding clearly shows that the court did not credit Obear's testimony that there was no stated account. As the only evidence of a stated account was that it was stated by him in his capacity of manager and president, and as he did not contradict the fact that he was acting in that capacity, if he did it at all, it must have been in that capacity that the account found to have been stated was stated.

[3] It follows that the first part of the finding has no support in the evidence, because, as we have said above, the proof was complete that Obear did possess the necessary authority.

[4] On the question of Obear's authority to bind the corporation, the plaintiff offered a resolution of the board of directors of the defendant, appointing Obear general manager of the corporation, with full power to make

and enter into all contracts for and on behalf of the company. The defendant was thereupon permitted, over plaintiff's objection, to introduce portions of its by-laws, providing that it shall be the duty of the president to sign all contracts and other instruments in writing which have been first approved by the board of directors, and that it shall be the duty of the secretary to affix the corporate seal to all documents requiring such seal. The admission of such by-laws is assigned as error. The evidence should have been excluded. The by-laws did not assume to limit the power of the president with respect to oral contracts. *Freyberg v. L. A. Brewing Co.*, 4 Cal. App. 403, 88 Pac. 378. They had therefore no relevancy to the case at bar, in which the plaintiff was not relying upon a written agreement. The admission of this evidence was therefore erroneous.

[5] The court permitted the defendant to introduce in evidence two written contracts between McLellan and the defendant. These were the contracts giving rise to the claims which, as plaintiff asserted, were fixed in amount by the account stated. The first of these contracts provided that McLellan was to receive one-half of the payment for work to be done in preferred stock of the defendant company. The second superseded the first in part. The contracts were offered on cross-examination of McLellan in connection with questions designed to show that no agreement for the payment of a fixed sum of money had been reached, but that the only proposition made by Obear had been to pay the major portion of any sum which might be found to be due on contracts for the sale of lots by defendant to various purchasers. We think the contracts were properly admitted as a part of the cross-examination on this point.

[6] It is, no doubt, the ordinary rule that, in an action upon an account stated, the items of the original demand cannot be gone into. *Hendy v. March*, 75 Cal. 566, 17 Pac. 702. But, where the defendant has raised an issue regarding his assent to the alleged account stated, he may introduce any evidence tending to show he did not so assent. *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504; *Kearney v. Bell*, 160 Cal. 661, 117 Pac. 925. The contracts here offered had a logical bearing upon the probability of the transaction as testified to by plaintiff's assignor. If they were not relevant in this aspect, we do not see how their admission can have worked substantial injury to the plaintiff. The court also erred in permitting an amendment to the answer whereby the irrelevant by-laws of the defendant were pleaded. No other alleged errors require notice.

The order is reversed.

BEATTY, C. J., does not participate in the foregoing.

PEOPLE v. ALLEN. (Cr. 1,791.)

(Supreme Court of California. Dec. 24, 1913.)

1. HOMICIDE (§ 228*)—SUFFICIENCY OF EVIDENCE—CORPUS DELICTI.

In a prosecution for homicide, where there was no autopsy on deceased, but the surgeon attending her testified that from the course of the bullet her death resulted from a hemorrhage from the severing of the aorta, and where there was evidence that she fell and was found unconscious immediately after the shot was fired, was sufficient if believed to prove the corpus delicti—death as a result of the shot fired.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 471-476; Dec. Dig. § 228.*]

2. HOMICIDE (§ 270*)—JURY QUESTION—INTOXICATION.

In a prosecution for homicide, where a witness stated without objection that he and defendant had been drinking together on that day and was then allowed to state that defendant was intoxicated, and where defendant himself was permitted to state what and how often he had drank on that day, there was evidence sufficient for the jury's application of the rule prescribed by Pen. Code, § 22, that the jury may consider the fact that accused was intoxicated at the time in determining the motive or intent with which he committed the act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 564; Dec. Dig. § 270.*]

3. HOMICIDE (§ 165*)—ADMISSIBILITY OF EVIDENCE—RELATION OF PARTIES.

In the trial of accused for the murder of his wife, where the prosecution did not attempt to show that defendant had made threats or to prove a long existing feeling of hostility by accused against her, and where the only motive was furnished by defendant's testimony regarding the transfer of her affections to another, evidence that the relationship between them had been most friendly and that he had provided for her well was remote from the issue of intent and hence inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. § 165.*]

4. CRIMINAL LAW (§ 703*)—TRIAL—CONDUCT OF PROSECUTOR—EXAMINATION OF WITNESSES.

In a prosecution for murder a witness who had worked for defendant at various places in which defendant had kept a saloon was examined by defendant's counsel in detail with reference to defendant's career during their four years' acquaintance and was questioned about defendant's leaving a certain place. Held, in view of the direct examination, of the exclusion of a question suggesting defendant's arrest in that place upon a criminal charge and the difference between attributing an infamous offense and suggesting a misdemeanor, that the misconduct of the prosecutor in persistently cross-examining as to whether defendant left because his license was taken away was not such as to require a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. § 703.*]

5. CRIMINAL LAW (§ 1170½*)—CROSS-EXAMINATION—SCOPE.

In a prosecution for the murder of his wife, where defendant on direct examination detailed his various places of residence and a residence in a place where he owned and conducted a saloon, but said that he had quit the saloon business there and sold out, cross-examination as to whether, at the time of leaving, defendant and his bartender were accused of beating a man up in the saloon, if erroneous, was without injury, where the court prompt-

ly told the jury to disregard the question and the suggestion contained in it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.*]

In Bank. Appeal from Superior Court, Colusa County; H. M. Alberty, Judge.

Jerry Allen was convicted of murder in the first degree, and he appeals. Affirmed.

M. T. Brittan, of Marysville, J. W. Maddox, of Colusa, John T. Williams, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was tried for the murder of his wife, Sadie Allen, sometimes known as Pearl Evans. The jury returned a verdict of murder of the first degree. His motion for a new trial was denied and he was sentenced to suffer the death penalty. He appeals from the judgment.

The killing took place at Williams, Colusa county, on the night of December 25, 1912. The woman, Sadie Allen, or Pearl Evans, was an inmate of a house of prostitution at that place, and her husband, the defendant, had visited her a few days before the tragedy. He testified that when he had married her, some years before that time, she had been a prostitute, but that he had taken her from that life and had supported her. He said that they had lived quite happily in various cities in which he had worked, generally as a bartender, or as a saloon keeper, and that only a short time before her death she had returned to the old life of infamy, much against his will. According to his testimony, he had purchased a place in the country and had urged her to go there to live with him. Finally she promised that she would do so after the holidays, but about that time he began to believe, from what she herself and others had told him, that she had transferred her affections to another man. On Christmas day, 1912, he went to Williams and again heard these rumors. He then proceeded to the house which she and another prostitute occupied. The other woman admitted him and he inquired for his wife. The other woman summoned her, and Allen and she met in her bedroom to which he had gone immediately after entering the house. The testimony of the witnesses regarding the occurrences immediately following this meeting is somewhat in conflict. There is no doubt, however, that after a very brief conversation between them, the defendant drew a revolver, shot his wife, and then turning the weapon upon himself inflicted a wound on his head. The woman died within a very short time, but the defendant soon arose from the floor where he had fallen after he wounded himself and departed from the house. Subsequently he was wounded by

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the officer who arrested him, because, as the constable said, he refused to halt when ordered to do so.

The defendant testified that at the last conversation with his wife a few days prior to December 25, 1912, it had been agreed that he would apply for employment as a bartender, and that he had been given a card of introduction to a saloon keeper at Placer-ville, who, he was assured, would give him a position immediately upon presentation of his credentials. He had with him this card when he went to see Sadie Allen for the last time. Shortly after his arrival in Williams, he had been told by a friend that he had lost the affections of his wife and that she had bestowed them upon another man. He then made the call upon her, and his own version of what transpired immediately before the killing is as follows: "Well, I went over and knocked at the side door, and Miss Herman came to the door—Miss Fanny. I asked her—I says, 'Where is the old lady?' I think, is what I said to her. She says, 'I will call her.' She called her. Q. Just a moment: When you refer to the old lady, to whom do you refer? A. I refer to my wife. And I stepped into her room. I had been in her room before. I knew just what room she had. I walked into her room and she came in and we shook hands. Q. Now, then, tell everything that was said. A. I showed her this card, and I says, 'Well, I got the job.' I says, 'Are you going to go with me?' She says, 'Well, no.' She says, 'I am not going with you.' I says, 'I was introduced to a fellow up the street,' I says, 'just a minute ago.' I says, 'which,' I says, 'Jack told me is your new fellow—some fellow,' I says, 'with a black overcoat.' I says, 'Is that him?' She says, 'Yes, that is him.' I says, 'Do you mean that?' She says, 'Yes, I mean that.' I says, 'Why, didn't you tell me just yesterday that you would go with me?' She says, 'Yes, but I have changed my mind.' 'Well,' I says, 'You know now that I am all in.' I says, 'I am about broke.' I says, 'Will you give me a chance to raise a few dollars on this property, because I don't want to be in California and you living with somebody else here?' She says, 'No, I am not going to have any mortgage on that property at all.' 'Well,' I says, 'that ain't doing just about right, is it?' She says, 'Well, I can't help that.' I says, 'What are you going to do,' I says, 'live on that property there with this new man of yours?' 'Is he going to finish paying for it?' She says, 'The property is mine, and I will do as I damn please with it.' She says, 'Furthermore, he is going to sleep here with me to-night, and you can go and get your room at the hotel.' And from that on, I don't know what came up—I suppose is when the shooting happened. Q. At that time you say you lost control of yourself? A. I couldn't tell but I did or how I talked to her. I can't

express myself. I don't know how I felt. It seemed like everything was dark and dreary around me. Q. Well, go ahead. A. Well, I suppose I must have shot her then, and shot myself. And I got up, and the next I knew—the next was about right, I guess,—was the doctor dressing my head. I don't know just what did happen."

George Waters testified that on the night in question he was washing glasses in the "winerom," a small apartment adjoining the kitchen of the house occupied by the Allen woman. The doors were open and he could see Allen and the latter's wife as they stood in her room. He testified in part as follows: "Q. What did you first observe? What did you first see with reference to these two parties, Jerry Allen and Pearl Evans? A. These two parties shook hands. Q. You say you saw them shake hands? A. Yes, sir. Q. And what next did you see or hear or observe? A. I saw Mr. Allen hit her. Q. How long had Jerry Allen been in that room before you observed him strike her? A. About two minutes. Q. Do you know what was the reason or cause or occasion of Jerry Allen striking Pearl? A. I do not, sir. Q. What had they been doing after he had entered the room and shook hands with Pearl? What had they been doing up to the time of the striking? A. Talking about some affairs, I don't know what; I couldn't make out what was said. Q. And as to any word that was said by either of the parties between the time of the entrance of Jerry Allen and the striking of Pearl by Jerry—any words that you heard and caught on to—can you now recall at all anything that you heard? A. The words, 'Don't do that, Jerry.' Q. Did you hear Mr. Allen—do you now recall any words that he said? A. I do not recollect, sir. Q. Well, you observed him strike her. What was the effect of that blow? A. The effect of the blow, she fell on her knees. She went to the floor, her knees on the floor and her hands on the bed. Q. What next did she do? A. She got up and went out to the kitchen. Q. Where were you all of this time? A. I have been in the winerom. Q. Where were you when she came out of her room into the kitchen? A. I was standing at the stove. Q. How close did she pass to you? A. About a foot and a half or two feet. Q. Where did she go? A. She went to the back end of the kitchen door. Q. That was the door that would lead outside to the very back of the house? A. Yes, sir. Q. What did she do at the door? A. She wheeled, and the door was locked, and she wheeled and backed up against it. * * * Q. Where was Jerry Allen in the meantime? A. Jerry Allen followed her up. Q. What next occurred after she had turned her back to the door? A. Next occurred, Jerry Allen shot her. Q. At that point and at that time, do you recall whether anything was said by either of the parties? A. There was, but I was too scared to make out what it was. Q. You have stat-

ed that she having her back to the door, Jerry having followed her out, that he shot her? A. Yes, sir. Q. How many times did he shoot at her? A. Once. * * * Q. What was the effect, that you observed, upon Pearl? What did she do? A. She fell to the floor. Q. And what was the next thing that was done by Jerry Allen? A. He tried to shoot himself. Q. What was the effect that you observed upon him in that trial? A. The effect that he fell to the floor. Q. How many times did he shoot altogether? A. Twice."

Two other witnesses who were in the front room of the house testified that Pearl Allen exclaimed, "Don't do that," or words of similar import just before the shots were fired.

[1] Appellant's first contention is that the corpus delicti was not proven because the prosecution did not establish with sufficient certainty the fact that the deceased was killed by the shot fired from defendant's revolver. It is true that there was no autopsy, but the surgeon who was called to attend the wounded woman testified that, in his opinion, from the course of the bullet, the woman's death resulted from hemorrhage due to the severing of the aorta. Added to this was the testimony of Waters that the woman fell immediately after the shot was fired and the statements of other witnesses that they found her unconscious when they entered the bedroom immediately after the revolver had been discharged. It did not need the evidence which an autopsy would have furnished to establish the cause of death. The testimony of these witnesses was quite sufficient, if believed, to justify the jury in finding that she died as a result of the shot fired from her husband's revolver.

[2] The next assignment of error by appellant is based upon the refusal of the court to admit certain testimony having a tendency to show that the defendant was intoxicated at the time of the commission of the alleged murder. The court did sustain certain objections to questions tending to elicit answers showing how many drinks of intoxicating liquor the defendant had taken just prior to the shooting. This was during the time when witness Warren was on the stand. However, Warren was permitted to state, without objection, that he and Allen had been drinking together on the day of the homicide, and, after discussing the rule contained in section 22 of the Penal Code, the court allowed the witness to testify regarding the apparent condition of Allen. The witness Warren swore that Allen was intoxicated, and the answer was allowed to stand. We cannot see that the defendant was prejudiced by the rulings of which his counsel complain. Without objection, Warren stated that he and Allen were in two different saloons, drinking, and told how long they remained in each. He also, as we have seen, was allowed to give it as his opinion that the defendant was intoxicated. This was sufficient to give the jurors an opportunity of applying to the evi-

dence before them the rule set forth in the latter part of section 22 of the Penal Code that the "jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Further answers were elicited from the witness on direct examination by defendant's counsel to the effect that he noticed nothing peculiar in Allen's actions at the time they were together on the day upon which the homicide occurred. The defendant, while a witness on his own behalf, was permitted to tell with great detail how often and what he had drunk on that Christmas day. It will be seen therefore that the defendant's counsel were given abundant opportunity to show Allen's condition of intoxication, if, indeed, he had been drinking to excess, and there was no violation of the rule that proof of drunkenness is admissible for the limited purpose set forth in the latter part of section 22 of the Penal Code and discussed in such cases as *People v. Blake*, 65 Cal. 277, 4 Pac. 1, and *People v. Fellows*, 122 Cal. 239, 54 Pac. 830.

[3] Counsel for the defendant made a formal offer to prove that the relationship between Allen and his wife had been most friendly, and that he had provided for her well. This sort of proof was tendered for the purpose of showing lack of intent on his part to take the life of Pearl Allen. The court thereupon sustained certain objections to questions tending to develop the facts regarding the domestic and personal relations of the couple. There was no error in the ruling. The proffered proof was too remote. No effort had been made by the prosecution to show that threats had been uttered by the defendant nor was there any evidence tending to prove a long existing feeling of hostility by Allen against the woman. The only showing of a probable antecedent motive for the crime was furnished by the defendant himself in his testimony regarding his wife's declaration that her affections had been transferred to another man. The harmony or discord in the domestic relations of the Allens was a subject which was not in issue.

The most serious question involved in this appeal arises from the alleged misconduct of the district attorney. Witness Warren, who had worked for the defendant at various places in which the latter had conducted the business of saloon keeping, was examined quite in detail with reference to the career of Allen during the four years of their acquaintance. On cross-examination, the following occurred: "Q. * * * Do you remember the cause and occasion of Mr. Allen leaving Astoria? No, sir; I do not. Q. Do you know the fact to be that his license was taken away and revoked? A. No, sir; I do not, sir. Mr. Brittan: Now, just a moment: That is incompetent, irrelevant, and immaterial and improper conduct on the part of the district attorney, and has nothing to do

with this case whatever. The Court: It may be a question whether you didn't open the subject or not. I am inclined to think it is rather remote. Mr. Brittan: Has anything been said about a saloon license here? The Court: Something said about why, or the occasion of his leaving Astoria. Mr. Brittan: It is an insinuation, your honor, purely upon the part of the district attorney. Mr. Millington: I beg your pardon. Mr. Brittan: Nevertheless, I am going to make my objection. The only question I asked him if he were there when Mr. Allen left Astoria, and with whom he went. He testified who went with him. Now, that was all the question that was asked in relation to that, and he was asked where they went, and he said they went to San Francisco. The Court: I am inclined to think the objection probably better be sustained. The matter was opened, however, in your direct examination for some cross-examination on the subject of his business there. Mr. Brittan: Nothing was asked about that at all. * * * Mr. Millington: Q. And isn't it a fact that Mr. Allen and his assistant, Mr. Carson, were each under arrest upon the charge of beating a man up in that saloon at the time of his leaving, and that you remained? Isn't that a fact? A. I don't know. Q. What is that? A. I don't know anything about that. Mr. Brittan: Now, if your honor please, I am going to ask at least, your honor, for the protection that this defendant is entitled to in this court from the district attorney injecting in this case extraneous matters, matters which, even if he knows to be a fact, are incompetent, irrelevant, and immaterial, and not in any way intending to prove, and merely a matter which is by question, where that he knows that if he did have a witness that he could place upon the stand and ask the question: 'Was this man ever arrested for battery? Was he ever arrested for petit larceny? Was he ever arrested for any offense?'—that he couldn't prove it. It is not material or competent testimony, and I will ask your honor at this time for the protection which this defendant is entitled to, and to instruct the district attorney to refrain from such further conduct in this case. The Court: I am inclined to think the objections better be sustained. There is some question about its admissibility, however, from the way in which you opened the subject. The subject was opened by the defense. You asked about this man's knowledge as to the situation there. You afforded some grounds for the question, but the objection better be sustained, and such will be the ruling." Later in the cross-examination of this witness these questions were propounded by the district attorney, and the subjoined answers were given without objection: "Q. And he didn't transfer his license at Golden Gate avenue, did he? A. No, sir; not that I know of. Q. Don't you know that they were taken away from him?

A. No, sir; I do not. Q. Do you know that? A. No, sir; I do not."

[4] Appellant's counsel assign the asking of the questions by the district attorney as misconduct demanding the reversal of the judgment of conviction. In this behalf they cite *People v. Wells*, 100 Cal. 461, 34 Pac. 1078; *People v. Derwae*, 155 Cal. 595, 102 Pac. 266; and *People v. Crosby*, 17 Cal. App. 524, 120 Pac. 441. In the first of these cases, the misconduct of the district attorney consisted of a series of improper and damaging questions having no possible relevancy to the guilt or innocence of the defendant and evidently asked for the unfair and indefensible purpose of getting before the jury a suggestion of other unlawful acts on his part. In the second case, the prosecuting officer, in the face of repeated rulings that the domestic relations of the defendant were not admissible on his trial for attempt to commit burglary, asked a question carrying the insinuation that the defendant had been guilty of incest. The Crosby Case was one in which the defendant was being tried on a charge of rape. In his examination of the prosecutrix the district attorney propounded an interrogatory in which he embodied the statement that Crosby had put other girls in a house of ill fame. In these, and in many other cases which might be cited, new trials were ordered because of that which the court found to be obvious and flagrant misconduct. And in this connection it may be said that there is a great difference between that sort of misconduct which attributes to a witness the commission of an infamous offense and the suggestion by the cross-examiner that he may have been guilty of a misdemeanor. In the case at bar, there was, as the court suggested, some question whether or not the defendant's counsel had opened the door for the sort of cross-examination in which the district attorney indulged. The defense for some reason had seen fit to trace Allen through his various experiences, introducing testimony that in Astoria and in San Francisco he had supported his wife and had made a home for her and her young sister. Warren's testimony had related to Allen's various movements, and there was at least some ground for the theory that the witness might be questioned regarding the reasons for some of the defendant's changes of residence. When, however, the prosecution asked a question involving a suggestion of the arrest of Allen in Astoria on a criminal charge, the court sustained an objection to it. We do not find that the course of the district attorney in asking the questions quoted above amounted to misconduct, particularly in view of the instruction which the jurors received from the court in ruling upon similar questions propounded to the defendant when he was under cross-examination.

[5] During the direct examination of the defendant, his counsel took him over a series

of years, and the witness spoke in detail of his various places of residence and his business activities in each of them. In the course of his narrative he told of his residing for some time in Astoria, where he owned and conducted a saloon. In answer to a question by one of his counsel, he said that he had "quit the saloon business in Astoria." Then the following colloquy occurred between counsel and witness: "Q. Did you have to give your saloon up? Did you sell it, or what disposition was made of the saloon? A. I sold it. Q. What did you receive for it? A. \$1,200." On cross-examination of the defendant, the following proceedings were had: "Q. At the time of your leaving Astoria, I will ask you if it is not a fact that you and your bartender, Mr. Carson, each of you, were accused of the beating of a man up in your saloon? Mr. Brittan: To which we object as being irrelevant, incompetent, and immaterial. Mr. Millington: Q. And if that wasn't the occasion of your leaving Astoria? Mr. Brittan: Now, if your honor please, let me insist. A question was asked, and I am trying to interpose an objection. Now, Mr. Reporter, I don't know—he has got the question and another one chopped into it there. Will you please read the first question so I will have an opportunity to object to it? (The reporter reads the question previous to the last one.) Mr. Brittan: Now, to which we object as being irrelevant incompetent, and immaterial. The court: I am inclined to think that the question is objectionable. Mr. Brittan: Certainly. The Court: Of course, something was said about his leaving that place, and I am not sure as to whether something was said about what happened when he left the place, but I am inclined to think this is objectionable, and that the objection better be sustained. Mr. Brittan: Now, if your honor please, I also want to add to the objection that I assign it as error upon the district attorney's part to make any such statement, he knowing that it is not in accordance with law; that he knew that the question was objectionable at the time that he asked it, and he asked it for no other purpose than to prejudice this jury against the defendant in this case. And I ask at this time, now, that your honor instruct this jury to pay no attention to the remark that was made—the question asked by the district attorney. Mr. Millington: I am perfectly willing for any such instruction, because I know that the jury is intelligent enough not to receive anything as evidence that may be said by either attorney. The Court: The jury will understand that any questions stricken out, or testimony stricken out, is not for the consideration of the jury. Mr. Millington: In my own justification, I wish to say that I asked it

solely for the answer of the witness to the effect that he sold his property up there for cash, indicating the amount, and going into the details of the transaction. The Court: You are entitled to ask about that."

The question was not altogether indefensible as cross-examination. The witness had been asked on direct examination "Did you have to give up your saloon?" and had explained that he had sold it, and there is at least room for argument that it was legitimate cross-examination, therefore, to ask him the impelling reason for disposing of the property. There are many authorities justifying the cross-questioning of a witness upon matters about which he had been interrogated on direct examination, and in some of them the questions have been approved even when their tendency was to develop the commission of other offenses by a defendant who had taken the stand in his own behalf. See *People v. Freshour*, 55 Cal. 376; *People v. Crowley*, 100 Cal. 480, 35 Pac. 84; *People v. Gallagher*, 100 Cal. 473, 35 Pac. 80; *People v. Dole*, 122 Cal. 491, 55 Pac. 581, 68 Am. St. Rep. 50; *People v. Glaze*, 139 Cal. 159, 72 Pac. 965; note to *Evans v. O'Connor*, 75 Am. St. Rep. 338. Therefore we cannot say that, as matter of law, the district attorney went deliberately outside of the record for the purpose of injuring the man on trial. The admissibility of the questions was a matter about which lawyers might reasonably differ. The court, however, very properly resolved in favor of the defendant the doubt which was entertained, and instructed the jury to disregard the question and the suggestion contained in it. In the present case, the injury, if any, arising from the cross-examination was cured we think by this prompt action on the part of the court. We are the more constrained to this conclusion because the worst injury that the questions could have inflicted upon the defendant would have been to arouse the belief in the minds of the jurors that he had used physical violence against a man; but previously, under examination by his own counsel, while emphatically denying that he had struck his wife just before he killed her, he stated that upon one occasion he had slapped her. Such testimony would have had a far more potent effect in establishing before the jury his character as a man of violence than the suggestion that he had beaten a man.

No other alleged errors are assigned by counsel and our careful examination of the record has revealed nothing which would require a reversal of the judgment.

The judgment is affirmed.

BEATTY, C. J., does not participate in the foregoing.

WILMINGTON TRANSP. CO. v. RAILROAD
COMMISSION OF CALIFORNIA.

(S. F. 6,687.)

(Supreme Court of California. Dec. 29, 1913.)

1. CARRIERS (§ 12*)—RATES—ESTABLISHMENT
—CONSTITUTIONAL AND STATUTORY PROVISIONS—“COMMON CARRIER.”

Const. art. 12, § 23, provides that every carrier is a public utility subject to regulation by the Railroad Commission, as may be provided by the Legislature, which is empowered to fix rates; the Legislature being given plenary power to confer on the Commission authority to regulate public utilities. Public Utilities Act (St. 1911 [Ex. Sess.] p. 18) § 2, subd. 1, declares that the term “common carrier” includes every corporation owning, controlling, or operating any vessel regularly engaged in the transportation of persons and property for compensation on the waters of the state or on the high seas over regular routes between points within the state. *Held*, that such provisions conferred on the Commission authority to regulate rates to be charged by a steamship company transporting passengers and freight between two points in Los Angeles county, though the vessels in passing from one port to the other necessarily traveled over the high seas and outside of the territorial jurisdiction of the state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

2. COMMERCE (§§ 33, 47*)—RATES—REGULATION—JURISDICTION—“COMMERCE WITH FOREIGN NATIONS.”

Where petitioner was engaged in operating a line of steamships for the transportation of passengers and freight between two ports in Los Angeles county, and, in passing from one of such ports to the other, the route lay in part over the high seas and outside the territorial jurisdiction of the state, such transportation did not constitute “commerce with foreign nations,” within federal Const. art. 1, § 8, conferring on Congress exclusive power to regulate commerce with foreign nations, etc., so as to deprive the state of jurisdiction to vest the regulation of such transportation in the State Railroad Commission.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 86-90, 107, 108, 134-141, 204; Dec. Dig. §§ 33, 47.*

For other definitions, see Words and Phrases, vol. 2, pp. 1293, 1299.]

In Bank. Petition by the Wilmington Transportation Company against the Railroad Commission of the State of California for a writ of review to determine the validity of the Commission's order prescribing rates to be charged by petitioner, a common carrier, for the transportation of passengers and freight between the ports of San Pedro and Avalon in Los Angeles County. Order affirmed.

Gibson, Dunn & Crutcher, of Los Angeles (Edward E. Bacon, of Los Angeles, of counsel), for petitioner. Max Thelen and Douglas Brookman, both of San Francisco, for respondent. Karl L. Ratzer, of Los Angeles, *amicus curiæ*.

ANGELLOTTI, J. This is a proceeding inaugurated by petitioner under the provisions

of section 67 of the act known as the Public Utilities Act (St. 1911 [Ex. Sess.] p. 18), approved December 23, 1911, for the purpose of having the lawfulness of an order of the Railroad Commission of this state inquired into and determined. The order was one made by the Railroad Commission in a certain proceeding pending before that body in which the firm of Miller & Donaldson are complainants and petitioner here is defendant, inaugurated with a view to the proper adjustment and reduction of rates and fares charged by petitioner for the transportation of passengers and freight between the ports of San Pedro and Avalon, both of which are situated in the county of Los Angeles in this state. The order, the validity of which we are asked to inquire into and determine, was one denying a motion to dismiss the proceeding, and requiring petitioner to satisfy the complaint or to answer within ten days. The motion was based upon the claim that the Railroad Commission had no jurisdiction in the matter.

No suggestion is made by respondent that the law does not contemplate a review by this court of an order of the character here involved, but was intended simply to provide for a review of what might properly be considered a final order or judgment in any proceeding before the Commission. The parties have addressed themselves solely to the question they apparently desire to have decided, viz., the jurisdiction of the Commission under such circumstances as here exist. We have not considered at all the question we have just suggested, and this decision is not to be taken as expressing any view thereon.

The petitioner is a California corporation, with its principal place of business in Los Angeles county, in this state. Its occupation or business is that of a common carrier of persons and freight, by sea, between the port of San Pedro and that of Avalon, Santa Catalina island, both of which ports are, as we have said, in Los Angeles county. The whole of Santa Catalina island is a part of Los Angeles county. Notwithstanding that the ports are in the same county, a vessel, in passing directly from one to the other, must travel for upwards of 20 miles upon the high seas, outside of the territorial jurisdiction of this state. As said in respondent's brief: “Vessels plying between San Pedro and Avalon cross the high seas for the sole purpose of getting from one point in Los Angeles county to another point in the same county. They do not touch at any other port, either of the United States or of any foreign country. They do not transfer their passengers or freight to any other vessel or receive the same from any other vessel in their course. They do not on the voyage take on or put off any article of commerce. While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real pur-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 137 P.—73

pose of the voyage, which is to ply between two ports, both of which are located in the same county in this state."

[1] Our law confers upon the Railroad Commission the power to establish rates of charges for transportation of passengers and freight by railroads and other transportation companies. Const. § 22, art. 12. In section 23 of article 12 it is stated that "every common carrier is hereby declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the Legislature"; and the Railroad Commission is empowered to fix the rates to be charged for services rendered by public utilities, as authorized by the Legislature; and it is further provided that "the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution." In section 2, subd. 1, of the Public Utilities Act, it is provided that the term "common carrier," when used in the act, includes, among others, "every corporation or person, * * * owning, controlling, operating or managing any vessel regularly engaged in the transportation of persons or property for compensation upon the waters of this state or upon the high seas, over regular routes between points within this state." It is not to be doubted that these provisions purport to confer jurisdiction upon the Railroad Commission in the matter of fixing the rates to be charged by petitioner for transportation of passengers and freight between San Pedro and Avalon, notwithstanding that the vessels, in passing from one of these ports to the other, must travel in part over the high seas, and outside of the territorial jurisdiction of the state of California.

[2] The sole claim of petitioner is that the Railroad Commission of this state has no jurisdiction to regulate the rates charged for such transportation, for the reason that, in so far as such transportation is over the high seas, the power to regulate the charges therefor is vested exclusively in the Congress of the United States by virtue of the declaration in section 8 of article 1 of the federal Constitution that "the Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." If not so vested in the Congress of the United States by this provision, confessedly the Railroad Commission has jurisdiction in the matter. It is obvious that we have here no attempt to regulate commerce among the different states of the United States, or with the Indian tribes. The claim of petitioner must therefore be and is that, under the circumstances above set forth, petitioner's vessels, while on the high seas on their trips between San Pedro and Avalon, are engaged in "commerce with foreign nations."

In view of the admitted facts, it is difficult

to find any ground for this claim, except such as is to be found in some language used in certain decisions. In the absence of clear expression to the contrary by the Supreme Court of the United States on the subject, and treating the matter independent of authority, we should not hesitate to say that no support whatever for the claim is to be found in the language referred to. What possible "commerce with" any foreign nation or nations is involved under the circumstances existing here, even if we treat the word "commerce" as synonymous with "intercourse," as is claimed by petitioner should be done? All the traffic and intercourse are between two ports in the same county and state, and no part of the transportation is over the territory of any other state or of any foreign nation or nations; the route, so far as it is outside of the state of California, being over territory not owned by any particular nation or nations, but open for the purposes of travel and transportation to the use of the people of all nations. Intercourse or commerce with a foreign nation would necessarily seem to imply something more than the mere passing of ships on this common pathway. It would seem to necessarily involve some traffic in the territory of the foreign nation or some movement of persons or property to or from the territory or vessels of such foreign nation. The object of the provision of the federal Constitution was stated by the United States Supreme Court in *Lehigh Valley Railroad v. Pennsylvania*, 145 U. S. 192, 12 Sup. Ct. 806, 36 L. Ed. 672, as follows: "The conflict between the commercial regulations of the several states was destructive to their harmony and fatal to their commercial interests abroad, and this was the mischief intended to be obviated by the grant to the Congress of the power to regulate commerce with foreign nations and among the states." See, also, *County of Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. Obviously such commerce as is here involved does not come within the "mischief intended to be obviated" by the section; those in the state of California being the only persons concerned therein.

There is, however, certain language in some of the decisions tending to support petitioner's view, and there is also one decision of a United States Circuit Court which appears to be squarely in point.

The principal case relied on by petitioner is that of *Lord v. Steamship Co.*, 102 U. S. 541, 26 L. Ed. 224, a case involving the application of the federal limited liability law to contracts of affreightment between two ports of this state. These contracts could not be performed except by going not only out of California but out of the United States as well. There was really no question of commerce with a foreign nation involved in this case, for the limited liability law was not enacted by Congress under its power to regulate commerce, but was attributable

entirely to the exercise of its admiralty and maritime jurisdiction, a power, as said in *Lehigh Valley R. R. v. Pennsylvania*, supra, "not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends," even, as was held in *Re Garnett*, 141 U. S. 1, 11 Sup. Ct. 840, 35 L. Ed. 631, to a steamer engaged in commerce on a river within a state. It was applicable, of course, to any vessel navigating the high seas, even though the voyage was between ports in the same state, altogether regardless of whether or not the vessel was engaged in commerce with a foreign nation. This was declared in *Lehigh Valley R. R. Co. v. Pennsylvania*, supra, to have been the single question in the Lord Case; the court saying: "The single question in *Lord v. Steamship Co.* was * * * whether Congress had power to regulate the liability of the owners of vessels navigating the high seas, to engage only in the transportation of goods and passengers between ports and places in the same state; it being conceded that the voyages of the steamship in respect of whose loss the question arose were always ocean voyages." And the court further said that in that case it was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question, thereby practically discrediting what was said in the opinion in the Lord Case as to what constitutes commerce with a foreign nation. With all due respect to the learned author of the opinion in the Lord Case, we must confess that we are unable to follow his reasoning upon this question. Substantially he says: The vessel there involved, traveling between two ports in this state, "was navigating among the vessels of other nations"; that, while she was not trading with them, she was "navigating with them," and consequently "with them was engaged in commerce"; if in her navigation she inflicted a wrong on another country, the United States, and not the state of California, must answer for what was done; "in every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations." The conclusion on this point appears to us to be without any support in the reasoning. The conclusion that the limited liability law was applicable was undoubtedly correct for the reason stated in the later case of *Lehigh Valley R. R. Co. v. Pennsylvania*, supra, but, in view of what is said in the latter case as to the true ground of decision in the Lord Case, we do not feel bound to follow the views expressed in the Lord Case as to what constitutes commerce with foreign nations.

The Circuit Court case to which we have referred is *Pacific Coast S. S. Co. v. Board of R. R. Commissioners* (C. C.) 18 Fed. 10. This case was decided prior to the decision

of the Supreme Court in *Lehigh Valley*, etc., *Co. v. Pennsylvania*, supra, and appears to have been based upon what was said in the Lord Case.

Hanley v. Kansas City Southern Railway Co., 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, was a case involving the right of the Railroad Commission of Arkansas to fix and enforce rates for traffic moving from one point in Arkansas to another point in the same state, where the shipments passed for a distance of 64 miles through the "Indian Territory," which was held to come within the meaning of the word "states" in the clause "among the several states" in section 8 of article 1 of the Constitution. It was held that the exercise of any such right would be an attempted regulation of commerce "among the several states," a matter within the exclusive province of Congress under the express language of the constitutional provision. It will be observed that this case involved in part the transportation of goods and persons over the territory of what was held to be another state, something coming within the broad definition of the term "commerce" given in one or two of the decisions, and which might fairly be held to be commerce "among the several states." But we are at a loss to see the applicability of this decision to the facts in the case at bar, where the only prohibition we have to meet is that relating to "commerce with foreign nations." Bearing in mind that the high seas belong to no nation, constituting simply the common highway of all nations, it seems to us that the decision is in no way applicable. What may be claimed to have been said in the *Hanley* Case as to the right of a state to regulate commerce being limited to commerce within the state, or strictly domestic commerce, must be taken in the light of the facts of that case, which shows an attempt to regulate commerce in another state. A state, of course, has no power to regulate commerce among the several states or with a foreign nation. But it has all powers in regard to commerce that have not been delegated to Congress.

In the *Abby Dodge v. United States*, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390, it was declared that a vessel engaged in gathering sponges on the high seas and without the limits of any state, and transporting the same to the United States, is engaged in foreign commerce, and is therefore amenable to the regulative power of Congress upon that subject, including the power to forbid merchandise carried in such commerce from entering the United States. It appears reasonable enough to conclude that in taking sponges from the high seas and without the limits of any state, and transporting them to the United States, the vessel was engaged in "foreign," as distinguished from strictly "domestic," commerce. The court did not expressly hold that the vessel was engaged in

commerce with foreign nations, but, holding that it was engaged in "foreign commerce," declared that "the practices from the beginning, sanctioned by the decisions of this court, establish that Congress by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States," citing *Buttfield v. Stranahan*, 192 U. S. 470, 492-493, 24 Sup. Ct. 349, 48 L. Ed. 525.

The case of *Cowden v. Steamship Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, involved a matter of maritime contract. There is no other case cited requiring notice.

In no case cited except the *Lord Case* is it expressly declared that such commerce as is here involved is "commerce with foreign nations." In no decision of the United States Supreme Court has it been squarely decided that a state may not regulate charges for transportation under such circumstances as exist here. Of course the position of learned counsel for petitioner is that the decisions cited establish the proposition that the mere transportation of passengers and freight constitutes commerce, and that, in so far as such transportation is over the territory of another state, it is interstate commerce, and, in so far as it is over the territory of another nation, it is commerce with that nation. All this may be here assumed to be true. But here the transportation is not over the territory of any other state or any foreign nation, but over the high sea, constituting the common highway of the people of all nations. It does seem to us that under such circumstances, whether the mere transportation over the high seas be deemed commerce or not, it is not in itself commerce with foreign nations, and that some other element, such as transportation to a foreign port, or delivery of the goods to a foreign vessel, etc., would be essential to make it commerce with foreign nations. We are unable to see that all transportation over waters outside of the territorial limits of a state is necessarily commerce with foreign nations. In our judgment it may or may not be such, depending on other facts, and we think that the facts in the case at bar are not such as to make it such commerce. We realize that, in view of certain expressions in some of the decisions, the question is not entirely free from doubt, however plain it may appear to us as an original proposition. If we are in error in our conclusion as to the effect of the decisions of the Supreme Court of the United States in this matter, it will be a simple matter for petitioner to obtain redress in the federal courts.

The order of the Railroad Commission is affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

ST. LOUIS & S. F. R. CO. v. LONG.
(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. PLEADING (§ 236*)—AMENDMENT—DISCRETION—DEATH OF RAILROAD EMPLOYEE.

Where allowance of filing of amended petition immediately before trial and of insertion of additional allegation amending feature in description of accident resulting in death for which damages are claimed to conform to facts proved do not change substantially plaintiff's claim, and it does not appear any right of defendant was thereby prejudiced, it was in the sound discretion of the court to permit same.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

2. CONTINUANCE (§ 29*)—GROUNDS—SURPRISE—DISCRETION.

Where attorney for plaintiff, in questioning jurors as to causes for challenge, makes statement erroneously construed as disclosing ground for removal of case to federal court in conflict with allegation in petition, whereupon attorney for defendant claims surprise, asks leave to withdraw announcement of ready for trial and answer on file and for continuance of case for purpose of time in which to file petition and bond for such removal, whereupon attorney for plaintiff disclaims intent to state and expressly denied existence of such ground, and the undisputed evidence showed that no such ground existed, there was no error in denying such leave and continuance.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. § 95; Dec. Dig. § 29.*]

3. TRIAL (§ 68*)—REOPENING CASE—DISCRETION.

Where, after both parties have rested, plaintiff is permitted, over oral objection and statement by defendant that she had already announced that her case was closed (which record does not show), that defendant's witnesses have been excused and have left town (which is denied by plaintiff and not supported by affidavit or other proof), and that amendment allowed did not conform to the proof already introduced (which is not entirely correct), to introduce evidence relating to whether space in which her decedent's foot was caught should have been blocked by defendant, and where no prejudice of right or abuse of discretion in doing so appears, there is not reversible error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 158-163; Dec. Dig. § 68.*]

4. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—EVIDENCE—DIAGRAM.

The unnecessary permitting of diagram on floor in view of jury and its use, by reference thereto, in questions to and answers by witnesses, is, at least, not to be commended; but, where only few questions and answers relate thereto, and the court then expresses disapproval, to which deference is shown by desisting from such references, and the party objecting thereafter causes witness to make and puts into record a diagram like the one on the floor, and also later puts into record a more elaborate diagram including the same features as the one on the floor, the error will not require reversal of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

5. MASTER AND SERVANT (§§ 288, 289*)—NEGLIGENCE (§ 136*)—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—QUESTION FOR JURY.

Const. art. 23, § 6 (section 355, Williams' Const.), of Oklahoma, is not merely declaratory of the common law, but requires that the de-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fense of contributory negligence and of assumption of risk, as questions of fact, in all cases whatsoever, shall, at all times, be left to the jury; and the finding of the jury upon these defenses is conclusive upon the courts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068-1090, 1092-1132; Dec. Dig. §§ 288, 289; * Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

6. TRIAL (§ 268*)—CONTRIBUTORY NEGLIGENCE—REFUSAL OF INSTRUCTIONS.

It is not error to refuse requested instructions going beyond bare definition, as to the defenses of contributory negligence or assumption of risk, though they correctly state the law in other respects, if the jury are not instructed and the party presenting same does not request instruction to effect that "the defense of contributory negligence or of assumption of risk, in all cases whatsoever, shall be a question of fact, and shall, at all times, be left to the jury."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 662, 673; Dec. Dig. § 268.*]

7. TRIAL (§ 260*)—REFUSAL OF INSTRUCTIONS COVERED—NEGLIGENCE—"ORDINARY CARE"—"ORDINARY NEGLIGENCE"—"CONTRIBUTORY NEGLIGENCE."

Where the court defines "ordinary care" as "such care as a person of ordinary prudence would exercise about his own affairs of ordinary importance" and the want of same as "ordinary negligence," and further instructs that "contributory negligence, as used in these instructions, is such an act or omission on the part of plaintiff's decedent which amounts to a want of ordinary care on his part and which, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the act complained of," it is not reversible error for the court to refuse to give a differently worded instruction substantially to the same effect nor another that merely emphasizes and illustrates the rule given the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5029-5042; vol. 8, pp. 7739, 7740; vol. 6, pp. 5047, 5048; vol. 8, p. 7740; vol. 2, pp. 1540-1547; vol. 8, p. 7617.]

8. TRIAL (§ 252*)—INJURY TO RAILROAD EMPLOYEE—REFUSAL OF INSTRUCTION—EVIDENCE.

Where uncontradicted evidence shows safety would result from blocking dangerous open space between guard rail and main line rail in yard of railway company used in switching cars at night, and that, besides defendant, which did not, two of three other roads for which the only witness on this point had worked used the blocking system which it does not appear introduces any new danger, it was not error to refuse to instruct "that the mere fact that defendant did not block the frogs, guard rails, and angles between the side track and the rail of its main track will not warrant you in finding that the defendant was negligent, and such omission on the part of the defendant does not amount to negligence as a matter of law."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.*]

9. DEATH (§ 99*)—DAMAGES RECOVERABLE.

Where plaintiff wife was nearly 24 years old, the child for whom she also sued was 2 years old, and her decedent husband was 30 years old, sober and healthy, and where decedent had earned as high as \$160 per month while working for another railroad company, and, within the 20 or 21 months during which he worked for defendant, had commenced work

at \$50 and thereafter got \$120 per month until about 15 days before his death, but during these days worked about an hour less time each day and got a little less salary, and where he was affectionate to his family and usually turned his earnings over to plaintiff, who paid bills and deposited balance in bank, and he did not spend money foolishly, although only about \$200 was in bank at time of his death and plaintiff's account of his use of his earnings is not entirely satisfactory, it cannot be said a verdict for \$15,000 damages by reason of his death from negligence of defendant is excessive and apparently given because of passion or prejudice.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125-130; Dec. Dig. § 99.*]

(Additional Syllabus by Editorial Staff.)

10. MASTER AND SERVANT (§ 203*)—"ASSUMPTION OF RISK."

"Assumption of risk" is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. Citing Words and Phrases, vol. 1, p. 589. See, also, vol. 8, pp. 7584, 7585.]

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. § 203.*]

Commissioners' Opinion, Division No. 1. Error from District Court, Marshall County; James R. Armstrong, Judge.

Action by Mabel V. Long against the St. Louis & San Francisco Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

W. F. Evans, of St. Louis, Mo., and R. A. Kleinschmidt and J. H. Grant, both of Oklahoma City, for plaintiff in error. Wolfe, Wood & Haven, of Sherman, Tex., and Hardy & Franklin, of Madill, for defendant in error.

THACKER, C. In this opinion plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On March 15, 1909, S. H. Long, foreman of defendant's switch engine crew, was killed in uncoupling its moving cars in its yards at Francis, Okl.; and on June 10, 1909, plaintiff, for herself and minor child, Hazel Long, these being wife and child respectively of said S. H. Long, commenced this action against defendant for \$35,000 as alleged damages suffered by reason of alleged negligence of defendant, as master, causing the death of the husband and father, as its servant.

The defendant assigns error in that the court permitted plaintiff (first specification) "to file an amended petition after the case had been called for trial" (seventh specification) "to reopen her case after she had announced that she rested," and (eighth specification) "to amend her petition after both the plaintiff in error and defendant in error had rested and after the court had excused the witnesses."

On the same day, but apparently before the case was called for trial, plaintiff was per-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mitted to file, over objection in most general terms, an amended petition alleging negligence in the failure and refusal of the engineer in charge of the switch engine to slow up and stop in obedience to a signal given by plaintiff's decedent before he went between the cars, in anticipation that such signal would be obeyed, to make the uncoupling, and in thereafter starting "said cars backward at a very dangerous rate of speed," which allegations in respect to signal finds no support in the evidence, unless such an inference could have been drawn by the jury from the proven facts admissible under the original as well as the amended petition, which, without necessity for deciding, we may assume for the purpose of this opinion could not have been done; and, although the two other grounds of negligence charged in the original petition were repeated in somewhat changed form in this amended petition, it does not appear that any other material change in the original petition was made by this amendment. Plaintiff's original petition, as well as this amended petition, alleges negligence against the defendant in that it had permitted the frogs and angles of its rails to remain open without blocks, and had permitted the defective condition of the coupling equipment in the car her decedent was attempting to uncouple at the time of the accident; and that from these causes "his foot caught in a frog in the track, or in an angle formed by the side track rail approaching the rail of the main line, and was thrown down and run over by said cars and cruelly killed." After this amended petition was filed, defendant refiled its amended answer, plaintiff filed her reply, and the case went to trial with both parties apparently ready.

After a demurrer to the evidence introduced by plaintiff had been overruled, she asked and was granted permission to withdraw her announcement of rest, defendant thereupon excepted, plaintiff thereupon stated a desire to prove that other railroads in the vicinity of the accident protected users of their yards by blocking frogs as the purpose for which she desired to withdraw such announcement, the defendant then objected, and the court then repeated the permission already given; but the plaintiff thereupon announced: "Well, we will stand on the record as it is."

[1] After both parties had rested in the taking of evidence, plaintiff asked and was permitted to reopen the case and amend her petition to conform to the proof by inserting the following additional words: "That deceased caught his foot between the guard rail and the main line and was thereby run over and killed."

It does not appear wherein the allegation of negligence in the conduct of the engineer in charge of the switch engine in disregarding any signal found defendant unprepared to meet it, even if there had been evidence in support of that allegation, nor wherein the

defendant might have been better prepared at any future time, nor wherein the allowance of the amendment made any occasion for the imposition of any onerous term as a condition thereof, nor wherein the amendment by insertion of the words last above quoted is subject to any objection urged against it by defendant; the objection being in general and not specific terms, and the trial being free from any developments showing any wrong done defendant in this regard.

Neither of the amendments changed substantially the claim of the plaintiff, it does not appear that they operated to the prejudice of the rights of the defendant, and it was in the sound discretion of the trial court to permit each of them.

We are unable to find any reversible error in the action of the trial court complained of in either or all of the three assignments of error above mentioned. Comp. Laws 1909, § 5679, Rev. Laws Ann. 1910, § 4790; City of Shawnee et al. v. Slankard, 29 Okl. 133, 116 Pac. 808; Herron v. M. Rumley, 29 Okl. 317, 116 Pac. 952; Z. G. Fort Produce Co. v. Southwestern Grain & Produce Co., 26 Okl. 13, 108 Pac. 386; Lookabaugh v. Bowmaker, 21 Okl. 489, 96 Pac. 651; Comp. Laws 1909, §§ 5673, 5674 and 5675; Binlon v. Lyle, 28 Okl. 430, 114 Pac. 618; St. L. I. M. & S. Ry. v. Hardwick et al., 28 Okl. 577, 115 Pac. 471; Chas. T. Derr Const. Co. v. Gelruth, 29 Okl. 538, 120 Pac. 253; Coley v. Johnson, 32 Okl. 102, 121 Pac. 271; Merchants & Planters' Ins. Co. v. Crane, 128 Pac. 260; Gross Const. Co. v. Hales, 129 Pac. 28; Booker Tobacco Co. v. Walker, 131 Pac. 537.

[2] The defendant further assigns error in that the court refused (specification 2) "to grant the defendant a continuance and" leave "to withdraw its amended answer, which had been filed under a misapprehension of facts, and for the further reason that counsel had overlooked new issues that had been raised in defendant in error's amended petition which plaintiff in error was not prepared to meet."

It does not appear that any new issue other than above stated was raised by any amendment of plaintiff's petition; and this assignment of error appears to be entirely without merit, inasmuch as no "misapprehension of facts" of which defendant could complain is specified in the briefs or appears in the record; it does not appear wherein defendant was surprised or unprepared, or how it might by a continuance have been better prepared to meet any new issue raised; nor is there any specification of new issue overlooked or sufficient explanation given throwing any light upon why counsel overlooked the same. It appears that request for leave to withdraw the answer from the files was merely an incident of defendant's request for a continuance, and had for its purpose the same purpose for which the continuance was asked, i. e., to give defendant time to prepare and file a petition and bond

for removal of the case to the proper federal court, and this assignment of error appears to relate to no other purpose whatever; but the record does not disclose any fact justifying such purpose. No further ground for such removal appears, although, in the examination of the jurors as to their qualifications, counsel for the plaintiff stated that she "is at the present time at Stringtown, Okl.;" and thereupon defendant's counsel asked leave to withdraw its announcement of ready for trial on the ground that the pleadings (evidently referring to said amended petition) and statement (evidently referring to the statement just quoted) of counsel for the plaintiff had taken counsel for defendant by surprise, in that it appeared to him in the light of that statement that plaintiff was at that time a resident of Oklahoma, which, if true, might have afforded ground for such removal. On this ground, and for the purpose of filing a petition and bond for removal from the state to the federal court, counsel for the defendant asked a continuance of the case. Counsel for the plaintiff (erroneously, as it appears, assuming he had stated she was a resident of Oklahoma) thereupon stated that his statement that plaintiff resided at Stringtown, Okl., was inadvertent; that he did not intend to change her place of residence; and that he meant to state she was visiting her brother at Stringtown, and that he withdrew his former statement. The court stated that, if it should develop that plaintiff was a resident of Oklahoma, the verdict should be set aside. Thereupon defendant added to its motion by asking leave to withdraw its amended answer for the reason that the same was filed under the misapprehension that plaintiff was a resident of the state of Texas. Whereupon the court stated that if it should develop on the trial that plaintiff was really a resident of Oklahoma, that defendant should have the right to file a petition for removal; but that, as counsel for plaintiff had declared his remark in this regard was inadvertent, and that he only intended to state she was visiting in Oklahoma, and there was no evidence before the court as to her residence, defendant's motion would at that time be denied, to which defendant excepted. The uncontradicted evidence of the plaintiff was that she resided (as alleged in both her original and amended petitions) in the state of Texas and owned her home at Denison, Tex., and had so resided all her life, except from about February 17, 1908, until some time in March, 1909, during which excepted time she lived at Francis, Okl.; and the request for continuance was not renewed. "The granting or refusing of a continuance is within the sound judicial discretion of the trial court; and, unless it appears that there was an abuse of such discretion, the order of the trial court in such matters will not be disturbed by the Supreme Court on appeal."

Kelley et al. v. Wood, 32 Okl. 104, 120 Pac. 1110, and cases there cited. "Surprise at the trial is not sufficient ground for a continuance, unless the surprise is such as cannot be obviated by the exercise of ordinary care and due diligence on the part of the party asking for the continuance." *M. K. & T. Ry. Co. v. Horton*, 28 Okl. 815, 119 Pac. 233.

[3] Defendant further assigns error in that the court permitted plaintiff (ninth specification) "to reopen her case and introduce further evidence after same had been closed and after the court had excused the witnesses." Plaintiff asked and was granted leave to reopen the case for the purpose of "offering additional proof" in connection with her last aforesaid application to amend her petition after both parties had rested; and defendant objected to the same as follows: "To which application of the plaintiff defendant objects for the reason that the plaintiff has already announced that his case was closed and some of the defendant's witnesses have been excused and have left town, and for the further reason that said amendment does not conform to the proof already introduced, and the purpose of the same is to introduce new evidence changing the issues and making the issues other than that raised by the original pleading;" but it does not appear that plaintiff consented nor who excused these witnesses. Plaintiff stated in answer to this objection that no train or witness had left and no witness had any way to leave, to which defendant did not reply; and no proof was offered upon the issue thus made by statement of counsel. The amendment of the petition was made, as hereinbefore stated, and immediately after this plaintiff recalled the witness, Martin J. De Long, and, without further objection, introduced additional testimony relating to the blocking of frogs and angles by railroad companies. The case of *Harris v. Palmer*, 25 Okl. 770, 108 Pac. 385, is in point here. In the opinion in that case the case of *West v. Cameron*, 39 Kan. 736, 18 Pac. 894, is quoted with apparent approval as follows: "In the case of *West v. Cameron*, supra, the Supreme Court of Kansas on this proposition said: 'The opening of a case for the purpose of receiving further evidence, after the case has been tried, but before any decision has been rendered therein, and the continuance of the case for such evidence, and the receiving of the same are all within the judicial discretion of the court. * * *'" In the state of the record above disclosed it does not appear that there was either prejudice or abuse of discretion in the action of the court in permitting the reopening of the case and the introduction of this additional testimony without objection other than above stated.

The defendant further assigns error in that the court permitted (tenth specification) "In-

competent, irrelevant, and immaterial testimony offered by defendant in error and objected to by plaintiff in error," and excluded (eleventh specification) "competent and relevant testimony offered by plaintiff in error"; but the brief does not point out what testimony offered by defendant was excluded.

[4] It is contended that the court erred in permitting the witness De Long, over objection and exception by the defendant, to draw a diagram on the floor, from which he afterwards, without objection at the time, testified by designating thereon the "station," the "shanty," where plaintiff's decedent was killed, and the guard rail, between which and the main line rail he had been mashed by the wheels of the train. After answer to the fourth question referring to the plat on the floor, the defendant moved to strike this testimony out as incompetent, irrelevant, and immaterial, "the witness having made indications on the floor, that cannot be shown in the record," to which the court made no immediate response; but counsel for plaintiff responded by stating to the stenographer that: "The point indicated by the witness * * * is the point where the side track that runs on the west side of the main line joins the main line on the east rail of the main line;" to which statement defendant objected; and in response to this objection the court said: "Yes, let the witness state that, I think it would be better;" whereupon counsel for defendant stated: "That is the objection I have to the whole proposition on the floor—it don't go into the record; reference of the witness to the different points on the diagram on the floor will be unintelligible on the record;" to which the court responded: "It will unless he is careful." The record does not disclose any exception taken by defendant to either the action or inaction of the court relating to this matter except to the drawing of the diagram on the floor in the first instance, as above stated.

After a few further questions, without reference to the diagram that had been drawn on the floor, counsel for plaintiff said: "I don't know whether the jury understand or not; the gentleman objects to my using the diagram; the main thing is to let the jury understand (here the attorney draws diagram on the floor)—now, say the straight line there indicates the one side of the angle and this curve indicates the other side of the angle that joins the main line; you say the block is driven in the angle; if I understand you, you drive the block in so as to close up this acute angle or sharp angle where this man's foot was caught, and at the end of the block the rails flare apart so as to give no chance for the man to catch his foot?" Objection was made to this interrogative statement, and the court, in its answer, said: "The diagram on the floor, as shown in the record, has been called

ed." The court overruled this objection; and thereupon counsel for plaintiff asked the witness, who had not answered the question: "Can you answer that, the effect of putting the block in the angle?" Before this question was answered, the court said: "I don't see why you can't ask the question and make it clearly intelligible to the jury without referring to the diagram;" to which counsel for plaintiff responded by saying he would try to do so; and it does not appear that there was any further reference by him to the diagram on the floor. Later defendant called upon this same witness to make and, when made, put into the record a diagram purporting to be identical with the one drawn upon the floor; and, in addition to this, later put into the record a more elaborate diagram embracing, among others, all the features of the one purporting to be identical with the one drawn on the floor. The record does not disclose that there was any difference between the diagram drawn upon the floor in respect to what it represented and those that were put into the record; but, to the contrary, all the diagrams appear identical with respect to the features shown by the one drawn on the floor.

The court should not perhaps have permitted the unnecessary drawing of the diagrams upon the floor, which could not conveniently be made part of the record, nor the testimony of the witness, nor the statement of counsel with reference to the same over the objection by defendant—at least, it is a practice not to be commended. See *Rachmel v. Clark*, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 939; *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179. But it does not necessarily follow that this was reversible error. In *Meek v. Daugherty*, 21 Okl. 859, 97 Pac. 557, it is held: "The admission of incompetent and immaterial evidence, that appears to have prejudiced the substantial rights of the party objecting to the admission thereof, is reversible error;" but can it be said that the drawing of the diagram upon the floor and the testimony and statements relating to the same appear to have prejudiced any substantial rights of the defendant? We think not.

Defendant further assigns error in that the court (fourteenth specification) refused "to give to the jury instructions requested by the defendant," and refused "to give each of said instructions numbered from 1 to 17, both inclusive," and (fifteenth specification) gave "the jury instructions numbered 1 to 15, both inclusive," and gave "to the jury each of said instructions over the objection of the plaintiff in error"; but urge error in brief only the refusal to give special instructions numbered 1, 4, 5, 6, 7, 12, 16, and 17 requested by defendant; and the giving of the court's instructions numbered 2, 9, and 10 only are urged by counsel as error.

[5] Each and all of the instructions refused and given in which defendant contends

there was reversible error, except the first and sixteenth instructions refused, relate to the defenses of contributory negligence or of assumption of risk.

The answer of defendant consisted of a general denial, allegations of contributory negligence by plaintiff's decedent, and the allegations of assumption of risk by him.

The court instructed the jury on the issue of contributory negligence as follows:

"(1) Ordinary care, as used in these instructions, is such care as a person of ordinary prudence would exercise about his own affairs of ordinary importance. The want of ordinary care constitutes ordinary negligence.

"(2) Contributory negligence, as used in these instructions, is such an act or omission on the part of plaintiff's decedent which amounts to a want of ordinary care on his part, and which, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the injury complained of.

"(3) You are further instructed that, if you find from the evidence in this case that the plaintiff's decedent was guilty of contributory negligence, then the plaintiff herein cannot recover, regardless of whether defendant was guilty or not. By contributory negligence, as already explained, is meant want of ordinary care on the part of the deceased which in some degree directly caused his injury, and without which the injury would not have occurred. While it was the defendant's duty to provide a reasonably safe place for the deceased to work, and reasonably safe tools and appliances with which to perform his work, and maintain same in such condition, it was also the duty of the deceased, while engaged in the work assigned to him, to exercise ordinary care for his own safety; that is, such care as a reasonably prudent person of his experience and understanding would exercise under the same circumstances and conditions. If you find from the evidence that he did not exercise such care, and was injured by reason thereof, plaintiff cannot recover herein, and your verdict should be for the defendant.

"(4) In determining whether or not plaintiff's decedent was guilty of contributory negligence in causing his injury, you should take into consideration all the facts and circumstances surrounding him at the time he was injured, as well as his own conduct at and just prior to the accident, his age, his intelligence and understanding, the length of time he had been working in and about the defendant's yards at Francis, his previous experience in the railroad business, and, from all the circumstances and facts surrounding the deceased at the time of his injury which have been introduced in evidence before you, say in your judgment whether or not he was guilty of contributory negligence, and, if, in your opinion, he was not, then the

plaintiff herein is entitled to recover; if, on the other hand, you believe that his own conduct and his own acts in some manner and in some degree contributed to his injury, then plaintiff would not be entitled to recover, and your verdict should be for the defendant."

On the issue of assumption of risk the court instructed the jury as follows:

"(5) The said S. H. Long, when he entered the service of the defendant, assumed such risks as were ordinarily incident to the work in which he was engaged, but he did not assume any risk which might be caused by the negligence of the defendant; if, therefore, you believe that the accident which caused the death of the said Long was an accident which could not reasonably have been anticipated or foreseen and thus guarded against by the exercise of ordinary care by the defendant, and was not the result of ordinary negligence on the part of the defendant, its agents or employees, then, in that event, the injury would be one of the risks which the said Long assumed, and in such case it would be your duty to find for the defendant. If, however, you find that the death of the said S. H. Long was occasioned by the failure of the defendant company to exercise ordinary care to handle its cars, to exercise ordinary care for the safety of those working in the yards, then, in such case, the said Long would not be held to have assumed the risk, and, if the said Long was in his proper place of duty and was not guilty of contributory negligence as hereinbefore explained, it would be your duty to find for the plaintiff."

"(9) If you believe from the evidence that the said angle where the said S. H. Long got his foot caught and was run over was unblocked, but that the same was known to the said S. H. Long, and that the dangers arising therefrom were so open and apparent that a person of ordinary prudence would not continue to work without the same being blocked, then you will find that S. H. Long assumed the risk of danger arising from the unblocked condition of said angle, and in that event you will find for the defendant.

"(10) If you believe from the evidence that the coupling apparatus of the car above referred to was defective, and if you believe from the evidence that the said S. H. Long knew of the same, or by the use of ordinary care in the performance of his duties could have known of the same, before he undertook to operate it, and you further believe that a person of ordinary prudence after becoming acquainted with the said defects would not have undertaken to uncouple the cars in the manner that S. H. Long did, then you are instructed that the said S. H. Long assumed the risk of being injured by uncoupling the same in the manner he did, and, if you so believe, you will find for the defendant."

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“(11) You are further instructed that as to such dangers as are patent and obvious to a person of ordinary intelligence and experience and that are known to the employé, or that ought to have been known to him in the exercise of ordinary care, the master is under no obligation to warn him against them.”

Section 6, art. 23 (section 355, Williams'), Constitution of Oklahoma reads: “The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.” That these defenses in all cases are questions of fact and must be left to the jury, see, also, the following cases: *Chicago, R. I. & P. Ry. v. Beatty*, 27 Okl. 844, 116 Pac. 171; *Independent Cotton Oil Co. v. Beacham*, 31 Okl. 384, 120 Pac. 969; *Phoenix Printing Co. v. Durham*, 32 Okl. 575, 122 Pac. 708, 38 L. R. A. (N. S.) 1191; *Chicago, R. I. & P. Ry. Co. v. Hill*, 129 Pac. 13, 43 L. R. A. (N. S.) 622; *Dewey Portland Cement Co. v. Blunt*, 132 Pac. 659, not yet officially reported.

[6] Neither the defense of contributory negligence nor the defense of assumption of risk can arise, of course, unless the defendant has been guilty of negligence which, but for one or both of these defenses, would render it liable for damages to the plaintiff. Until then there is nothing against which to make defense; but, if there be evidence from which the jury may find the defendant guilty of such negligence, these defenses, if they exist in fact, are available to the defendant. The section of the Constitution just quoted expressly recognizes these defenses as they existed, especially in their aspects as questions of fact, at the time of the adoption of the Constitution, although we express no opinion as to whether statutory change could be made; but it is quite clear from the language used that neither of them nor any question found in the evidence or want of evidence on an issue made by pleading either or both of these defenses can arise in any case as a question of law for the judge. The judge no doubt should, in leaving these defenses to them, inform the jury what these defenses are, that is, should define contributory negligence and assumption of risk in relation to the evidence and where the burden of proof lies in proper instructions, and inform them of the legal effect of same. The jury no doubt should, as a matter of fact, infer contributory negligence and assumption of risk or the absence thereof where the courts of this jurisdiction, as a matter of law, were accustomed to infer or presume the same prior to the adoption of this section; and it may be that the judge should advise the jury of such inferences and presumptions; but the jury alone can, with binding effect, say what inferences and presumptions of fact may be indulged in determining these defenses. The language of this section and

the cases hereinbefore cited do not permit any other interpretation or construction; and there is nothing in the history of the provision under consideration to suggest any other intent on the part of the convention that framed or the people who adopted the Constitution.

It is urged by counsel for defendant in brief and oral argument that this provision of our Constitution is merely declaratory of the pre-existing law; but this contention is conclusively answered by the cases hereinbefore cited, and especially that of *Independent Cotton Oil Co. v. Beacham*, 31 Okl. 384, 120 Pac. 969, in which it is said: “Another point is made that the proposition that our constitutional provision, providing that the defense of contributory negligence or assumption of risk is a question of fact to be submitted to the jury, is merely declaratory of the common law that, when the court has found that there is legal evidence tending to show negligence or contributory negligence, it is for the jury to determine from the evidence whether negligence or contributory negligence exists. Citing *Kiley v. C. M. & St. P. Ry. Co.*, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756. To give the Wisconsin provision the construction contended for by the plaintiff in that case would have the effect of conferring judicial power on juries, in violation of article 7, § 2, of the Constitution of Wisconsin, which confers all judicial power upon designated courts. In the case at bar the provision under discussion is a constitutional provision, and, of course, it is not necessary to resort to construction to harmonize it with any other enactment. Upon its face, it seems to be plain and unambiguous. It provides that the ‘defense of contributory negligence and of assumption of risk shall, in all cases whatsoever, be a question of fact, and shall, at all times, be left to the jury.’”

As to the law of contributory negligence:

In *Ladow v. Oklahoma Gas & Electric Company*, 28 Okl. 15, 119 Pac. 250, it is said: “Contributory negligence is nothing more nor less than negligence on the part of the person injured, and the rules of law applicable to the negligence of a defendant are applicable thereto. *Pitman v. City of El Reno*, 2 Okl. 414, 37 Pac. 851. Negligence, as defined by section 2830, Comp. Laws of Oklahoma 1909, is as follows: ‘The terms “neglect,” “negligence,” “negligent,” and “negligently,” when so employed, import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.’”

In 29 Cyc. 505, it is said: “Contributory negligence in its legal significance is such an act or omission on the part of plaintiff, amounting to an ordinary want of care, as concurring or co-operating with the negligent act of defendant is the proximate cause or occasion of the injury complained of.”

In *Little v. Hackett*, 116 U. S. 386, 6 Sup. Ct. 391, 29 L. Ed. 652, it is held: "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it."

As to the law of assumption of risk:

[16] In *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153, it is held: "Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk."

See 1 Words and Phrases, 589, where the following cases are cited: *Bauer v. American Car & Foundry Co.* [132 Mich. 537] 94 N. W. 9, 10 (citing *Narramore v. Cleveland, C., C. & St. L. Ry. Co.*, 96 Fed. 301, 37 C. C. A. 501, 48 L. R. A. 68); *Atchison, T. & S. F. Ry. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253; *Green v. Western American Co.*, 30 Wash. 87, 70 Pac. 310, 317.

The foregoing instructions given by the court, in the light of the authorities just quoted, appear free from reversible error on any point urged against them by defendant, although the jury is thereby informed that the plaintiff's decedent "did not assume any risk which might be caused by the negligence of defendant" and is nowhere informed that the defenses of contributory negligence and assumption of risk are questions of fact of which they are the exclusive judges. The defendant neither in brief or oral argument insists upon this omission as error. The omission is in accord with the contention of defendant both in the trial court and here, and the error, if any, is waived.

In *Citizens' Bank & Trust Co. v. Dill*, 30 Okl. 1, 118 Pac. 374, it is held: "It is the rule and repeated holding of this court that alleged errors, other than those affecting jurisdiction, not specifically pointed out and insisted upon in plaintiff's error's brief, will be treated as waived."

It is urged upon the authority of *Gilbert v. Burlington, O. R. & N. Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27, that the definition of contributory negligence as given in the court's foregoing instruction number two is not correct; but we are unable to find in that case any authority for its condemnation, although it is there held: "The test of contributory negligence is whether or not the want of care directly contributes to the injury, not whether it is the more proximate cause of it than the negligence of the defendant. If it directly contributes to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it."

In the fifteenth instruction requested by the defendant and refused by the court it is stated: "You are instructed that the test of contributory negligence is whether or not the want of care directly contributed to the injury, not whether or not it was the more proximate cause of it than the negligence of the defendant. If it directly contributed to the injury, it is fatal to the plaintiff's recovery, although the negligence of the defendant may be the more proximate cause of it." This instruction merely emphasizes and illustrates, by more specific and a different form of statement, a proposition of law that is fairly embraced in the foregoing instructions given by the court.

[7] In *St. Louis & S. F. Ry. Co. v. Walker*, 31 Okl. 494, 122 Pac. 492, it is held: "It is not error to refuse to give an instruction that correctly states the law, if substantially the same instruction is embodied in the charge of the court to the jury, and the charge, taken as a whole, correctly states the law applicable to the facts in the case." To the same effect see the following cases: *Standifer v. Sullivan*, 30 Okl. 365, 120 Pac. 624; *National Drill & Mfg. Co. v. Davis*, 29 Okl. 625, 120 Pac. 976; *Scott v. Vulcan Iron Works*, 31 Okl. 334, 122 Pac. 186; *Eisminger v. Beman*, 32 Okl. 818, 124 Pac. 289; *Enid City Ry. Co. v. Reynolds*, 34 Okl. 405, 126 Pac. 193; *Enid Electric & Gas Co. v. Decker*, 128 Pac. 708; *St. Louis & S. F. Ry. Co. v. Bilby*, 130 Pac. 1089.

[8] The sixteenth instruction requested by defendant and refused by the court reads: "You are further instructed that the mere fact that the defendant did not block the frogs, guard rails, and angles between the side tracks and the rails of its main track will not warrant you in finding that the defendant was negligent, and such omission on the part of the defendant does not amount to negligence as a matter of law." It may be that this instruction was intended to present the idea that negligence could not be predicated upon the unblocked condition of the space between the convergent rails where the decedent's foot was caught, upon all the evidence relating to that subject; but it was susceptible of being understood as less comprehensive of the evidence to which it relates, and as meaning that proof of nothing more than the unblocked condition of this space was not sufficient proof of negligence on the part of defendant, a meaning less favorable, of course, to defendant than the former, if we assume, as we will for the purpose of present discussion, that the evidence as a whole on this subject was not sufficient to show negligence. In other words, assuming for the present purpose only that defendant was entitled to an instruction to the effect that the unblocked condition of the space between the guard and main line rails, under all the evidence, including the evidence as to the peculiar situation and

right use of this space and the effect and custom of blocking, did not constitute negligence, was it material, in view of the additional evidence, to determine whether the mere fact that the defendant did not block the frogs, guard rails, and angles between the side track and the rails of its main track, might constitute negligence; and did the court err in refusing the instruction merely as not presenting to him a question based on all the evidence relating to this subject? The evidence shows, and indeed it is a matter of common knowledge, that such open spaces as that in which the decedent's foot was caught are dangerous, especially in the nighttime, to employes working in such a yard; and the evidence further shows not only that such danger may be eliminated by blocking, but that of three other roads, for which the only witness questioned on this subject had worked, two of them used the block system, and the other, like defendant, did not.

The decided cases upon the question presented by the instruction under consideration are not in harmony; and this lack of harmony is reflected in the following authorities:

In 3 Elliott on Railroads, 1272a, it is said: "It is generally held that the operation of a railroad without blocking its frog, switches, or guard rails is not negligence. It is certainly not negligence as a matter of law in the absence of any statute upon the subject, although there are cases holding that the question is for the jury."

In 1 Labatt on Master and Servant, 69, it is said: "The position taken in some jurisdictions seems to be that a jury may properly infer negligence from the mere fact that a frog or guard rail was not blocked. The obvious complement of the doctrine is that the court cannot say, as a matter of law, that culpability is imputable where nothing more appears than that there was a want of blocking. Another view is that the servant, in order to make good his right of recovery, must do more than establish the want of blocking. That is to say, he has the burden of proving that frogs, etc., are not reasonably safe for the purposes which they are designed to subserve, and must also show that on the whole, the use of the block would be prudent, in that it would guard against dangers in one direction, without introduction of new perils in another. * * * He cannot recover merely upon evidence that an increase of safety is obtained by using the blocks. * * * In many of the cases the circumstances with reference to which the question of reasonable safety has been considered has been the common usage of railway companies. In order to estimate the doctrinal significance of these decisions, the theory held by the courts which rendered them must be taken into account. In some jurisdictions, * * * proof that it is the common usage

of railway companies not to block frogs or guard rails will prevent recovery, as a matter of law. In others, such evidence is merely treated as an element proper for the consideration of the jury. A conception sometimes relied upon has been that the risk created by the unblocked frogs was obvious, and therefore assumed. In one case this seems to stand as the specific and differentiating reason upon which recovery was denied. But most of the decisions in which phraseology indicative of the conception is employed emanate from courts of which at least a part would deny the master's liability, even apart from this consideration."

In many of the decided cases it does not appear that any nice distinction was made or necessary to be made to a correct disposition of the case between negligence on the part of the railroad company and assumption of risk on the part of the employe; and the courts, in holding negligence could not be predicated upon the want of blocking, have generally held in the same cases that the employe assumed the risk, while the courts holding that the question of negligence in permitting the unblocked condition of such spaces was for the jury have generally held in the same cases that the employe did not, as a matter of law, assume the risk. Indeed, in all the jurisdictions in which we have found decided cases in point there has been no imperative necessity for differentiating between want of negligence on the part of the railway company and assumption of risk on the part of the employe; but in this jurisdiction, where the defense of assumption of risk on the part of the decedent is a question of fact for the jury, the court must of necessity differentiate in determining whether, as a matter of law, there is evidence warranting the jury in finding the defendant guilty of such negligence; and the value of the decided cases in such other jurisdictions as precedents for our guidance in finding this line of demarcation is not so great as it otherwise would be. There was another subject of negligence presented by the general instructions to the jury upon which the verdict might rest; and it was not necessary for the trial court to determine whether negligence in the defendant could be predicated upon the unblocked condition of this particular space under the evidence in this case, unless the question was fairly presented to him by the instruction under consideration.

Assuming, without deciding, that defendant would have been entitled to have the jury instructed that negligence could not be predicated upon the unblocked condition of this particular space under the evidence in this case, upon the theory that it was necessary for plaintiff to have further shown, and that she did not show, that blocking would not have introduced any new danger nor involve any unreasonable expense, or that the same is a customary safety device for such

spaces, was the trial court not, in the light of what has already been said, justified in refusing it because it omitted material elements or facts on the subject to which it related and left undisposed of the effect of proof of safety in blocking and the peculiar situation and purpose of this guard rail and space? If this instruction had been given, the jury would have been left without guidance as to the effect of the proof of safety to employees in blocking and of the peculiar situation and purpose of this guard rail and space upon the question of negligence in this respect; and it was not material for the court or jury to determine whether the mere proof of want of blocking, considered apart from the proof of safety to employees in blocking and the peculiar situation and purpose of this particular guard rail and space, was sufficient to support a verdict against defendant.

In Hughes Instructions to Juries, 27, it is said: "An instruction which omits any material element or fact on the subject to which it relates is defective, and for that reason it is properly refused. Such defective instructions, though correct in other respects, may be refused."

In 38 Cyc. 1627-1628, it is said: "Instructions which ignore or exclude from the consideration of the jury evidence which is competent and material to the issue involved are erroneous, and this is so, although the evidence is slight; and it is of course proper to refuse instructions which are defective in this respect."

It may be, and, so far as we have examined the cases is, true that this rule is supported only by cases in which the instruction requested and refused was more favorable to the party asking it than it would have been if it had embraced the omitted facts on that subject; and it may be that, as a general rule, an instruction cannot be refused when less favorable in such respect to the party asking it than such party was entitled to have it; but in a case like this, where there was another subject submitted to the jury upon which negligence might have been predicated, and where the requested instruction may have been understood by the trial court as impliedly admitting that proof of facts in addition to the mere fact of the unblocked condition of the space might justify the predication of negligence upon such unblocked condition of this space, and where the defendant does not request an instruction involving the consideration by the trial court of the effect of all the evidence relating to this subject apart from the other subject of negligence, we doubt if it can be said that the question of sufficiency of the proof of negligence upon this one subject of negligence was fairly presented to the trial court for decision.

In the foregoing discussion of this requested and refused instruction we have assumed

that, upon all the evidence, the court should have instructed, if it had been requested, that negligence against the defendant could not be predicated upon the unblocked condition of the space between the convergent rails in question under all the evidence; but is it true that it could not? It is undisputable that no negligence is found by failure of a master to adopt a device which, so far as it appears, has not been discovered or come to be known as a practical utility, but this rule does not mean that railroad companies are not bound to keep themselves reasonably abreast with approved methods, so as to lessen the danger attendant on the service, and, while they are not required to adopt every new invention, it is their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances. *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 South. 276; *Georgia Pac. Ry. Co. v. Propst*, 83 Ala. 518, 3 South. 764. There has been such improvement in the machinery and appliances used by railroads, for the better security of life, limb, and property, that it would be inexcusable to continue the use of old methods of machinery and appliances known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer, and which are in general use by well-regulated railroads. *Louisville, etc., Ry. Co. v. Allen*, 78 Ala. 494; *Loyd v. Hanes*, 126 N. C. 859, 35 S. E. 611; *Gulf, etc., R. Co. v. Warner* (Tex. Civ. App.) 36 S. W. 118; *Tennessee, etc., R. Co. v. Kyle*, 93 Ala. 1, 8 South. 764, 12 L. R. A. 103; *Greenlee v. Southern Ry.*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; *Harden v. N. C. R. Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; *France v. Rome, etc., Co.*, 88 Hun, 318, 34 N. Y. Supp. 408; *Burke v. Whitherbee*, 98 N. Y. 562.

In the case of *France v. Rome*, supra, the court held that the best known or conceivable appliances need not be furnished, but that the test was such as a prudent man would furnish if his life were exposed to the danger that would result from unsuitable or unsafe appliances.

In a note to 1 Labatt, supra, it is said: "The following vigorous argument by Lewis, J., in his dissenting opinion in *Richmond & D. R. Co. v. Risdon* (1891) 87 Va. 335, 12 S. E. 786, is worth quoting: 'That the frogs were dangerous is not disputed, but it is contended that they were the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded, and situated, as this one was, in a place where there are many tracks, and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightfully so

found. Nor, upon this point, are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of "filling" them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the frogs ought always to be filled, as a protection to switchmen; and this is so well understood, he says, that the laws of some states expressly require it to be done. And why should they not be filled? Why should the servant be exposed to unnecessary risks that can so easily be guarded against? Is the rule that the master must exercise reasonable or ordinary care a meaningless phrase—the mere jingle of words? I think not." And this reasoning, as applied to the space in which decedent's foot was caught, appeals to us very strongly.

The following cases cited in the same note tend to support the view that the question of negligence in the unblocked condition of frogs, angles or guard rails is for the jury: *Sherman v. Chicago, M. & St. P. Ry.* (1885) 34 Minn. 259, 25 N. W. 593; *Trott v. Chicago, R. I. & P. R. Co.* (1901) 115 Iowa, 80, 86 N. W. 33, 87 N. W. 722; *Mayes v. Chicago, R. I. & P. Ry. Co.* (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Hamilton v. Rich Hill Coal Mining Co.* (1891) 108 Mo. 364, 18 S. W. 977; *Missouri, P. R. Co. v. Baxter* (1894) 42 Neb. 793, 60 N. W. 1044; *O'Neill v. Chicago, R. I. & P. Co.* (1901) 62 Neb. 358, 86 N. W. 1008; *Holum v. Chicago, M. & St. P. R. Co.* (1891) 80 Wis. 299, 50 N. W. 99. A case which also tends to support the same view is *Union P. R. Co. v. James* (1896) 163 U. S. 485, 16 Sup. Ct. 1109, 41 L. Ed. 236; but the rulings were on points of procedure. And the case of *Southern P. Co. v. Seley* (1894) 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 891, seems to commit the Supreme Court to the theory that evidence merely of the want of blocking is not enough to establish culpability. Also see, as holding that question for the jury, the following cases: *McManus et al. v. Oregon Short Line R. Co.* (1906) 118 Mo. App. 152, 94 S. W. 743.

In *Union Pacific R. Co. v. James*, supra, it is held in the syllabus: "Testimony by plaintiff that the frog in which he was injured was unblocked at the time of the accident is sufficient to carry the question to the jury, though a number of witnesses testified that, just after the accident, the frog was found to be properly blocked;" but it is said in this case: "The charge in the petition was that the frog was not, and never had been, blocked. The answer denied this

fact, and did not assume to set forth as a defense that it had once been blocked, and the block misplaced without the knowledge of or notice to the railroad company. The railroad company was apparently content to rest its defense upon the single question of the existence of blocking at the time of the injury. The testimony went to that alone."

The argument first advanced by counsel for the railroad company on motion for new trial in that case was that "even if the frog was unblocked, that fact, of itself, would not make defendant liable for the injuries resulting therefrom; that the proof must go further, and bring to the defendant knowledge of such unblocked condition;" and the Supreme Court held that the issues made by the pleadings and the silence of the testimony in respect to the prior situation narrowed the inquiry of the injury to the single matter of the condition of the frog at the time of the accident. The question as to whether negligence could be predicated upon the unblocked condition of a frog or other angle in a case where the railway company did not use the block system was not presented by that case.

In the earlier case of *Southern Pac. Co. v. Seley*, supra, as reported in 14 Sup. Ct. 530, it is held in the syllabus: "It is not negligence to use unblocked frogs in a railroad freight yard, whereby the feet of employes coupling cars are liable to be caught, it appearing that unblocked frogs are generally used in the same section of the country, and that it is doubtful whether they are not the better kind;" but in that case the decedent put his foot into the frog in attempting to make a coupling and, although warned to take it out, did the same thing immediately afterwards, when he was killed; and the Supreme Court said, as a matter of law, he assumed the risk and was also guilty of contributory negligence.

These are the only cases we find decided by that court in any way involving the question here; and it will be seen from what has already been said as to them that they are not distinctly and clearly in point here.

The evidence as to the practicability of a block in the space between the guard rail and main line rail in question here is certainly meager and unsatisfactory; but, in view of the great danger involved in such open spaces, the situation of this particular space, the absence of any appearance of danger or impracticability in blocking from the facts proven, and the safely assumed advantageous situation of the defendant with respect to ability to produce expert evidence which it did not produce as to the same, we are unable to say, as a matter of law, that negligence could not be predicated upon the unblocked condition of this space under all the evidence relating to that subject. In saying this, we are not unmindful of the fact that the burden of proof was upon the plaintiff; but,

in the light of all the facts and circumstances we have stated, we are unable to say that the proof was not sufficient to go to the jury.

The defendant further assigns error in that the court (sixth specification) refused to sustain demurrer to evidence and (thirteenth specification) refused peremptory instruction, also (fourth specification) the verdict of the jury is not sustained by sufficient evidence, and (fifth specification) the verdict of the jury is contrary to law.

The question of negligence in the speed at which the train was backed was not submitted to the jury—the question of negligence in permitting the unblocked space between the convergent rail and the defective condition of the equipment for uncoupling only being submitted.

About 2 o'clock on the morning of March 15, 1909, defendant's extra freight train, consisting of about 20 cars, more or less, came from the south into its south yard and stopped south of the switch at the north end of the same, at Francis, Okl. It was the duty of defendant's car inspector, W. J. Thrasher, with his helper, Wilcox, to thereupon take charge of the train, inspect the cars, mark those in bad order by placing a red "bad order" card on them, and when through inspecting to surrender the train to plaintiff's decedent, S. H. Long, the foreman of the switch engine crew; and accordingly this inspector, with his helper, took charge of this train and commenced inspection with the car on the north end of the train about the time the road engine was uncoupled and taken away. They proceeded with the work of inspection along the cars toward the south, the inspector on the west and his helper on the east side, until they had inspected three, four, or five cars; but according to the testimony of the inspector, at this time the switch engine coupled onto the car from which the road engine had been taken and commenced to draw the entire train of cars to the north of the said switch for the purpose of switching, while the testimony of the yardmaster was to the effect that the work of inspection had been completed before the work of switching was begun. The inspector had exclusive control and could, it seems, have prevented any movement of the cars until he had completed his inspection; but, instead, according to his testimony, he simply held his light so as to inspect them as best he could as they passed him with intent to make a more careful and thorough inspection at some subsequent time. He observed that all the draft bolts on one side of a box car except one were broken; and as Frisco coal car No. 11935 passed him he observed that a queen-post used to support a truss rod was loose and that a drawbar in the coupling equipment in one end of the car seemed drawn out a little too long; but observed no defect in the equipment for uncoupling; and he did not put the usual "bad order" card on

this car. After the train had passed him he crossed to the east side of the main track upon which it had gone north and followed north to where S. H. Long, plaintiff's decedent, was standing, somewhere near but north of the switch at the north end of this yard.

S. H. Long at this time, as foreman of the switch engine crew, and in discharge of his duties as such, after a train of cars was turned over to him by the inspector, had the control over the same, for the purpose of switching and placing cars similar to that a conductor on the road has over his train.

In this south yard there were two tracks on either side of the main line on which the train of cars had gone north as stated. The caboose, due to be placed on the caboose track, and a box car, said by Martin J. De Long, defendant's night yardmaster at the time, to have been in bad order and due to be placed on the repair track, had been left on the main line at the time the train of cars were first taken north by the switch engine; and it appears that, about the time the inspector approached plaintiff's decedent somewhere near but north of the switch mentioned, as above stated, three cars on the rear of the train had been "kicked" onto and cut off and left on the second track west of the main line known as the stock track. About this time the inspector, according to his testimony, informed plaintiff's decedent that "this car" (referring to Frisco coal car No. 11935, which was about to pass, was passing, or had passed where they were standing) "and a box car is a bad order;" and plaintiff's decedent acknowledged the information only by asking: "How bad is the box car?"

The evidence does not clearly show how near the inspector was to either "this car" or to plaintiff's decedent at the time, nor throw any further light upon the question as to whether plaintiff's decedent actually received the information and understood therefrom that Frisco coal car No. 11935 was in bad order, and his inquiry suggests a question for the jury as to whether he did actually receive the information intended by the inspector to be given him as to "this car," or whether he did not inquire about the extent of defect in the coal car because the same was in view.

It was the duty of plaintiff's decedent as switch engine foreman, subject to the instructions from its night yardmaster, said Martin J. De Long, to switch and place for future use all the cars in the train, except "bad order" cars, which his duty required him to place on the repair track for repairs. It appears that the only instruction given plaintiff's decedent by the night yardmaster at the time this train came in was to take out from the train the four or five cars for Holdenville, a station a short distance away; and it appears that the four or five cars,

including Frisco coal car No. 11935, were due to go at once to Holdenville, unless this defective car should have been detained for repairs.

After "kicking" the three cars down on the stock track as already stated, and after the inspector had walked south about 50 or 60 yards from plaintiff's decedent, the train was backing south for the purpose of "kicking" this Frisco coal car No. 11935 off down the main track toward the caboose and the box car with it when the accident resulting in the death of plaintiff's decedent occurred; but it does not appear certain whether this Frisco car No. 11935 was being so placed for the purpose of being put into the Holdenville train, as the night yardmaster testified, or for the purpose of being afterwards put on the repair track with the bad order box car, either inference being apparently possible under the testimony. The switch engine crew consisted of the engineer, the fireman, and one helper by the name of Parker, who was temporarily and excusably a short distance away from this work of switching at the time of the accident; and plaintiff's decedent evidently undertook to and did in fact uncouple Frisco coal car No. 11935 while it was being so "kicked" down the main line to the desired position, and lost his life in so doing.

"This car" and the one to which it was coupled were each provided with automatic couplers, and each provided with a lever extending along the end out to the side of the car for use in uncoupling by the switchman without going in between the cars. Plaintiff's decedent was on the east side of these cars, and the uncoupling lever on Frisco coal car No. 11935 was also on the east side of the coupling equipment; but the lever for uncoupling the other car was on the opposite and west side of the coupling equipment, beyond his reach. The "dead wood" over the drawbar on the end of this Frisco coal car No. 11935 had in the course of time been beaten off underside so as to permit the drawbar to go back under the upper part so far as to take under it the lock block or coupling pin in the equipment of this car, and thus make it impossible to effect an uncoupling by use of the lever on this side of the train or by lifting this lock block or coupling pin by hand, so that he was confronted by the alternative of stopping the train or going between the moving cars in order to effect an uncoupling.

It appears that some rule of the company not in evidence, except by the admission in a general way of a witness on cross-examination, forbade the uncoupling of cars by going between them while in motion; but it also appears that the practice of the employees of the company at Francis was to effect uncouplings by doing so, while the trainmaster, who had authority to discharge such employees for violating rules, was in

the yards in both day and night time while it was being done, as well as other times, although there is no proof that the trainmaster actually saw and acquiesced in such violation of rules other than may be found in the evidence of his opportunity to have seen the same.

The inspector had, at the time of the accident, walked south some 50 or 60 yards, as already stated, when, being on the main line, down which Frisco coal car No. 11935 was being "kicked," heard the cars coming at such speed as to cause him, in a sense of precaution against danger, to look back to see how near they were to him; and, in looking back he saw what appeared to be a spark as it flew out to one side of the train. The inspector thought that a brake beam had fallen and had thrown off this spark, and he walked back to where it appeared to be to investigate. When he got near enough he saw, by the use of his lantern, plaintiff's decedent mashed on and between the guard rail to the east and the east rail of the main line about a rod south of the switch.

At the time of the accident, the night yardmaster was on or near the stock track some 100 or 150 yards to the south and away from the place thereof; and, after his attention was attracted in that direction by the exhaust of the engine and the speed of the cars, he was informed of the same by the inspector.

The inspector and the night yardmaster each testified to stopping the train by signalling as soon as the accident was discovered; and each testified that the train was stopped in obedience to his signal; but the night yardmaster testified that the engineer thereupon pulled the train forward the length of half a car and pulled one pair of trucks over plaintiff's decedent, and, when cross-questioned as to whether or not the sudden stopping of the engine might have caused the cars to go forward on recoil 10 or 12 feet, insisted that he knew by the exhaust of the engine that the engineer had gone forward after stopping.

The only witnesses who claimed any personal knowledge of the accident or any fact immediately connected therewith were the night yardmaster, Martin J. De Long, the principal witness for the plaintiff, who soon after the accident had been discharged by defendant because of unsatisfactory service according to a statement in his service letter, and the car inspector, W. J. Thrasher, the only witness for the defendant, still in its employ—nor was there any other witness in the case except the plaintiff; and neither party accounts for the absence of the testimony of the engineer, the fireman, the inspector's helper, or the plaintiff's decedent's helper.

The night yardmaster testified for plaintiff that at the time of the accident the train was being backed at a speed of at least 12

miles per hour; but, on cross-examination, he was confronted by a report he made immediately after the accident stating the speed as 6 miles per hour. He at first intimated that this report was not correct and was made in fear of loss of his job, but later admitted it must have been true and that he must have been mistaken in his testimony that the speed was at least 12 miles per hour, as he would not have made a false report, although, on later redirect examination with respect to his report of 6 miles per hour, he finally said it always seemed to him that it was going faster than that. This witness also testified that they "hardly ever 'kicked' them that hard, though, to roll that far"—referring to the speed of the train at the time of the accident.

On cross-examination, the car inspector, a witness for the defendant, at first testified the speed of the train at the time of the accident was 10 miles per hour, but later testified it was from 6 to 8 miles per hour, and finally said he did not know.

When the train was stopped by the signals mentioned, plaintiff's decedent was found to be dead under the eighth car from the one he had evidently undertaken to uncouple; and it was found that his left foot had been caught and was fastened between the guard rail and the east main line rail, and the wheels of the cars had passed over his left ankle, cutting it off, and had crushed his left leg, his body, and one of his arms between the guard rail to the east and the east rail of the main line about a rod south of the switch—he was evidently dead before the accident was discovered by either of the witnesses, one of whom said the passing of one of the trucks over him would have killed him. The left foot of plaintiff's decedent was fastened in the space between these convergent guard and main line rails, with toe to the south, indicating that while in between the cars in motion his foot had passed in, where the width between the two rails was sufficient to receive the same, and had been forced along between these convergent rails to where they were so close together at the top of the rails that he could not extricate it; and he had been thus thrown down upon the rails and run over and killed by the moving train immediately after he had effected the uncoupling.

The convergent rails (including guards, frogs, and angles) in defendant's yards at Francis at the time of the accident were unblocked, and it appears from the evidence that by placing blocks of wood or metal between such convergent rails where one's foot might enter the danger of such accidents could have been obviated; but it does not appear from the evidence what the cost of so doing would have been, nor whether such blocks increased the danger of derailment or any other danger. The plaintiff's witness, the night yardmaster, testified to knowledge of such blocking being at two places on an-

other road in Oklahoma, and on still another road at Amarillo, Tex., where he was employed as switchman at the time he testified; but, in addition to the defendant, he specified another road which did not block its frogs and angles when he worked for it. It appears that there was no eyewitness to the accident, at least no one was produced upon the trial who saw it; and the only proof as to what was done by plaintiff's decedent or whether the car was in motion or standing still at the time he went between them is found in such inferences as the jury might properly have drawn from the foregoing facts. There is no evidence that he did or did not signal the engineer; but it seems quite certain that plaintiff's decedent went between the cars for the purpose of effecting an uncoupling; and whether he first, in ignorance of the defective condition of the uncoupling equipment on coal car No. 11935, attempted to effect the same by use of the lever from the outside and, failing, then went between the cars and attempted to draw the lock block or pin by hand in the coupling equipment of that car, and finally effected an uncoupling by drawing the lock block or pin in the coupling equipment of the other car, was left entirely to inference by the jury from the aforesaid proven facts and common knowledge as far as permissible in respect to such matters; but at the time he was killed an uncoupling had been effected by lifting the pin in the coupling equipment of such other car; and the evidence tends to show he had the pin in hand when his foot was caught and held to it as long as he could. It appears that the next cars were to be switched to the stock track, and that the uncoupling of Frisco coal car No. 11935 should have been effected before the switch was reached; but it does not appear otherwise than from his position north of the switch a short time before at what place plaintiff's decedent first attempted it.

It will be seen from what has already been said in discussing another specification that defendant's sixth, thirteenth, sixteenth, fourth, and fifth specifications of error cannot be sustained; but, assuming, for the purpose of discussion, that negligence cannot be predicated upon the unblocked condition of the space between the guard and main line rails, is there not evidence sufficient to have gone to the jury on the question of negligence in the defective condition of the equipment for uncoupling? The fact that the railroad company had in operation a car with defective drawheads, and that a coupling cannot be properly made in the way it could have been had the coupling device been in repair, tends to show negligence on the part of the railroad company, according to *Gilliland v. Charleston, etc., R. Co.*, 86 S. C. 137, 68 S. E. 186.

In *Northern Pac. R. v. Tynan*, 56 C. C. A. 192, 119 Fed. 283, it is held: "It is the duty of a railroad company, which it owes to its

employees as well as to the public, to use reasonable care to see that the cars used on its road are in good order and fit for the purposes for which they are intended; and an employé has the right to rely upon the performance of this duty. * * *

In *Houston, etc., R. Co. v. Myers*, 55 Tex. 110, it is held: "The company is required, by the plainest dictates of reason and rules of law, to furnish to its servants operating trains good, sound, and suitable machinery, apparatus and material necessary in the conducting of that business; and generally the company is liable to its servants for injuries resulting from the use of defective machinery, apparatus, or material in the discharge of their duty, provided the company knew, or could have known by reasonable care, that the same was so defective or unfit for the purposes for which it was furnished."

In *Troxler v. Southern R. Co.*, 122 N. O. 902, 30 S. E. 117, it is held that a railroad company was negligent in using on its cars drawheads that were defective and dangerous; and in *Branz v. Omaha, etc., R., etc., Co.*, 120 Iowa, 406, 94 N. W. 906, it is held that, when a defect in a drawhead is shown to have existed such a length of time that the company ought to have been aware of it, there is negligence.

In *Bradshaw v. C., R. I. & P. Ry. Co.*, 58 Kan. 618, 50 Pac. 876, where the evidence showed that if the middle projection had been whole it would have prevented the coupler from passing back far enough to have injured the hand of the switchman, but, the whole front of it being broken out, the short end of the coupler slipped in between the upper and lower projection far enough to allow the long end to strike his hand; and it being shown that, although the switchman had not noticed the broken condition of the car, the accident occurring at night, and had no knowledge of the defect before the accident, it had been used in its broken condition a month or more, the court in reversing the judgment sustaining a demurrer to the evidence said: "There certainly was ample evidence of neglect on the part of the company. A defective appliance was in use in connection with one of the most hazardous branches of the company's business. It had been used in that condition for a sufficient time to enable the company in the exercise of reasonable care, to discover the defect."

In the case of *Belt Ry. Co. v. Confrey*, 209 Ill. 344, 70 N. E. 773, it was held that, where the evidence tends to show that a reasonably careful examination would have disclosed to the inspector that the coupling apparatus was defective, the determination of the issues of negligence is one for the jury.

In the case at bar the jury was left to infer from the very indefinite statement that the defect, consisting of the "battered-up" condition of the bottom of the "dead wood,"

was "not new" and "was not what you might call old," how long this defect had existed; but we cannot say, as a matter of law, that it was not shown by this evidence to have existed long enough to charge the defendant with knowledge. It was also for the jury to say, under the facts in this case, whether the inspector, and through him the defendant, by reasonable inspection, should have discovered this defect immediately before the decedent undertook to effect the uncoupling resulting in his death; and it was for the jury to say whether defendant was guilty of negligence in permitting that defect without informing the decedent of the same, and whether he was sufficiently informed.

In *Booker Tobacco Co. v. Walker*, 131 Pac. 537, the Supreme Court of this state following *Fidelity Mutual Life Ins. Co. v. Stegall et al.*, 27 Okl. 151, 111 Pac. 389, it is held: "It is only when the evidence with all the inferences the jury could justifiably draw from it will be insufficient to support a verdict for plaintiff, * * * that the court is authorized to direct a verdict for defendant; and, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts which the evidence tends to establish, the case should be left to the jury under proper instructions."

A case will not be reversed for want of evidence, if there is any evidence, including every valid inference the jury could have drawn from the same, reasonably tending to support the verdict. See the following cases: *Creek Bank & Trust Co. v. Johnson*, 33 Okl. 696, 127 Pac. 480; *St. Louis & S. F. R. Co. v. Dale*, 128 Pac. 137; *Hampton v. Culberson*, 29 Okl. 468, 118 Pac. 134; *American W. & P. Co. v. Spear*, 31 Okl. 22, 119 Pac. 586; *Grimes v. Wilson*, 30 Okl. 322, 120 Pac. 294; *Federal Trust Co. v. Spurlock*, 34 Okl. 644, 126 Pac. 805; *Brissey v. Trotter*, 34 Okl. 445, 125 Pac. 1119; *Stringer v. Hart*, 128 Pac. 135; *T. S. Reed Grocery Co. v. Miller*, 128 Pac. 271.

[9] The defendant further assigns error in that (third specification) the damages awarded are excessive and "appear to have been given under the influence of passion and prejudice."

Section 7, art. 23 (section 356, Williams'), Constitution of Oklahoma reads: "The right of action to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation."

The question of recovery for the pain and suffering of the intestate is neither involved nor claimed in this proceeding. *A., T. & S. F. Ry. Co. v. Rowe*, 56 Kan. 411, 43 Pac. 683; *Farmers' State Bank v. Stephenson et al.*, 23 Okl. 695, 102 Pac. 902; *State ex rel. v. Cullison*, Judge, 31 Okl. 187, 120 Pac. 650. The damages recoverable have reference to a pecuniary loss. *St. Joseph & Western R. Co. v.*

Wheeler, 35 Kan. 185, 10 Pac. 461; A., T. & S. F. Ry. Co. v. Weber, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; O., K. & W. R. Co. v. Bockoven, 53 Kan. 279, 36 Pac. 322. See, also, Tilley v. Hudson River R. R. Co., 24 N. Y. 471; Telfer v. Northern R. R. Co., 30 N. J. Law, 188; Safford v. Drew, 10 N. Y. Super. Ct. 627; Chicago & R. I. Railroad Co. v. Morris, 26 Ill. 400; Ill. Cent. Railroad Co. v. Weldon, 52 Ill. 290; City of Chicago v. Scholten, 75 Ill. 468; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Kesler v. Smith, 68 N. C. 154; Baltimore & O. R. Co. v. State, Use of Kelly et al., 24 Md. 271; Penn. R. R. Co. v. McCloskey, 23 Pa. 526; Same v. Vandever, 36 Pa. 298; Same v. Butler, 57 Pa. 335; Same v. Goodman, 62 Pa. 329; Johnston v. Cleveland & T. R. Co., 7 Ohio St. 336, 70 Am. Dec. 75; M. & W. R. R. Co. v. Johnson, 38 Ga. 409; Rose v. Des Moines Valley R. R. Co., 39 Iowa, 246; Orgall v. Chicago, B. & Q. R. Co., 46 Neb. 4, 64 N. W. 450; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. 360; Bertha Geiger v. Worthen & Aldrich Co., 66 N. J. Law, 576, 49 Atl. 918; Donaldson v. Miss. & Mo. R. R. Co., 18 Iowa, 280, 87 Am. Dec. 391; Nashville & C. R. Co. v. Stevens, 9 Helsk. (Tenn.) 12; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Malott, Receiver, v. Shimer, Adm'x, 153 Ind. 35, 54 N. E. 101, 74 Am. St. Rep. 278.

In *St. Louis, I. M. & S. Ry. Co. v. Freeman*, 89 Ark. 326, 116 S. W. 678, it is said: "It is contended that the verdict is excessive. Plaintiff's decedent was shown to have been 24 years of age, a man of good habits, healthy, intelligent, and industrious. He left no children. The case was therefore stripped of all elements of damage except as to the amount of his probable contributions to those dependent upon him. The evidence tended to show a present earning capacity at the time of his death and contribution to his wife of \$900 per annum. It tended to show also, and the jury were warranted in finding, that his earning capacity would probably have been increased—to what extent is a matter of speculation. It is shown that his wages had been increased from time to time, and that he was in line of promotion. According to the annuity tables, placing his contributions at \$900 per annum, computing at the rate of 6 per cent. per annum, the recovery should have been for \$10,845. Making due allowances for the probable increase in his earning capacity, we are of the opinion that the evidence is insufficient to sustain a verdict for more than \$15,000." See, also: *Pulaski Gas Light Co. v. McClintock*, 97 Ark. 576, 134 S. W. 1189, 1199, 32 L. R. A. (N. S.) 825; *Tillar v. Reynolds*, 96 Ark. 358, 131 S. W. 969, 30 L. R. A. (N. S.) 1043; *St. Louis, I. M. & S. Ry. v. Raines*, 90 Ark. 398, 119 S. W. 685, 17 Ann. Cas. 1; *St. Louis & N. A. R. Co. v. Mathis*, 76 Ark. 185, 91 S. W. 763, 113 Am. St. Rep. 85; *St. Louis, I. M. & S. Ry. Co. v. Caraway*, 77 Ark. 405, 91 S. W. 749; *St. Louis, I. M. & S. Ry. Co. v. Hitt et al.*, 76 Ark.

227, 88 S. W. 908, 990; *St. Louis, I. M. & S. Ry. Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

In *St. Louis, I. M. & S. Ry. Co. v. Freeman*, supra, only the widow survived, and consequently the element of pecuniary damages for the loss to a child could not be considered in sustaining a verdict for \$15,000. There the intestate was 24 years of age; here he is 30 years of age.

In 13 Cyc. 375, 376, it is said: "While the general rule is that the recovery must be confined to strictly pecuniary damages, the jury are not bound to any fixed and precise rules in estimating the amount of damages, * * * but may give compensation for any injuries, proceeding from whatever source, and their discretion in fixing the amount of damages should not be interfered with by the court, unless it has been palpably abused. The rule has been sometimes thus stated: To justify interference by the court with the verdict of the jury, it must appear that some rule of law has been violated, or else that the verdict is so excessive or grossly inadequate as to indicate partiality, passion or prejudice in the minds of the jurors."

In the case at bar the jury were not informed by the evidence or by instructions from the court as to the life expectancy of the plaintiff or her decedent shown by standard mortality tables, and there was no evidence of ancestral long life nor the physical condition of the decedent further than plaintiff's statement that he was in perfect health so far as she knew and was a strong man. The evidence showed that he was an affectionate man to his family; that he spent no money for foolishness, "only for necessary expenses"; that he was very industrious; that it was his custom to take his pay check and give it to plaintiff, who, after paying bills, put the balance in bank. Plaintiff was nearly 24 years old, the child, Hazel Long, was about 2 years old, and the decedent was a strong, healthy, and sober man 30 years old at the time of his death. During the three years of his marriage with plaintiff he had earned as high as \$160 per month while working for another railroad company, had commenced work for the defendant about 20 or 21 months before his death at \$50 per month, had earned \$120 per month as night yardmaster for the defendant for an undisclosed length of time, ending about 15 days before his death, and during the 15 days or thereabout prior to his death had worked for defendant as foreman of its switch engine crew about an hour less time each day and at a little less than \$120 per month; but at time of death had saved only about \$200 in money.

The evidence is not entirely satisfactory as to actual financial loss sustained by plaintiff and the child for whom she also sues; and under the law as already herein announced she could not of course recover more; but, in the light of the authorities just quoted, we cannot say, as a matter of law, that she and

the child, during its minority, would not apparently have received from his earnings, if he had lived, enough to justify this verdict, nor that the jury might not properly have found from the evidence that they would have received the same.

The defendant further assigns error in that the court (sixteenth specification) overruled its motion for a new trial; but what has already been said in respect to the other assignments of error is believed to cover every question presented by this one; and we find no reversible error in the action of the court in denying the motion.

It follows that the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

HOWARD MERCANTILE CO. v. MOORE.
(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 1015*)—DISCRETIONARY RULING—GRANTING NEW TRIAL.

The granting of a new trial being so much within the discretion of the trial court, this court will not reverse an order of such court granting a new trial, unless error is clearly established in respect to some pure, simple, and unmixed question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.*]

Error from Ellis County Court; A. L. Squire, Judge.

Action by the Howard Mercantile Company against W. F. Moore. Judgment for defendant, and plaintiff brings error. Affirmed.

O. B. Leedy, of Arnett, and Charles Swindall, of Woodward, for plaintiff in error. W. H. Springfield and C. B. Warren, both of Gage, for defendant in error.

WILLIAMS, J. This proceeding in error is to review the action of the trial court wherein the plaintiff in error, as plaintiff, sued the defendant in error, as defendant, in a replevin action to recover the possession of certain personalty described in a chattel mortgage given by said defendant to said plaintiff to secure the payment of a note in the sum of \$600 and interest. The parties will hereinafter be referred to in the manner in which they appeared in the trial court.

The questions presented for determination are: (1) As to whether the trial court committed reversible error in sustaining the defendant's motion for a new trial; (2) whether, as a matter of law, the plaintiff was the real party in interest; or, if not, (3) was the question properly submitted to the jury?

The jury having returned a verdict in favor of the plaintiff the court sustained a motion for a new trial and set aside the verdict upon the following grounds: "That the court erred in refusing to sustain defendant's mo-

tion to peremptorily instruct the jury to return for the defendant after all the evidence had been introduced showing that plaintiff was not the owner and holder of the note described by the mortgage sought to be foreclosed in suit, and that said verdict is contrary to weight of evidence offered herein."

The first ground assigned as a reason for setting aside the verdict, to wit, that the court erred in refusing to peremptorily instruct the jury to return for the defendant on the ground that the plaintiff was not the owner and holder of the note under the record, was purely a question of law. The latter ground that the verdict was contrary to the weight of the evidence involved a mixed question of law and fact; under such circumstances the action of the trial court in granting a new trial will not be disturbed. *Hughes v. C. R. I. & P. Ry. Co.*, 35 Okl. 482, 130 Pac. 591, and authorities therein cited.

In view of the foregoing conclusion it is not essential to pass on the other questions raised in order to dispose of this proceeding in error.

The judgment of the lower court is affirmed.

OKLAHOMA CITY v. WHEELAND et al.
(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 430*)—SUMMONS—NECESSITY—DISMISSAL.

A petition in error will be dismissed on motion, even though the same is filed in this court within the time allowed under the statute, where no waiver of issuance and service of summons in error is had, and no præcipe for same is filed, and no summons issued, or general appearance made, within such time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174, 3126; Dec. Dig. § 430.*]

Error from Superior Court, Oklahoma County; Edward Dewes Oldfield, Judge.

Action between Oklahoma City and Thomas E. Wheeland and others. From the judgment, the City brings error. Dismissed.

J. W. Johnson, of Oklahoma City, for plaintiff in error. W. A. Smith, of Oklahoma City, for defendants in error.

HAYES, C. J. The judgment from which this appeal is attempted to be prosecuted was rendered in the court below on February 1, 1913. Petition in error and case-made were filed in this court on July 31, 1913. No waiver of issuance and service of summons in error and no præcipe for same was filed within the time allowed by chapter 18, p. 35, Sess. Laws 1910-11, and no general appearance has been made. Defendants in error have moved to dismiss the appeal, for the reason that no summons in error has been issued, served, or waived, and that no præcipe therefor has been filed within the time re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

quired by law. Upon the authority of *McConnell v. Security State Bank et al.*, 35 Okl. 151, 128 Pac. 683, and authorities therein cited, the appeal must be dismissed; and it is so ordered. All the Justices concur.

DEAN v. ADAMS et al.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 671*)—RECORD—SCOPE OF REVIEW.

Upon an appeal to this court by petition in error and transcript of the record proper, no errors will be considered, save such as plainly appear upon the face of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.*]

Error from District Court, Okmulgee County; W. L. Barnum, Judge.

Action by C. R. Dean against Henry Adams and others to quiet title. Judgment for defendants, and plaintiff brings error. Affirmed.

Blakeney, Maxey & Miley, of Muskogee, for plaintiff in error. Harlan Read, of Okmulgee, for defendants in error.

KANE, J. This was an action to quiet title to certain real estate, commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below. The petition of the plaintiffs was in the usual form. The answer of the defendant W. Thornburgh was a general and special denial of all the facts contained in the petition of the plaintiff, except such as were specifically admitted, and there are further allegations to the effect that the answering defendant was the owner of the land, and a prayer that the plaintiff take nothing by his action, and that the title to said premises be quieted in the answering defendant; that the claims to title made by the other defendants be decreed to constitute a cloud upon the answering defendant's title, and be removed by a decree of the court. The pleading is entitled "Answer and Cross-Petition." Thereafter the plaintiff filed his demurrer to said pleading upon the ground that the same "does not state facts sufficient to entitle the cross-petitioner to any relief against this plaintiff," which demurrer was overruled by the court, to which action an exception was saved. Thereafter there was no further appearance on behalf of the plaintiff, and no further pleadings were filed by him. Thereafter the court entered a decree in favor of the answering defendant, to review which action the plaintiff filed this proceeding in error in this court, which consists of a petition in error, attached to which is what purports to be a transcript of the record. As there is no reversible error apparent upon the face of the record, the judgment of

the court below must be affirmed. The assignments of error relied upon as stated in the petition in error are:

"First. That the answer of the said Wright Thornburgh did not state any defense to the plaintiff's petition.

"Second. That the cross-petition of the said Wright Thornburgh did not state a cause of action, and did not state facts sufficient to constitute a cause of action against the plaintiff in error and in favor of the said Thornburgh.

"Third. That the said answer and cross-petition of the said Thornburgh did not state facts sufficient to entitle the said Thornburgh to any relief against this plaintiff in error, and did not constitute an answer to the plaintiff's petition.

"Fourth. That the said district court erred in overruling the demurrer of the plaintiff in error to the answer and cross-petition of the defendant Thornburgh.

"Fifth. That the answer and cross-petition of the said Thornburgh does not state facts sufficient to support the judgment rendered herein in favor of said Thornburgh and against this plaintiff in error."

The foregoing assignments merely amount to saying in different ways that the court below erred in overruling the demurrer of the plaintiff, upon the ground that his answer and cross-petition did not state facts sufficient to constitute a defense to the plaintiff's petition. That really is the only question that can be reviewed here upon a transcript. It is not seriously contended that the pleading filed by the defendant Thornburgh whether it be denominated an answer or a cross-petition, or both, states facts which, if established, would defeat the plaintiff's cause of action. As the only exception saved below was one saved to the ruling of the court on the sufficiency of the answer and cross-petition, and all the assignments of error are to the same effect, it follows that, as we conclude the answer and cross-petition do state facts sufficient to constitute a defense to plaintiff's action, the judgment of the court ought to be sustained. There is some point made in the brief of counsel for plaintiff in error, to the effect that the decree of the court shows that the same was entered against the plaintiff without taking any evidence tending to establish the facts stated in the answer and cross-petition of the answering defendant, and that this error which appears on the face of the record is sufficient to reverse the cause. We do not believe the conclusion of counsel is justified by the record before us. It is true that the decree states that the plaintiff, "C. R. Dean, and the defendant W. E. Templeman and O. D. Wolfe are in default, and that the allegations of the answer and cross-petition of the defendant W. Thornburgh be taken as true and confessed," but the decree also contains a recitation to the effect that the court having

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

heard the evidence and the arguments of counsel, and being fully advised in the premises, adjudges and decrees, etc. As the evidence is not before us, we must presume, especially in view of the recitation in the decree that it was rendered after hearing the evidence, that the court heard sufficient evidence, if any was necessary, to support the judgment rendered.

The judgment of the court below is therefore affirmed. All the Justices concur.

In re HEROD'S ESTATE.
(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 356*)—SERVICE OF SUMMONS IN ERROR—SUFFICIENCY.

A petition in error was filed on the last day of the statutory period for commencing a proceeding in error, and on the same date a summons in error was issued, but service thereof was not had within 60 days after the issuance of the same. *Held*, that the proceeding was not commenced within the period required by the statute, and that the same should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

Error from District Court, Muskogee County; R. C. Allen, Judge.

In the matter of the estate of Amanda Herod, deceased. From a judgment decreeing and finding the purported will of Amanda Herod to be a forgery, Wallace Herod and others bring error. Appeal dismissed.

O. B. Jefferson, of Muskogee, for appellants. Geo. C. Beidleman, of Okmulgee, and Wright & Blinn, of Oklahoma City, for appellees.

LOOFBOURROW, J. In February, 1912, Wallace Herod filed a petition in the county court of Muskogee county, Okl., asking for the admission to probate of a purported will of Amanda Herod, deceased. Georgia Smith, an heir at law of the decedent, and certain other heirs contested said will. Same was admitted to probate by the judge of the county court, and from his order and decree Georgia Smith et al. appealed to the district court of said county. Judgment was entered by said district court in favor of contestants, finding and decreeing that said purported will of Amanda Herod was and is a forgery. From this judgment Wallace Herod, F. P. Mayes, and J. C. Johnson appeal to this court.

The defendants in error filed a motion to dismiss this appeal for the reason: Third. "That summons in error has not been served upon Georgia Smith within 60 days after the issuance of said summons in error and the expiration of the statutory period for commencing the proceeding in error in this court."

The record shows that Georgia Smith is a necessary party defendant, but no summons

in error has been served upon her, nor has she waived service of the same. The petition in error and case-made were filed in this court on August 13, 1913, the last day of the statutory period for perfecting the appeal from the judgment sought to be reversed.

Upon the authority of School District No. 39, Kiowa County, v. Fisher, 23 Okl. 9, 99 Pac. 648; Wedd v. Gates et al., 15 Okl. 602, 82 Pac. 808; Durant et al. v. Munford, 134 Pac. 50, this appeal must be dismissed. All of the Justices concur.

RAUH v. MORRIS et al.
(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. COURTS (§ 487*)—COUNTY COURTS—REMOVAL OF CAUSES—WAIVER OF NOTICE.

Section 2 of the act of the Legislature entitled "An act to provide for holding sessions of the county court in Shattuck, Ellis county," approved February 23, 1910 (Sess. Laws 1910, p. 28), requires that the party to an action, who desires to remove a cause from the county court pending at either of said places where the court is held in said county to the county court at the other place, shall give notice to the opposite party of his motion for such transfer; but where the opposite party is present in court at the time such a motion is presented and has an opportunity to be heard and participates in the hearing on said motion, without objections thereto on the ground that no notice had been served upon him, will be held to have waived such notice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 703, 1307-1315; Dec. Dig. § 487.*]

2. FRAUDULENT CONVEYANCES (§ 210*) — RIGHT TO ATTACK—SUBSEQUENT CREDITOR.

It is the general rule that a subsequent creditor, who extends credit or acquires his claim after he has due notice, either actual or constructive, of an alleged fraudulent conveyance, cannot attack such conveyance on the ground that it was made in fraud of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 634; Dec. Dig. § 210.*]

3. SALES (§ 235*)—BILL OF SALE—UNAUTHORIZED RECORDING—NOTICE.

In the absence of any statute authorizing the filing and recording of bills of sale conveying personal property, the filing and recording of such an instrument in the office of the register of deeds does not give constructive notice of the conveyance of such property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 681-685; Dec. Dig. § 235.*]

4. EVIDENCE (§ 231*) — DECLARATIONS OF SELLER.

Anything done or said by a vendor before or at the time of an alleged fraudulent sale, showing he intends thereby to defeat his creditors, is admissible as to such intent; and it is not necessary to its admission for that purpose that it should have been said or done in the presence of the vendee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-839, 852-859; Dec. Dig. § 231.*]

5. EVIDENCE (§ 317*)—HEARSAY—OWNERSHIP OF PROPERTY.

Where one of the questions involved is whether the property in controversy belongs

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to the plaintiff or her husband, it is error to permit a witness to testify to statements made by plaintiff's minor son, in her absence, that such property belonged to plaintiff's husband.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

Error from County Court, Ellis County; A. L. Squire, Judge.

Action in replevin by Eva Rauh against Perry J. Morris and another. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

W. H. Springfield, of Gage, for plaintiff in error. C. B. Leedy, of Arnett, and J. G. Aubuchon and Perry J. Morris, both of Shattuck, for defendants in error.

HAYES, C. J. [1] This is an action in replevin, brought originally in the county court of Ellis county by plaintiff in error against defendants in error, Perry J. Morris and Henry Gottman, the latter a constable in said county, in which plaintiff in error seeks to recover possession of certain chattels, consisting of one farm wagon, one spring wagon, and 400 bushels of Kafir corn. The suit was filed in the county court of said county originally at Arnett. Upon motion of defendants in error, the cause was transferred from the county court at Arnett to the county court at Shattuck in the same county. This act of the court transferring the cause is complained of in one of the assignments of error.

Section 2 of an act of the Legislature, entitled "An act to provide for holding sessions of the county court in Shattuck, in Ellis county," approved February 23, 1910 (Sess. Laws 1910, p. 28), provides that upon application presented after reasonable notice, any action or matter pending in the county court, either at Arnett or Shattuck, shall be transferred to or remain in the county court held in said county nearest the residence of defendant in the action. Plaintiff in error contends that the order complained of was made without notice to her. The record is silent as to whether any notice was given, but the record does disclose that plaintiff was present by counsel and in person at the time the application for the transfer was made and objected to the transfer upon other grounds than that of failure to give notice. So far as the record discloses, no objections whatever were made in the trial court for want of notice; and, under these circumstances, it must be held that since plaintiff was present and had an opportunity to be heard and did participate at the hearing upon the application for the transfer, which is the very purpose of the notice, he waived any formal service of notice upon him before the presentation of the application.

The property in controversy was seized by defendant Gottman as constable under a writ of attachment issued by one of the justice courts of Ellis county to enforce the payment

of a judgment in favor of defendant Morris against Chris Rauh, the husband of plaintiff. Plaintiff, in her petition, seeks to recover the property upon two grounds: First, that she is the absolute owner thereof; and, second, that if she is not the owner thereof, and her husband be the owner thereof, the property is exempt from execution to the family under the statute of this state.

The evidence on the part of plaintiff tends to establish that, at the time she married plaintiff, she brought to him in money \$500 and certain other personal property, the value of which is not made clear by the record; that they lived together for a great many years as husband and wife; that she is a very industrious, hard-working woman; that for many years the property of the family was held and controlled by her husband, Chris Rauh; that she contributed very much toward the acquirement of said property by her labor. During this time the evidence tends to establish that the responsibility and care of the home and the farm and the management of its affairs devolved largely, if not entirely, upon her; that her husband was engaged in trading, principally in the buying, selling, and shipping cattle, in which business he appears generally to have lost money until ultimately the financial affairs of the family became in very bad condition. Plaintiff became uneasy that all their property was going to be lost by the bad management of her husband and insisted that he convey to her all the property he then had, in consideration of what she had contributed in money and services toward the acquirement of said property, and in order that she might so manage it as to retain a home for herself and children. Her husband, with much reluctance, consented to and did, during the first part of the year 1910, convey to her all the real estate then owned by him and certain personal property, including the property in controversy. For the personal property he executed to plaintiff a bill of sale, which was filed for record with the register of deeds of the county. At the time these conveyances were executed by her husband to plaintiff, he owed considerable debts, most or all of which were secured by mortgages upon the real estate or other property conveyed by him to plaintiff. As a part of such conveyance, she agreed to assume and pay all of said indebtedness. Defendant Morris was not, however, at that time a creditor of plaintiff's husband, Chris Rauh, but the debt upon which he secured judgment, to enforce which the attachment involved herein was issued, was contracted by Chris Rauh, with defendant Morris subsequently. It is the contention of defendants that the conveyance by Chris Rauh of the property in controversy to his wife was: First, in fraud of his creditors; and, second, that it was a sham conveyance, and that in fact the property was

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

never transferred and never intended to be transferred to plaintiff. The trial resulted in a verdict and judgment in favor of defendant.

[2] By one of the instructions of which plaintiff complains, the jury was instructed that the filing of said bill of sale by plaintiff was sufficient notice to bind all persons "who had actual knowledge of said bill of sale." The general rule is that a conveyance cannot be attacked on the ground of fraud by a subsequent creditor, or one whose claim is acquired after due notice of the conveyance, either actual or constructive. *State Bank of Chase v. Chatten*, 69 Kan. 435, 77 Pac. 96; *Sheppard et al. v. Thomas*, 24 Kan. 780; 20 Cyc. 427.

[3] It is the contention of plaintiff that the filing for record of the bill of sale received by her from her husband, conveying the property in controversy, was constructive notice of such conveyance to defendant Morris and, if fraudulent, cannot be attacked by him upon that ground, and that the instruction complained of erroneously stated the law, because it required that defendant have actual knowledge of the bill of sale before the conveyance would be valid as to him. But constructive notice of the contents of an instrument can be given by filing or recording the instrument only when there is some statute authorizing such instrument to be filed or recorded and declaring the effect of such acts to be constructive notice of its contents. The unauthorized filing of an instrument has not the effect to convey constructive notice. *Lewis v. Johnson*, 68 Tex. 448, 4 S. W. 644; *Quackenbush v. Reed*, 102 Cal. 493, 37 Pac. 755; *Betser v. Rankin*, 77 Ill. 289; *Kelley v. Vandiver*, 75 Mo. App. 435. No statute has been called to our attention, and we are aware of no statute in this jurisdiction, authorizing the filing and recording of bills of sale or making such acts constructive notice of their contents.

[4] Over plaintiff's objection, witnesses were permitted to testify to statements made by Chris Rauh, plaintiff's husband, in the absence of plaintiff, just before or at the time he executed the bill of sale, tending to show that his purpose in making the conveyance was to defraud his creditors. The court committed no error in permitting this evidence to be introduced. One of defendants' defenses is that the sale and conveyance of the property to plaintiff by her husband was for the purpose of hindering, delaying, and defrauding his creditors. One of the elements of this defense was the fraudulent intent of her husband. The other element is that plaintiff was not a purchaser for a valuable consideration, or that she knew or had reason to believe that the vendor was acting in bad faith toward his creditors. It was competent to show the statements of plaintiff's husband, the vendor, at the time he execut-

ed the conveyance for the purpose of establishing his intent. "Anything said or done by a vendor before or at the time of the alleged fraudulent sale, showing his intent thereby to defraud his creditors, is admissible as evidence as to such intent, and it is not necessary to its admission for that purpose that it should have been said or done in the presence of the vendee." *Buckingham v. Tyler*, 74 Mich. 101, 41 N. W. 868; *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847; *Burlington Nat. Bank v. Beard et al.*, 55 Kan. 773, 42 Pac. 320; 20 Cyc. 768.

[5] Over the objection of plaintiff, witnesses were permitted to testify to the statements of plaintiff's minor son, made in her absence, as to who was the owner of the property in controversy. This evidence is to the effect that the minor son, at or about the time the attachment was levied upon the property involved, stated to different persons that said property was the property of his father, Chris Rauh, and that he pointed out the property to the officers as his father's property. That this evidence is mere hearsay evidence and was incompetent appears elementary. The minor son was in no way a party to any of the transactions between his father and mother involved, and was the agent of neither of them. That this evidence was prejudicial becomes obvious when it is observed that one of defendants' contentions is that there was in fact never any settlement between plaintiff and her husband, Chris Rauh, and conveyance of the property in controversy, but that the bill of sale was executed as a mere sham; and, to support this contention, the only evidence referred to and relied upon in the brief of counsel for defendant is the statements of this son, made in the absence of plaintiff to third parties relative to the ownership of the property.

Other questions are discussed in the brief of counsel for plaintiff, but they are either not presented in sufficient conformity with the rules of this court to entitle them to consideration, or they are without sufficient merit to require discussion.

For the admission of the incompetent testimony, the judgment of the trial court is reversed, and the cause remanded. All the Justices concur.

SKIRVIN v. GOLDSTEIN et al.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 786*)—FRIVOLOUS APPEAL—RIGHT TO DISMISS.

This court has the inherent power to dismiss an appeal which is manifestly frivolous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3128; Dec. Dig. § 786.*]

Error from District Court, Oklahoma County; W. R. Bailey, Judge.

Action by J. Goldstein and another, part-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ners, against W. B. Skirvin. Judgment for plaintiffs, and defendant brings error. Dismissed.

J. C. Helms, of Oklahoma City, for plaintiff in error. Chas. B. Selby, of Oklahoma City, for defendants in error.

PER CURIAM. On July 31, 1912, defendants in error sued plaintiff in error in the district court of Oklahoma county, upon a certain promissory note. After answer filed there was trial to the court and judgment for plaintiff for the amount due on the note, after allowing defendant a credit of \$25, which was all he asked. After motion for new trial was filed and overruled defendant brings the case here, alleging that the "judgment is contrary to the evidence and contrary to law," and "the evidence is insufficient to sustain the judgment," and "the court erred in overruling the motion for a new trial." The motion to dismiss the appeal is sustained for the reason that the appeal is frivolous. In *Kirkland et al. v. J. T. Trezevant et al.*, 134 Pac. 1198, this court, quoting approvingly from *Johnson v. St. Paul, etc., Co.*, 68 Minn. 408, 71 N. W. 619, said: " * * * We are of the opinion that an appellate court has the inherent power to dismiss an appeal which is manifestly and palpably frivolous and without merit. This power is necessary in order to prevent the court itself from being imposed upon and the administration of justice itself being trifled with and perverted for mere purpose of delay."

Dismissed.

McKAY v. WATSON et al.

(Supreme Court of Oklahoma. Jan. 18, 1914.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 334*) — DEATH OF PARTY.

In an action to quiet title, plaintiff in error died pending proceedings in error and before submission in this court; nothing was done to revive the action, and the year (section 5294, Rev. Laws 1910) expired. Then came defendant in error, and without consenting to a revivor moved to dismiss. *Held*, that the action is barred by the statute, and the appeal is ordered dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1848, 1851-1863; Dec. Dig. § 334.*]

Error from District Court, Johnston County; Robt. M. Rainey, Judge.

Action by Sylvina E. Watson, etc., and another against R. J. McKay. Judgment for plaintiffs, and defendant brings error. Appeal dismissed.

Thos. E. Toney, of Oklahoma City, for plaintiff in error. Cornelius Hardy, of Tishomingo, for defendants in error.

PER CURIAM. This action to quiet title was commenced on April 11, 1911, in the dis-

trict court of Johnston county, by Sylvina E. Watson, a minor, by her next friend J. C. Thurlow and John K. Watson, her husband, against R. J. McKay. On October 20, 1911, a demurrer was sustained to McKay's answer, and judgment rendered canceling a certain deed and quieting the title to the land in controversy in Sylvina E. Watson. To review that judgment plaintiff in error commenced proceedings in this court on April 15, 1912. On November 25, 1913, and before submission of the cause, defendant in error, plaintiff below, suggested the death of plaintiff in error, R. J. McKay, and made known to the court that he died November 19, 1912; that more than one year had elapsed since his death; that no steps had been taken to revive in the name of his administrator or heirs; that defendant in error did not consent to a revivor, and moved the court to dismiss the cause.

Section 5290, Rev. Laws 1910, provides: "Upon the death of the plaintiff in an action, it may be revived in the name of his representatives, to whom his right has passed. Where his right has passed to his personal representatives, the revivor shall be in their names, where it has passed to his heirs or devisees, who could support the action is brought anew, the revivor shall be in their names"—thus requiring an action to be revived in the name of the heirs in some cases, and in the name of the personal representatives in others. *Glazier v. Heneybuss*, 19 Okl. 316, 91 Pac. 872.

Section 5294, Rev. Laws 1910, provides: "An order to revive an action, in the names of the representatives or successors of a plaintiff, may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have first been made. * * *"

These sections are construed in *Glazier v. Heneybuss*, supra. There the court, following the Kansas construction, held that "where the subject-matter of the action was a part of the personal estate" the revivor must be in the name of the administratrix of the estate, and in such a case the time began to run after the expiration of a reasonable time from the death of the plaintiff in which a legal representative might have been appointed; but, where the subject-matter was "not a part of the personal estate," the time began to run from the death of the plaintiff. This case is in the latter class, and the revivor would have been in the name of the heirs. As the statute provides that the order of revivor "shall not be made * * * after the expiration of one year from the time the order might have been first made," and as more than one year has expired since "the order might have been first made," the appeal is dismissed. *Glazier v. Heneybuss*, supra.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**TITLE GUARANTY & TRUST CO. v.
TURNBULL.**

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

TRIAL (§ 5*)—TIME FOR TRIAL.

Prior to May 16, 1913, the date on which the Revised Laws of Oklahoma 1910 were adopted, it was reversible error for the trial court to compel a party, over his objection upon such ground, to proceed to a trial of a case upon a date earlier than ten days after the issues were made up.

(a) As to whether, since May 16, 1913, it is reversible error not determined.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 11, 12; Dec. Dig. § 5.*]

Error from District Court, Nowata County; John J. Shea, Judge.

Action by W. T. Turnbull against the Title Guaranty & Trust Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. A. Chase, of Nowata, and W. A. Sipe, of Tulsa, for plaintiff in error. R. Y. Nance, of Stilwell, for defendant in error.

WILLIAMS, J. In *City of Ardmore v. Orr*, 35 Okl. 305, 129 Pac. 867, section 5834, Compiled Laws of Oklahoma 1909 (section 5043, Revised Laws of Oklahoma 1910), was under consideration, and there it was held that said sections authorized a case to be set for trial at any time during a term, not earlier than ten days after the issues are made up, whether made up within the time fixed to plead before the term or during the term, and that the case in the district court could not, under said statute, without the agreement of the parties, be set for trial earlier than ten days after the time defendant filed his answer, and that it was error to compel the trial of his case on its objection prior to such time, citing several cases, some of which had been decided by the Supreme Court of Kansas prior to the time of the adoption of the Civil Code of Procedure of that state by the Legislature of the territory of Oklahoma.

In *Conwill v. Eldridge*, 35 Okl. 537, 130 Pac. 912, the same statute was under consideration. In the opinion it is said: "Said statute, where the issues thereto are settled during the term of the court, makes a case triable at the same term of court only after the expiration of ten days from the date the issues are made up. *City of Ardmore v. Orr*, 35 Okl. 305, 129 Pac. 867. And it is error for the court to compel a party, over his objection upon this ground, to proceed to a trial of the case on a date earlier than ten days after the issues are made up. Such error on the part of the trial court renders the judgment voidable only, and not void. It is not a jurisdictional error which cannot be waived by the party. The statute is for the benefit of the parties to the action only. It secures to them in all cases a reasonable

time after issues joined in which to secure witnesses and prepare for trial. It does not affect third parties, or the state, suing for the benefit of the parties only; they may consent to a trial upon an earlier date than that fixed by statute. By proceeding to trial without objecting thereto, a party acquiesces therein, and, after the trial has resulted adversely to him, he should not be permitted to object that the judgment was erroneous because the case was not triable. Plaintiff made no objection in the trial court that the case was not properly upon the trial docket, and therefore, under the foregoing statute, was not triable; but he there treated the case as if it was properly upon the docket, and sought a continuance upon the statutory ground of an absent witness. In this court he does not urge that the court committed error in overruling his motion for continuance upon the grounds upon which he sought the continuance in the trial court; but he here seeks to have the action of the court declared error upon another ground. Nothing is better settled than that one cannot proceed in the trial of questions in the trial court upon one theory, and, having lost, change from and try to prevail on appeal. * * * Had plaintiff objected to proceeding to trial upon the ground that the case was not triable upon the date for which it was set, or had he made a motion to strike the same from the trial docket for such reason, and saved his exception to the action of the trial court in refusing to sustain his objection or motion, the act of the court would then be reversible error; but, since he failed to do this, and treated the cause as properly on the trial docket and triable, and sought a continuance upon other grounds, he will be held to have waived his right under the statute, and consented to the trial of the cause, except upon the grounds set forth in his motion, which are not urged in this court."

On September 28, 1910, the plaintiff in error, the Title Guaranty & Trust Company, moved the court for a continuance of the cause, on the ground that the issues were not made up until that day, and that said cause did not stand for trial until ten days had elapsed therefrom. The motion then and there was overruled, and, over the protest of the plaintiff in error (defendant in the court below), it was required to proceed to trial. Under this status of the record, reversible error was committed.

Section 4791, Revised Laws of Oklahoma 1910, was in force when *City of Ardmore v. Orr*, supra, and *Conwill v. Eldridge*, supra, were decided. Said section was taken from the Code of Civil Procedure of Kansas, and in force there when the Supreme Court of Kansas held that it was error to compel the trial of a case on objection within ten days after the issues were made up. Section

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6005, Revised Laws of Oklahoma 1910, does not apply to this case, as said section was first incorporated in the Revised Laws of Oklahoma 1910, and under the act adopting the Code said section 6005 does not apply to pending causes.

It follows that the cause must be reversed and remanded, with instructions to grant a new trial. All the Justices concur.

**CONSOLIDATED ALFALFA MILLING CO.
et al. v. ROBERTS et al.**

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 78*)—DECISIONS REVIEWABLE.

An order of the district court overruling a motion to dismiss is not reviewable in the Supreme Court until a final judgment has been rendered in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. § 78.*]

Error from District Court, Tillman County; Frank Matthews, Judge.

Action by H. L. Roberts for himself and others, subscribers to the stock of defendant corporation, against the Consolidated Alfalfa Milling Company, a corporation and others. Judgment for plaintiffs, and defendants bring error. Appeal dismissed.

C. W. Stringer, of Oklahoma City, for plaintiffs in error. Mounts & Davis, of Frederick, and Gray & McVay, of Oklahoma City, for defendants in error.

LOOFBOURROW, J. The defendants in error, plaintiffs below, filed their amended petition in the district court of Tillman county on the 17th day of September, 1910. Thereafter each of the defendants filed a separate motion to dismiss said case for the reason "that the court has no jurisdiction of the person of said defendant." The defendant the Consolidated Alfalfa Milling Company also filed a separate motion to quash the summons. The court, on the 7th day of September, 1911, overruled "each and all of the said motions," to which ruling of the court the defendants respectively excepted, and from such order overruling said motions to dismiss defendants prosecute this appeal, assigning as error "that the court erred in overruling the motions of the plaintiffs in error to dismiss the suit." The case is now before this court on the motion of defendants in error to dismiss the appeal "for the reason that no final judgment appears to have been entered in said cause, and that said order and orders of said district court assigned as error in said petition in error are not appealable to this court, that they are not final, and are not subject to review herein in the absence of any final order or judgment of the said district court

duly entered and brought to this court for review, as provided by law."

This case is still pending in the court below, and, until a final judgment or disposition of the same is made in that court, the cause is not reviewable in this court. See *Brown v. Kimble*, 5 Kan. 81; *Edenfield v. Barnhart*, 5 Kan. 225; *Simpson v. Stein*, 43 Kan. 35, 22 Pac. 1020; *Spaulding v. Polley*, 28 Okl. 764, 115 Pac. 864; *Snyder v. Elliott*, 26 Okl. 856, 110 Pac. 784; *Simpson v. Kirschbaum*, etc., 43 Kan. 36, 22 Pac. 1018; *Dolbee v. Hoover*, 8 Kan. 124; *Simpson v. Rothschild*, 43 Kan. 83, 22 Pac. 1019; *Kansas Rolling Mill Co. v. Bovard*, 84 Kan. 21, 7 Pac. 622; *Reynolds v. Packers' Nat. Bank*, 66 Kan. 461, 71 Pac. 847.

The appeal is therefore dismissed. All the Justices concur.

COLLIER et al. v. GANNON.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. ATTACHMENT (§ 239*)—IRREGULARITY—WAIVER OF OBJECTION.

An agreement, after seizure of chattels attached, that the sheriff shall sell summarily and retain the proceeds, or place them in a designated depository to abide the final judgment in said proceeding, precludes the defendant from insisting on a dissolution of the writ.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 822, 823, 827; Dec. Dig. § 239.*]

2. APPEAL AND ERROR (§ 757*)—BRIEF—RULINGS ON EVIDENCE.

The action of the lower court in the exclusion or admission of evidence will not be reviewed by this court, unless this evidence is set out in the brief of the plaintiff in error as required by rule 25 (20 Okl. xii, 95 Pac. viii), although assigned as error by proper specifications of error therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.*]

3. TRIAL (§ 143*)—DEMURRER TO EVIDENCE—DIRECTION OF VERDICT.

Where there is any substantial conflict in the evidence, neither should a demurrer thereto nor a motion to direct a verdict be sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

4. EXECUTORS AND ADMINISTRATORS (§ 453*)—CONSTRUCTION.

A judgment rendered against Aubry Addington, administrator of the estate of Z. T. Addington, deceased, is not a personal judgment, but a judgment against him in his trust or his official capacity, and binds only the estate of said intestate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1884-1908; Dec. Dig. § 453.*]

5. APPEAL AND ERROR (§ 218*)—OBJECTION BELOW—VERDICT.

Where a verdict is not void, any objection going to a defect or irregularity which renders the verdict merely voidable will not be considered when raised for the first time in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1321, 1323; Dec. Dig. § 218.*]

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

6. LANDLORD AND TENANT (§ 328*) — RENT — REMEDIES OF LANDLORD.

Under sections 3806 and 3807, Revised Laws of Oklahoma 1910, the landlord may elect to take his share of the crop, or, if such share has been appropriated or disposed of by the tenant, then the landlord may elect to enforce his lien for rent in the value of such share by attachment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1388, 1390–1392; Dec. Dig. § 328.*]

Error from Jefferson County Court; G. M. Bond, Judge.

Action by C. E. Gannon against Pres Collier and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. H. Harper and Jones & Green, all of Waurika, for plaintiffs in error. Bridges & Vertrees and N. C. Peters, all of Waurika, for defendant in error.

WILLIAMS, J. On October 27, 1908, the defendant in error, hereinafter referred to as plaintiff, commenced an action in a justice of the peace court against the plaintiffs in error, hereinafter referred to as defendants, to recover one-third of the corn and one-fourth of the cotton grown on a certain tract of land in Jefferson county; the same being described in the affidavit for attachment. Bond in attachment in the sum of \$400 was executed conditioned for the payment of damages in case it was decided that the order was wrongfully issued. The writ of attachment directed the officer to take one-third of the corn and one-fourth of the cotton raised on said tract. On change of venue, the case being transferred to another justice of the peace court in said county, the defendant filed a motion to quash the writ of attachment and also an answer. At the trial the motion to quash was overruled, and after a hearing the case was transferred to the district court on the ground that the justice of the peace court was without jurisdiction; it being averred that the title to land was necessarily involved. In the district court, on motion, Aubry Addington, administrator of the estate of Z. T. Addington, deceased, one of the plaintiffs in error, was made a party defendant, and he appeared and answered. As disclosed by the record the cause was remanded back from the district court to the justice of the peace court, where it was tried and judgment rendered against the defendant Pres Collier. In due time an appeal was prosecuted to the county court, where a judgment was rendered in favor of the plaintiff in the sum of \$123. A motion for a new trial was then filed in due time, and the action of the trial court in overruling the same is now before this court by proceeding in error.

The affidavit for attachment is in part as follows: "W. E. Connor, being first duly sworn on oath says that he is agent for C. E. Gannon, plaintiff in the above-entitled cause;

that there is due from defendant to plaintiff the following shares of crops on lands hereinafter described to wit: One-third of the corn, and one-fourth of the cotton grown and raised on the 140 acres * * * being for rent on farm lands above described, and that plaintiff claims a lien on said crops. That said defendant intends to remove, and was about to remove at the time of instituting this suit, his property, the crops, and a part thereof, from the leased premises above described."

The bond or undertaking rendered in favor of the defendant in the sum of \$400 conditioned that the plaintiff "shall pay to the defendant all damages which he may sustain by reason of the attachment in this action, if the order thereof be wrongfully obtained." The writ commanded the sheriff or constable "to attach and safely keep one-third of the corn and one-fourth of the cotton" raised on said premises.

[1] The plaintiffs in error insist that said attachment should have been vacated in that said affidavit, bond, and writ were insufficient.

Section 3809, Revised Laws of Oklahoma 1910, provides: "When any person who shall be liable to pay rent (whether the same be due or not, if it be due within one year thereafter, and whether the same be payable in money or other things) intends to remove, or is removing, or has, within thirty days, removed, his property, or his crops, or any part thereof, from the leased premises, the person to whom the rent is owing may commence an action, and upon making an affidavit stating the amount of rent for which such person is liable, and one or more of the above facts, and executing an undertaking as in other cases, an attachment shall issue in the same manner and with the like effect as is provided by law in other actions."

Section 3810, Revised Laws of Oklahoma 1910, also provides: "In an action to enforce a lien on crops for rent of farming lands, the affidavit for attachment shall state that there is due from the defendant to the plaintiff a certain sum, naming it, for rent of farming lands, describing the same and that the plaintiff claims a lien on the crop made on such land. Upon making and filing such affidavit and executing an undertaking as prescribed in the preceding section, an order of attachment shall issue as in other cases, and shall be levied on such crop, or so much thereof as may be necessary; and all other proceedings in such attachment shall be the same as in other actions."

It appears from the record that the defendant in error, C. E. Gannon, and plaintiffs in error, Pres Collier and Aubry Addington, administrator, agreed that the attached crop should be sold and the money placed in a certain bank to abide the decision of the court; appraisal and further execution

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

of the order of the attachment being waived. This precludes the plaintiffs in error from objecting to any irregularities in the attachment proceedings. *Ooyie Mercantile Co. v. Nix, Halsel & Co.*, 7 Okl. 287, 54 Pac. 469; *Reister et al. v. Land*, 14 Okl. 34, 76 Pac. 156; *Wickman v. Nalty*, 41 La. Ann. 284, 6 South. 123; *Thames v. Schloss*, 120 Ala. 470, 24 South. 835; 4 Cyc. 780.

[2] The tenth assignment of error is as follows: "Because the court erred in permitting the abstract of title over the defendant's objection that it was incompetent, irrelevant and immaterial and did not prove or disprove any issue in the case, in so far as it could make title in the plaintiff."

The evidence raised by this assignment is not set out in accordance with rule 25 of this court (20 Okl. xii, 95 Pac. viii), which provides that where a party complains "on account of the admission or rejection of testimony, he shall set out in his brief the full substance of the testimony, to the admission or rejection of which he objects, stating specifically his objection thereto." Under the uniform holdings of this court, where such is not done, such question will not be considered on review here. *Scoville et ux. v. Powell et al.*, 33 Okl. 446, 126 Pac. 730.

[3] As to the contention that the court erred in overruling defendants' demurrer to the evidence, and denying the requested instruction for a verdict, that appears to be without merit. *Christy v. Springs*, 11 Okl. 710, 69 Pac. 864; *Sevy v. Stewart et al.*, 31 Okl. 589, 122 Pac. 544; 24 Cyc. 1034.

[4] As to the assignment that the rendition of the judgment against Aubry Addington as administrator of the estate of Z. T. Addington, deceased, is a judgment against him personally, and not in his trust or official capacity, that is also without merit. Such judgment binds him only as administrator, and not as an individual.

[5] There is no merit in the objection here for the first time as to the form of the verdict. *Brown et al. v. First Natl. Bank of Temple*, 35 Okl. 726, 130 Pac. 140.

[6] Section 3807, Revised Laws of Oklahoma 1910, provides that: "When any such rent is payable in a share or certain proportion of the crop, the lessor shall be deemed the owner of such share or proportion, and may, if the tenant refuse to deliver him such share or proportion, enter upon the land and take possession of the same, or obtain possession thereof by action of replevin."

Section 3806, Revised Laws of Oklahoma 1910, also, provides: "Any rent due for farming land shall be a lien on the crop growing or made on the premises. Such lien may be enforced by action and attachment therein, as hereinafter provided."

These sections, being construed together, it is obvious that the remedy is cumulative; that the landlord may elect to take his share

of the crop, or if the tenant disposes of the landlord's share, then he may elect to enforce his lien by attachment, for in section 3806, supra, it is provided that, whether the rent "be payable in money or other things," an attachment may issue. The contention that an attachment will not lie to enforce the landlord's lien where the rent is payable in kind or a certain portion of the crop is without merit.

As to the objection to the rendition of the judgment against the Bank of Addington, the plaintiffs in error are not in position to complain.

The defendant in error further insists that there is no recital in the case-made that it contains all the evidence introduced on the trial. On page 38 we find the following: "The foregoing is all of the evidence offered at the trial of above cause, and all the oral proceedings therein. It is agreed between the attorneys for the plaintiff in error and defendant in error that the foregoing case-made contains all the evidence introduced in the trial of said cause."

Section 5243, Revised Laws of Oklahoma 1910, which, in substance, became effective March 15, 1905, Session Laws 1905, p. 322, provides for the correction or amendment of a case-made by written agreement made and entered into by the parties plaintiff and defendant in error. It has time and again been held by this court that, by virtue of said section, the parties were entitled to withdraw the case-made so as to have it corrected and amended to affirmatively show that it contained all the evidence. *England Bros. v. Young et al.*, 25 Okl. 876, 105 Pac. 654; *Fidelity & Casualty Co. v. Walton et al.*, 24 Okl. 671, 104 Pac. 909; *Divine v. Harmon et al.*, 23 Okl. 901, 101 Pac. 1125; *Ins. Co. v. Gish, Brook & Co.*, 25 Okl. 78, 105 Pac. 672; *Springfield Fire & Marine Co. v. Gish*, 25 Okl. 80, 105 Pac. 673; *London & L. Fire Ins. Co. v. Gish*, 25 Okl. 81, 105 Pac. 673.

It has also been repeatedly held that the certificate of counsel that the case-made contained all the evidence did not dispense with the necessity of a recital in the case-made to that effect. *McClellan v. Minor*, 19 Okl. 104, 91 Pac. 863; *Exendine v. Goldstine*, 14 Okl. 100, 77 Pac. 45; *Co. Commissioners v. Wright*, 8 Okl. 190, 57 Pac. 203; *Gaffney v. Stanard et al.*, 31 Okl. 541, 122 Pac. 510, and authorities therein cited.

In the last case the certificate, however, was made only by the attorney for the plaintiff in error. Here it is in the form of a stipulation by all parties. Under section 5243, it being permissible for the case-made to be amended by stipulation, the parties having so agreed by stipulation appearing in the case-made, this court, upon such joint certificate without more, would order the case-made accordingly amended. All the Justices concur.

(Syllabus by the Court.)

1. TRIAL (§ 139*)—DEMURRER TO DEFENDANT'S EVIDENCE.

Whenever all the evidence and the reasonable and rational inferences and deductions therefrom in favor of the defendant, taken as true, will warrant a verdict in his favor, it is error for the court to sustain plaintiff's demurrer to such evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

2. TENANCY IN COMMON (§ 55*)—RECOVERY OF LAND—NECESSARY PARTIES.

One tenant in common may maintain an action for the recovery of real property against a third person; but his recovery is limited to such interest in the premises as he proves title in himself superior to that of defendants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 140-156; Dec. Dig. § 55.*]

Error from District Court, Seminole County; Tom. D. McKeown, Judge.

Action by Sam Norton against George Moppin and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

J. A. Baker, of Wewoka, for plaintiffs in error. Crump, Fowler & Skinner, of Wewoka, for defendant in error.

LOOFBOURROW, J. In May, 1905, Minerva Moppin executed an instrument in writing in form a general warranty deed, whereby she conveyed to C. M. Rodman and Sam Norton 40 acres of land situated in the Seminole Nation. In April, 1910, Sam Norton, one of the grantees, commenced this action for the recovery of said real property; issues were joined, and the case tried in the district court of Seminole county.

Minerva Moppin testified: That this land was allotted to her. That she could not read or write. That her son, at the time this deed was executed, was in jail in Tecumseh, and that she wanted to obtain \$100, with which to pay an attorney for services rendered in behalf of said son. That she went to Konawa to a notary public, Mr. Mathis. That she told him she wanted to make a mortgage for \$100 to Mr. Norton. That she signed the instrument, and delivered it to another son, Lane Osborne, who took the instrument to Tecumseh, and delivered it to Norton. That afterward Norton came down to the place. She had a conversation with him. He looked over the land, and told her: "The ground bad. I don't want your land. It has a lease on it, and I can't do anything with it without I buy it out, and that would cost me more than the land is worth, and you can pay me the money when you get it"—to which she replied that she did not have any money, and that she would pay him when she could. That she never received any money from this

transaction. That Norton did not claim that she had sold him the land. That he said he did not want it. That he said, "You pay me the money, Grandma, when you get it." That she did not know the instrument she signed was a deed; she thought it was a mortgage.

Alice Moppin testified that she is the daughter of Minerva Moppin; that she knew Sam Norton about three years; the first time she saw him was at her mother's house; that on that occasion he came to see her mother about the land; heard him tell her mother that he did not want the land; that he told her mother she could pay him whenever she got the money.

It is admitted that, if Lane Osborne had been present, he would testify that the deed made by his mother, Minerva Moppin, to Sam Norton was and is only a mortgage to secure the payment of \$100 loaned by Norton to Minerva Moppin; that he was present at the time, and knows this of his own personal knowledge.

Thereupon defendants rested, and the plaintiff demurred to defendants' evidence, which demurrer was by the court sustained, and judgment entered in favor of plaintiff, Norton, and against defendants Moppin and others. From this judgment, defendants appeal, and ask for a reversal of said judgment, for the reasons, first, "that the court erred in sustaining the demurrer to defendants' evidence, and withdrawing the case from the jury, and rendering judgment himself;" second, defendants contend "that the evidence on the part of the plaintiff was not sufficient to authorize a recovery in this case."

[1] As to the first question, the test is whether or not all the evidence and the reasonable and rational inferences and deductions therefrom in favor of the defendants, taken as true, will warrant a verdict for the defendants. Applying this test to the evidence in the case, we think that the ruling of the trial court in sustaining the demurrer and taking the case from the jury was error. See *Pittman v. Reno*, 4 Okl. 633, 46 Pac. 495; *Archer v. United States*, 9 Okl. 569, 60 Pac. 268; *McCormick v. Bonfils*, 9 Okl. 605, 60 Pac. 296; *Sanders v. Chicago, etc., Ry. Co.*, 10 Okl. 325, 61 Pac. 1075; *Yingling v. Redwine*, 12 Okl. 64, 69 Pac. 810; *Watkins v. Havighorst*, 13 Okl. 128, 74 Pac. 318; *Norman v. Groves*, 22 Okl. 98, 97 Pac. 561; *Cole v. Missouri, K. & O. Rd. Co.*, 20 Okl. 227, 94 Pac. 540, 15 L. R. A. (N. S.) 268; *Missouri, K. & T. Ry. Co. v. Walker*, 27 Okl. 849, 113 Pac. 907; *Shawnee Fire Ins. Co. v. Thompson*, 30 Okl. 466, 119 Pac. 985.

[2] As to the second proposition, counsel for plaintiff in error, in their brief, say: "Is the evidence on the part of the plaintiff such as to authorize the recovery?" This question of fact is one to be determined by the jury

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In a retrial of the case; but the argument of counsel proceeds upon the theory that, since both Norton and Rodman are named in the deed as grantees, and the action is for the recovery of the entire property described in the deed, Norton alone cannot, as a matter of law, maintain the action.

Norton and Rodman are, under the deed, tenants in common. Chancellor Kent says: "They [tenants in common] are deemed seised per my, but not per tout. They are separately seised, and there is no privity of estate between them." Norton and Rodman are not so united in interest that they must be joined as plaintiffs in order to determine the controversy between Norton and plaintiffs in error. While, as tenants in common, each has an undivided interest in each and every part and parcel of the land, still each has a separate and distinct freehold—one has no more interest in the title of the other than a stranger. Since Rodman is not a plaintiff, presumably he prefers that defendants remain in actual possession than that the possession be given Norton. Norton alone can maintain the action; but his recovery is limited to such interest in the land in which he proves title or right of possession in himself superior to that of the defendants.

Bliss on Code Pleading, § 25, discussing statutes like section 4690, Rev. Laws Okl. 1910, says: "This section of the statute just considered is permissive only; parties are not required to join as plaintiffs unless they are 'united in interest'—that is, have a joint interest—and consequently tenants in common may sue severally at their option, each for his own interest. It would seem, however, in the absence of statutory authority, that they must all join for the whole tract, or each must sue for his individual interest." For authorities supporting this doctrine, see *Mattis v. Boggs*, 19 Neb. 698, 28 N. W. 325, in which the Supreme Court of Nebraska, construing sections 29, 40, and 42, Civil Code of Nebraska, which are the same as sections 4681, 4690, and 4692, Rev. Laws Okl. 1910, held: "Tenants in common may join in an action for the possession of real estate held by one without title, or they may sue severally and recover according to their several interests." Also, see, *King v. Hyatt*, 51 Kan. 504, 32 Pac. 1105 [37 Am. St. Rep. 304]; *Hines v. Trantham*, 27 Ala. 359; *Lowery v. Rowland*, 104 Ala. 420 [16 South. 88]; *Butrick v. Tilton*, 141 Mass. 93, 6 N. E. 563; *Mobley v. Bruner*, 59 Pa. 481 [98 Am. Dec. 360]; *Marshall v. Palmer*, 91 Va. 344, 21 S. E. 672 [50 Am. St. Rep. 838]; *Oruger v. McClaghry*, 51 Barb. [N. Y.] 642; *Habrouck et al. v. Bunce et al.*, 62 N. Y. 475; *Sanford v. Sanford*, 58 Ga. 259; *Williams v. Coal Creek M. & M. Co.*, 115 Tenn. 578 [93 S. W. 572, 6 L. R. A. (N. S.) 710, 112 Am. St. Rep. 878], also reported in 5 Ann. Cas. 824, with notes.

The judgment of the trial court is reversed, with directions to proceed in accordance with this opinion. All the Justices concur.

TAYLOR v. ANDERSON et al.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW (§ 311*)—WEIGHTS AND MEASURES (§ 2*)—DUE PROCESS—CONCLUSIVENESS OF WEIGHTS.

Act approved March 7, 1913 (Sess. Laws 1913, c. 24), providing that, where lists of baled cotton are purchased from local buyers and stored in cotton yards owned and operated by cotton weighers, he shall reweigh the same before it is removed from his yard; that the purchasers may be present, and (section 4), "when any cotton shall be reweighed in their presence they shall accept the weights as being correct and make final settlement on the same;" and (section 5) that when the same is reweighed according to the provision of said act "the transaction between the buyer and seller as to weights, shall be at an end and neither party shall have any recourse on the other"—*held* to be a legislative attempt to make conclusive, between the parties to a sale, the finding of the fact of the weight of the cotton by the weigher, and hence is unconstitutional as denying the buyer or seller, when sued by the other, due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 932; Dec. Dig. § 311;* Weights and Measures, Cent. Dig. § 2; Dec. Dig. § 2.*]

Error from District Court, Cleveland County; R. M. McMillan, Judge.

Action by F. E. Anderson and others against J. F. Taylor. Judgment for plaintiffs, and defendant brings error. Affirmed.

Ralph C. Hardie, of Norman, for plaintiff in error. Burwell, Crockett & Johnson, of Oklahoma City, for defendants in error.

TURNER, J. On October 8, 1913, defendants in error brought suit in the district court of Cleveland county against J. F. Taylor, plaintiff in error, the object of which is to test the constitutionality of an act approved March 7, 1913 (Senate Bill 77, c. 24, Sess. Laws 1913). The petition substantially states that one of the plaintiffs, Wm. Morgan, Jr., is a local cotton dealer at Norman and, as such, had, together with other cotton owned by him, 20 bales of cotton stored in the cotton yard operated by defendant at that place; that his coplaintiff, Anderson, Clayton & Co., of Oklahoma City, are dealers in cotton which they buy from local dealers for resale and export; that said Morgan as the owner of the 20 bales aforesaid theretofore sold the same to said Anderson, Clayton & Co., and agreed to deliver the same to them f. o. b. Norman, with weights guaranteed at the compress at Oklahoma City; that said Taylor, whose yard is the only one in Norman, refused and still refuses to surrender possession of said 20 bales of cotton to plaintiffs on demand and refuses to permit them

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to remove the same except after the same are reweighed and ten cents per bale paid him therefor as weigher, which plaintiff refused to pay; that defendant threatens to and will reweigh not only that but all cotton belonging to plaintiffs which may be stored in his said yard from time to time and will claim and charge such fee for reweighing and will not deliver said cotton except upon the payment of the fee aforesaid. It is further charged that defendant is so doing pursuant to said act, which is alleged to be unconstitutional for certain reasons set forth in the petition. The prayer is that the defendant be enjoined from so doing and for general relief. After answer filed, in effect a general admission and a plea of justification under the act, there was judgment for plaintiffs upon the pleadings, the act was declared unconstitutional, the injunction granted as prayed, and defendant brings the case here.

The act assailed is entitled: "An act to require the reweighing of baled cotton before removing the same from any local cotton yard and fixing the penalty for the violation thereof."

It provides:

"Section 1. Every person, firm or corporation in the state of Oklahoma, engaged in the business of cotton buying, where lists of baled cotton are purchased from local buyers, and the said cotton stored in cotton yards or cotton warehouses owned or operated by cotton weighers, shall, before removing same, have said cotton reweighed.

"Sec. 2. Every owner or operator of a cotton yard or warehouse in the state of Oklahoma, shall be required, before allowing any cotton to be removed from his yard, or warehouse, to reweigh same in the presence of the owner or purchaser, or some agent of said purchaser, or owner of same; and, with indelible ink, mark on the bale, in figures, the weight of the bale."

Section 3 provides for testing the scales and a second weighing.

"Sec. 4. Persons, firms, or corporations engaged in the cotton business, coming under the provisions of this act, shall have the right to be present at the reweighing of any cotton they may purchase or desire to purchase, and when any cotton shall be reweighed in their presence they shall accept the weights as being correct and make final settlement on the same.

"Sec. 5. When a list of cotton has been reweighed before leaving the cotton yard, according to the provisions of this act, the transaction between the buyer and seller as to the weights, shall be at an end and neither party shall have any recourse on the other."

Section 6 provides the penalty for a violation of the act. Which means (section 1) that when Morgan bought this cotton and had it stored in this yard, before he can deliver it to the purchasers, his coplaintiffs, he must

have it reweighed by the weighmaster of the yard. Not only that, but section 2 makes it the duty of the weighmaster to reweigh it, before it is removed, in the presence of one of the contracting parties or his agent, and to mark the weight of the bale thereon. After section 3 makes provision for any person in interest not satisfied with the weights to require a reweighing, section 4 provides that the purchasers may be present at the reweighing, and that when they are, and the cotton is reweighed in their presence, "they shall accept the weights as being correct and make final settlement on the same." Not only that, but, whether the purchaser is present or not, section 5 provides that, when the cotton is reweighed as provided, "the transaction between the buyer and seller as to weights, shall be at an end and neither party shall have any recourse on the other." Which means that such finding of the weights by the weigher is conclusive as to that fact, and should either buyer or seller sue the other and base his claim on over or under weights resulting from fraud, accident, mistake or anything else, the other has the right to plead the weights, as found by the weighmaster, in bar of the action, and the same will be conclusive evidence of the weight of the cotton. Whether the act is an attempt to confer upon the weighmaster the exercise of judicial power, or denies to either party to the sale the equal protection of the law, or whether it interferes with plaintiffs' right to contract, or whether it constitutes a taking of private property for private use (and it seems to be open to objection on any of these grounds), and for any of the reasons stated is unconstitutional, we need not say, for true it is it was beyond the power of the Legislature to make the finding of the weighmaster conclusive evidence of that fact, and hence the act must fall, as denying to the party sued, whether buyer or seller, due process of law.

Cooley's Const. Lim. (7th Ed.) p. 526, says: " * * * Except in those cases which fall within the familiar doctrine of estoppel at common law, or other cases resting upon like reasons, it would not, we apprehend, be in the power of the Legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations the law of the land requires an opportunity for trial; and there can be no trial if only one party is suffered to produce his proofs. The most formal conveyance may be a fraud or forgery; public officers may connive with rogues to rob the citizen of his property; witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitu-

tional law"—citing Blackwell on Tax Titles, p. 100 et seq.

In *McCready v. Sexton & Son*, 29 Iowa, 356, 4 Am. Rep. 214, the court said: "Wantlan v. White, 19 Ind. 470, which was a proceeding by habeas corpus in behalf of an enlisted minor, who had taken the usual oath of his age. His discharge was resisted on the ground that the act of congress provided that 'the oath of enlistment taken by the recruit shall be conclusive as to his age.' The court held 'that it is not competent for the legislative power to declare what shall be conclusive evidence of a fact.' * * * In *Groesbeck v. Seeley*, 13 Mich. 329, *Quinlon v. Rogers*, 12 Mich. 169, and *Case v. Dean et al.*, 16 Mich. 12, a statute making the tax deeds conclusive evidence of title was held absolutely void, as being in conflict with the constitutional provision guaranteeing due process of law for the protection of life, liberty, and property."

In *Wilson v. Wood et al.*, 10 Okl. 279, 61 Pac. 1045, the court, in the syllabus, said: "The Legislature has no power to declare a tax deed or the recitals therein conclusive evidence of a compliance with those matters which are essential to the exercise of the taxing power, or to those matters which are necessary to be done in order to divest the title of the former owner or those claiming through him, and to execute a valid deed of conveyance. In judicial investigations the law of the land requires an opportunity for trial, and there can be no trial if only one party is suffered to produce his proofs. Except in those cases which fall within the established doctrine of estoppel at the common law, or cases resting on like reasons, it is not within the power of the Legislature to declare that a particular item of evidence shall preclude a party from establishing his rights in opposition to it"—and after quoting approvingly from Judge Cooley, as we have done, cited *Weeks v. Merkle*, 6 Okl. 714, 52 Pac. 929.

In *Graves v. Northern Pacific Ry. Co.*, 5 Mont. 556, 6 Pac. 16, 51 Am. Rep. 81, it was held that a statute rendering a railroad company liable for cattle killed by it at a valuation to be conclusively fixed by appraisers was unconstitutional as denying a right to trial by jury.

In *Vega Steamship Co. v. Consolidated Ele. Co.*, 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484, plaintiff was a common carrier of freight on the Great Lakes between two certain points; defendant owned and operated a public grain elevator at one of them. On a certain day S. M. & Co. proceeded to transport, on one of plaintiff's ships, a certain number of bushels of wheat, stored in said elevator, to the other point. The wheat while being delivered from the elevator to the ship was weighed out by the assistant state weighmaster, under the laws of Minnesota. Gen. Stat. 1894, § 7675, after prescribing the duties of the

weighmaster, one of which was to weigh said grain, provided that "the action and certificates of such weighmaster and his assistants in the discharge of their aforesaid duties shall be conclusive upon all parties, either in interest or otherwise, as to the matters contained in said certificates." When the grain was delivered to consignee, there was a shortage which was paid for by the carrier pursuant to the terms of the bill of lading, who thereupon, becoming subrogated to his rights, brought suit against the elevator company for the amount of the shortage. On the trial the court directed a verdict for defendant and in effect held that the statute in question made the finding of the weighmaster as to the weights conclusive of that fact as between the parties. In passing, speaking to the statute, the court said: "But is it competent for the Legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The Legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See *Cooley Const. Lim.* (6th Ed.) p. 452; 6 Am. & Eng. Enc. Law (2d Ed.) p. 1050; *Graves v. Northern P. R. Co.*, 5 Mont. 556 [6 Pac. 16], 51 Am. Rep. 81; *Moore v. State ex rel. Denny*, 55 Ind. 362, 363; *Wantlan v. White*, 19 Ind. 470."

M., K. & T. Ry. Co. v. Simonson et al., 64 Kan. 802, 68 Pac. 653, 57 L. R. A. 765, 91 Am. St. Rep. 248, was a suit against the railway company for a shortage of hay shipped over its lines. There was judgment for plaintiff and the company appealed. The action was brought under Gen. Stat. 1901, §§ 5938-5947, which among other things provided that the railway company should furnish track scales for weighing hay and issue duplicate bills of lading, and concluded one of the sections thus: "And in any action hereafter brought against any railway company, for or on account of any failure or neglect to deliver any such grain, seed or hay to the consignee, or his heirs or assigns, either duplicate of such bill of lading shall be conclusive proof of the amount of such grain, seed or hay so received by such railway company." To escape liability the railway company offered to prove that the full amount of hay receipted for in the bills of lading had not in fact been received by it. In passing upon the admissibility of the evidence, the court held that part of the statute quoted to be unconstitutional, admitted the evidence, and said: "Is it in the power of the Legislature thus to create a conclusive presumption" of evidence "in a matter of private contract? We are constrained to believe that it is not. Every suitor is entitled to his day in court and to have his case determined on such evidence as legal policy will allow. It is doubt-

less competent for the Legislature to prescribe many of the rules of evidence. The subjects of the competency of witnesses, the order of trial, the burden of proof, the effect of public records, the certification of copies of official documents, the prima facie character of certain evidence, and other like matters which pertain to the practice rather than the right of proving causes, are lawfully within the sphere of legislative regulation; but it is not within the power of the Legislature to exclude from the courts that which proves the truth of a case, nor on the other hand, to compel them to receive that which is false in character." And in the syllabus: "The provision of chapter 100 of the Laws of 1893 (Gen. Stat. 1901, §§ 5938-5947) which makes the specification of weights in bills of lading issued by railroad companies for hay, grain, etc., shipped over their lines, conclusive evidence of the correctness of such weights, is unconstitutional because denying to the companies due process of law, and because wrongfully depriving the courts of the judicial power to determine the weight and sufficiency of evidence." See, also, *People v. Rose*, 207 Ill. 352, 89 N. E. 762; *McNulty et al. v. Toof et al.*, 116 Ky. 202-210, 75 S. W. 258; *State v. Schlenker*, 112 Iowa, 642, 84 N. W. 698, 51 L. R. A. 347, 84 Am. St. Rep. 360; *Southern P. R. Co. v. Bd. of Railroad Com'rs* (C. C.) 78 Fed. 236; *Ramish v. Hartwell*, 126 Cal. 443, 58 Pac. 920; *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970; *Little Rock, etc., Ry. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Corbin v. Hill*, 21 Iowa, 70; *Weeks v. Merkle*, 6 Okl. 714;† *White v. Flynn*, 23 Ind. 46; *Groesbeck et al. v. Seeley*, 13 Mich. 329; *Wantlan v. White*, 19 Ind. 470; *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410; *Abbott v. Lindenbower*, 42 Mo. 162.

We are therefore of the opinion that the whole act is unconstitutional and must fall. We say the whole act for the reason that the purpose of the act was to accomplish one object only, which was to make the determination of the weights by the weighmaster conclusive evidence of that fact. Where such is the case, the whole act must fall, for it is impossible to suppose that the Legislature would have passed the act with its ultimate object eliminated therefrom.

No other question being raised, the judgment of the trial court is affirmed.

LAWSON v. GUTHRIE.

(Supreme Court of Oklahoma. Jan. 13, 1914.)

(Syllabus by the Court.)

1. REMOVAL OF CAUSES (§ 89*)—PAPERS TRANSFERRED—CERTIFIED COPIES.

Section 431, Williams' Const., provides that, when a case is removed or transferred from a state court to the United States Circuit or District Court, " * * * the files and papers in such transferred cases shall be transfer-

red to the proper United States Circuit or District Court, together with a transcript of all book entries to complete the record in such particular case so transferred." But when the petition for removal is denied, then the files and papers must remain in the court in which the petition is filed, and the petitioner must secure certified copies of all such files, papers, and records, and cause that to be filed in the United States court.

[Ed. Note.—For other cases, see *Removal of Causes*, Cent. Dig. §§ 162, 165, 189, 192-195, 197, 200, 201; Dec. Dig. § 89.*]

2. APPEAL AND ERROR (§ 1002*)—VERDICT—EVIDENCE.

Where the evidence is conflicting, and there is sufficient evidence in the record tending to support the verdict of the jury, this court will not disturb such verdict.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

3. CLERKS OF COURTS (§ 37*)—PREPARATION OF TRANSCRIPT—ACTION FOR FEES—INSTRUCTIONS—QUESTION FOR JURY.

Instructions examined, and held as correctly stating the law applicable to the case.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. § 65; Dec. Dig. § 37.*]

Error from County Court, Okfuskee County; W. A. Huser, Judge.

Action by Charles E. Guthrie against Lewis C. Lawson. Judgment for plaintiff, and defendant brings error. Affirmed.

Winston T. Banks, of Hugo, for plaintiff in error. John L. Norman and S. L. O'Bannon, both of Okemah, for defendant in error.

LOOKBOURROW, J. In December, 1907, there was filed in the office of the clerk of the district court of Okfuskee county the original record in the case of *Dollie Houston v. Lena W. Huddleston et al.*; said cause being transferred from the United States Court for the Western District of the Indian Territory to the district court of Okfuskee county, state of Oklahoma, by virtue of the Enabling Act. Lewis C. Lawson, an attorney at law, the attorney for *Dollie Houston* in said cause, filed a motion for removal of said cause of *Houston v. Huddleston* from the district court of Okfuskee county, Okl., to the United States District Court of the Eastern District of Oklahoma. The motion or petition for removal was denied, and thereupon said Lawson directed the clerk of the district court, Charles E. Guthrie, the defendant in error in this case, to prepare a transcript of the case of *Houston v. Huddleston*, that the same might be filed in the United States Court for the Eastern District of Oklahoma; Attorney Lawson stating at the time that he personally had the money with which to pay for said transcript when completed. The clerk prepared the transcript, and notified Lawson that his fees for such service amounted to \$48. Lawson refused to accept said transcript, and refused to pay the \$48, and the plaintiff below, Guthrie, commenced an action in the justice court of Okfuskee county against said Lawson to re-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes
† 52 Pac. 929.

cover said amount. Judgment was rendered in the justice court in favor of Guthrie. From that judgment, Lawson appealed to the county court, where the case was tried to a jury. The jury returned a verdict against Lawson, judgment being entered thereon, and, from that judgment, Lawson appeals to this court.

Plaintiff assigns as error the refusal of the trial court to give to the jury certain instructions by him requested; also error in the giving of instruction No. 3 by the court. And contends that the evidence is not sufficient to sustain the verdict and judgment.

[1] Section 431, Williams' Const., provides that, when a case is removed or transferred from a state court to the United States Circuit or District Court, " * * * the files and papers in such transferred cases shall be transferred to the proper United States Circuit or District Court, together with a transcript of all book entries to complete the record in such particular case so transferred." Plaintiff in error contends that it is contrary to law for the clerk to make a transcript of all of the records, files, and papers in the case, and that he should have transferred the original files and papers, and only transcribed the book entries necessary to complete the record. That contention is correct if the case is removed; but, when the petition for removal is denied, then the files and papers, being the records of that court, must remain in the court in which the petition is filed, and the petitioner, if he wishes the ruling reviewed by the United States Circuit or District Court, must secure certified copies of all files, papers, and records, and cause that to be filed in the United States court.

[2] As to whether or not \$48 was a reasonable fee and charge for the services rendered by the clerk is and was a question of fact to be determined by the jury, and the verdict of the jury was against the plaintiff in error, and there is evidence in the record tending to support such verdict.

Plaintiff in error also contends in his argument that he requested the clerk to make a copy of book entries alone, and did not request a transcript of the entire record. The testimony of Guthrie is to the effect that District Judge Caruthers, at the time Lawson demanded a transcript, stated to him that it would be necessary for him (Lawson) to show that he had ample funds to pay for this record; that Lawson thereupon pulled from his pocket a pocketbook full of currency, made a display of money to show that he had the money to pay for the transcript. "Q. What did Mr. Lawson say? A. He said, 'I have got the money to pay for it; I want a transcript of the record.' That's what he said. Q. In pursuance of this request and demand of his, did you make a transcript of the record in that case? A. Yes, sir." Witness Guthrie further testified that the

transcript was to be paid for upon its completion. He notified Lawson of its completion, and testified to having demanded the fees several times, and having been refused; tendered it before the justice of the peace, and brought it into the county court and tendered it. He further testified that, after the petition for removal was denied, Mr. Lawson said to him, the clerk, "Should you fail to comply with my demand to get out this transcript in order that I may remove this case, the crime is a very grave one." "Q. Did you prepare it for Lawson or for Dollie Houston? A. For Lawson. Q. Did you make this record on the strength of his personal request and demand? A. Yes, sir. Q. You knew nothing about his clients, whether they lived in the United States or Africa? A. No. He showed me the second time in the presence of Mr. Moon the contents of his money purse."

[3] The court instructed the jury, in part, as follows:

"III. You are instructed that, if you believe from the evidence that the defendant requested the plaintiff to make a transcript of the record in the case in question, and that the plaintiff and the defendant understood at the time of such request that it was for the entire record as admitted in evidence, and that the defendant individually and personally agreed to pay for same, then you should find for the plaintiff in such sum as you shall find from the evidence to be a reasonable compensation for the making of such transcript."

"IV. If you believe from the evidence that the defendant requested the plaintiff to make a copy of the book entries alone, and that he did not request the plaintiff to make a transcript of the entire record as exhibited to you, and that the plaintiff made another and entirely different transcript from that requested, then you should find for the defendant."

These instructions present both theories, and the jury found the facts in favor of the defendant in error.

Plaintiff in error contends that there was no direct allegation in the bill of particulars that he promised to pay the defendant in error the sum sued for, or for the transcript of the record as made. The second paragraph of the bill of particulars states, in part: " * * * The defendant (Lawson) thereupon in open court ordered from this plaintiff a transcript in said cause, in order that he, the defendant, representing the plaintiff (Houston), might file the same in the United States Court for the Eastern District of Oklahoma, stating at the time in open court, and unto the court, in the presence of this plaintiff, the clerk of said court, that he, the defendant (Lawson) personally had the money with which to pay for said transcript when completed."

The case was tried upon the theory that

the acts and conduct of Lawson were such as to make him personally responsible for these fees. This was a question of fact, and the jury determined it adversely to the plaintiff in error. See *Barnes et al. v. Lynch et al.*, 9 Okl. 156, 59 Pac. 995; *Richardson, R., B. Dry Goods Co. v. Hockaday et al.*, 12 Okl. 546, 73 Pac. 957; *Kramer v. Ewing*, 10 Okl. 357, 61 Pac. 1064; *Bird v. Webber*, 23 Okl. 583, 101 Pac. 1052.

In the instructions of the court and the record we find no error. The judgment of the trial court is therefore affirmed. All the Justices concur.

ELLSWORTH v. STATE.

(Criminal Court of Appeals of Oklahoma.
Jan. 27, 1914.)

(Syllabus by the Court.)

1. INCEST (§ 14*)—SUFFICIENCY OF EVIDENCE.
In a prosecution by a daughter against her father for incest, where it appears that she was over the age of consent when the act charged was committed, and her testimony is corroborated by proof of material facts and corroborating circumstances, connecting the defendant with the commission of the crime, the evidence is held sufficient to sustain the verdict and judgment, and that no reversible error was committed on the trial.

[Ed. Note.—For other cases, see *Incest*, Cent. Dig. § 12; Dec. Dig. § 14.*]

2. INCEST (§ 18*)—EVIDENCE—PRIOR ACTS.
In a prosecution for incest, evidence tending to establish acts of incest at times other than and prior to that relied on for the conviction is admissible as indicating continuousness of the illicit relation and as tending to corroborate the testimony of the prosecutrix as to the particular act relied on for conviction.

[Ed. Note.—For other cases, see *Incest*, Cent. Dig. § 11; Dec. Dig. § 13.*]

Appeal from District Court, Stephens County; Frank M. Bailey, Judge.

Fred Ellsworth was convicted of incest, and appeals. Affirmed.

Womack & Brown and Wilkinson & Morris, all of Duncan, and Stuart, Cruce & Gilbert, of Oklahoma City, for plaintiff in error. Charles West, Atty. Gen., and Smith O. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. This appeal is prosecuted from a conviction had in the district court of Stephens county upon an information charging the defendant, Fred Ellsworth, with the crime of incest alleged to have been committed with his daughter Flora Ellsworth in said county on or about the 25th day of July, 1911. The verdict was guilty as charged, leaving his punishment to be assessed by the court. On the 18th day of November, 1911, the court pronounced judgment and sentenced the defendant to imprisonment in the penitentiary at McAlester for the term of ten years. To reverse the judgment, an appeal was perfected.

[1, 2] The only question worthy of notice

which the record presents goes to the merits of the case. It is claimed by defendant's counsel, in an elaborate argument, that the evidence does not warrant his conviction in that there is no sufficient corroboration of the testimony of the prosecuting witness, who must be considered as an accomplice.

The prosecution gave in evidence the testimony of Flora Ellsworth as follows: That she was the daughter of defendant and was 16 years old March 8, 1911. That her mother died when she was an infant, and that after her mother's death she lived with her grandparents near Lexington, Okl., until she was seven years old. At that time her father, having married the second time, took her to live with him. That when she was 12 years old her father moved to the Wood Reserve in Stephens county. That when she was 10 years of age her father began to have sexual intercourse with her, and that their illicit relations were continual until Friday, July 25, 1911, which was the last time. That on that day her stepmother had gone to Marlow, taking her half-sister with her; and the act occurred in her bedroom during the afternoon. She also testified that her father slept with her off and on since she had been living with him. That her stepmother was away the winter before three weeks or a month, and her father occupied the same bed with her during that time and had intercourse with her two or three times a week. That she did not tell people about it before because he said "that if I told it on him that he would kill me." That he often cuffed and kicked her and whipped her with a strap. That he pulled her hair until large bunches came out, and made her stand while her stepmother whipped her. That he stopped her from going to school. That her stepmother usually went to town on Tuesday and Friday of each week with the butter and eggs. On cross-examination she testified that her father would come and take her out of her bed to his pallet and have intercourse with her; that this occurred so often that she could not state the number of times; that she was positive the last act took place on Friday, July 25th; that her mother and stepsister had gone to town on that day, and Ed. McGehee, who had worked for her father about a year and a half, was in the field working; that McGehee had been her sweetheart for about six months before the defendant's arrest; that she told Mrs. Duncan, and Mr. Duncan brought her to the county seat to make the complaint, and she did not return to her father's.

George Townsend testified that he had worked for the defendant off and on for five years, the last time two years before; that he had often seen the defendant and his daughter Flora sleeping together; that the last time that he had seen them sleeping together was about four years ago.

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Ed McGehee testified in substance: That he had been working as a farm hand for the defendant for about a year before the prosecution was commenced. That the Ellsworth house had two rooms and there was a kitchen and smokehouse detached, and that he slept in the smokehouse. That Mrs. Ellsworth would go to Marlow twice a week, on Tuesdays and Fridays, to sell butter and eggs, and that she generally took the baby girl with her and left the defendant and his daughter Flora at home. That Mrs. Ellsworth went away on a visit, and while she was away the defendant and his daughter Flora slept in the south bedroom. That he noticed mornings that only one bed was slept in, and that it would be "disarranged and wallered up." That he had seen the defendant take his daughter Flora by the hair of the head and churn her head up against the wall. That the prosecutrix never kept company with young men, but witness had been courting her, but had never had sexual intercourse with her. That his suspicions were aroused by the fact that at one time when Mrs. Ellsworth was absent he sent him down in the pasture to see about an old sow that was going to find pigs, and sent the little girl along with him, while the defendant remained at the house with the prosecutrix. That another time when Mrs. Ellsworth was gone to town the little girl came out to where he was working. That during the summer he saw the defendant and the prosecutrix sleeping on a pallet in the front room.

Mrs. J. W. Turner testified in substance that she had lived for three years a near neighbor of the defendant; that in February, 1911, Mrs. Ellsworth went away and was gone for about six weeks, and that during her absence witness was at the Ellsworth house nearly every day, sometimes early in the morning, and noticed that only one bed had been occupied; that the prosecutrix never had any young men company.

Dr. O. E. Frost testified that he was a duly licensed physician and surgeon and had practiced medicine for 36 years; that he, with Dr. Adams present, made a personal examination of the prosecutrix; that he found that the hymen had been broken down and it was not of recent occurrence; "that her sexual organs resembled those of a married woman, that was in the habit of having sexual intercourse;" that the parts had assumed a flabby nature because of friction or excessive intercourse; that "the condition of her body was that of a married woman," and whatever had been the disturbing cause had existed for some time necessarily from the flabby condition of the vulva; that he made a subsequent examination some months after and found her general condition much improved.

Henry Crawford testified that he was a deputy sheriff and arrested the defendant in the town of Marlow some time last Au-

gust; that the defendant asked him what he was arrested for; that he did not tell him; that he allowed him to go and get some one to take his team home; that he then went to the bank to get some money, and from there he went to a drug store.

W. M. Cates testified that he was sheriff; that he phoned from Duncan to Deputy Sheriff Crawford at Marlow to arrest the defendant; that shortly after the defendant called him up on the phone and wanted to know what he was arrested for, but that he refused to give him the information.

L. A. Selver testified that he was a druggist and the defendant came into his store on the day he was arrested and asked for five or ten cents worth of strychnine, and he told him he did not have any. At the time Deputy Sheriff Crawford was standing out in front of the drug store.

Thereupon the state rested and the defendant moved the court to instruct the jury to return a verdict of not guilty on the ground "that there was a total failure of corroboration of the testimony of the prosecuting witness." The court overruled the motion and allowed an exception.

On behalf of the defendant, three or four witnesses testified that the defendant was in the town of Marlow on the afternoon of Tuesday, the 25th day of July, 1911.

The next witness on the part of the defendant was his wife, Mrs. Sara Ellsworth, who testified that since their marriage she and the defendant had slept together, and that the prosecutrix never slept with him alone. Proper predicate was laid for introducing statements which the state contended had been made by Mrs. Ellsworth to Mrs. Turner, and Miss Mollie Parham.

George Watson testified that he worked for the defendant in Cleveland county, and at that time he saw prosecutrix sitting in the lap of a man named Erwin, and that Erwin asked him not to say anything about it.

A Mr. Walker of Pauls Valley testified that he was at the home of the defendant in October, 1910, painting for him, and that he had seen Ed McGehee and Flora Ellsworth sitting on the bed, and that McGehee had his hands up under her clothes.

Will Brady testified that he was at the home of the defendant on the 28th day of July last, and saw the prosecutrix and a man he took to be Ed McGehee lying on the floor; that he inquired of the prosecutrix for her father, and she said that he had gone to Marlow.

Defendant, as a witness in his own behalf, denied ever having illicit relations with his daughter, and said at the time of his arrest he went into the drug store to purchase strychnine at his wife's request.

In rebuttal, Miss Mollie Parham testified: That she was 50 years old and lived with her sister, Mrs. Turner, across the section line from the defendant. That about two years ago Mrs. Ellsworth told her that the defend-

ant had been having illicit relations with his daughter Flora Ellsworth, and that her happiness had been broken up because of that. That she said, "Flora is an immoral girl, and she comes between me and Fred;" and I said, "How can she be immoral; she never leaves home;" and she said, "This goes on right under my own roof, and you will see some day that this will come to light." That she afterwards repeated the story to her.

Mrs. J. W. Turner testified that Mrs. Ellsworth, speaking about her husband's arrest, said to her: "You can just tell Miss Mollie that it is just like I told her. I have told her that often."

On accomplice testimony the court instructed the jury as follows: "You are instructed, gentlemen of the jury, that under the law of this state a person cannot be convicted upon the testimony of an accomplice unless they be corroborated by such other evidence in the case as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. And you are instructed in this case, gentlemen of the jury, that the prosecuting witness, Flora Ellsworth, being under the law an accomplice in the crime charged against this defendant, you cannot convict the defendant upon the testimony of the said witness unless you further find from the evidence that the testimony of such witness is corroborated by such other evidence in the case as tends to connect the defendant with the commission of the offense charged in the information. And it is for the jury to say, in the light of all the evidence in the case, as to the reasonableness or unreasonableness of the evidence of the prosecuting witness and as to whether it has been corroborated by the testimony of other credible witnesses or by facts and circumstances proven in the case."

It is our opinion that the condition of the prosecutrix and the opinion of the physician who made the examination as to its probable cause corroborates the testimony of the prosecutrix, and there are other facts and circumstances brought out in the evidence calculated to substantiate and corroborate the testimony of the prosecutrix. For this reason the question of the innocence or guilt of the defendant was a question for the determination of the jury. They found the defendant guilty. No other finding could well have been reached, and no good reason is shown why that finding should be disturbed.

The record does not disclose any reversible error. The judgment of conviction is therefore affirmed.

ARMSTRONG, P. J., and FURMAN, J., concur.

JOHNSON v. GRAND LODGE A. O. U. W.
OF KANSAS et al.

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

INSURANCE (§§ 793, 797, 817*)—DIVORCE (§ 169*)—FRATERNAL BENEFIT CERTIFICATE—BENEFICIARY—DIVORCED WIFE—BURDEN OF PROOF.

An insurance policy for \$2,000, issued by a fraternal benefit association upon the life of a member, named his wife as the beneficiary. She obtained a decree of divorce from her husband and a judgment in her favor for \$1,500, which the decree of divorce provided should be a lien upon certain property owned by the husband. Six days after the divorce was granted the husband died without having designated another beneficiary. In an action by the former wife against his heirs to recover the proceeds of the policy, it is *held*:

(a) Under the by-laws of the association and by the express provisions of section 4303, General Statutes 1909, the plaintiff would not be entitled to payment of the certificate unless she was dependent upon the member at the time of his death.

(b) Whether the plaintiff in this case was dependent within the meaning of the by-laws and the provisions of the statutes depended upon facts, the burden of proving which rested upon her.

(c) Notwithstanding the complete dissolution of the marriage relation by the decree of divorce, if it were shown that by the death of her former husband the plaintiff was deprived of all means to enforce the collection of her judgment, she would be regarded as a dependent upon him to the extent of her interest in the judgment, and in that event she could maintain an action upon the policy to recover the amount of the judgment and costs, but no more. Any balance due upon the policy would, in that event, be payable to the heirs of the member.

(d) The fact alone that when the death of the former husband occurred her judgment had not been satisfied would not make her a dependent upon him if his death did not prevent the collection of her judgment.

(e) Since every reasonable inference to be drawn from the record and from plaintiff's attitude in the court below, as well as here, compels the conclusion that there is nothing to prevent her from obtaining full satisfaction of her judgment, she is not a dependent upon her former husband, and therefore cannot maintain the action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1936, 1967–1972, 1976, 1980, 1999–2002; Dec. Dig. §§ 793, 797, 817;* Divorce, Cent. Dig. § 551; Dec. Dig. § 169.*]

Appeal from District Court, Sedgwick County.

Action by Cora A. Johnson against the Grand Lodge Ancient Order of United Workmen of Kansas and others. From judgment for defendants, plaintiff appeals. Affirmed.

Dale & Amidon, of Wichita, for appellant. George Gardner and Jean Madalene, both of Wichita, for appellees.

PORTER, J. In his lifetime Charles A. Johnson was a member of the Ancient Order of United Workmen of Kansas, and held a beneficiary certificate in the order for the sum of \$2,000, payable at his death to Cora

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A. Johnson, who at the time the certificate was issued was his lawful wife. On the 10th day of January, 1910, Cora A. Johnson obtained a decree of divorce from him in the district court of Sedgwick county, and the decree was in full force and effect and unappealed from at the time of his death. He committed suicide on the 16th day of January, 1910. Thereafter Cora A. Johnson brought this action to recover upon the certificate. The Grand Lodge paid the money into court, and upon its motion the heirs of Charles A. Johnson were made defendants. During his lifetime Charles A. Johnson made no change in the beneficiary; and the question in this controversy is whether the policy is payable to Cora A. Johnson, the person named as beneficiary, or to his heirs. The trial court found for the heirs, and the plaintiff appeals from the judgment.

The by-laws of the association issuing the certificate contain the following provision: "The beneficiary shall be named in the beneficiary certificate, and shall be confined to one or more of the family of the member, or some person or persons related to him by blood, or who shall be dependent upon him."

Section 4303, General Statutes of 1909, which controls fraternal beneficiary associations, reads: "The payment of death benefits of such an association shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member thereof." Page 963.

It is the law in this state that no person, other than those designated in the statute, has an insurable interest in the life of the member of such an association, nor can any person outside the designated class be made a beneficiary or receive death benefits. *Gilliam v. Dale*, 60 Kan. 362, 76 Pac. 861; *Bolce v. Shepard*, 78 Kan. 308, 96 Pac. 485. To the same effect is *Murphy v. Nowak*, 223 Ill. 301, 79 N. E. 112.

It is likewise settled law in this state that upon the rendition of a decree of divorce, complete dissolution of the marriage relation immediately follows. *Durland v. Durland*, 67 Kan. 734, 74 Pac. 274, 63 L. R. A. 959; *Phillips v. Phillips*, 69 Kan. 324, 76 Pac. 842; *Woolverton v. Johnson*, 69 Kan. 708, 713, 77 Pac. 559; *Bell Jacobs v. Charles Gaskill*, 69 Kan. 872, 77 Pac. 550.

In *Durland v. Durland*, supra, it was said: "Upon the rendition of a decree of divorce the relation of husband and wife no longer exists between the parties to the suit, and if one of them should die within six months following the date of the decree the survivor would take no share of the property of the deceased under the statute of descents and distributions, by virtue of the former relationship." Syl.

In *Modern Woodmen v. Comeaux*, 79 Kan. 493, at page 496, 101 Pac. 1, at page 2 (25 L. R. A. [N. S.] 814, 17 Ann. Cas. 865), the court had occasion to construe the meaning

of the word "dependent" as used in the by-laws of similar associations and as employed in the statute supra. In the opinion it was said: "The word 'dependent' is here used in such relation to the preceding words as to indicate that the character of dependence intended should, in a general sense, be similar to the dependence which usually exists between parent and child, husband and wife, or such as obtains generally in the family relation." The opinion also quoted with approval from *McCarthy v. New Eng. Order of Protection*, 153 Mass. 314, at page 318, 26 N. E. 866, at page 867 (11 L. R. A. 144, 25 Am. St. Rep. 637), as follows: "The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable grounds, and not upon the purely voluntary or charitable impulses or dispositions of the member."

The whole case turns, in our opinion, upon whether Cora A. Johnson was a dependent of Charles A. Johnson at the time of his death. On January 10th, when the divorce was granted, the court gave the plaintiff a judgment against Charles A. Johnson for \$1,500, and the same was charged as a lien upon the property of the defendant. In her petition she alleged that he was the owner of certain personal property, the joint accumulations of herself and the defendant during their marriage, and that this property consisted of 45 head of cattle, 9 mules, 3 horses, farm implements, and about 1,200 bushels of corn. The petition described the land upon which this property was located. A temporary restraining order was granted in the action for divorce which restrained the husband from selling or disposing of any of the property until the further order of the court; and the final decree gave her a lien upon the property for the satisfaction of her judgment. The day following the granting of the divorce she sued out a general execution to recover the judgment and costs, and the sheriff on the same day levied the execution upon and took into his possession the same personal property. The return shows that six days later, by order of plaintiff's attorney, the sheriff delivered the property to the administrator of the estate of Charles A. Johnson, deceased.

It is the contention of the defendants that under the statute relating to benefit associations (section 4303, supra) and the foregoing decisions of this court, the moment the divorce was granted Cora A. Johnson was no longer a dependent of Charles A. Johnson, and that she became from that time merely a judgment creditor, with a lien upon his property fixed by the express terms of the decree of divorce. The court is of the opinion that by reason of the peculiar character of the judgment in her favor she was more than a mere judgment creditor. The claim

upon which she was granted the relief had its origin in the obligations which arose out of the marital relation. True the claim for future support and maintenance was merged in the judgment; but after the divorce, and until the judgment was satisfied, the former husband, so long as he lived, was under an obligation to provide for her support and maintenance by paying the judgment. The obligation could only be discharged by satisfaction of the judgment. In *Johnson v. Johnson*, 57 Kan. 343, at page 348, 46 Pac. 700, at page 701, the court had under consideration the question of the character of an allowance made to a divorced wife. It was said in the opinion: "The foundation for its allowance is the duty of the husband to provide for the wife's support; and where a divorce or separation occurs because of his fault, the duty of providing for her maintenance continues, and the court by an allowance of alimony compels its performance. A division of the property of the parties is an essentially different thing."

If there had been a division of the property, the former wife could not be said to be in any sense dependent for support or maintenance upon the former husband, because in that case the decree would have relieved the husband of any further obligation in this respect, and the wife would have been obliged to look for support and maintenance to her share of the division of the property. The decree, as we have seen, did not provide for what might be termed a division of the property, but gave to Cora A. Johnson a judgment for a specific amount, which was made a lien upon the personal property of the former husband.

If, therefore, it were in good faith claimed, or if it appeared from the record, that by the death of her former husband the plaintiff was deprived of the means to enforce the collection of her judgment, we would have no hesitation in holding that when his death occurred she was a dependent upon him within the meaning of that term as used in the by-laws of the order and the statutes referred to, and that she could in that event have maintained this action for the purpose of recovering the amount of her judgment and costs, but no more. Any balance due upon the policy would, in our opinion, be payable to the heirs of the member. It is as plain as the noonday sun, however, that this is not the theory upon which the plaintiff seeks to recover. Since she was no longer the wife of Charles A. Johnson, the question whether she was dependent upon him within the meaning of the by-laws of the order and the statute referred to became a question that depended upon facts, and the burden rested upon her to establish them. Instead of taking up this burden, she adopted an entirely different theory. She merely showed the judgment and the fact that when Charles A. Johnson died the judgment had not been

paid. Upon the trial of the case she was a witness, and on cross-examination was asked whether or not she had filed a claim in the probate court against the estate of her former husband. She was also asked if she had ever received the \$1,500. Both questions were objected to by her counsel, and the court sustained the objections upon the ground that the questions were incompetent, irrelevant, and immaterial.

While the record does not affirmatively show whether the plaintiff has in fact collected the judgment, every reasonable inference to be drawn from the entire record is that she has refrained from attempting to collect it, and is seeking to recover the full amount of the policy. No argument is made in the briefs of plaintiff to the effect that she bears the relation of a dependent because of her inability to collect the judgment. On the contrary, counsel stand upon the position taken in the court below that all that was necessary to make her a dependent was a showing that when Charles A. Johnson's death occurred the judgment had not been satisfied, and that this fact alone made her a dependent upon the former husband without regard to whether or not her judgment was amply secured. We cannot agree to this contention. If it were shown or claimed that there was no way in which her judgment could be satisfied, we think she would be a dependent to the extent of her interest in the judgment, and in that event she could maintain an action upon the policy to recover the amount of the judgment and interest thereon. But there is no showing of her inability to realize upon her judgment, nor is that the contention. Every effort to inquire into that matter upon the trial was resisted by the plaintiff. In our view of the case that was one of the most material facts necessary for the plaintiff to establish, and the questions asked of her on cross-examination were entirely proper. There is, however, no cross-appeal nor any claim that the court erred in the ruling made. As observed, every reasonable inference to be drawn from the record and from the attitude of plaintiff's counsel in the court below, as well as here, compels the conclusion that there is nothing to prevent the plaintiff from obtaining full satisfaction of her judgment, if in fact she has not already done so.

In *Filley v. Illinois Life Ins. Co.*, 137 Pac. 793, decided at this session, the right of a divorced wife to recover upon a policy of insurance, naming her as the beneficiary, is upheld; the distinction between that case and this resting wholly upon the statute (section 4303, *supra*) which controls in the case of beneficiary associations, and which has no force or effect upon ordinary life insurance policies. Decisions from other courts are cited by the plaintiff; but, without examination of the authorities, we assume that they were not controlled by an express statute. If the cases cited were decided upon any the-

ory that a statutory provision such as we have is not controlling upon the courts, we should decline to follow them. We conclude, therefore, that the plaintiff is not a dependent upon the former husband within the meaning of the by-laws of the order and the statutes.

The judgment will be affirmed. All the Justices concurring.

**SCOTT CITY NORTHERN R. CO. v.
WILKINSON.†**

(Supreme Court of Kansas. Jan. 10, 1914.)

(Syllabus by the Court.)

**1. BILLS AND NOTES (§ 132*)—RAILROAD
AID NOTE—DEFENSES.**

It is no defense to a note given to aid in the construction of a railroad that the road was built by another company than that specified in the contract where nothing in the agreement itself or in the surrounding circumstances indicates that it made any difference to the signer by what company the road was built.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 316-324; Dec. Dig. § 132.*]

**2. BILLS AND NOTES (§ 132*)—RAILROAD AID
NOTE—CONTRACT IN CONSIDERATION—PER-
FORMANCE.**

A contract by a railroad company, in consideration of an aid note, to build a road to a point on another railroad on or before a stated day may be regarded as substantially performed, so as to authorize a recovery on the note, although for a distance of three-quarters of a mile—up to the right of way of the other road—the ties and rails were laid between midnight of that day and 11 o'clock the next morning.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 316-324; Dec. Dig. § 132.*]

Appeal from District Court, Logan County.

Action by the Scott City Northern Railroad Company against J. H. Wilkinson. From a judgment for plaintiff, defendant appeals. Affirmed.

Sayers & Cary, of Hill City, W. H. Wagner, of Russell Springs, and C. B. Daughters, of Manhattan, for appellant. Kagey & Anderson, of Beloit, for appellee.

MASON, J. The Scott City Northern Railroad Company obtained a judgment against J. H. Wilkinson upon a note given as an inducement to the building of a railroad from Scott City to a point on the Union Pacific north of Russell Springs, and the defendant appeals.

The principal contentions upon which a reversal is asked are: (1) That the payment of the note sued upon was conditioned upon the building of a road by another company than that which did build it; and (2) that the conditions in other respects were not sufficiently performed.

The note or contract sued upon reads: "Upon the completion of a standard gauge railroad between Scott City, Kansas, and Russell Springs, Kansas, then to a point on

the Union Pacific Railroad north of Russell Springs, Kansas, on or before July 1, 1911, for value received, I promise to pay to the order of the Garden City, Gulf & Northern Railroad Company at the Russell Springs State Bank, at Russell Springs, Kansas, \$1,000.00 (one thousand dollars), with interest at 8 per cent. per annum after maturity, this obligation to be conditioned upon the construction and completion by the aforesaid company of a standard gauge railroad from Scott City, Kansas, to Russell Springs, Kansas, thence to a point on the Union Pacific Railroad north of Russell Springs, Kansas, on or before July 1, 1911; failure to so construct said railroad as above specified shall make this obligation null and void."

The findings show these facts: The company named in the contract had already constructed and was operating a railroad from Garden City to Scott City, and its charter authorized it to build a line for a considerable additional distance both north and south. The plaintiff company was chartered to build and operate a railroad northwest from Scott City. It was not technically the successor of the other company; but its purposes were practically identical so far as relates to the road from Scott City to the Union Pacific. It built that road, and the note sued on was transferred to it. No clearly defined lines were drawn by any one between the activities of the two companies.

[1] Cases may arise, and have arisen, where aid has been subscribed for the building of a railroad under such circumstances that payment could not be exacted where the road was built by any other company than that to which the promise was made. 33 Cyc. 94; 37 Cyc. 483, 496. Toledo & S. H. Ry. Co. v. Lamphear, 54 Mich. 575, 20 N. W. 590, is a typical instance. There, however, the consideration was expressed to be the benefit to be derived from the building of the railroad of the company named through a designated village, and the circumstances indicated that the identity of the company was regarded as a material part of the agreement. Here the payment was promised upon the completion of a railroad between the points named. The writing specified as a condition that within a certain time the road should be completed "by the aforesaid company"; but the road was not required to be that of any particular company, nor was anything said as to what company should operate it. The court found as a fact that at the time he signed the note it made no difference to Wilkinson who built the road. In this situation we think the court rightly held the defendant liable, so far as concerns the contention under consideration.

In Tol. & A. A. R. Co. v. Johnson, 55 Mich. 456, 460, 461, 21 N. W. 888, 890, the original company to whom an aid note had been given became bankrupt, and a new com-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

† Rehearing denied February 12, 1914.

pany acquired its assets, completed the work, and sued upon the note. A recovery was sustained; the court saying: "This was not a personal contract which could be performed by the Toledo, Ann Arbor & Northern Railroad Company only. It contemplates a transfer of the contract. The agreement is to pay to the order of the company. * * * It would seem to be immaterial to defendant what railroad company actually constructed the road, so long as it was done substantially upon the line adopted by the company named; the benefits derived from its construction would be the same whether built by one company or another." See, also, *Smith and Others v. Hollett*, 34 Ind. 519; *First National Bank v. Ruddock Co.*, 158 Cal. 334, 111 Pac. 86; *Hunt v. Upton*, 44 Wash. 124, 87 Pac. 56.

A further finding reads: "The railroad was constructed from Scott City through Russell Springs to the Union Pacific Railroad, at Winona, by the close of July 1, 1911, except that for about three-quarters of a mile from the Union Pacific Railroad only the grading was completed, and the ties and rails were not laid; but by 11 o'clock the following morning, Sunday, July 2, 1911, the last three-quarters of a mile had been laid, with ties and rails sufficiently spiked up to the Union Pacific right of way. A few weeks later the road was connected with the Union Pacific track at Winona, and train loads of freight or of passengers, or both, have ever since been carried over said road daily, except Sunday, upon a regular schedule from Winona to Scott City and return, except in severe snow blockades early in 1912."

[2] The question for determination is whether this constituted a sufficient performance to authorize a recovery upon the note in suit. There is conflict of judicial opinion as to whether anything but a complete, exact, and technical fulfillment of every condition stated will enable a railroad company to enforce an aid contract. This court, however, has held that a substantial compliance is all that is necessary. See *Railroad Co. v. Scott County*, 82 Kan. 795, 109 Pac. 684, where the cases bearing on the question are collected. See, also, *Jackson v. Stockbridge*, 29 Tex. 394, 94 Am. Dec. 290; *Missouri Pacific Railway Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97; *Ogden et al. v. Kirby*, 79 Ill. 555.

We are clearly of the opinion that either the finding quoted compels the conclusion, as a matter of law, that there was such a substantial compliance with the conditions named as to entitle the company to enforce the subscription, or else this finding, taken in connection with others and with the evidence, justified a decision by the trial court, as a question of fact, that there had been such a compliance.

The appellant contends that error was committed in overruling a demurrer to the

petition. The questions involved in this assignment are substantially the same as those already considered. If the plaintiff failed to set out the facts with sufficient fullness in its pleading, the defect was supplied by the evidence. The real controversy was fully threshed out before the trial court, and there is no occasion now for a critical examination of the allegations of the petition.

The judgment is affirmed. All the Justices concurring.

MEMORANDUM DECISIONS

CALIFORNIA MILL & MIN. CO., Limited, et al. v. ROCKY MOUNTAIN NAT. BANK et al. (Court of Appeals of Colorado. Jan. 12, 1914.) Error to District Court, Gilpin County; Flor Ashbaugh, Judge. Action by the California Milling & Mining Company, Limited, and others, against the Rocky Mountain National Bank and others. A demurrer was sustained to plaintiffs' complaint, and they bring error. Reversed and rendered.

See, also, 22 Colo. App. 237, 124 Pac. 590. *Henry J. Hersey, Arthur Ponsford, William E. Hutton, and Dayton & Denious*, all of Denver, for plaintiffs in error. *H. A. Hicks, L. J. Williams, and C. W. Waterman*, all of Denver, for defendants in error.

MORGAN, J. The error assigned herein, upon which the argument is based, is to the ruling of the lower court sustaining a general demurrer to the plaintiffs' complaint. The recent opinion of the Supreme Court in the case of *Sykes v. Kruse*, 49 Colo. 560, 113 Pac. 1013, handed down since the filing of the original briefs herein, determines the contention here in favor of the plaintiffs in error, and makes it unnecessary to write an extended opinion. In that case the Supreme Court had before it a motion to strike a counterclaim in which the same allegations, in substance, were made as those contained in the complaint herein, involving, practically, the same subject-matter, and the opinion of the Supreme Court in that case, holding that the lower court erred in sustaining the motion to strike out said counterclaim, is for all purposes applicable to this case, and the same in effect, as to hold that the ruling of the lower court in this case sustaining the demurrer to the complaint was error requiring a reversal of the judgment. The opinion of the Supreme Court is so direct and positive, and so applicable in all respects to the contention here, that the judgment of the lower court in this case is hereby reversed, and the cause remanded for further proceedings, upon the authority of the ruling of the Supreme Court in *Sykes v. Kruse*, supra.

HENEGHAN v. CAHILL. (Court of Appeals of Colorado. Dec. 8, 1913.) Appeal from District Court, Denver County; Harry C. Riddle, Judge. Action between P. J. Heneghan and D. J. Cahill. From a judgment for Cahill, Heneghan appeals. Affirmed. *John T. Bottom, of Denver (Milnor E. Gleaves, of Denver, of counsel), for appellant. Yeaman & Gove and George P. Steele, all of Denver, for appellee.*

PER CURIAM. In their brief, counsel for appellant frankly admit (and their admission is entirely justified by the record) that substantially their whole contention in this case is that the findings and judgment of the trial court are so against the weight of the evidence as to indi-

cate passion, misapprehension, or some other improper consideration, on the part of the trial court, and that for this reason the judgment in this case should be reversed. The case was tried to the court without a jury. We have carefully examined the entire record, and given the briefs filed by appellant due consideration. From our examination of the record, we are not able to agree with appellant's contention that the findings and judgment of the trial court are against the weight of the evidence. There are no principles of law involved requiring a written opinion at our hands. An elaborate discussion of the evidence would therefore necessarily take the form of an argument based solely upon facts, and such argument would be of no advantage to the profession or to the parties to this action. The judgment of the trial court is affirmed. Judgment affirmed.

MATHERS et al. v. BARDWELL. (Court of Appeals of Colorado. Jan. 12, 1914.) Appeal from District Court, City and County of Denver; George C. Allen, Judge. Action by Rodney J. Bardwell, as trustee, against Alexander Mathers and others. From a judgment for plaintiff, defendants appeal. Affirmed. Van Cise, Grant & Van Cise, of Denver, for appellants. Hughes & Dorsey and Barnwell S. Stuart, all of Denver, for appellee.

PER CURIAM. We have examined the entire record in this case with care. The controversy presented in the briefs and on the trial below springs entirely from the fact that the plaintiff pleaded one contract, and relied thereon, while the defendants, in their answer, set up an entirely different contract, and sought by way of counterclaim (which, but for the contract that defendants averred, they would clearly not be entitled to) to recover damages from the plaintiff. All of the differences between the parties can be fairly ascribed to this situation. Plaintiff's proof was sufficient to support the judgment which the trial court, without a jury, rendered in his behalf. To demonstrate the correctness of the foregoing conclusions would require an analysis of the pleadings, for which we can perceive no justification. The judgment of the trial court is affirmed.

Ex parte FENNER et al. (Supreme Court of Montana. April 28, 1913.) Application for writ of habeas corpus. Julius H. Brass and A. P. Heywood, both of Helena, for complainants. H. S. Hepner and J. A. Walsh, both of Helena, for respondent Sister Our Wishes, Sister Superior of the House of Good Shepherd.

PER CURIAM. Complainants' application herein having been heretofore (April 22, 1913) argued and submitted, it is ordered that the writ be denied, and the proceeding dismissed.

KLEIN v. JENSVOLD. (Supreme Court of Montana. April 7, 1913.) Appeal from District Court, Musselshell County. Hathhorn & Brown, of Billings, for appellant. W. M. Johnston and H. J. Coleman, both of Billings, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein, heretofore submitted, is, after due consideration by the court, granted, and the appeal is accordingly dismissed.

PETERS v. SCOLLARD. (Supreme Court of Montana. June 11, 1913.) Appeal from District Court, Silver Bow County; J. J. Lynch, Judge. Geo. Y. Patten, of Bozeman, and Walter E. Collins, of Butte, for appellant. Nolan & Donovan, of Butte, for respondent.

PER CURIAM. It is ordered that the appeal from the judgment herein be, and the same is

hereby, dismissed in accordance with stipulation of counsel on file.

RYAN v. HYLENT et al. (Supreme Court of Montana. Feb. 10, 1913.) Appeal from District Court, Sanders County. H. J. Burleigh, of Plains, for appellants. A. S. Ainsworth, of Thompson Falls, for respondent.

PER CURIAM. Respondent's motion to dismiss the appeal herein, this day submitted to, and taken under advisement by, the court, is hereby sustained, and the appeal accordingly dismissed.

SULLIVAN v. CITY OF BUTTE. (Supreme Court of Montana. May 16, 1913.) Appeal from District Court, Silver Bow County. H. L. Maury, John A. Smith, and N. A. Rotering, all of Butte, for appellant.

PER CURIAM. Appellant's motion to dismiss the appeal herein is hereby granted, and the appeal is accordingly dismissed.

ZIMMERMAN v. HELENA LIGHT & RY. CO. et al. (Supreme Court of Montana. April 7, 1913.) Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge. Wm. Wallace, Jr., John G. Brown, and T. B. Weir, all of Helena, for appellants. E. A. Carleton, of Helena, for respondent.

PER CURIAM. It is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed in accordance with motion of counsel for appellants.

DAVIS v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 17, 1914.) Error from District Court, Garfield County; James B. Culison, Judge. R. L. C. Davis was convicted of burglary in the second degree, and appeals. Appeal dismissed. Rush & Smith, of Enid, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, R. L. C. Davis, was tried and convicted in the district court of Garfield county of the crime of burglary in the second degree. On June 12, 1912, the court sentenced him to imprisonment in the penitentiary for the term of two years. A petition in error with case-made was filed in this court on December 12, 1912. The Attorney General has filed a motion to dismiss the appeal for the following reasons, to wit: "First. That on June 12, 1912, judgment was entered, at which time the appellant was granted 60 days in which to make and serve a case-made; that thereafter, on the 12th day of August, 1912, the court by an order of that date attempted to extend the time within which to make and serve a case-made, but the Attorney General says that said purported order was made after the 60 days allowed on June 12, 1912, and that said order of August 12, 1912, is of no effect. Second. The state further says that there is no transcript of the record filed with the case-made herein, for the reason that there is no certificate of the clerk. Wherefore the Attorney General says that this court is without jurisdiction, except to dismiss the appeal herein." Upon an examination of the record it is our opinion that the motion to dismiss is well taken. The purported appeal herein is therefore dismissed, and the cause remanded to the district court of Garfield county, with direction to enforce its judgment therein.

FERGUSON v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 27, 1914.) Appeal from County Court, Ellis County; A. L. Squire, Judge. W. E. Ferguson was convicted

of conducting a game of poker, and appeals. Affirmed. C. B. Leedy, of Arnett, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen. (Frank E. Ransdell, of Arnett, of counsel), for the State.

PER CURIAM. Plaintiff in error was prosecuted and convicted upon an information which alleges that he did unlawfully deal, play, carry on, open and cause to be opened, and conduct the prohibited game of poker for money, checks, credits, and other representatives of value; the said game of poker so opened up, carried on and conducted as aforesaid, being then and there played by the persons playing at said game for money, checks, credits, and other representatives of value. In accordance with the verdict of the jury on the 16th day of September, 1912, he was by the court sentenced to be confined in the county jail for thirty days, and to pay a fine of \$150. Numerous errors are assigned. Without entering into a discussion of the same, we will state, from our examination of the record, they are without merit. The information is sufficient, and the evidence on the part of the state was of such a character as to leave the inference of guilty the only reasonable one possible from the facts disclosed. The judgment of conviction is therefore affirmed.

KINGLE v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 17, 1914.) Appeal from District Court, Craig County; Preston S. Davis, Judge. W. W. Kingle was convicted of burglary in the second degree, and brings error. Appeal dismissed. E. J. Hobdy, of Vinita, for plaintiff in error. Chas. West, Atty. Gen., and Smith O. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, W. W. Kingle, was tried and convicted in the district court of Craig county for the crime of burglary in the second degree. In accordance with the verdict of the jury, on the 19th day of December, 1911, the court pronounced judgment and sentenced him to imprisonment in the penitentiary for the term of two years. A petition in error, with case-made, was filed in this court on June 12, 1912. The Attorney General has filed a motion to dismiss the appeal for the following reasons: "Because the record shows that this is an attempted appeal from a judgment of conviction for a felony, to wit, burglary, rendered in the district court of Craig county on December 19, 1911; that at said time the trial court granted plaintiff in error 30 days in which to prepare and serve his case-made upon the county attorney; that thereafter, to wit, on January 18, 1912, and within the time previously granted, the court granted an additional extension of 60 days within which to prepare and serve case-made; that thereafter, to wit, on March 18, 1912, and within the time theretofore granted, the court made an additional order extending the time 60 days to plaintiff in error within which to prepare and serve his case-made; that thereafter, to wit, on May 18, 1912, the trial court attempted to make an additional order extending the time for preparing and serving case-made 30 days, but the Attorney General respectfully submits that the time theretofore granted had expired on and with the 17th day of May, 1912, and the court was therefore without power to make this pretended additional extension on May 18, 1912; that the case-made was not served on the county attorney until the 3d day of June, 1912, and after the time legally granted had expired. In this connection, the Attorney General desires to call the court's attention to the fact that the month of February, 1912, had 29 days. Wherefore the Attorney General says that this court is without jurisdiction, except to dismiss this appeal; there being no certified transcript of the

record accompanying the petition in error." From an examination of the record it is our opinion that the motion to dismiss the appeal is well taken. The purported appeal herein is therefore dismissed, and the cause remanded to the district court of Craig county, with direction to enforce its judgment and sentence therein.

McKNIGHT v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 12, 1914.) Appeal from County Court, Pottawatomie County; Ross E. Lockridge, Judge. Charles McKnight was convicted of vagrancy, and appeals. Reversed. Pitman & Goode, of Shawnee, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. Plaintiff in error, Charles McKnight, was convicted of vagrancy in the county court of Pottawatomie county, and the judgment and sentence of the court was that he pay a fine of \$100. Error is assigned upon the ruling of the court in admitting evidence that the defendant's general reputation was that of a professional gambler. This is a companion case to the case of *Michell v. State*, 9 Okl. Cr. 172, 130 Pac. 1175, and the record presents the same questions of law. For the reasons set forth in the opinion in that case, the judgment of conviction is reversed, and the cause remanded.

MADISON v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 12, 1914.) Appeal from County Court, Major County; F. W. Madison, Judge. Charley Madison was convicted of malicious mischief, and appeals. Dismissed. Fairchild & Randall, of Enterprise, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error, Charley Madison, was convicted at the January, 1913, term of the county court of Major county on a charge of malicious mischief, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 6 months. The appeal is dismissed, on motion of the Attorney General and consent of the complaining party. Mandate ordered forthwith.

OSTENDORF v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 13, 1914.) Appeal from County Court, Garfield County; Winfield Scott, Judge. Ollie Ostendorf was convicted of gaming, and appeals. Appeal dismissed. A. J. Jones, of Enid, for plaintiff in error.

PER CURIAM. The plaintiff in error, Ollie Ostendorf, was convicted of gaming, and on the 16th day of December, 1912, was sentenced by the court to be confined in the county jail for 30 days and pay a fine of \$100. An appeal from this judgment was properly taken. The plaintiff in error has filed a motion to dismiss the appeal, which motion is hereby sustained, and the cause remanded to the lower court, with direction to enforce the judgment therein.

PINKERTON v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 15, 1914.) Appeal from County Court, Garfield County; Winfield Scott, Judge. Jim Pinkerton was convicted of a violation of the prohibition law, and appeals. Affirmed. W. O. Cromwell, of Enid, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. Plaintiff in error was tried and convicted upon an information which charged that he did sell whisky to one Rush Kimmel. On the 16th day of December, 1912,

he was sentenced to be confined in the county jail for 4 months, and that he pay a fine of \$400. Numerous errors are assigned, but they are without merit. The information is sufficient. W. P. Calhoun testified that in the city of Enid, in the basement of the Turf Pool Hall, on the 29th day of March, the defendant sold Mr. Schoidigger, Mr. Smith, and himself four drinks of whisky, and that Rush Kimmel paid him for it. This was all the evidence in the case. The appeal being without merit, the judgment is affirmed, and the cause remanded to the county court of Garfield county, with direction to enforce its judgment and sentence therein.

Ex parte RUTHERFORD. (Criminal Court of Appeals of Oklahoma. Jan. 17, 1914.) Application for writ of habeas corpus by H. P. Rutherford. Writ denied.

PER CURIAM. On this day a petition for writ of habeas corpus was filed and presented for the purpose of setting at liberty H. P. Rutherford. It appears, from the averments in the petition, that the petitioner is imprisoned in the county jail of McClain county, under three commitments issued out of the district court of said county, upon three informations filed therein by the county attorney, charging petitioner with the offense of sodomy in each of said informations. It is further averred that said restraint is illegal and unauthorized, because the facts relied upon by the state to support the information in each of said cases do not constitute the offense of sodomy, or any other crime known to the law, and that such facts so relied upon by the state of Oklahoma in the prosecution of these cases is not sufficient to confer jurisdiction upon the district court of McClain county, and that in each of said cases the defendant waived a preliminary examination and was held to answer to said district court. Section 4893, Rev. Laws, provides: "No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: * * * (4) Upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." In *Ex parte Burroughs*, 10 Okl. Cr. —, 133 Pac. 1142, it is held by this court that: "The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner, and the only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law; and a defendant, held by virtue of an information preferred by a proper prosecuting officer in a court of competent jurisdiction, cannot be discharged on habeas corpus on the ground that the evidence adduced upon his preliminary examination was insufficient to show that a public offense has been committed, or probable cause to believe the defendant guilty thereof." Where a person who is arrested on a criminal warrant is brought before a committing magistrate for a preliminary examination, he can either insist upon or waive examination, and if he waives it the magistrate may bind him over for trial, for the offense charged in the complaint, and the county attorney is authorized to file an information in the district court, charging him with the offense charged in the complaint, and when the defendant waives his right to a preliminary examination, and on account of such waiver no examination is had, he will be estopped to claim any advantage because of the absence of such examination. It appearing that the application for writ of habeas corpus is insufficient to show that petitioner is entitled to the writ or a rule to show cause, it will be denied.

SCAPE et al. v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 27, 1914.) Appeal from County Court, Caddo County; C. Ross Hune, Judge. A. C. Scape and another were convicted of violating the prohibition law, and appeal. Affirmed. Bristow & McFadyen, of Anadarko, for plaintiffs in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiffs in error were convicted upon an information which charged that they did unlawfully have and keep in their possession certain intoxicating liquors, to wit, 67 quarts of beer and 8 quarts of whisky, with the unlawful intent to sell the same. In accordance with the verdict of the jury on the 2d day of December, 1912, the court sentenced each defendant to be confined in the county jail for 3 months and that each pay a fine of \$250. From the judgments the defendants appeal. After a careful examination of the various questions raised, we are satisfied that under well-settled rules, sustained and upheld by the decisions of this court, no error has been committed to the prejudice of the defendants. The judgments of the county court of Caddo county are therefore affirmed.

STAMPER v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 27, 1914.) Appeal from County Court, Pottawatomie County; Ross L. Lockridge, Judge. George Stamper was convicted of violating the prohibition law, and appeals. Reversed and remanded. Pitman & Goode, of Shawnee, for plaintiff in error. Chas. West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error was convicted of an unlawful sale of whisky to one G. G. Woodruff, and in accordance with the verdict of the jury, on the 18th day of November, 1912, he was sentenced to be confined in the county jail for 4 months and to pay a fine of \$300. From the judgment he prosecutes this appeal. We deem it unnecessary to review the testimony, further than to say that G. G. Woodruff, a private detective, was the only witness for the state; but, whether the defendant was guilty or innocent, he was entitled to a fair and impartial trial according to the forms of law, and we are constrained to hold that this right was denied him. Among the numerous errors assigned is the one that the court erred in refusing to strike out incompetent, irrelevant, immaterial, and prejudicial testimony offered by the state. The record discloses the following examination of the state's witness Woodruff by the prosecuting attorney: "Q. Mr. Woodruff, had anybody come to you and asked you not to testify in this case? A. Yes, sir. Mr. Goode: Objected to as incompetent, irrelevant, and immaterial. The Court: Objection overruled. Q. And, if so, did they tell you George Stamper sent them? A. Yes, sir. Mr. Goode: We object to hearsay. Q. Just go ahead and tell who came to you about this case. A. Joe Mogonquot. Q. And who else? A. Mr. Peyton Perkins. Mr. Goode: Objected to as incompetent, irrelevant, and immaterial. This defendant is not bound by what Peyton Perkins and some other man has said to this gentleman." Cross-examination: "Q. Mr. Woodruff, where was this conversation held? A. One of them, Peyton Perkins, came to me in Asher. Q. The defendant was not there? A. I never saw him; but there was some man in the buggy, and I did not know who he was." As was said by this court in the case of *Will Williams v. State*, 136 Pac. 778: "That this testimony was incompetent and prejudicial to the defendant we think there can be no doubt. If the minds of the jury were wavering on the question of the innocence or guilt of the defendant, this incompetent testimony, which the court had sanctioned with judicial approbation, was sufficient

to turn the scale against the defendant." See, also, *Bruner v. U. S.*, 1 Okl. Cr. 205, 96 Pac. 597. We deem it unnecessary to review the other errors assigned. For error in the rulings of the court in the admission of the testimony above quoted, the judgment of conviction is reversed, and the cause remanded for another trial.

STATE v. LEWALLEN. (Criminal Court of Appeals of Oklahoma. Jan. 27, 1914.) Appeal from County Court, Woods County; W. M. Bickel, Judge. W. O. Lewallen was charged with violating the prohibition law, and from a judgment sustaining a demurrer to the information, the State appeals. Affirmed. Sandor J. Vigg, of Alva, for the State.

PER CURIAM. The county attorney filed in the county court of Woods county an information, intending to charge the defendant with a violation of the prohibition law. Upon his arraignment the defendant interposed a general demurrer thereto. Upon considering said demurrer, the court gave judgment sustaining the same. From said judgment the state appeals. We have examined the information, and it is our opinion that the same does not allege facts sufficient to constitute an offense. The judgment of the county court, sustaining the demurrer, is therefore affirmed.

STITCH v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 17, 1914.) Appeal from County Court, Payne County; W. H. Wilcox, Judge. M. A. Stitch was convicted of violating the prohibition law, and appeals. Appeal dismissed. J. M. Springer, of Stillwater, for plaintiff in error.

PER CURIAM. Plaintiff in error was convicted upon an information charging the unlawful possession of intoxicating liquor, and in accordance with the verdict of the jury was on the 30th day of April, 1913, sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. An appeal was perfected. His attorney of record has filed a motion to dismiss the appeal. The motion is sustained, and the appeal is hereby dismissed, and the cause remanded to the trial court, with direction to enforce its judgment and sentence therein.

WEBER v. STATE. (Criminal Court of Appeals of Oklahoma. Jan. 17, 1914.) Appeal from County Court, Caddo County; C. Ross Hume, Judge. W. T. Weber was convicted of violating the prohibition law, and appeals. Affirmed. Bristow & McFadyen, of Anadarko, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. This appeal is prosecuted from a conviction had on an information which charged that the defendant did have in his possession intoxicating liquors with the unlawful intent to sell the same. In accordance with the verdict of the jury on the 25th day of November, 1912, the court sentenced the defendant to be confined in the county jail for 90 days and to pay a fine of \$300. The evidence shows that beer was found in the defendant's place of business, that the defendant paid the federal license tax required of retail liquor dealers, and that he had sold intoxicating liquors at his place of business. A careful examination of the record leads to the conclusion that no error has been committed to the defendant's prejudice. The judgment of conviction is therefore affirmed.

RYDSTROM v. RYDSTROM. (Supreme Court of Washington. Jan. 8, 1914.) Department 2. Appeal from Superior Court, Pacific County; A. E. Rice, Judge. Action by Matilda Rydstrom against H. M. Rydstrom. From a

judgment for plaintiff, defendant appeals. Affirmed. John I. O'Phelan, of Raymond, for appellant. Fred M. Bond, of South Bend, for respondent.

MOUNT, J. Action for divorce. In her complaint the plaintiff alleged several grounds for divorce, one of which was cruelty. Upon the trial of the case the court found "that the treatment of the plaintiff by defendant during the past two years has been practically inhuman, and amounting to cruelty, * * * until it is absolutely impossible for the parties to live together any longer." Upon this ground a divorce was granted to the plaintiff, and the property of the parties was divided between them. The defendant has appealed. The appellant assigns several errors, but the principal contentions are that the evidence is insufficient to support a decree upon the ground of cruelty, and that there was an unequal and unjust division of the property. Both of these positions depend entirely upon the facts in the case. We have carefully examined the evidence, and have concluded that the superior court was justified in granting a decree of divorce upon the ground stated. We are also of the opinion that the division of the property made by the court was substantially equal. But, whether it was equal or not, we are of the opinion that the respondent is entitled to the share of the property which was awarded to her. It is unnecessary to discuss the facts or the evidence of the witnesses upon which the findings of the court were based, because such a discussion would serve no useful purpose in its publication. The judgment appealed from is affirmed.

CROW, C. J., and PARKER, MORRIS, and FULLERTON, JJ., concur.

STATE v. WRIGHT. (Supreme Court of Washington. Jan. 24, 1914.) Department 2. Appeal from Superior Court, Pacific County; Sol Smith, Judge. From an order adjudging him to be in contempt of court, and imposing a fine of \$100, Edward H. Wright appeals. Reversed and remanded, with instructions to dismiss the proceedings. Welsh & Welsh, of South Bend, for appellant. H. W. B. Hewen, of South Bend, for the State.

PER CURIAM. Appeal from an order adjudging appellant to be in contempt of court and imposing a fine of \$100. We shall make no attempt to recite the facts in this case, nor make reference to the controversy which culminated in the order complained of, as it would be of no benefit to the parties interested nor to the public at large. The beginning of the controversy culminating in the adjudication of contempt was a letter addressed to the court commissioner of Pacific county, which was received by the judge of the lower court, in which some complaint was made concerning the conduct of appellant in effecting a settlement of an estate then in process of probate. This letter was treated by the judge as a complaint, and citation was issued, addressed to the appellant, to which a copy of the letter was attached, indorsed, "A true copy of the complaint," citing appellant to show cause as to the matter complained of in the letter. Appellant visited the judge and represented to him what had been done in the estate, and, at request of the judge, made and filed a written report. The court thereupon made findings of fact and conclusions of law, in which he severely criticised appellant, to which appellant filed written exceptions, the language of which the court deemed contemptuous. Further proceedings were then had, resulting in the order complained of. Whatever may have been said by appellant in the exceptions filed by him was invited by the court in the unnecessary criticism made of appellant's conduct. If the court desired to make findings, a statement of the facts would have been suffi-

cient, without a resort to condemnation. Appellant, on the other hand, went beyond an attempt to clear himself from the strictures made in the findings. Both were to blame, and evidently sought the occasion to express a mutual dislike. We will not say more. We would not have said what we have, but for the requirement to give reasons for our decision. The above reasons are, in our judgment, sufficient, and the judgment is reversed, and the cause remanded, with instructions to dismiss the proceedings.

WASHINGTON WATER POWER CO. v. ABACUS ASS'N. (Supreme Court of Washington. Jan. 22, 1914.) Department 2. Appeal from Superior Court, Spokane County; Henry L. Kenan, Judge. Eminent domain by the Washington Water Power Company against the State of Washington and the Abacus Association. From a judgment for plaintiff, the last-named defendant appeals. Affirmed. Patrick C. Shine and James Z. Moore, both of Spokane, for appellant. Post, Avery & Higgins, of Spokane, for respondent.

MAIN, J. This action was instituted for the purpose of acquiring title to land under the right of eminent domain. The petitioner was a public service corporation. The appellant was the owner of a tract of land consisting of approximately 180 acres, the north boundary of which was the Spokane river. The petitioner sought to condemn a 28-foot strip across the entire tract and adjacent to the river. The object of acquiring the strip of land was that it might be overflowed by the rise of the river on account of the erection of a dam therein 22 miles below the appellant's property, where an electric power plant was installed. In the petition it was sought to acquire the entire title to the strip taken, but when the case was called for trial the petitioner offered what it termed a

stipulation, wherein it declared its intention to be to acquire only the right to flood the land, and that the appellant and its successors should retain every other right thereto, such as crossing the same in any manner, erecting or maintaining houses or other structures thereon, the running of pipe lines across or through the same at any point or place that might be desired. Over the objection of the appellant, this stipulation was permitted to be filed. Thereupon the appellant moved for a continuance on the ground of surprise, which motion was denied. The cause was tried to the court and a jury. After both parties had finished the introduction of evidence, the petitioner moved that all the evidence upon the question of the reduction in the velocity of the stream and as to the portion of land remaining be withdrawn from the jury, for the reason that there was no evidence showing either damage on account of loss of the motive power of the stream or of the amount of damages, if any, to the tract of land from which the strip was taken. This motion was sustained by the court for the reasons given. The question submitted to the jury was the value of the strip taken, and an instruction was given to include in the verdict nominal damages to the remainder, and also nominal damages on account of the reduction in the velocity of the stream. A verdict was returned in the sum of \$18. Motion for new trial was seasonably made and overruled. Judgment was entered upon the verdict, from which the appeal is prosecuted. The appellant's brief contains 51 assignments of error. To attempt to follow the discussion of these as contained in the briefs would prolong this opinion to forbidden lengths. It is sufficient to say that the record has been carefully read and all the assignments of error have been considered. We do not find in any of them substantial merit. The judgment will be affirmed. CROW, C. J., and ELLIS, FULLERTON, and MORRIS, JJ., concur.

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§ 45 (Wash.) In an action to establish the boundary line between lands located on the opposite shores of a river, it was permissible for plaintiff to join a claim for damages caused from the depositing of debris in the river so as to deflect the course of the stream to the injury of plaintiff's lands.—*Sartori v. Denny-Renton Clay & Coal Co.*, 187 P. 494.

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§ 50 (Wash.) Under Laws 1911, c. 25, §§ 1, 3, relating to orders by county commissioners, prohibiting live stock from running at large, the county commissioners' order is not final until required publication had been made and until then they may revoke their action.—*State v. Virnig*, 137 P. 1039.

§ 92 (Or.) Under L. O. L. §§ 5762, 5763, 5765, the owner of premises not inclosed by a lawful fence cannot recover for trespassing stock, though the county has adopted section 5575, forbidding the running at large of stock.—*Ball v. Croisan*, 137 P. 225.

§ 92 (Utah) One who willfully and against the owner's protest brings sheep on uninclosed arid land for grazing is liable for resulting damages.—*Thomas v. Blythe*, 137 P. 396.

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§ 1 (Nev.) The right of appeal is based entirely on statute, and the Supreme Court is prohibited from taking jurisdiction unless the appellant has a statutory right.—*State v. State Bank & Trust Co.*, 137 P. 400.

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§ 151 (Nev.) Under Rev. Laws, § 5327, giving right of appeal to person aggrieved, a receiver appointed to wind up affairs of bank held not authorized to appeal from an order directing the preferential payment of a claim.—*State v. State Bank & Trust Co.*, 137 P. 400.

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§ 173 (Cal.) The objection that a purchaser's offer to perform was not made with sufficient detail cannot be made for the first time on appeal.—*Parkside Realty Co. v. MacDonald*, 137 P. 21.

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lief on that ground *sua sponte*, yet where the trial court's attention has not been called to that subject an appellant may not ask relief on appeal.—*Id.*

§ 173 (Cal.App.) Defendant, in a suit to enforce a contract of repayment of the purchase price of mining stock on the buyer's becoming dissatisfied, held not entitled to object on appeal to a judgment for plaintiff because it did not require that the stock be returned on payment thereof.—*Union Collection Co. v. Oliver*, 137 P. 1082.

§ 173 (Wash.) Claim or contention not pleaded by defendant in the court below held not open to him on appeal.—*Stewart v. Preston*, 137 P. 993.

§ 179 (Kan.) Where plaintiff regards testimony excluded on his cross-examination of an adverse witness as important, he should make such witness his own, or ask later to open the case to admit such evidence as a part of his case in chief.—*Kuhn v. Johnson*, 137 P. 990.

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§ 207 (Okl.) Under Rev. Laws 1910, §§ 5028, 5027, improper argument of counsel will not be reviewed where no objection was seasonably made or exception properly taken thereto below.—*Perkins v. Baker*, 137 P. 661.

§ 218 (Okl.) Any objection going to a defect or irregularity which renders a verdict merely voidable will not be considered when raised for the first time on appeal.—*Collier v. Gannon*, 137 P. 1179.

§ 222 (Cal.App.) Where affidavits filed in support of a motion for new trial were not objected to below although they were filed too late, they will be considered on appeal.—*Strange v. Strange*, 137 P. 1104.

§ 227 (Wash.) Where the time for filing a statement of facts was extended by a void order, the validity of the order and the statement of facts filed pursuant thereto may, for the first time, be attacked on appeal.—*Michaelson v. Overmeyer*, 137 P. 332.

§ 231 (Okl.) Where objections to the evidence do not assign the statutory grounds named in Rev. Laws 1910, § 5070, or any other grounds, they cannot be considered on appeal.—*Fender v. Segro*, 137 P. 103.

§ 231 (Utah) The reason for requiring specific objections in case of complaint of the charge given is to give the trial court an opportunity to correct his error.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 231 (Wash.) If evidence on the question of damages did not tend to prove damages which could be recovered under the measure of damages applicable, a general objection that the evidence was incompetent, irrelevant, and immaterial was sufficient to authorize review of its admissibility.—*Hunt v. Allison*, 137 P. 322.

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§ 260 (Okl.) Whether the court erred in admitting testimony over objection will not be reviewed, where no exception is saved to the ruling.—Giles v. Latimer, 137 P. 113.

§ 260 (Or.) A ruling excluding evidence cannot be considered on appeal when not excepted to.—Johnson v. Miami Lumber Co., 137 P. 765.

§ 263 (Okl.) In the absence of an exception to an instruction authorizing the jury to take papers to the jury room, error could not be predicated thereon.—Giles v. Latimer, 137 P. 113.

§ 265 (Wash.) Where no exceptions were taken to the findings of fact, an assignment complaining that the findings and judgment are contrary to the evidence cannot be reviewed.—Fortson Shingle Co. v. Skagland, 137 P. 304.

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§ 301 (Okl.) Errors not assigned in the motion for new trial will not be reviewed by the Supreme Court.—Hailey v. Bowman, 137 P. 722.

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§ 347 (Okl.) Where a referee reports findings of fact and both parties move for judgment thereon, the motion presents question of law only, and a motion for new trial is unnecessary, so that the time for appeal runs from the date of the judgment.—Veverka v. Frank, 137 P. 682.

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of, repealed Laws 1907, c. 57, § 3, providing for the issuance of writs of error by the clerk of the court.—Wood v. Sloan, 137 P. 678.

Writs of error, issued by the clerk, after statehood, with the knowledge and acquiescence of the Supreme Court, are issued by the direction of the Supreme Court and justices, within Const. art. 6, § 3.—Id.

§ 413 (Or.) Under L. O. L. § 550, service of notice of appeal on a defendant who did not appear is not necessary and gives him no additional rights.—State v. Simpson, 137 P. 750.

§ 419 (Or.) The notice of appeal required by L. O. L. § 550, must describe the judgment or decree with reasonable certainty.—Fisher v. Portland Ry., Light & Power Co., 137 P. 763.

§ 425 (Wash.) Under Rem. & Bal. Code, § 1720, providing for the service of notice of appeal, held, that an appeal by the grantees of principal defendants should be dismissed, where they did not serve notice until 30 days after the service of notice of appeal by the principal defendants.—Peck v. Peck, 137 P. 137.

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The superintendent was acting in "another's right," and in the court's discretion might be exempted from giving bond under Code Civ. Proc. § 946.—Id.

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§ 499 (Cal.App.) Where the transcript showed that no specification of error for the giving of any instructions was made in the statement of the case, errors assigned upon the instructions cannot be reviewed.—Moore v. Gilson, 137 P. 268.

§ 515 (Mont.) Under Supreme Court rule 7, subd. 3 (123 Pac. xi), the court on appeal in equity need not review the evidence, where it is incorporated in the transcript in narrative form.—Gilmore v. Ostronich, 137 P. 378.

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§ 525 (Utah) Under Comp. Laws 1907, § 1351, requests to charge are part of the record, though not incorporated in the bill of exceptions.—Lindsay Land & Livestock Co. v. Smart Land & Livestock Co., 137 P. 837.

(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

§ 544 (Okla.) A motion for judgment on the findings of fact of a referee and a motion for new trial and exceptions are no part of the record proper and must be shown by a bill or case-made.—*Veverka v. Frank*, 137 P. 682.

§ 544 (Okla.) Errors not made a part of the record by case-made or bill of exceptions will not be reviewed by the Supreme Court.—*Hailey v. Bowman*, 137 P. 722.

§ 548 (Wash.) In the absence of a statement of facts, the appellate court cannot determine whether findings by the trial court were unsupported by the evidence.—*Barbre v. Hilschman*, 137 P. 997.

§ 553 (Cal.App.) A statement of the case which is not also a bill of exceptions cannot be resorted to for the purpose of reviewing alleged errors of law, under Code Civ. Proc. § 659, subd. 3.—*Hastaran v. Marchand*, 137 P. 297.

If a statement of the case be considered as a bill of exceptions, which may be done, specifications of error would not be necessary to review alleged errors of law appearing therein under Code Civ. Proc. § 650.—*Id.*

(D) Contents, Making, and Settlement of Case or Statement of Facts.

§ 557 (Wash.) Acts 1913, c. 116, § 2, relating to abstracts of statements of facts, does not obviate the necessity for a statement of facts; section 2 expressly declaring that nothing therein contained shall alter the present manner of settling statements of facts.—*Michaelson v. Overmeyer*, 137 P. 332.

§ 563 (Cal.App.) A statement of the case on motion for a new trial and bill of exceptions may be incorporated in one paper without invalidating either.—*Hastaran v. Marchand*, 137 P. 297.

§ 564 (Okla.) A case-made not served within the time fixed by statute or as extended by the court is a nullity and cannot be considered.—*Veverka v. Frank*, 137 P. 682.

§ 564 (Wash.) The time within which to file a statement of facts begins to run from the date of the denial of the motion for a new trial.—*Michaelson v. Overmeyer*, 137 P. 332.

An order for an extension of the time for filing a statement of facts, when made on an ex parte application, is wholly void, under Rem. & Bal. Code, § 393.—*Id.*

Though the court stenographer obtained an order extending the time for filing a statement of facts, that does not relieve the appellant from complying with the statute by giving notice and showing cause for the extension.—*Id.*

A failure to file a statement of facts within the time fixed by statute will not be excused because of the appellant's diligence in otherwise perfecting his appeal.—*Id.*

(G) Authentication and Certification.

§ 613 (N.M.) Where the certificate of the trial judge to an alleged bill of exceptions is not certified to by the clerk, and not shown to have been filed in the clerk's office, neither the bill nor certificate will be considered by the Supreme Court.—*City of Tucumcari v. Belmore*, 137 P. 585.

(H) Transmission, Filing, Printing, and Service of Copies.

§ 621 (Cal.App.) Defendant having filed his transcript while a motion for a new trial was pending and undetermined, it was in time, under Supreme Court rule 2 (119 Pac. ix), though the motion was ultimately denied.—*Union Collection Co. v. Oliver*, 137 P. 1082.

(I) Defects, Objections, Amendment, and Correction.

§ 634 (Cal.App.) As a rule the legal effect of a document which is a part of the record must

be determined from its subject-matter rather than the name by which it is designated, and it cannot be ignored because of misnomer.—*Hastaran v. Marchand*, 137 P. 297.

(K) Questions Presented for Review.

§ 671 (Okla.) On appeal by petition in error and transcript of the record proper, no errors will be considered except such as plainly appear on the face of the record.—*Dean v. Adams*, 137 P. 1173.

§ 671 (Wash.) The impropriety of remarks of counsel made in the presence of the court cannot be reviewed if not made a part of the statement of facts.—*Loy v. Northern Pac. Ry. Co.*, 137 P. 448.

§ 694 (Cal.App.) Under Code Civ. Proc. §§ 648, 659, 950, alleged insufficiency of the evidence to support findings cannot be considered on appeal from the judgment, or from the order denying a new trial, where the statement of the case does not specify the particulars in which the evidence is insufficient.—*Hastaran v. Marchand*, 137 P. 297.

Specifications of the insufficiency of the evidence in a statement of the case or bill of exceptions are intended primarily for the information of the adverse party and trial court, so as to advise them upon settlement of the statement or bill as to what matters of evidence should be included therein.—*Id.*

§ 696 (Okla.) The Supreme Court will not examine the evidence unless the case-made recites that it contains all the evidence.—*Perkins v. Baker*, 137 P. 661.

§ 699 (Cal.App.) Where the transcript disclosed that the instructions were not embodied in the statement of the case, errors based on the instructions cannot be considered.—*Moore v. Gilson*, 137 P. 268.

§ 701 (Or.) Though a bill of exceptions contains no statement of the evidence or other matters to explain it, yet, if instructions appear erroneous in the light of the pleadings, they may be reviewed.—*Willis v. Horticultural Fire Relief of Oregon*, 137 P. 761.

(L) Matters Not Apparent of Record.

§ 713 (Utah) Under Utah Comp. Laws 1907, § 3197, as amended by Laws 1911, c. 94, the disposition of motions to quash the summons and service and to transfer the cause cannot be considered, where they were not incorporated in the bill of exceptions, although they were improperly included by the clerk in the transcript of the judgment roll.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 714 (Utah) Exceptions to instructions and to refusals to charge cannot be reviewed upon the court stenographer's certificate that certain exceptions were taken, if such exceptions are not contained in a bill properly allowed.—*Thomas v. Blythe*, 137 P. 396.

XI. ASSIGNMENT OF ERRORS.

§ 724 (Ariz.) Assignments of error not in conformity with Supreme Court Rule 8, subd. 1 (126 Pac. xi), requiring that assignments distinctly specify each ground of error relied on and the particular ruling complained of, *held* insufficient.—*In re Scarry's Estate*, 137 P. 868.

§ 730 (Utah) While, to properly present for review the giving an instruction, the precise language given must be set out; that is unnecessary where the assignment is based on the refusal of the trial court to charge as requested it being sufficient to refer to the request refused by number.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 748 (Ariz.) Under Supreme Court Rule 8 (126 Pac. xi), an assignment so defective as to raise no question is as if no assignment had been made, and the objection to the ruling or

action complained of will be deemed waived.—Blaisdell v. Steinfeld, 137 P. 555.

Where an assignment of error is so defective as to raise no question for decision, objection may be made by calling the court's attention to the defect, and no motion to strike is necessary.—Id.

XII. BRIEFS.

§ 756 (Okla.) Where the brief of plaintiff in error does not contain an abstract of the transcript setting forth the material matters relied on, together with such statements from the record as are necessary to a full understanding of the questions presented, as required by Supreme Court rule 25, the appeal will be dismissed.—Williamson v. Human, 137 P. 664.

§ 757 (Okla.) Rulings on evidence will not be reviewed, where the evidence is not set out in the brief of plaintiff in error as required by rule 25 (20 Okla. xii, 95 Pac. viii), though assigned as error by proper specifications therein.—Collier v. Gannon, 137 P. 1179.

§ 758 (Cal.App.) Alleged error in rulings on evidence will not be reviewed where appellant's brief merely states that an examination of the record will satisfy the court of his position without pointing out any particular ruling.—Murdough v. Murdough, 137 P. 267.

§ 758 (Cal.App.) The appellate court will not consider points merely referred to by stating that it is for the appellate court to determine whether the testimony was properly excluded, or other testimony was properly admitted, and referring to unauthenticated documents, designated a bill of exceptions, for the errors of law and authority supporting the points.—Hastaran v. Marchand, 137 P. 297.

§ 765 (Wyo.) Parties may by stipulation extend the time for filing the briefs and waive the rules of court.—Union Pac. R. Co. v. Grace, 137 P. 881.

§ 767 (Ariz.) Though appellant's opening brief be stricken from the record, the record would still have to be considered for manifest and fundamental error.—Shank v. Holmes, 137 P. 871.

§ 767 (Wash.) That answering brief was filed before a motion to strike was interposed, though not till 59 days after appellant's brief was served, that no delay in placing the cause on the calendar resulted, and that appellants had ample time in which to prepare a reply brief, held, that the motion to strike respondent's brief for failure to file in time would be denied.—Magnuson v. MacAdam, 137 P. 485.

§ 770 (Wyo.) The filing of a brief out of time is not jurisdictional and may be waived by the parties.—Union Pac. R. Co. v. Grace, 137 P. 881.

§ 773 (Okla.) Where plaintiff in error has completed and filed his record and served and filed a proper brief and defendant in error has failed to file brief or to offer any excuse, the Supreme Court will reverse the case where the brief filed appears reasonably to sustain the assignments of error.—Purcell Bridge & Transfer Co. v. Hine, 137 P. 668.

§ 773 (Wyo.) Where plaintiff in error did not file his brief within 60 days after filing his petition in error as required by court rule 15 (104 Pac. xiii), defendant in error cannot secure a dismissal of the writ of error, where he recognized the brief filed by motion for an extension of time in which to file a reply brief.—Union Pac. R. Co. v. Grace, 137 P. 881.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

§ 781 (Or.) Where, after appeal, the trial court makes a nunc pro tunc entry in terms annulling the judgment and entering a new one but in fact only eliminating a defendant, the appeal will not be dismissed on the ground

that the judgment appealed from has been annulled.—Fisher v. Portland Ry., Light & Power Co., 137 P. 763.

§ 786 (Okla.) The Supreme Court has inherent power to dismiss a manifestly frivolous appeal.—Skirvin v. Goldstein, 137 P. 1176.

§ 796 (Or.) A party who has suffered default judgment cannot move to dismiss an appeal by the other party.—State v. Simpson, 137 P. 750.

XV. HEARING AND REHEARING.

§ 832 (Or.) Where the respondent on the original hearing failed to assert that an order denying a new trial could not be reviewed on appeal from the judgment, the question could not be raised by petition for rehearing.—Goodeve v. Thompson, 137 P. 744.

§ 835 (Wash.) The Supreme Court will not consider and review an alleged constitutional question, not reasonably predicated on the assignments of error theretofore made, first raised by accused on motion for rehearing in order to lay a foundation for a writ of error from the Supreme Court of the United States.—State v. Hassard, 137 P. 143.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 837 (Or.) The denial of a nonsuit will not be disturbed if plaintiff's omission to produce sufficient evidence is supplied by subsequent evidence.—Oberstock v. United Ry. Co., 137 P. 195.

§ 842 (Wash.) Where the facts were undisputed, the question whether plaintiffs were entitled to a mechanic's lien is one of law, and hence the determination of the trial court on that issue may be reviewed on appeal.—Baker v. Yakima Valley Canal Co., 137 P. 342.

§ 843 (N.M.) An abstract question, not material to the result, will not be considered.—Roswell Nursery Co. v. Mielenz, 137 P. 579.

§ 854 (Or.) Statements made in refusing a decree for defendants on the pleadings are immaterial, where the answer did not state facts constituting an answer or defense.—State v. Warner Valley Stock Co., 137 P. 746.

§ 864 (Cal.App.) Errors of law appearing in a statement of the case or bill of exceptions may be reviewed upon appeal from the judgment, though there is no appeal from the order denying a new trial.—Hastaran v. Marchand, 137 P. 297.

(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.

§ 874 (Or.) On an appeal from an order refusing a decree for defendants on the pleadings, the final decree is not before the Supreme Court for review.—State v. Warner Valley Stock Co., 137 P. 746.

§ 874 (Wash.) An order refusing to dissolve an attachment will not be reversed for insufficiency of the complaint if it is capable of amendment so as to state a cause of action.—Johnson v. Muenz, 137 P. 126.

(C) Parties Entitled to Allege Error.

§ 877 (Cal.) A defendant, in a suit to quiet title, may not complain of the judgment in so far as it concerns third persons only.—Faxon v. All Persons, etc., 137 P. 919.

§ 877 (N.M.) An assignment of error, complaining of the court's disposition of money paid into court in foreclosure proceedings, could not be considered, where the appellant mortgagor had no interest in the disposition of such money.—Edwards v. Fitzhugh, 137 P. 582.

§ 882 (Utah) A party whose counsel filed the motion upon which the action of the court was invoked, and on the hearing repeatedly stated that pleadings were unnecessary, and parties

who acquiesced in such action were estopped to thereafter complain that pleadings were not filed.—*Salt Lake City v. Utah & Salt Lake Canal Co.*, 137 P. 638.

§ 882 (Wash.) A party may not complain of instructions on the ground that they unnecessarily repeat the legal proposition involved where his requested instructions are subject to the same criticism.—*Crandall v. Puget Sound Traction, Light & Power Co.*, 137 P. 319.

§ 883 (Cal.App.) Where, in a mortgage foreclosure proceeding, the nonappealing defendants admitted that their rights in the premises arose subsequent to the mortgage, and all defendants stipulated at trial that all claims, except those of the appealing defendants to the surplus, should be determined in another pending action, *held*, that the appealing defendants could not complain of a judgment for providing that any surplus after the sale should be deposited with the court to await judgment in the other action.—*Berkeley Bank of Savings & Trust Co. v. Miller*, 137 P. 1101.

(E) Presumptions.

§ 905 (Utah) It is presumed on appeal that rulings of the trial court are correct, until the contrary is shown by the record.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 907 (Cal.App.) In the absence of a sufficient statement of facts or bill of exceptions, it will be presumed on appeal that the evidence fully supported the findings, and justified the refusal of a new trial.—*Hastaran v. Marchand*, 137 P. 297.

§ 913 (Utah) Where, when an action was commenced against a firm to foreclose a mechanics' lien, one of the partners had parted with all of his interest in the real estate to the other partner, who had since died, and no personal judgment was asked, it will be presumed that such partner was made a defendant as a surviving partner.—*Bingham Coal & Lumber Co. v. Blom*, 137 P. 630.

In an action against a copartnership to enforce a mechanic's lien, it will be assumed that a surviving partner who joined in a general demurrer did so as surviving partner; that being the only capacity in which he was properly a party.—*Id.*

§ 917 (Cal.App.) Where the record does not show that the trial court did not rule upon a demurrer to the complaint, the appellate court will presume, to sustain the judgment for plaintiff, that the court did rule thereon.—*Murdough v. Murdough*, 137 P. 267.

§ 917 (Cal.App.) Allegations in a complaint to which a demurrer has been sustained must be assumed to be true in passing on the correctness of the ruling.—*Mulvey v. Wangenheim*, 137 P. 1106.

§ 920 (Or.) In the absence of a showing in the abstract that allegations and interrogatories were served on a garnishee as prescribed by L. O. L. §§ 62, 538, 539, it must be determined that they were not served.—*Fraley v. Hoban*, 137 P. 751.

§ 931 (Cal.) In view of findings in favor of one for whom judgment was rendered, the evidence must, on appeal, be considered in the light most favorable to him.—*Ernst v. Ganahl*, 137 P. 256.

§ 931 (Cal.) The rule that findings must be interpreted so as to support the judgment if reasonably possible is controlled by the further rule that they must be interpreted on appeal so as to be within the issues.—*E. W. McLellan Co. v. East San Mateo Land Co.*, 137 P. 1145.

§ 934 (Cal.App.) Where a complaint contains two counts, one of which is good, a judgment for plaintiff will be referred to that count.—*Union Collection Co. v. Oliver*, 137 P. 1082.

(F) Discretion of Lower Court.

§ 974 (Utah) Under Comp. Laws 1907, § 3163, the question whether special findings shall be submitted resting in the sound discretion of the trial court, its ruling will not be disturbed unless abused.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 978 (Or.) Where the trial court finds that the conduct of plaintiff and a juror was improper, an order denying a new trial will be reversed.—*Goodeve v. Thompson*, 137 P. 744.

§ 978 (Wash.) Whether a new trial should be granted because of improper argument of counsel is largely within the discretion of the trial court, and its exercise of that discretion will not be disturbed except in cases of clear abuse.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

(G) Questions of Fact, Verdicts, and Findings.

§ 987 (Or.) The Supreme Court will not review the evidence at the suggestion of appellant to determine what verdict should have been rendered, though it may, in case of error, review the evidence to determine whether it may nevertheless affirm or direct the judgment to be entered.—*Willis v. Horticultural Fire Relief of Oregon*, 137 P. 761.

§ 994 (Cal.) The amount of credence to be given to witnesses is exclusively one for the trial court.—*Ernst v. Ganahl*, 137 P. 256.

§ 994 (Mont.) The Supreme Court cannot decide, on appeal from a judgment for plaintiff and an order denying a new trial, that a jury should have believed defendant's witnesses and discredited plaintiff's witnesses.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

§ 1001 (Idaho) Where counsel for defendant cross-examined plaintiff at length upon the account sued on, and plaintiff stated that the difference between the debits and credits therein shown was the amount of his claim, the appellate court could not disturb the finding, as to the balance due, as not sustained by sufficient evidence.—*Pomeroy v. Gordan*, 137 P. 888.

A verdict supported by substantial evidence will not be disturbed on appeal for insufficiency of the evidence.—*Id.*

§ 1001 (Kan.) Where the evidence, in an action on a written instrument sustains a finding that the instrument was not delivered, verdict for defendant will not be disturbed.—*Scott City Northern R. Co. v. Bilby*, 137 P. 984.

§ 1001 (Okla.) The questions whether proper demand has been made for production of books and inventory as required by an insurance policy, and whether the failure to produce was the fault of the insured are questions on which the verdict if supported by sufficient evidence is conclusive.—*Commercial Union Assur. Co., Limited, of London, Eng., v. Wolfe*, 137 P. 704.

§ 1001 (Utah) A verdict will not be disturbed on appeal, where there is substantial evidence in its favor.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 1002. A verdict on conflicting evidence will not be disturbed on appeal.

—(Cal. App.) *Moore v. Gilson*, 137 P. 268; (Wash.) *In re Queen Anne Boulevard*, 137 P. 435.

§ 1002 (Kan.) The weight and credibility of conflicting evidence is for the jury, and not for the appellate court.—*Dent v. National Fire Ins. Co.*, 137 P. 799.

§ 1002 (Okla.) A verdict supported by the evidence and inferences legitimately to be drawn therefrom is conclusive though the evidence is conflicting.—*Walters Nat. Bank v. Bantock*, 137 P. 717.

§ 1002 (Okla.) A verdict sustained by sufficient evidence will not be disturbed, though the evidence is conflicting.—*Lawson v. Guthrie*, 137 P. 1183.

§ 1002 (Wash.) A verdict assessing damages on conflicting evidence is conclusive where there is substantial testimony sustaining the amount of the verdict.—*Freebury v. Chicago, M. & P. S. Ry. Co.*, 137 P. 1044.

§ 1004 (Wash.) The Supreme Court cannot disturb jury findings on conflicting evidence as to the amount of damages in proceedings to improve a waterway.—*Newell v. Loeb*, 137 P. 811.

§ 1005 (Cal.) A verdict sustained by evidence and approved by the trial court is conclusive on appeal.—*Tousley v. Pacific Electric Ry. Co.*, 137 P. 31.

§ 1005 (Wash.) If there is substantial evidence to sustain the verdict, though it is conflicting, and the trial court has refused to set it aside, the Supreme Court will not interfere.—*Loy v. Northern Pac. Ry. Co.*, 137 P. 446.

§ 1008 (Kan.) Where all the material testimony was oral, its weight and credibility and the inferences therefrom were for the trial court, and the Supreme Court will not disturb its finding.—*Kuhn v. Johnson*, 137 P. 990.

§ 1009 (N.M.) Where, in a suit to compel trustees to account, the court did not hear all of the witnesses testify, an assignment that the court erred in finding that certain claims had been assigned to cross-complainant L. required a review of all the evidence in the case.—*Lohman v. Raymond*, 137 P. 375.

§ 1009 (N.M.) Even in an equity case, where findings are based on oral testimony, the appellate court will not disturb them, where the overwhelming weight of the evidence is not against them.—*Fraser v. State Savings Bank*, 137 P. 592.

§ 1009 (Okla.) A general finding for a defendant seeking reformation of the written instrument, sued on the ground of mutual mistake, should be set aside where such finding, or any particular finding necessarily included therein, is not reasonably supported by the evidence.—*Schafer v. Midland Hotel Co.*, 137 P. 664.

§ 1009 (Wash.) In an equity case the finding of the trial court, though entitled to weight, is not binding on the Supreme Court; the case being triable de novo on appeal.—*Baker v. Yakima Valley Canal Co.*, 137 P. 342.

§ 1010 (Cal.) A finding sustained by ample evidence is conclusive.—*Borden v. Borden*, 137 P. 27.

§ 1010 (Cal.App.) The findings of the court in civil cases will not be set aside when there is substantial evidence to support them.—*W. B. McGerry & Co. v. Marsicano*, 137 P. 40.

§ 1010 (Idaho) Where there is substantial evidence supporting the finding, the judgment will not be reversed for insufficiency of evidence.—*Henry Gold Mining Co. v. Henry*, 137 P. 523.

§ 1010 (Okla.) A judgment on findings reasonably supported by the evidence will not be disturbed.—*Mullin v. Brown*, 137 P. 107.

§ 1010 (Or.) A court's findings of fact stand as a verdict, which, under Const. art. 7, § 3, can be set aside only when there is no evidence to support it.—*Fields v. Western Union Telegraph Co.*, 137 P. 200.

§ 1010 (Or.) A court's findings of fact will not be disturbed unless the evidence was not sufficient to support them.—*Cook v. Gordon*, 137 P. 782.

§ 1010 (Wash.) A finding sustained by evidence will not be disturbed.—*Columbus Varnish Co. v. Seattle Paint Co.*, 137 P. 434.

§ 1011 (Ariz.) Findings on conflicting evidence will not be disturbed on appeal in the absence of some prejudicial error in rulings on evidence.—*In re Scarry's Estate*, 137 P. 868.

§ 1011 (Cal.) A finding by the trial court as to matter of heirship, in a proceeding to determine the right of succession when based on con-

flicting evidence, cannot be reviewed.—*In re Walden's Estate*, 137 P. 35.

Even though all the testimony was given by depositions, a finding of fact by the trial court will not be disturbed on appeal unless an abuse of discretion appears.—*Id.*

§ 1011 (Cal.) A decision on a substantial conflict of evidence is conclusive.—*National Lumber Co. v. Ripple*, 137 P. 236.

§ 1011 (Cal.) A finding on conflicting evidence, and sustained by evidence, will not be disturbed on appeal.—*Wills v. Wills*, 137 P. 249.

§ 1011 (Cal.App.) A finding of the court on sharply conflicting testimony will not be disturbed on appeal.—*Strange v. Strange*, 137 P. 1104.

§ 1011 (Okla.) Where the testimony is oral and conflicting and the finding of the court is general, it is a finding of every special thing necessary, and is conclusive on appeal.—*Martin v. Spaulding*, 137 P. 882.

§ 1011 (Wash.) A finding for defendant sustained by the preponderance of the evidence will not be disturbed.—*Schreiber v. Advance Thresher Co.*, 137 P. 454.

§ 1012 (Wash.) In an action upon a note, tried without a jury, the weight of the evidence was peculiarly for the trial judge, whose finding that the presumption of consideration was overcome was conclusive.—*Nicholson v. Neary*, 137 P. 492.

§ 1012 (Wash.) Under Rem. & Bal. Code, § 1736, in actions tried to the court, the Supreme Court will treat the finding of the trial judge with great respect; but, if convinced that a preponderance of the testimony is against it, the court will give effect to its own findings.—*Zizich v. Holman Security Inv. Co.*, 137 P. 1028.

§ 1015 (Okla.) The grant of a new trial will not be disturbed unless it clearly appears that it was induced by error in an unmixed question of law.—*Leonard v. Showalter*, 137 P. 346.

§ 1015 (Okla.) The granting of a new trial will not be disturbed where it does not clearly appear that the ruling was induced by error on the decision of some unmixed question of law.—*Rogers v. Quabner*, 137 P. 361.

§ 1015 (Okla.) The granting of a new trial will not be disturbed unless error is clearly established as to some unmixed question of law.—*Howard Mercantile Co. v. Moore*, 137 P. 1172.

§ 1022 (Or.) Where the findings of a referee on a claim against an insolvent were set aside for error therein, and the court made its own findings and the testimony tends to support them, they are conclusive.—*In re Standard Cafeteria Co.*, 137 P. 774.

(H) Harmless Error.

§ 1026 (Okla.) A case will not be reversed for errors not affecting some substantial right of the adverse party.—*Lawson v. Rowley*, 137 P. 667.

§ 1039 (Utah) Though pleadings should have been filed, yet it was not prejudicial, since part of the evidence introduced on the hearing was a very elaborate report by the commission and two other engineers setting forth in detail just what improvements were necessary, which showed plainly the matters before the court.—*Salt Lake City v. Utah & Salt Lake Canal Co.*, 137 P. 638.

§ 1042 (Cal.App.) Denial of a motion to strike out probative matter in a complaint was not ground for reversal, where it did not appear that defendants were in any wise prejudiced.—*Boschetti v. Morton*, 137 P. 1085.

§ 1050 (Wash.) In a servant's action for injury from the swing of the tongue of a heavy concrete mixer operated by steam, error, if any, in the admission of expert testimony as to whether plaintiff might have held the tongue

when steam was applied *held* not prejudicial.—*Magnuson v. MacAdam*, 137 P. 485.

§ 1052 (Okla.) Permitting the use of a diagram drawn on the floor in connection with the examination of witnesses *held* harmless, where a similar diagram, identical in its material features, was put in the record.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1158.

§ 1052 (Or.) In an action on a railway contractor's bond, a straight verdict for defendant shows that any error in admission of evidence that some of the delay was caused by plaintiff was harmless, where the evidence was not referred to in the charge.—*Astoria Southern Ry. Co. v. Pacific Surety Co.*, 137 P. 857.

§ 1052 (Utah) Though the measure of damages was the diminution of the value of the land, it was not prejudicial error to admit evidence of injuries to crops, where the court correctly charged on the measure of damages, and the verdict showed that the jury were not misled.—*Jensen v. Davis and Weber Counties Land Co.*, 137 P. 635.

§ 1052 (Utah) Error, if any, in a ruling that plaintiff could put in evidence a portion of a deposition without introduction of the remainder was harmless where the whole deposition was read in evidence.—*F. W. Niebling Co. v. James Coal & Ice Co.*, 137 P. 834.

§ 1053 (Okla.) Error in the improper admission of evidence as to elements of damage is cured where the instructions forbid a recovery of any sum on account of such improper elements.—*First Nat. Bank v. Thompson*, 137 P. 668.

§ 1053 (Utah) Where the court improperly received hearsay testimony which was very brief and direct, and then ordered it stricken and directed the jury not to consider it, the error was not prejudicial.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 1054 (Kan.) A judgment in a case tried without a jury will not be reversed for admission of incompetent evidence, where it does not appear that there was no competent evidence to support it or that the improper evidence affected the result.—*Kimball v. Edwards*, 137 P. 948.

§ 1056 (Wash.) Where plaintiff was clearly entitled to no relief, the improper exclusion of evidence which would not have changed the result is harmless.—*Empire Realty Co. v. Ratcliff*, 137 P. 1049.

§ 1064 (Okla.) Where it appears that the jury were not misled by an erroneous instruction, the judgment will not be disturbed.—*Roberts v. Wilkins*, 137 P. 111.

§ 1064 (Okla.) Inaccuracy in an instruction is harmless where it could not have misled the jury.—*Big Jack Mining Co. v. Parkinson*, 137 P. 678.

§ 1064 (Wash.) The error in fixing the limit of recovery of plaintiff suing for a personal injury in excess of the amount recoverable under any circumstances necessitates a new trial, unless plaintiff remits the excess.—*Crandall v. Puget Sound Traction, Light & Power Co.*, 137 P. 319.

§ 1066 (Utah) The improper inclusion of two immaterial sections of the statutes *held* harmless.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 1067 (Cal.App.) In view of Code Civ. Proc. § 475, the improper refusal of the court to charge that a witness false in part of his testimony is to be distrusted in others is harmless, for such an instruction pertains to a commonplace matter about which the jury is supposed to know.—*Medlin v. Spazier*, 137 P. 1078.

§ 1068 (Kan.) Error, if any, in instructing in a broker's action for commission that he could recover either upon an express or implied agreement, was cured where the jury found specifically that there was an express agreement.—*McClintick v. Pyle*, 137 P. 788.

§ 1068 (Kan.) Refusal of an instruction, in an action on a note, that the signer was negligent as a matter of law in signing it *held* harmless, where the findings showed that, because of the fraud in procurement of the note, plaintiff could not have recovered, though the requested instruction had been given.—*Iowa City State Bank v. Claypool*, 137 P. 949.

§ 1068 (Okla.) An instruction, in an action commenced prior to statehood, that nine of the jury concurring could return a verdict was harmless where the verdict was unanimous.—*First Nat. Bank v. Thompson*, 137 P. 668.

§ 1068 (Okla.) Erroneous instructions are not ground for reversal, where the evidence clearly shows that any different verdict should have been set aside.—*Whitcomb v. Oller*, 137 P. 709.

§ 1071 (Cal.) Errors, if any, in the findings as to the making of alleged misrepresentations were harmless, where the court further found that plaintiff did not rely on the representations.—*Maron-Nowlin Co. v. Norswing*, 137 P. 240.

§ 1071 (Kan.) The refusal of a request for a special finding which, if made, could have had no material effect on the result unless considered in connection with another finding, which was not requested, is not prejudicial error.—*Humble v. German Alliance Ins. Co.*, 137 P. 980.

(I) Error Waived in Appellate Court.

§ 1078 (Colo.App.) An assignment of error not referred to in appellant's brief will be deemed abandoned.—*Muntzing v. Harwood*, 137 P. 71.

(K) Subsequent Appeals.

§ 1097 (Okla.) The opinion of the Supreme Court in a case appealed and remanded is the law of the case on a subsequent appeal.—*Leonard v. Showalter*, 137 P. 546.

§ 1099 (Or.) A decision on appeal that limitations did not run against the state is the law of the case on a subsequent appeal.—*State v. Warner Valley Stock Co.*, 137 P. 746.

§ 1099 (Wash.) Where the Supreme Court, on appeal from a nonsuit, decided that the evidence of plaintiff was sufficient to carry the case to the jury, a verdict for plaintiff on a subsequent trial will not be disturbed, where his evidence was not materially different from that on the former trial.—*Hendrickson v. Simpson Logging Co.*, 137 P. 444.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

§ 1140 (Okla.) Instructions submitting an element of damage of which there is no competent proof, where the verdict is general, cannot be cured by remittitur.—*St. Louis & S. F. R. Co. v. Criner*, 137 P. 705.

(C) Modification.

§ 1151 (Cal.App.) Where a judgment improperly allowed interest upon a recovery on an implied contract, it will not be reversed on appeal, but will be modified by striking therefrom the allowance of interest.—*Merchants' Collection Agency v. Gopcevic*, 137 P. 609.

(D) Reversal.

§ 1160 (Cal.) Where, in a suit against two defendants to establish a trust in real estate, the issue was whether a defendant's half ownership was in trust, the court on appeal from a judgment against plaintiff will not reverse the judgment on the oral statement made during argument, to the effect that settlement had been made between plaintiff and codefendant.—*Wills v. Wills*, 137 P. 249.

§ 1169 (Idaho) Failure in an equity case to make findings of fact upon each material issue is ground for reversal.—*Jensen v. Bumgarner*, 137 P. 529.

§ 1170 (Cal.) That no proof was offered of publication of a change in the name of the plaintiff, a corporation organized under the laws of Illinois, was not of sufficient importance to justify reversal of a judgment for plaintiff, even though such publication be required by the Illinois statute.—Cellulose Packaging Mfg. Co. v. Calhoun, 137 P. 238.

§ 1170 (Mont.) Under Rev. Codes, § 6593, held that where the judgment in the action could not have been otherwise, the court could not reverse for errors therein.—Howell v. Bent, 137 P. 49.

§ 1180 (Wash.) Under Rem. & Bal. Code, § 1720, in action for damages against sheriff and surety, reversal of judgment on surety's appeal held not to require vacation of judgment against sheriff.—Morgan v. Williams, 137 P. 476.

(F) Mandate and Proceedings in Lower Court.

§ 1195 (Mont.) On a retrial, instructions justified by decision on a former appeal held properly given.—Smith v. Zimmer, 137 P. 538.

Where the testimony presented a case for the jury under the decision upon a former appeal, the question was properly submitted on second trial.—Id.

§ 1195 (Wash.) A determination on a prior appeal, in an action for breach of a contract to lease a building, as to the extent of plaintiff's right and the measure of his damages, held the law of the case on retrial.—Oldfield v. Angeles Brewing & Malting Co., 137 P. 469.

§ 1195 (Ok.) The opinion of the Supreme Court in a case appealed and remanded is the law of that case in the trial court.—Leonard v. Showalter, 137 P. 346.

§ 1197 (Wash.) Where the United States Supreme Court, on writs of error by parties seeking damages for injury to abutting property from an original street grading done under municipal authority by defendant railroad, only determined the constitutionality of Laws 1909, c. 80, § 1, relating to compensation in such case, this court's consideration of defenses other than those based on the statute is not inconsistent with such decision.—Ettor v. City of Tacoma, 137 P. 820.

§ 1203 (Kan.) The district court held to have jurisdiction to render judgment on findings of fact as to the amount due, made at a previous term; an appeal having been taken meanwhile from the judgment finding defendant indebted, and the case having been remanded.—Winfrey v. Clapp, 137 P. 798.

§ 1210 (Wash.) On new trial after reversal for exclusion of evidence, held, that the trial court should have rendered judgment in accordance with his views of the law and the facts, instead of rendering judgment in supposed conformity to the Supreme Court's opinion.—Cooper v. Farmers' & Merchants' Bank of Wenatchee, 137 P. 1011.

APPEARANCE.

See Motions, § 32; Pleading, § 406.

§ 19 (Or.) Under L. O. L. § 614, where defendants demur to the alternative writ, the court has jurisdiction of the persons and of the subject-matter.—Crawford v. District School Board for School Dist. No. 7, in Klamath County, 137 P. 217.

§ 22 (Cal.) Where a controversy is shown by the pleadings and the court has jurisdiction of the subject-matter, and both parties voluntarily appear, the defeated party may not complain of want of jurisdiction for defect in the preliminary proceedings by which the cause was in court.—Faxon v. All Persons, etc., 137 P. 919.

APPOINTMENT.

See Executors and Administrators, §§ 9-35; Officers, §§ 28-61.

APPROPRIATION.

See Waters and Water Courses, §§ 83, 128-152.

ARBITRATION AND AWARD.

See Reference; Submission of Controversy.

ARCHITECTS.

See Contracts, § 196.

ARGUMENT OF COUNSEL.

See Criminal Law, §§ 699-730.

ASSAULT AND BATTERY.

See Carriers, § 280; Evidence, § 123; Master and Servant, § 302; Trial, § 296.

I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Therefor.

§ 3 (Ok.) In an action by a patient against a surgeon for assault, plaintiff need not show that the surgeon intended to injure him, but merely that the act was wrongful.—Rolater v. Strain, 137 P. 96.

§ 6 (Ok.) Where a surgeon, in the performance of an operation, unlawfully removed a bone from a patient's foot without her consent, this constitutes a technical assault and battery.—Rolater v. Strain, 137 P. 96.

§ 13 (Ok.) That a peace officer, in lawful self-defense, at close range shoots at an assailant, and, missing him, accidentally wounds a bystander, does not render the officer guilty of actionable negligence per se, so as to necessarily make him liable to such bystander, though he was chargeable with knowledge of the bystander's presence.—Shaw v. Lord, 137 P. 885.

A person who shoots at an assailant in self-defense, and, missing him, accidentally wounds an innocent bystander, is not ordinarily liable for the injury, if guilty of no negligence.—Id.

(B) Actions.

§ 42 (Ok.) Whether a person who, in self-defense, shot at an assailant, and, missing him, accidentally wounded a bystander, was guilty of negligence rendering him liable for the injury held a question for the jury.—Shaw v. Lord, 137 P. 885.

ASSESSMENT.

See Drains, §§ 76, 91; Municipal Corporations, §§ 406-514, 568; Taxation, §§ 317-497.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 724-748.

ASSIGNMENTS.

See Attorney and Client, § 26; Chattel Mortgages, § 211; Corporations, § 656; Judgment, § 744; Landlord and Tenant, §§ 192, 208; Mortgages, §§ 239, 270; Principal and Agent, § 170; Set-Off and Counterclaim, §§ 33, 34.

I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

§ 10 (Cal.App.) Assignment of a cause of action on a guaranty was not objectionable because made before the money was due.—Union Collection Co. v. Oliver, 137 P. 1082.

§ 19 (Cal.App.) A claim under a contract to repay the purchase price of corporate stock

on the buyer's becoming dissatisfied *held* assignable.—Union Collection Co. v. Oliver, 137 P. 1082.

§ 22 (Utah) The only test of assignability is whether the cause of action survives and passes to the personal representative of the owner.—National Union Fire Ins. Co. v. Denver & R. G. R. Co., 137 P. 653.

§ 24 (Utah) A claim by the owner of property negligently destroyed by a railroad company for damages for its destruction is assignable under the statute.—National Union Fire Ins. Co. v. Denver & R. G. R. Co., 137 P. 653.

§ 30 (Utah) Assignment of only a part of a claim is not, in the absence of statute, enforceable at law, though good as an equitable assignment.—National Union Fire Ins. Co. v. Denver & R. G. R. Co., 137 P. 653.

(B) Mode and Sufficiency of Assignment.

§ 32 (Cal.) Where two partners individually assigned to a third the contract under which the three were entitled to a commission as brokers, the assignment was valid.—Jauman v. McCusick, 137 P. 254.

§ 41 (Cal.) An assignment of "the within contract," when indorsed on the contract assigned, *held* sufficient in description.—Jauman v. McCusick, 137 P. 254.

§ 41 (N.M.) An instrument in the form of a release of claims of three creditors against an insolvent's estate to L., together with certain explanatory oral testimony, might be properly held to amount to an assignment of such claims to L.—Lohman v. Raymond, 137 P. 375.

§ 49 (Okl.) Ordinarily the drawing of a check does not operate as an equitable assignment pro tanto before it has been accepted or certified by the bank.—Walters Nat. Bank v. Bantock, 137 P. 717.

§ 50 (Okl.) A check for the amount of a fund that a trustee had deposited to pay for land, across which the bank had written "in escrow," and had delivered to the cashier pending completion of the sale, *held* an equitable assignment enabling the payee to recover thereon.—Walters Nat. Bank v. Bantock, 137 P. 717.

§ 58 (Cal.App.) That a guaranty of repayment of the price of corporate stock on the buyer's becoming dissatisfied was nonassignable was immaterial, where the seller, with notice of the assignment, agreed with the assignee that the amount due was \$3,000, and that he would pay such sum.—Union Collection Co. v. Oliver, 137 P. 1082.

II. OPERATION AND EFFECT.

§ 88 (Wash.) Where the purchasers of land by installments assigned to the vendor another contract for the purchase of land as security, the assignment was merely to secure performance, and the vendor, having elected to rescind the contract for default in payments, is not entitled to take the second contract.—Miller v. Moulton, 137 P. 491.

IV. ACTIONS.

§ 121 (Utah) An insurance company, receiving an assignment of a property owner's claim for damages against a railroad company for the negligent destruction of the owner's property, which was insured by the insurance company, was the "real party in interest" within Comp. Laws 1907, § 2902, so as to entitle it to maintain an action on such assignment in its own name, even if the assignment to it was of only a part of the claim.—National Union Fire Ins. Co. v. Denver & R. G. R. Co., 137 P. 653.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Time, § 5.

V. RIGHTS AND REMEDIES OF CREDITORS.

(B) Presentation, Proof, and Payment of Claims.

§ 300 (Or.) Under L. O. L. § 7544, a claimant has at least three months from the first publication of notice by an assignee for creditors, in the absence of notice by mailing, to file his claim.—In re Standard Cafeteria Co., 137 P. 774.

ASSUMPSIT, ACTION OF.

See Limitation of Actions, § 127; Money Lent; Use and Occupation.

ASSUMPTION OF RISK.

See Master and Servant, §§ 203-222, 238.

ATTACHMENT.

See Appeal and Error, §§ 71, 874; Landlord and Tenant, § 328.

III. PROCEEDINGS TO PROCURE.

§ 109 (Cal.App.) An allegation in an attachment affidavit, in an action on certain notes, that payment of the notes and that each of them and each part of them had not been secured *held* sufficient and not objectionable as a negative pregnant.—Nichols v. Davis, 137 P. 41.

§ 119 (Wash.) Complaint in attachment before maturity of debt under Rem. & Bal. Code, § 649, *held* insufficient unless it shows on its face the reasons for its premature filing.—Johnson v. Muenz, 137 P. 126.

§ 122 (Cal.App.) Since under Code Civ. Proc. § 538, an attachment affidavit may be made by plaintiff or on his behalf, an amendment necessary to prevent the discharge of an attachment under section 558 may also be made by plaintiff's attorney on his behalf.—Nichols v. Davis, 137 P. 41.

Code Civ. Proc. § 558, authorizes the supplying of matter omitted by inadvertence or oversight from an attachment affidavit which is not lacking in a substantive particular requiring the conclusion that it is absolutely void.—Id.

Where, in an action against two defendants, an original attachment affidavit alleged that the action was not intended to hinder, delay, or defraud creditors of the said "defendant," an amendment changing the word quoted to the plural and adding "or either of them" was permissible.—Id.

Where an original attachment affidavit was not so defective as to be a nullity, an amended affidavit merely particularizing what was attempted to be stated in the original was properly filed.—Id.

VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.

§ 239 (Okl.) An agreement after attachment that the sheriff shall sell summarily, and retain or deposit the proceeds to abide final judgment, precludes defendant from insisting on a dissolution of the writ.—Collier v. Gannon, 137 P. 1179.

ATTORNEY AND CLIENT.

See Action, § 25; Appeal and Error, §§ 207, 671; Criminal Law, §§ 699-730; Embezzlement, §§ 2, 17, 44; Mortgages, § 581; New Trial, § 29; States, § 68; Taxation, § 598; Wills, § 707.

I. THE OFFICE OF ATTORNEY.

(B) Privileges, Disabilities, and Liabilities.

§ 26 (Nev.) Where a miner entitled to a lien assigned the claim, pending suit to enforce the lien, and died, payment of the proceeds by the miner's attorney to the clerk of the district court instead of to the assignee *held* voluntary

and no defense to the attorney's liability to account to the assignee.—State v. Langan, 137 P. 517.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

§ 140 (N.M.) The amount of an attorney's compensation for collecting a note was not fixed by a stipulation in the note for a 10 per cent. attorney's fee, and in the absence of an agreement thereon between him and his client he was entitled only to the reasonable value of his services.—Rogers v. Kemp Lumber Co., 137 P. 586.

§ 167 (Or.) In an action by an attorney for compensation, evidence held to justify an instruction as to fraudulent conduct of defendant in failing to notify plaintiff of acceptance of his resignation of employment, under a regular retainer, till he had rendered services in important litigation.—Johnson v. Miami Lumber Co., 137 P. 765.

ATTORNEY GENERAL.

See States, § 68.

§ 1 (Or.) Under Const. art. 7, § 17, as it first existed, and article 7, § 2, as amended, and L. O. L. §§ 2666-2672, the powers of the Attorney General at common law are vested either in that officer or in the district attorneys.—Gibson v. Kay, 137 P. 864.

ATTORNTMENT.

See Adverse Possession, § 48.

AUTHORITY.

See Principal and Agent, §§ 99-136.

AUTOMOBILES.

See Corporations, § 492; Fraud, § 59; Highways, § 184; Municipal Corporations, § 705; Negligence, § 93; Railroads, § 327; Street Railroads, §§ 85, 99, 118.

BAIL.

See Habeas Corpus, §§ 33, 54, 107.

II. IN CRIMINAL PROSECUTIONS.

§ 43 (Ariz.) Under Const. art. 2, § 22, and McNeill Book, p. 469, § 1171, a person charged with crime may, in all cases, claim admission to bail, except where he is charged with a capital offense, and the proof of his guilt is evident or the presumption great.—In re Haigler, 137 P. 423.

§ 49 (Ariz.) The presumption of innocence which attends the accused throughout the entire trial is with him upon an application for admission to bail.—In re Haigler, 137 P. 423.

In a proceeding for admission to bail, where the state objects on the ground that the offense is capital, and that the presumption of guilt is great, the burden of establishing those facts is upon the state.—Id.

BALLOTS.

See Elections, §§ 164, 172, 269.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

BANKS AND BANKING.

See Account Stated, § 6; Appeal and Error, §§ 150, 151, 460; Municipal Corporations, § 172.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(E) Insolvency and Dissolution.

§ 73 (Cal.) On liquidation of a bank's affairs by the state superintendent of banks, the franchise of the corporation to do business is terminated, and it cannot be again acquired except by reorganization as a new corporation.—Mercantile Trust Co. of San Francisco v. Miller, 137 P. 913.

§ 74 (Idaho) That a depositor when he draws and presents to an insolvent bank a check which is paid in the usual course of business knows of the bank's insolvency, will not render him liable, for the amount so withdrawn, to a receiver subsequently appointed.—Wilson v. Baker Clothing Co., 137 P. 896.

Preferences made by an insolvent bank through conspiracy or fraud with a creditor, may be set aside.—Id.

§ 77 (Cal.) The superintendent of banks, in liquidating the assets of a bank, is a trustee first to pay creditors, then to pay any overplus to corporation stockholders.—Mercantile Trust Co. of San Francisco v. Miller, 137 P. 913.

Where a bank in the hands of the superintendent of banks claimed that bonds held by it were the only valid bonds secured by a mortgage, the superintendent of banks was a proper party to foreclose the mortgage for the benefit of holders of all the bonds.—Id.

Superintendent of banks, in administering the affairs of an insolvent bank in his possession, is not required to consult or co-operate with its officers.—Id.

The state superintendent of banks, in liquidating a bank's assets, is a trustee of an express trust, and authorized by Code Civ. Proc. § 369, to sue in his official name and character in any action necessary for the performance of the trust, and is a proper party defendant in any action by a third person affecting the property.—Id.

§ 80 (Cal.App.) Where petitioner's attorney, desiring to send her certain funds deposited in his own name, drew a check and accepted a certificate of deposit payable to petitioner, which he sent to her, on the day the bank failed, the amount evidenced by the certificate was not a special deposit, and she was not entitled to a preferred claim therefor.—People v. California Safe Deposit & Trust Co., 137 P. 1111.

§ 80 (Idaho) Under Rev. Codes, § 3005, the method of the payment of dividends by the receiver of an insolvent bank is left to the court under the requirements of law generally applied in such cases.—Blackman v. Pettengill, 137 P. 182.

Rev. Codes, § 5911, relating to proceedings in insolvency, should be read, with the provisions of Banking Law of 1911, §§ 65, 66, in considering the status of a secured depositor of an insolvent bank.—Id.

Under Banking Act of 1911, §§ 65, 66, giving a preference to depositors of an insolvent bank over all other creditors and placing such depositors on an equal footing, distribution to depositors must be made ratably.—Id.

Where a depositor of an insolvent bank holds mortgage security for his deposit, he is entitled to receive dividends only if the receiver is successful in defeating the mortgage, and, if the depositor succeeds in foreclosure, the net proceeds should be applied on his claim, and on any deficiency, he should receive the same dividends as the other depositors.—Id.

III. FUNCTIONS AND DEALINGS.

(B) Representation of Bank by Officers and Agents.

§ 116 (Cal.) Knowledge of the cashier and general manager of a bank is imputable to the bank, and when it took an accommodation note procured by his fraud, knowledge of the fraud.

is imputable to the bank, and it cannot claim as a bona fide purchaser, even though the cashier received some personal benefit out of the transaction.—*Williams v. Hasshagen*, 137 P. 9.

§ 116 (Wash.) Where the president and cashier of a bank were stockholders of a corporation when the bank permitted overdrafts by it, the bank was not chargeable with the knowledge of such officers that the capital stock had not been paid for so as to deprive it of its right to enforce the statutory liability of such stockholders.—*German-American State Bank v. Soap Lake Salts Remedy Co.*, 137 P. 461.

(C) Deposits.

§ 126 (Wash.) Where a bank credits a depositor with the amount of a check, and payment is stopped, the depositor is not entitled to claim the credit.—*Belsheim v. First Nat. Bank*, 137 P. 1055.

Where a bank notified a customer that payment on a check deposited by a third person, and in which the customer claimed some interest, could be stopped, its action did not constitute bad faith, prohibiting it from debiting the depositor's account with the proceeds of the check which had been credited to him before collection.—*Id.*

§ 129 (Cal.App.) A "general deposit" is where the bank is given custody of money with the intention that the same money need not be returned to the depositor, while a "special deposit" is where the bank assumes charge of money or property with the understanding that the same money or property is to be returned.—*People v. California Safe Deposit & Trust Co.*, 137 P. 1111.

§ 134 (Okl.) Where a bank knows that a deposit is a trust fund, and appropriates it to the depositor's indebtedness, it is liable therefor to the true owner.—*Walters Nat. Bank v. Bantock*, 137 P. 717.

§ 152 (Cal.App.) A bank certificate of deposit is a mere acknowledgment of indebtedness on the part of the bank creating no trust relation but merely that of debtor and creditor.—*People v. California Safe Deposit & Trust Co.*, 137 P. 1111.

BENEFICIARIES.

See Insurance, §§ 778-797.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

See Evidence, §§ 157-178.

BILL OF LADING.

See Carriers, §§ 53, 187.

BILLS AND NOTES.

See Attachment, § 109; Attorney and Client, § 140; Banks and Banking, § 116; Insurance, § 360; Limitation of Actions, §§ 25, 48, 66, 170; Payment, §§ 17, 18; Pleading, § 433; Principal and Surety, §§ 108, 118; Set-Off and Counterclaim, §§ 33, 34; Specific Performance, § 66; Usury, § 2; Vendor and Purchaser, §§ 302, 303.

I. REQUISITES AND VALIDITY.

(B) Consideration.

§ 92 (Wash.) Where an accommodation note was given, the giving up of a right to begin a present action at law thereon held not such a forbearance as would afford a consideration for the maker's new note for the amount of the first note.—*Nicholson v. Neary*, 137 P. 492.

§ 96 (Cal.) That a pledge of stock with the maker of an accommodation note was intended

to indemnify constitutes no consideration for the note.—*Williams v. Hasshagen*, 137 P. 9.

Where defendant executed an accommodation note in favor of a bank, the bank's cancellation of notes due from defendant's son and another is no consideration, where defendant did not know of them.—*Id.*

The party for whose accommodation a note is executed cannot enforce it against the accommodation maker.—*Id.*

Promises that defendant who executed an accommodation note should be reimbursed, and that she should lose nothing, constitute no consideration therefor.—*Id.*

Where defendant, at the solicitation of the cashier of a bank in which her son was interested, executed an accommodation note, a mere hope that it would benefit her son does not constitute a consideration.—*Id.*

(F) Validity.

§ 103 (Cal.) Where an accommodation note was executed by defendant in favor of a bank on the request of its cashier, and on his express promise that she should be reimbursed and protected, the attempt of the bank to enforce the note is fraud within the definition of Civ. Code, § 1572, subd. 4.—*Williams v. Hasshagen*, 137 P. 9.

To entitle defendant to a cancellation of an accommodation note on the ground of fraud, it must appear that she executed it upon reliance on the misrepresentations of the payee under Civ. Code, § 1568.—*Id.*

II. CONSTRUCTION AND OPERATION.

§ 129 (Cal.) Civ. Code, § 8135, declaring the maturity of notes payable on demand for the purpose of presentment to charge the indorser, held, not to extend the time of payment.—*Merchants' Nat. Bank of Santa Monica v. Bentel*, 137 P. 25.

§ 132 (Kan.) That the railroad was built by another company than that specified was no defense, in an action on a railroad aid note, where it did not appear to be material to the signer by what company the road was built.—*Scott City Northern R. Co. v. Wilkinson*, 137 P. 1193.

A railroad company's contract, in consideration of an aid note, to build a road to a point on another railroad on or before a stated day held substantially performed, though for the last three-fourths of a mile the ties and rails were laid between midnight of the stated day and 11 o'clock the next morning.—*Id.*

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(B) Indorsement for Transfer.

§ 267 (Cal.) An indorsement by the payee of a note is a contract in writing the effect of which is controlled by the law, and which cannot be changed to a guaranty, by the oral agreement of the parties.—*Merchants' Nat. Bank of Santa Monica v. Bentel*, 137 P. 25.

(C) Assignment or Sale.

§ 315 (Kan.) A note procured by fraud held not enforceable by a person not a holder in due course, though such fraud was coupled with negligence of the signer.—*Iowa City State Bank v. Claypool*, 137 P. 949.

§ 315 (Okl.) A nonnegotiable note transferred to an innocent purchaser before maturity for a valuable consideration, without notice to the person liable thereon, is subject to all defenses available against it in the original payee's hands.—*Seibold v. Ruble*, 137 P. 696.

VI. PRESENTMENT, DEMAND, NOTICE, AND PROTEST.

§ 396 (Cal.) Presentment to the maker, as well as demand for payment, is essential to fix the liability of the indorser of a note.—*Mer-*

chants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

§ 404 (Cal.) Upon a note, assumed to mature, for the purpose of presentment to charge the indorser, after one year from its date, as provided by Civ. Code, § 3135, a demand more than four months after such maturity was too late to charge the indorser.—Merchants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

§ 404 (Colo.App.) Presentation of a check must be made within a reasonable time; such time depending on the situation of the parties with reference to one another and the bank, and on other material facts entering into the transaction.—Babcock v. City of Rockyford, 137 P. 899.

VII. PAYMENT AND DISCHARGE.

§ 427 (Okla.) Where a person who assumes the payment of a secured note which is non-negotiable under Comp. Laws 1909, §§ 4626, 4627, and of the attached interest coupons, has no notice of an assignment thereof, proof of payment to the payee at the designated place is a good defense in an assignee's action to enforce payment.—Seibold v. Ruble, 137 P. 696.

Payment to the payee at the designated place in good faith without notice of the assignment of a nonnegotiable mortgage note and coupons, where the assignment was not put of record for over four and one-half years, is a good defense to the assignee's action.—Id.

Where the maker paid a nonnegotiable note to the payee at a designated place without notice of an assignment, that such payee, while acting as agent to procure a new loan and pay off the old, failed to pay over the proceeds of the new loan to the assignee of the note *held* not to render the maker liable a second time.—Id.

Payment of a nonnegotiable note at the designated place, when made to the ostensible owner who thereupon released the mortgaged premises securing same, *held* to discharge the maker's liability, though the payment never reached the assignee, and real owner of the note.—Id.

VIII. ACTIONS.

§ 493 (Cal.) The presumption of consideration arising out of the execution of a note is rebuttable, and is overthrown by direct testimony of the maker that there was no consideration.—Williams v. Hasshagen, 137 P. 9.

§ 493 (Wash.) Under Rem. & Bal. Code, § 3415, declaring that every negotiable instrument is prima facie issued for a valuable consideration, the burden of proof is upon one who pleads a want of consideration for a note.—Nicholson v. Neary, 137 P. 492.

§ 497 (Kan.) While every holder is given the benefit of the presumption that he is a holder in due course, yet, when a defective title is shown against him, he must, under Negotiable Instruments Law, § 66, assume the burden of proving as a fact that he is a holder in due course as defined by Negotiable Instruments Law, § 59.—Ireland v. Shore, 137 P. 928.

§ 520 (Cal.) In an action on a note given to a bank, evidence *held* sufficient to show that its execution was induced by the fraud of the bank's officers.—Williams v. Hasshagen, 137 P. 9.

Evidence *held* sufficient to sustain a finding that the maker signed the note in reliance on the fraudulent misrepresentations of the agent of the payee.—Id.

§ 523 (Kan.) Evidence *held* to sustain a special finding of the jury that plaintiffs did not purchase the notes sued on.—Ireland v. Shore, 137 P. 926.

§ 525 (Kan.) Where proof has been made that the title of a person negotiating an instrument is defective under Negotiable Instruments Law, § 62, and the burden thereby cast, pursu-

ant to section 59, upon the holder to show that he is a holder in due course, production of the instrument properly indorsed can prove no more than that it is complete and regular on its face.—Ireland v. Shore, 137 P. 928.

§ 527 (Cal.) In a suit on a note, where defendant cross-complained, seeking to recover from the payee bank payments on other notes belonging to her which had been hypothecated as security for the note sued on, evidence *held* sufficient to support a finding in defendant's favor.—Williams v. Hasshagen, 137 P. 9.

§ 527 (Kan.) Evidence *held* insufficient to support a finding that the note sued on had been paid, where it appeared that if the principal bought the notes he bought them for plaintiff, and did not become holder of same "in his own right," and thereby effect their discharge under Gen. St. 1909, § 5372, subd. 5.—People's State Bank of Wellsville v. Dryden, 137 P. 928.

§ 539 (Wash.) In an action on a note, where the trial court made specific findings of fact, a finding that the note was given for a valuable consideration is sufficiently specific, though the court was required to make findings of fact separately stated.—Barbre v. Hibachman, 137 P. 997.

BLASTING.

See Master and Servant, § 819.

BOARD OF EQUALIZATION.

See Taxation, §§ 276, 490-497.

BOARDS.

See Counties, § 58.

BONA FIDE PURCHASERS.

See Sales, § 235; Vendor and Purchaser, §§ 231, 239.

BONDS.

See Appeal and Error, § 384; Justices of the Peace, § 159; Principal and Surety.

BOOKS OF ACCOUNT.

See Evidence, §§ 166, 178.

BOUNDARIES.

See Action, § 45; Dedication, § 19; Mines and Minerals, §§ 18, 19; Waters and Water Courses, §§ 89, 98.

I. DESCRIPTION.

§ 20 (Colo.) Rule that deed describing land as bounded by street or highway means the middle thereof *held* not to apply where the title to a street is in the government or municipality, or where the grantor is a corporation holding the street for public purposes.—McDonald v. Kummer, 137 P. 51.

BREACH.

See Sales, § 272; Vendor and Purchaser, §§ 183-170.

BRIDGES.

See Mechanics' Liens, § 72; Trial, § 255; Waters and Water Courses, § 263.

I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 2 (Or.) The word "bridge" has generally been construed to mean the structure spanning a hollow, including the approaches.—Yocom v. City of Sheridan, 137 P. 222.

§ 7 (Or.) The obligation to build and maintain highways, including bridges, rests on the state, which may delegate it to a municipal or

quasi municipal corporation.—*Yocom v. City of Sheridan*, 137 P. 222.

§ 21 (Or.) The legislative assembly may grant the control of city streets, including bridges, to some other agency than the city, so long as the way is not diverted from its use, and no debt incurred by one municipality is imposed on another.—*Yocom v. City of Sheridan*, 137 P. 222.

Under the charter of the town of Sheridan (Laws 1880, p. 146) § 5, and the city charter of Sheridan (Laws 1891, p. 386) § 133, the county is bound to maintain the bridge across the Yamhill.—*Id.*

Whether or not a county road ceases and becomes a street when a city is incorporated, the legislative assembly may impose the burden of maintaining a bridge thereon on the county.—*Id.*

In view of L. O. L. § 937, subd. 4, and 6366, and notwithstanding section 6326, since repealed by Laws 1913, p. 105, a provision of the city charter of Sheridan (Laws 1891, p. 386, § 133, as amended by Laws 1895, p. 247), authorizing the city to collect road taxes, does not relieve the county of the duty of maintaining the bridge across the Yamhill and its approaches.—*Id.*

A provision of the city charter of Sheridan (Laws 1891, p. 373, § 57, as amended by Sp. Laws 1901, p. 209), relating to the city's liability for injuries from defects in bridges, does not relieve the county from maintaining approaches to a bridge which the charter expressly excepts from the control of the common council of the city.—*Id.*

BRIEFS.

See Appeal and Error, §§ 756-773, 1078; Criminal Law, § 1130.

BROKERS.

See Assignments, § 32; Pleadings, § 397; Trial, §§ 260, 350.

II. EMPLOYMENT AND AUTHORITY.

§ 9 (Cal.) A broker's agency, not specifying its duration, may be terminated at will, subject only to the ordinary requirements of good faith.—*Ernst v. Ganahl*, 137 P. 256.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 32 (Kan.) A real estate broker cannot act as agent for both vendor and vendee, where their interests are antagonistic, without the knowledge of each that he is employed by the other.—*Rinebarger v. Weesner*, 137 P. 969.

A contract to convey land, made through the service of an agent employed and paid by the vendor, could not be enforced against him, where without his knowledge or consent, the vendee also paid the agent a commission for his assistance in making the purchase.—*Id.*

§ 38 (Wash.) In an action against a real estate broker to recover the difference between the price fraudulently represented to and paid by plaintiff and the price actually paid by the broker under a secret agreement with the owner, *held*, that evidence as to the customary commission paid brokers purchasing land was admissible.—*Stewart v. Preston*, 137 P. 993.

The statute requiring agreement employing a broker to sell realty for a commission to be in writing does not make the want of a writing a defense to an action by the client to recover the difference between what the broker falsely stated was the seller's lowest price and the amount actually paid by the broker to the seller by arrangement between them.—*Id.*

In an action to recover the difference between the amount paid for land upon a broker's false representation as to the price and the amount actually paid for it by the broker under a secret

agreement with the owner, the broker *held* not entitled to credit for a reasonable commission.—*Id.*

IV. COMPENSATION AND LIEN.

§ 40 (Wash.) Where a real estate broker contracted with a salesman to pay him a percentage of the commissions on sales and exchanges which he effected, he acquired no rights against third persons, who were clients of his employer, and his only relief was to sue the employer.—*Empire Realty Co. v. Hatcliff*, 137 P. 1049.

§ 44 (Ariz.) Where trial court found that, under agreement to pay commissions on a sale of property attacked as usurious, the commission was to be paid only if a sale was made by the broker and that no sale had been made, and it was admitted that the authority to sell had been revoked, the findings entitled the principal to a return of collateral security for the payment of such commission.—*Blaisdell v. Steinfeld*, 137 P. 555.

Where plaintiff had revoked agreement to pay defendant commissions for selling property of corporation controlled by him, unrevoked agreement by the corporation to pay such commission *held* not to entitle defendant to hold collateral deposited by plaintiff as security for commissions on a future sale.—*Id.*

§ 44 (Cal.) A broker having, without any fault of the owner, failed to produce any satisfactory offer from his customer, and the agency having in good faith, and with the acquiescence of the broker, been terminated, the broker is not entitled to commissions, because on new and independent negotiations, through other parties, an exchange was afterwards effected with such customer.—*Ernst v. Ganahl*, 137 P. 256.

§ 48 (Cal.App.) To show performance of a broker's contract to sell real property, he must prove that he procured from a prospective purchaser an enforceable contract on the terms specified or assented to by the owner, or that he brought the parties together to consummate a contract of sale at the price and on the terms proposed, and that the owner declined to proceed.—*Douglas v. Spangenberg*, 137 P. 1103.

§ 48 (Or.) In determining whether a real estate agent is entitled to a commission, there is no difference between a sale and an exchange.—*Cook v. Gordon*, 137 P. 782.

§ 49 (Cal.) A real estate broker is not ordinarily entitled to commission unless, pursuant to his employment and within the time fixed therein, he has found a purchaser ready and willing to purchase on the terms specified.—*Jauman v. McCusick*, 137 P. 254.

§ 51 (N.M.) A broker has fully performed his undertaking, so as to entitle him to a commission, when he procures a customer with whom the principal makes a valid contract of sale or exchange.—*Keinath, Schuster & Hudson v. Reed*, 137 P. 841.

§ 54 (Cal. App.) Estate broker employed to effect an exchange of property is not entitled to his commission when he has produced a person who was not able to comply with the principal's offer within the time limited for performance.—*Dyar v. Stone*, 137 P. 269.

§ 54 (Kan.) When a real estate agent produces a purchaser able, ready, and willing to take the land at the agreed price, he is entitled to his commission.—*Avery v. Howell*, 137 P. 785.

§ 54 (N.M.) Where a broker's principal and a customer have entered into a valid written contract to exchange property, the broker is entitled to his commission, regardless of whether the customer is able to convey a perfect title.—*Keinath, Schuster & Hudson v. Reed*, 137 P. 841.

Where the principal enters into a contract of exchange with the customer produced by the broker, he thereby accepts the customer as able, ready, and willing to make the exchange.—*Id.*

§ 57 (Cal.App.) A broker's contract for the sale of real estate is not performed so as to earn his commission until he has procured a purchaser ready, willing, and able to buy the property offered for sale on the terms and conditions and at the price fixed by the owner.—*Douglas v. Spangenberg*, 137 P. 1103.

§ 60 (Cal.) Under a contract providing that brokers should be paid a commission for securing an agreement for the exchange of property, they were entitled to their commission when the particular agreement was procured by them and entered into, although it was subsequently abandoned without the broker's fault.—*Jauman v. McCusick*, 137 P. 254.

§ 63 (Colo.) Broker *held* to have earned commission where he procured purchasers ready, able, and willing to pay cash, to whom owner agreed to sell property, though the owner declined to carry out the agreement.—*Perkins v. Russell*, 137 P. 907.

§ 67 (Cal.) An agreement to pay a commission to a firm of real estate brokers was not invalid because they were also to be paid a commission by the other parties to the transaction, where such fact and the dual capacity in which the brokers were acting appeared on the face of the agreement.—*Jauman v. McCusick*, 137 P. 254.

§ 69 (Or.) The commission on an exchange of real property should be based on the actual and not the trade value of the property.—*Cook v. Gordon*, 137 P. 782.

V. ACTIONS FOR COMPENSATION.

§ 82 (N.M.) An answer alleging that the principal had not accepted the customer's property, that the written contracts of exchange were not valid, that the broker had not done all he was required to do to earn his commissions, and that the customer had failed to perform his part, *held* to tender issues of law and not of fact.—*Keinath, Schuster & Hudson v. Reed*, 137 P. 841.

In a broker's action for commission on an exchange of properties, where the complaint alleges a valid contract of exchange, it need not further state that the customer was able, ready, and willing to complete the exchange, or that he made any effort to that end, or that the principal refused to complete it.—*Id.*

§ 84 (Cal.App.) When no exchange was effected, the burden of proof is upon the broker to show that he produced a person ready, able, and willing to effect the exchange upon the terms proposed.—*Dyar v. Stone*, 137 P. 269.

§ 84 (Or.) Where the answer denied a sale for \$150 an acre, the burden was on plaintiff real estate agents to show a sale for more than \$125 an acre, the surplus of which was to be paid them as commission.—*Cook v. Gordon*, 137 P. 782.

§ 85 (Cal.App.) In an action for broker's commissions in negotiating a lease, evidence of a scale of charges fixed by the brokers' board of San Francisco, where the services were performed, was admissible to show what was a reasonable rate.—*W. B. McGerry & Co. v. Marsicano*, 137 P. 40.

§ 86 (Cal.App.) In an action for broker's commissions, evidence *held* insufficient to show that the broker procured a purchaser ready and willing to buy on the terms prescribed by defendant.—*Douglas v. Spangenberg*, 137 P. 1103.

§ 86 (Colo.) In a broker's action for commissions on a sale of sheep and other property, evidence *held* to show that prospective purchasers procured by the broker made an offer which the owner accepted, and that the failure to complete the sale was due to the owner's fault.—*Perkins v. Russell*, 137 P. 907.

§ 88 (Ariz.) In action involving whether consideration of agreement by plaintiff to pay de-

fendant commission on sale of real estate and property of a corporation was a loan of money and an extension of payment for services performed by the defendant, a finding that the corporation had appointed defendant its agent *held* outside the issues and not to support a judgment authorizing the defendant to hold collateral as security for commissions on a future sale.—*Blaisdell v. Steinfeld*, 137 P. 555.

BURDEN OF PROOF.

See Evidence, § 94.

BURGLARY.

See Criminal Law, §§ 404, 556, 1171; Indictment and Information, § 110.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3 (Cal.App.) One who broke and entered a boathouse not with the intention of committing larceny, but to procure a place of refuge for a female companion, is not guilty of burglary.—*People v. Ostrander*, 137 P. 619.

II. PROSECUTION AND PUNISHMENT.

§ 28 (Ariz.) Where the information charged only burglarious entry, an instruction that to support a conviction the state must establish that accused broke into the building, or aided or abetted others in doing so, was properly refused.—*Rain v. State*, 137 P. 550.

§ 38 (Ariz.) Evidence of accused's possession of goods stolen is admissible to connect him with the offense, provided the goods are under his control, but the mere fact that he resided with his family in a house near the place where the stolen goods were stored is inadmissible, unless he had some dominion over the place.—*Rain v. State*, 137 P. 550.

§ 41 (Cal.App.) Evidence *held* to sustain a conviction of burglary.—*People v. Wing*, 137 P. 47, 48.

§ 41 (Nev.) Evidence *held* sufficient to support a verdict of guilty.—*State v. Patchen*, 137 P. 406.

On trial for breaking and entering with intent to steal, evidence *held* to show that owners did not consent to the larceny, although one of them testifying did not directly negative consent.—*Id.*

§ 46 (Nev.) Under Rev. Laws, §§ 6634, 6635, instruction that it was not necessary to prove an actual larceny, and that the gist of the crime was the entering with intent to steal, "regardless of the fact whether or not there was an actual stealing of the said goods," modified by striking out the quoted words, *held* not erroneous.—*State v. Patchen*, 137 P. 406.

BY-LAWS.

See Corporations, § 54; Insurance, § 778.

CALENDARS.

See Time.

CANCELLATION OF INSTRUMENTS.

See Bills and Notes, § 103; Jury, § 14; Mines and Minerals, § 40; Public Lands, § 121; Quietting Title; Reformation of Instruments; Usury, § 93.

II. PROCEEDINGS AND RELIEF.

§ 34 (Wash.) Where a grantee fraudulently obtained a deed to settle a disputed boundary, and the grantor did not learn of the fraud until the trial of a suit between the grantee and a third person, involving the boundary, the right of the grantor could not be defeated by laches

based on his failure to assert his claim before the grantee established the grantor's title in the litigation.—*Ohlberg v. Boyd*, 137 P. 487.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

See Constitutional Law, §§ 297, 298; Eminent Domain, § 2; Evidence, § 471; Trial, § 296.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§ 10 (Wash.) Public Service Commission Act (Laws 1911, c. 117, § 83), relating to orders requiring joint action by two or more public service companies, does not authorize the Public Service Commission to establish joint rates on railroads, but such authority is conferred by section 57.—*State v. Public Service Commission of Washington*, 137 P. 132.

Public Service Act (Laws 1911, c. 117, § 57), empowering the Public Service Commission to order railroads to establish through routes and to establish a joint rate, authorizing the commission to order an interchange of cars between connecting carriers, *held* constitutional.—*Id.*

§ 12 (Cal.) Const. art. 12, § 23, and Public Utilities Act, § 2, subd. 1, *held* to confer on the Railroad Commission power to fix rates to be charged by a steamship company carrying passengers and freight between two points in Los Angeles county, though the vessels passing from one port to the other necessarily traveled over the high seas outside the territorial jurisdiction of the state.—*Wilmington Transp. Co. v. Railroad Commission of California*, 137 P. 1153.

§ 18 (Wash.) An order of the Public Service Commission directing railroads to put in force joint rates and to agree thereon within a specified time, or the commission will establish the rates and fix the division, is a final order within Public Service Commission Act (Laws 1911, c. 117, § 86), construed as authorizing the review of final orders only.—*State v. Public Service Commission of Washington*, 137 P. 132.

The findings of the Public Service Commission (Laws 1911, c. 117), so far as they established rates for railroads, will not be disturbed unless they are made arbitrarily and in disregard of the material rights of the parties.—*Id.*

II. CARRIAGE OF GOODS.

(B) Bills of Lading, Shipping Receipts, and Special Contracts.

§ 47 (Wash.) The agent of a carrier may make a special contract for carriage of freight by special train, where it is doubtful whether the regular train will arrive in time.—*Auditorium Theatre Co. v. Oregon-Washington R. & Navigation Co.*, 137 P. 489.

§ 53 (Wash.) A contract of carriage made before the freight was loaded may be modified by the parties as evidenced by a bill of lading issued thereafter; but the bill of lading, to have that effect, must have been assented to by the shipper as the contract of carriage.—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 137 P. 337.

(E) Delay in Transportation or Delivery.

§ 106 (Wash.) Whether a carrier contracted to move freight by its scheduled trains on schedule time *held* for the jury.—*Auditorium Theatre Co. v. Oregon-Washington R. & Navigation Co.*, 137 P. 489.

(F) Loss of or Injury to Goods.

§ 120 (Wash.) A shipper cannot recover where the loss was occasioned because of inherent

qualities or defects in the freight.—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 137 P. 337.

§ 121 (Wash.) A shipper cannot recover where the loss was occasioned by shipping in improper packages.—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 137 P. 337.

A shipper *held* entitled to recover for loss of freight where he established the loss, unless the carrier was excused because the freight was not shipped in proper containers, which caused the loss.—*Id.*

§ 137 (Wash.) In an action for loss of freight an instruction as to the effect of the bill of lading *held* erroneous.—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 137 P. 337.

(H) Limitation of Liability.

§ 151 (Wash.) Where a shipper of freight under a limited liability contract, made, while the freight was in the possession of a carrier, a contract for the transportation of the freight from one destination to another, the new contract did not affect the limited liability provided for in the original contract.—*Davis v. Northern Pac. Ry. Co.*, 137 P. 464.

§ 154 (Wash.) A shipper who is bound by a limited liability clause in a contract of shipment, is chargeable with notice that the limited liability clause was executed in consideration of the lower rate.—*Davis v. Northern Pac. Ry. Co.*, 137 P. 464.

§ 155 (Wash.) A shipper who signs a contract limiting the carrier's liability, after seeing that the goods were properly described therein, but without reading the entire contract, is bound thereby, in the absence of fraud.—*Davis v. Northern Pac. Ry. Co.*, 137 P. 464.

IV. CARRIAGE OF PASSENGERS.

(D) Personal Injuries.

§ 280 (Wash.) It is a carrier's duty to exercise the highest degree of care demanded by the circumstances in protecting a passenger from assault by a fellow passenger.—*Kelly v. Navy Yard Route*, 137 P. 444.

§ 298 (Kan.) Merely that a passenger is upset by the motion of an electric car in starting does not establish negligence in those operating it.—*Ewing v. Wichita R. & Light Co.*, 137 P. 940.

§ 305 (Okl.) Before a passenger can recover for injuries, it must be shown that the carrier's negligence was the proximate cause of the injury.—*St. Louis & S. F. R. Co. v. Criner*, 137 P. 706.

§ 316 (Kan.) Proof of an injury received by an alighting passenger from the sudden, violent starting of a street car raises a presumption of negligence against the railway company.—*Ewing v. Wichita R. & Light Co.*, 137 P. 940.

§ 318 (Okl.) Where a female passenger miscarries two or three days after arrival at her destination, and where, during the journey, the carrier may have been guilty of negligence, but there is no evidence that the miscarriage was caused by such negligence, a verdict partly based on such sickness cannot be sustained.—*St. Louis & S. F. R. Co. v. Criner*, 137 P. 706.

§ 319 (Wash.) A recovery of \$1,000 for an assault by a fellow passenger, resulting in severe temporary injuries, humiliation, and loss of time, *held* not excessive.—*Kelly v. Navy Yard Route*, 137 P. 444.

§ 320 (Wash.) In a passenger's action for injuries from a second assault by a fellow passenger, *held*, that the question whether defendant exercised the diligence demanded by the circumstances, and had a reasonable ground to anticipate a recurrence of the assault, was for the jury.—*Kelly v. Navy Yard Route*, 137 P. 444.

(E) Contributory Negligence of Person Injured.

§ 347 (Kan.) It is not negligence per se for a passenger to alight from a moving street car.—*Ewing v. Wichita R. & Light Co.*, 137 P. 940.

CASE-MADE.

See Appeal and Error, §§ 544, 564, 696.

CERTIFICATE.

See Appeal and Error, § 613; Forgery, § 15; Taxation, § 742.

CERTIFICATE OF DEPOSIT.

See Banks and Banking, § 152.

CERTIORARI.

I. NATURE AND GROUNDS.

§ 5 (Idaho) A writ of review affords a proper remedy to question the right of the district court to appoint a receiver or trustee to defend in foreclosure against a corporation which has forfeited its right to do business in the state, where it is more speedy than an appeal. (Per Stewart, J.)—*Rowe v. Stevens*, 137 P. 159.

§ 33 (Idaho) Nonresident directors of a foreign corporation which had forfeited its right to do business in the state held not to have such beneficial interest as entitled them, by petition for writ of review, to question the court's right to appoint a trustee or receiver to defend in a foreclosure proceeding against the corporation. (Per Stewart, J.)—*Rowe v. Stevens*, 137 P. 159.

II. PROCEEDINGS AND DETERMINATION.

§ 70 (Wash.) An appeal from an order of a superior court affirming orders of the Public Service Commission, rendered on a writ of review to the superior court of the county, will not be dismissed on the motion of the commission on the ground that the superior court of another county had the exclusive jurisdiction to review the orders, but the question of jurisdiction will be reviewed on the appeal.—*State v. Public Service Commission*, 137 P. 802.

CHALLENGE.

See Jury, §§ 135, 136.

CHAMPERTY AND MAINTENANCE.

§ 7 (Okl.) A conveyance of land held adversely, when made in contravention of Comp. Laws 1909, §§ 2214, 2215, is void as against the persons holding adversely, whether by themselves or tenants, and claiming ownership under color of title.—*Vaughan v. Holder*, 137 P. 672.

A deed from a person out of possession for more than a year, who has not within that time taken the rents and profits, is void as against persons in adverse possession.—Id.

CHARGE.

See Criminal Law, §§ 732-834.
To Jury, see Trial, §§ 191-296.

CHARITIES.

II. CONSTRUCTION, ADMINISTRATION, AND ENFORCEMENT.

§ 31 (Cal.) Courts look with favor upon testamentary charitable gifts.—In re Goodfellow's Estate, 137 P. 12.

CHARTER.

See Municipal Corporations, §§ 46, 48.

CHattel MORTGAGES.

See Usury, § 56.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 26 (Okl.) A provision of a chattel mortgage that no second mortgage shall be given without written consent, which is neither asked nor given, does not invalidate a second mortgage given in violation thereof.—*Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349.

III. CONSTRUCTION AND OPERATION.

(D) Lien and Priority.

§ 154 (Wash.) Under Rem. & Bal. Code, § 3662, declaring that filed mortgages shall not be notice to purchasers in good faith after maturity unless an affidavit of the amount due be filed, a purchaser or mortgagee for value is one in good faith.—*Best v. Felger*, 137 P. 334.

Under Rem. & Bal. Code, § 3662, a subsequent mortgagee who took within the two-year period will, at the expiration of that time without the filing of any such affidavit, have priority.—Id.

§ 156 (Kan.) Under Gen. St. 1909, § 5224, requiring that a chattel mortgage be filed unless there is an actual change of possession of the property, the change of possession sufficient to excuse failure to file must be such as to be open to observation.—*Moffat v. Beeler*, 137 P. 963.

That mortgaged chattels were already in the hands of the holder of a prior mortgage, who agreed to hold possession also for the benefit of the second mortgagee, held not to dispense with the necessity of filing the second mortgage to render it effective against creditors.—Id.

V. RIGHTS AND REMEDIES OF CREDITORS.

§ 196 (Wash.) While an unrecorded mortgage, under Rem. & Bal. Code, § 3660, is void as to creditors between the date of its execution and the time of recording, upon being recorded it becomes effective as though executed on that date, and creates a lien superior to the claims of creditors having no specific liens.—*Pacific Coast Biscuit Co. v. Oswald*, 137 P. 483.

VI. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 211 (Okl.) In replevin by the assignee of a nonnegotiable note and a chattel mortgage against the mortgagor to recover possession preliminary to foreclosure, defendant may prove failure of consideration and damages caused by the original payee to defeat the assignee's right of possession, but not to authorize recovery of damages from him.—*First State Bank of Mannsville v. Howell*, 137 P. 657; *Same v. Lawson*, Id. 661.

VIII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

§ 247 (Okl.) On voluntary payment of a chattel mortgage, a second mortgage on the same property becomes a first lien thereon.—*Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349.

CHECKS.

See Assignments, §§ 49, 50.

CHILDREN.

See Divorce, §§ 308, 323; Habeas Corpus, §§ 85, 99; Homestead, § 150; Parent and Child.

CITATION.

See Process.

CITIES.

See Municipal Corporations.

CLAIM AND DELIVERY.

See Replevin.

CLAIMS.

See Assignments for Benefit of Creditors, § 300; Mines and Minerals, §§ 18-27.

CLERKS OF COURTS.

See Appeal and Error, § 399.

§ 37 (Okl.) Instructions, in a district clerk's action for the cost of a transcript of the record made for a petitioner seeking to remove a cause to the federal court, that, if plaintiff made a transcript as ordered by defendant, who promised to pay for it, he could recover, but, if he made a different transcript, he could not recover, were sufficient.—*Lawson v. Guthrie*, 137 P. 1186.

Under the evidence, *held*, that the question whether defendant's conduct made him personally responsible for such fees was for the jury.—*Id.*

CLOUD ON TITLE.

See Quieting Title.

COLLATERAL ATTACK.

See Judgment, §§ 470-505; Taxation, § 490.

COLLATERAL INHERITANCE TAXES.

See Taxation, §§ 859, 895.

COLLECTION.

See Taxation, §§ 587-610.

COLLUSION.

See Pleading, § 8.

COMBINATIONS.

See Monopolies, § 21.

COMMERCE.

See Licenses, § 15.

II. SUBJECTS OF REGULATION.

§ 33 (Cal.) Transportation between two points in Los Angeles county over a route passing outside the territorial limits of the state and over the high seas *held* not commerce with foreign nations, within federal Const. art. 1, § 8, so as to prevent the regulation of such transportation by the State Railroad Commission.—*Wilmington Transp. Co. v. Railroad Commission of California*, 137 P. 1153.

§ 46 (Okl.) A foreign corporation engaged in interstate commerce may sue on a contract of employment entered into with a citizen of Oklahoma, though it has not filed a copy of its articles of incorporation, or appointed a service agent in the state pursuant to Rev. Laws 1910, §§ 1338, 1341.—*Kibby v. Cubie, Heimann & Co.*, 137 P. 352.

§ 47 (Cal.) Transportation between two ports in Los Angeles county over a route passing over the high seas and outside the territorial jurisdiction of the state *held* not "commerce with foreign nations," within federal Const. art. 1, § 8, so as to prevent regulation of such transportation by the State Railroad Commission.—*Wilmington Transp. Co. v. Railroad Commission of California*, 137 P. 1153.

III. MEANS AND METHODS OF REGULATION.

§ 58 (Wash.) Where a spur track ordered by the Public Service Commission on application

of a shipper was found to be reasonable, practicable, etc., and no such interference with the operation of the road was shown as to appreciably affect its interstate business, the order did not conflict with U. S. Const. art. 1, § 8, granting exclusive control of interstate commerce to Congress.—*State v. Public Service Commission*, 137 P. 1057.

COMMERCIAL PAPER.

See Bills and Notes.

COMMISSION.

See Carriers, §§ 10, 12, 18; Certiorari, § 70; Commerce, §§ 33, 47, 58; Constitutional Law, § 297; Corporations, § 394.

COMMISSION AND COMMISSIONERS.

See Officers, §§ 28-55; Railroads, § 9; Records, § 5; Schools and School Districts, §§ 37, 39; Taxation, § 446½; Telegraphs and Telephones, § 28; Waters and Water Courses, § 257.

COMMISSIONERS.

See Constitutional Law, § 50; Drains, § 91; Injunction, § 223; Judges, § 3.

COMMISSIONS.

See Brokers, §§ 40-69, 82-88; Receivers, § 196.

COMMITMENT.

See False Imprisonment, § 12.

COMMON LAW.

See Attorney General, § 1; Easements, § 18; Sodomy, § 1.

COMMON SCHOOLS.

See Schools and School Districts.

COMMUNITY PROPERTY.

See Husband and Wife, §§ 255-276.

COMPENSATION.

See Attorney and Client, §§ 140, 167; Brokers, §§ 40-69, 82-88; Contracts, §§ 229, 231; Eminent Domain, §§ 101-145; Justices of the Peace, § 15; Municipal Corporations, § 162; Officers, § 99; Physicians and Surgeons, § 24; Receivers, § 196; Witnesses, §§ 26, 29.

COMPLAINT.

See Pleading.

COMPOSITIONS WITH CREDITORS.

See Compromise and Settlement.

COMPROMISE AND SETTLEMENT.

See Payment.

§ 5 (Cal.App.) Civ. Code, § 1524, *held* only to apply to agreements of release and satisfaction made where the obligation is neither doubtful nor disputed, and does not render invalid a parol agreement of accord and satisfaction.—*B. & W. Engineering Co. v. Beam*, 137 P. 624.

§ 6 (Cal.App.) While an accord and satisfaction must be based on a bona fide dispute, it is not required that the circumstances of the transactions should affirmatively show that there was foundation for an honest dispute, the test being whether the dispute in fact was honest or fraudulent, and, if honest, it affords a proper basis for an accord.—*B. & W. Engineering Co. v. Beam*, 137 P. 624.

Where an agreement to accept in full payment of a sum less than the amount in dispute

has been shown to have been fully executed by payment and acceptance of the lesser sum, the original obligation is thereby extinguished.—Id.

§ 15 (Kan.) "Settlement" of a debt is the same as "payment."—Roniger v. McIntosh, 137 P. 792.

§ 16 (Cal.App.) An "accord and satisfaction" means the substitution of a new agreement for and in satisfaction of a pre-existing agreement between the same parties, and its effect is to extinguish the antecedent liability, as provided by Civ. Code, §§ 1521, 1523.—B. & W. Engineering Co. v. Beam, 137 P. 624.

§ 20 (Cal.App.) An accord without satisfaction will not operate to bar an action on a disputed debt.—B. & W. Engineering Co. v. Beam, 137 P. 624.

§ 22 (Cal.App.) An amended answer, alleging that on a specified date defendant B. disputed the amount of the claim of plaintiff's assignor, offered to pay a certain less sum in full settlement thereof, that such amount was accepted in full settlement, and the money used in the business of plaintiff's assignor, held a good plea of accord and satisfaction.—B. & W. Engineering Co. v. Beam, 137 P. 624.

§ 22 (Kan.) Where a settlement of a debt is relied on as a defense it must be pleaded; proof thereof not being admissible under a general denial.—Roniger v. McIntosh, 137 P. 792.

§ 23 (Cal.App.) In an action to recover a balance alleged to be due under a contract, evidence held to sustain a finding that a payment of \$1,070 had been received in full settlement.—B. & W. Engineering Co. v. Beam, 137 P. 624.

§ 24 (Cal.App.) On an issue of accord and satisfaction, whether there was a bona fide dispute which could be the basis of an accord is primarily a question of fact to be determined by the trial court from all the circumstances.—B. & W. Engineering Co. v. Beam, 137 P. 624.

COMPUTATION.

See Time.

CONCLUSIVENESS.

See Judgment, §§ 678-744.

CONDEMNATION.

See Eminent Domain.

CONDITIONAL SALES.

See Sales, §§ 472, 473.

CONDITIONS.

See Contracts, § 220.

CONDITIONS PRECEDENT.

See Eminent Domain, § 186.

CONFIRMATION.

See Taxation, §§ 800-810.

CONFLICT OF LAWS.

See Usury, § 2.

CONSIDERATION.

See Bills and Notes, §§ 92, 96; Contracts, §§ 50-72.

CONSPIRACY.

See Action, § 4; Criminal Law, § 423; Monopolies, § 21.

CONSTITUTIONAL LAW.

See Commerce, § 58; Monopolies, § 4; Municipal Corporations, §§ 46, 48, 339; Navigable

Waters, § 30; Negligence, § 130; Officers, §§ 28, 30; Pleading, § 406; Railroads, § 9; Removal of Causes, § 89; Schools and School Districts, § 18; Statutes, § 70; Taxation, §§ 24, 25, 37, 233, 276, 317, 319, 446½, 859; Telegraphs and Telephones, § 28; Waters and Water Courses, § 257; Weights and Measures, §§ 2, 8.

I. ESTABLISHMENT AND AMENDMENT OF CONSTITUTIONS.

§ 9 (Wash.) The constitutional amendment of 1912, relating to recall of officers, is not invalid because of irregularities in its proposal and submission.—Tabor v. City of Walla Walla, 137 P. 1040.

II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 13 (Mont.) The intention of the framers of the Constitution as disclosed by the language employed in the particular provision, when considered with the context and the legislative history of the subject, should be considered.—Northern Pac. Ry. Co. v. Mjelde, 137 P. 386.

§ 16 (Mont.) The Constitution is to be construed in the light of history, the surrounding circumstances, the subject-matter, the object sought to be attained, and the rule that Constitutions assume the existence of a system of law which is still to remain in force, especially in view of Const. Schedule, § 1.—State v. Sullivan, 137 P. 392.

§ 20 (Mont.) The construction of a word in the Constitution which has been accepted and acted on by the Legislature for 24 years in enacting statutes should have considerable weight in determining the meaning of such term.—Northern Pac. Ry. Co. v. Mjelde, 137 P. 386.

§ 26 (Mont.) A state Constitution is a limitation upon legislative action, and not a grant of power.—Northern Pac. Ry. Co. v. Mjelde, 137 P. 386; State v. Sullivan, Id. 392; Same v. Superior Court of Cowlitz County, Id. 994.

§ 27 (Wash.) The federal Constitution is a grant of power.—State v. Superior Court of Cowlitz County, 137 P. 994.

§ 29 (Ariz.) Const. art. 14, § 16, making certain corporations subject to the visitatorial and inquisitorial powers of the state, held not self-executing as such powers are not conferred on any particular person or body.—State v. Jones, 137 P. 544.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

(A) Legislative Powers and Delegation Thereof.

§ 50 (Or.) The functions of the corporation commissioner and his assistants pertain to the administrative department of the government, in which a member of the Legislature is forbidden to participate by Const. art. 3, § 1.—Gibson v. Kay, 137 P. 864.

§ 56 (Mont.) Rev. Codes, §§ 2894, 3010, 3026, and 6302, construed to forbid the district court from appointing an attendant where the sheriff was ready to perform the duties of bailiff, do not invade the inherent powers of the court, as they merely declare the law which existed when the Constitution was adopted.—State v. Sullivan, 137 P. 392.

(B) Judicial Powers and Functions.

§ 70 (Colo.) The wisdom of constitutional provisions is not a question for the courts.—People v. Perkins, 137 P. 55.

§ 70 (Utah) In view of Const. art. 5, § 1, the Supreme Court cannot declare any conduct a crime, no matter how morally reprehensible it may be, where it is not so declared by the Legislature.—State v. Johnson, 137 P. 632.

§ 70 (Wash.) The Supreme Court has no jurisdiction to declare a matter of state public policy.—Malette v. City of Spokane, 137 P. 496.

VI. VESTED RIGHTS.

§ 92 (Cal.) A mortgage must be read in the light of the statutes in existence at the time of its execution; and, in the absence of anything to indicate that the parties did not intend that the statutes should govern, they do not deprive the parties of any vested right.—Faxen v. All Persons, etc., 137 P. 919.

IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 205 (Or.) Laws 1913, p. 90, declaring eight hours shall be a day's labor in work for the state, county, etc., does not violate Const. art. 1, § 20.—Ex parte Steiner, 137 P. 204.

§ 206 (Or.) Laws 1913, p. 90, declaring eight hours shall be a day's labor in work for the state, county, etc., does not violate Const. U. S. amend. 14, relating to privileges and immunities of citizens of United States.—Ex parte Steiner, 137 P. 204.

X. EQUAL PROTECTION OF LAWS.

§ 229 (Kan.) The Inheritance Tax Law held not violative of the clause of the Bill of Rights declaring that free governments are instituted for the equal protection and benefit of the people.—State v. Cline, 137 P. 932.

§ 238 (Or.) Laws 1913, p. 90, declaring eight hours shall constitute a day's labor in cases of labor employed by the state or its auxiliaries, is not violative of Const. U. S. amend. 14.—Ex parte Steiner, 137 P. 204.

XI. DUE PROCESS OF LAW.

§ 275 (Or.) Laws 1913, p. 90, declaring eight hours shall constitute a day's labor in cases of labor employed by the state or its auxiliaries, is not violative of Const. U. S. amend. 14.—Ex parte Steiner, 137 P. 204.

§ 280 (Wash.) The taking of private property for private use for the promotion of the general welfare, on due notice and hearing, and on payment of compensation, is not incompatible with due process of law guaranteed by Const. U. S. Amend. 14.—State v. Superior Court of Cowlitz County, 137 P. 994.

§ 297 (Wash.) Public Service Act (Laws 1911, c. 117, § 57), empowering the Public Service Commission to order railroads to establish through routes and to establish a joint rate, authorizing the commission to order an interchange of cars between connecting carriers, held not to provide for taking of property without due process of law.—State v. Public Service Commission of Washington, 137 P. 132.

§ 297 (Wash.) Laws 1911, c. 117, §§ 13, 62, requiring railroads to construct side tracks and switch connections on their rights of way, order of the Commission after notice and hearing to make such connection at the expense of the shipper, if practicable, safe, etc., to be open to use by others upon reasonable terms, held not a taking of private property without due process of law, in violation of fourteenth amendment, § 1, or Wash. Const. art. 1, § 3.—State v. Public Service Commission, 137 P. 1057.

§ 298 (Wash.) The regulation of railroad rates by the state is not a taking of property without due process of law.—State v. Public Service Commission of Washington, 137 P. 132.

§ 310 (Wash.) Where plaintiff, on defendant's breach of a contract to accept a lease, erroneously sued for rent accrued, but was held only entitled to recover damages, an amendment of the complaint so as to recover such damages was not objectionable as depriving defendant of its property without due process of law.—Oldfield v. Angeles Brewing & Malting Co., 137 P. 469.

§ 311 (Okla.) Act approved March 7, 1913 (Sess. Laws 1913, c. 24), being an attempt to make conclusive between parties to a sale of cotton the finding as to the weight of the cotton by the weigher, is unconstitutional as denying the buyer or seller, when sued by the other, due process of law.—Taylor v. Anderson, 137 P. 1183.

CONSTRUCTION.

See Bills and Notes, §§ 129, 132; Chattel Mortgages, §§ 154, 156; Constitutional Law, §§ 13-29; Contracts, §§ 170-231; Deeds, §§ 112, 141; Guaranty, §§ 27-46; Insurance, §§ 146, 151; Landlord and Tenant, § 49.

CONTEST.

See Elections, § 269.

CONTINUANCE.

§ 29 (Okla.) Denial of a continuance on the ground of surprise from a statement by plaintiff's counsel in examining jurors, which statement was claimed to disclose ground for removal to federal court, held not error where plaintiff's attorney expressly denied existence of any such ground, and the undisputed evidence showed that no such ground existed.—St. Louis & S. F. R. Co. v. Long, 137 P. 1156.

CONTRACTS.

See Accord and Satisfaction; Action, § 62; Alteration of Instruments; Appeal and Error, § 173; Assignments; Bills and Notes; Carriers, §§ 47, 53, 151-155; Champerty and Maintenance; Commerce, § 46; Compromise and Settlement; Corporations, §§ 455, 642; Customs and Usages, §§ 12, 15, 16; Damages, §§ 40, 78; Deeds; Election of Remedies, § 8; Evidence, § 180; Frauds, Statute of; Guaranty; Indemnity; Injunction, § 59; Insurance; Limitation of Actions, § 127; Lost Instruments; Mechanics' Liens; Money Lent; Monopolies, § 21; Mortgages; Municipal Corporations, §§ 35, 162, 248, 283, 330, 339, 568, 751, 800, 1028; Partnership; Payment; Pleading, §§ 8, 237, 248, 397; Principal and Agent; Principal and Surety; Reformation of Instruments; Sales; Specific Performance; Trial, § 391; Use and Occupation; Usury, §§ 2-117; Vendor and Purchaser; Wills, § 64; Witnesses, §§ 257, 272.

I. REQUISITES AND VALIDITY.

(D) Consideration.

§ 50 (Cal.) Under Civ. Code, § 1605, it is not necessary to the validity of an executory contract that there be both a benefit to the promisor and a detriment to the promisee.—Parsons v. Cashman, 137 P. 1111.

§ 53 (N.M.) Mere inadequacy of consideration is not sufficient to avoid a contract.—Fraser v. State Savings Bank, 137 P. 592.

§ 65 (Kan.) A vendor's oral promise to find a purchaser at an advanced price, made at the time of execution of the original contract and as part of its inducement, constituted a sufficient consideration for a subsequent written contract embodying the oral promise.—Hurless v. Wiley, 137 P. 981.

§ 71 (Wash.) Forbearance of a legal right which one may legally exercise at the instance of a promisor is a valuable consideration, and in general the waiver of any legal or equitable right at the request of another is a sufficient consideration for promise.—Nicholson v. Neary, 137 P. 492.

§ 72 (Wash.) "Consideration" means not so much that one party is profiting, as that the other abandons some legal right in the present, the term "legal right" in such case meaning a right that may be enforced in a civil action.—Nicholson v. Neary, 137 P. 492.

Forbearance to sue upon a claim, not en-

forceable in law or in equity for want of a consideration, does not constitute a valid consideration for a new promise.—Id.

(E) Validity of Assent.

§ 93 (Idaho) Where a party to a contract, written in a language which he could not understand, signs same without having it read, he cannot, in absence of fraud, avoid it on the ground that he was ignorant of its contents.—Constantine v. McDonald, 137 P. 531.

(F) Legality of Object and of Consideration.

§ 116 (Wash.) A manufacturer may employ any means to secure legitimate benefits of the reputation of his goods, not inhibited by statute or inimical to sound public policy.—Fisher Flouring Mills Co. v. Swanson, 137 P. 144.

Contracts in "restraint of trade" are those importing agreements not to pursue a particular profession, trade, or business, while contracts in "restraint of competition" are all those relating to the control of markets, and are void as against public policy.—Id.

Where a manufacturer has a monopoly of a manufactured article, a contract fixing a minimum retail price for the product is void as in restraint of competition.—Id.

A contract fixing the price for a commodity, not ancillary to some main lawful contract, but tending only to restrain competition and enhance prices, is invalid.—Id.

Whether a contract between a manufacturer and seller fixing the price of resale is invalid depends on whether the restriction results, or tends to result, in a substantial control of the supply or price of a given commodity within a given area by a single dealer or a few dealers, and tends to create a monopoly.—Id.

A contract between manufacturer and seller of a commodity fixing the price for resale will be sustained when the restriction is reasonable in reference to the interests of the parties and public, and does not involve a controlling part of a given commodity in the market, and does not proceed from or tend to create or maintain a monopoly.—Id.

A provision of a contract for the sale of a special brand of patent flour manufactured by complainant held not invalid in so far as it contained a provision fixing the price at which retailers should sell the same to the public, which was not unreasonable as tending to restrict competition.—Id.

§ 137 (Okl.) A lawful contract will be enforced, though it be incidentally connected with an illegal contract, where it is supported by an independent consideration and can be proved without the aid of the illegal contract.—Walters Nat. Bank v. Bantock, 137 P. 717.

§ 138 (Kan.) Plaintiff was properly denied any relief where it appeared that his cause of action was based upon an unlawful contract in restraint of trade.—Patterson v. Imperial Window Glass Co., 137 P. 955.

II. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 170 (N.M.) Where parties to a contract construe it as having created a partnership relation, and act upon such construction, and rights accrue, the courts will not construe it to be a brokerage agreement.—Fraser v. State Savings Bank, 137 P. 592.

§ 175 (N.M.) In an action on a written contract, the terms of which are admitted, the intention of the parties as to its effect is to be determined by an inspection of the contract, unaided by evidence aliunde.—Keinath, Schuster & Hudson v. Reed, 137 P. 841.

§ 175 (Wash.) A contract by a railroad to grade and improve a certain street over which the county then had jurisdiction, will be pre-

sumed to have been made with reference to the facts and the law as they existed at that time.—Ettor v. City of Tacoma, 137 P. 820.

§ 176 (N.M.) An allegation in the answer of what the parties intended the contract should effectuate raised a question of law to be decided by the court.—Keinath, Schuster & Hudson v. Reed, 137 P. 841.

§ 176 (Wash.) Evidence held to make question for jury as to whether contract sued on, to do concrete work, was for 1,800 cubic yards or all the concrete work on 10 miles of railroad.—Culver v. Culliton, 137 P. 1000.

(B) Parties.

§ 179 (Cal.App.) Defendant, in executing a contract agreeing to repay to a buyer of the stock of a company the money invested in case he should become dissatisfied, held to have acted as an individual, and not in his representative capacity as president of the company.—Union Collection Co. v. Oliver, 137 P. 1082.

(C) Subject-Matter.

§ 196 (Cal.) An architect by every contract implies his possession of skill and ability, and agrees to exercise them reasonably and without neglect.—Benenato v. McDougall, 137 P. 8.

(D) Place and Time.

§ 213 (Cal.App.) Where defendant had agreed to construct a water plant and deliver water to certain farmers, its abandonment of such plan would not postpone the maturity under a writing by which it agreed to pay another \$1,000 within three days after water was turned on the first 25 acres subscribed by such farmers.—Taylor v. Simi Const. Co., 137 P. 1095.

(E) Conditions.

§ 220 (Cal.App.) Under a contract entitling an electric light company to use refuse from a box factory as fuel, held that the light company was entitled to no redress because the box factory was shut down and there was no refuse.—Loyalton Electric Light Co. v. California Pine Box & Lumber Co., 137 P. 1099.

(F) Compensation.

§ 229 (Wash.) The word "profits," as used in a contract by which P. agreed to pay one-half the net profits of the use of certain teams belonging to a firm of which K. was a member to plaintiff, in satisfaction of plaintiff's judgment against K., held to mean the balance remaining after deducting certain specified sums.—Craib v. Peterson, 137 P. 481.

§ 231 (Idaho) Under a contract to excavate earth and rock at 25 cents per cubic yard, the material was to be measured according to custom in solid form, and not in its loose form after being loaded on cars.—Constantine v. McDonald, 137 P. 531.

V. PERFORMANCE OR BREACH.

§ 294 (Wash.) A party must substantially perform a contract.—Culver v. Culliton, 137 P. 1000.

§ 294 (Wash.) Where defendant substantially performed an orchard planting contract, providing a penalty for delay, plaintiff could not recover damages for such delay, in the absence of proof of actual pecuniary damage resulting therefrom.—Sledge v. Arcadia Orchards Co., 137 P. 1051.

§ 303 (Wash.) A provision, in a contract for construction of a school building, that the contractor should not sublet any part without the architects' consent was no defense to the contractor's breach of a contract with plaintiff to do the plastering, in the absence of any showing that an application for the architects' consent had been refused or would have been re-

fused if made.—*Wohlforth v. Kuppler*, 137 P. 477.

§ 309 (Kan.) In an action for a vendor's breach of an agreement to find a purchaser at an advanced price within a stated time, the impossibility of procuring such a purchaser constituted no defense.—*Hurless v. Wiley*, 137 P. 981.

§ 316 (Wash.) Plaintiff, after suing for defendant's failure to perform a contract for the planting and care of an orchard, *held* to have waived the default by a subsequent letter from which defendant could assume that, if the work continued to completion, it would be accepted.—*Sledge v. Arcadia Orchards Co.*, 137 P. 1051.

§ 322 (Cal.) In an action upon a written contract for the payment of money secured by the pledge of a note and mortgage of another defendant, evidence *held* to sustain a finding that the services rendered by plaintiff to such other defendant were not wholly without value to him, and that he had agreed to pay plaintiff therefor the sum of \$1,650.—*Sharp v. Pitman*, 137 P. 234.

§ 322 (Cal.App.) Evidence *held* not to show a breach by defendant of a contract whereby plaintiff was entitled to use for fuel refuse from defendant's box factory.—*Loyalton Electric Light Co. v. California Pine Box & Lumber Co.*, 137 P. 1099.

§ 322 (Wash.) In an action for breach of an orchard planting contract, evidence that the open season for planting trees in the vicinity began from the 1st to the 10th day of April, and ended about the middle of May, and that trees planted after that time would be delayed in producing for one year, *held* inadmissible.—*Sledge v. Arcadia Orchards Co.*, 137 P. 1051.

§ 323 (Wash.) In action for breach of contract which defendants alleged plaintiffs abandoned, inconsistency in plaintiffs' testimony as to whether they understood before quitting work that there was more work *held* for the jury.—*Culver v. Culliton*, 137 P. 1000.

Where plaintiffs, under contract to do 1,800 cubic yards of concrete work, quit work after doing 119 cubic yards, tender by defendants of 160 yards more to be done by plaintiffs *held* not, as a matter of law, a substantial performance by defendants.—*Id.*

VI. ACTIONS FOR BREACH.

§ 352 (Okla.) Whether a contract is abandoned is a question of fact, to be determined from all the circumstances of the particular case.—*Martin v. Spaulding*, 137 P. 882.

CONTRADICTION.

See Witnesses, §§ 380, 414.

CONTRIBUTORY NEGLIGENCE.

See Negligence, §§ 66-83, 136.

CONVERSION.

See Trover and Conversion.

CONVEYANCES.

See Deeds; Indians, § 15; Infants, §§ 28-31; Mines and Minerals, § 55; Partition; Registers of Deeds; Vendor and Purchaser.

CONVICTS.

See Pardon.

CORPORATION COMMISSION.

See Officers, §§ 28-55.

CORPORATIONS.

See Abatement and Revival, § 35; Appeal and Error, §§ 150, 1170; Assignments, §§ 19, 58; Banks and Banking; Carriers; Certiorari, §§

5, 33; Commerce, § 46; Constitutional Law, §§ 29, 50; Contracts, § 220; Eminent Domain; Estoppel, § 65; Evidence, § 121; Fraud, §§ 58, 64; Highways, § 184; Indemnity, §§ 10, 11, 15; Judgment, § 126; Limitation of Actions, § 28; Logs and Logging, § 13; Municipal Corporations; Officers, §§ 28-55; Pleading, § 205; Railroads; States, § 68; Street Railroads; Taxation, §§ 276, 390; Telegraphs and Telephones; Waters and Water Courses, §§ 238-263; Witnesses, § 272.

I. INCORPORATION AND ORGANIZATION.

§ 29 (Idaho) Individuals can attack the organization of a corporation only in direct proceedings.—*Henry Gold Mining Co. v. Henry*, 137 P. 523.

An organizer of a corporation who has contracted with it with full knowledge of its transactions cannot contest the legality of its organization.—*Id.*

§ 30 (Idaho) A corporation *held* entitled to sue a promoter for specific performance of a contract made by its promoters prior to its organization, where it ratified the contract by its acts and the promoters became its sole stockholders, officers, and directors upon its formation.—*Henry Gold Mining Co. v. Henry*, 137 P. 523.

II. CORPORATE EXISTENCE AND FRANCHISE.

§ 32 (Cal.) Evidence *held* to support a finding that the plaintiff was a corporation existing under the laws of Illinois.—*Cellulose Package Mfg. Co. v. Calhoun*, 137 P. 238.

That the contract forming the basis of the Illinois judgment sued on recited that plaintiff was a corporation under the name in which it now sues, and the judgment thereon was recovered in that name, was sufficient proof of plaintiff's corporate capacity and that it was operating under that name.—*Id.*

§ 36 (Mont.) Under the direct provisions of Rev. Codes, § 3905, a corporation once lawfully organized continues to exist until dissolved by the expiration of the time limited by its charter, by a judgment of dissolution, or by act of the legislative assembly.—*Barnes v. Smith*, 137 P. 541.

III. CORPORATE NAME, SEAL, DOMICILE, BY-LAWS, AND RECORDS.

§ 47 (Cal.) A change in the name of a corporation was not a "change of organization," within the Illinois statute requiring the publication of notice of "changes of organization."—*Cellulose Package Mfg. Co. v. Calhoun*, 137 P. 238.

§ 54 (Or.) A by-law of a private corporation should not conflict with the statute or charter nor with the vested rights of stockholders and must operate equally on all of the class it is intended to govern.—*Griffith v. Klamath Water Users' Ass'n*, 137 P. 228.

IV. CAPITAL, STOCK, AND DIVIDENDS.

(C) Issue of Certificates.

§ 99 (Cal.App.) A corporation issuing stock as "paid-up" stock is thereby estopped from enforcing payment of the difference between the amount actually paid and the full par value of such stock.—*Merchants' Mut. Adjusting Agency v. Davidson*, 137 P. 1091.

§ 99 (Wash.) A contract between a corporation and two of its officers, by which it agreed to issue 200,000 shares of its capital stock to them in consideration of the assignment of a bond for title to certain mining claims, *held* valid as between the parties.—*Gold Ridge Mining & Development Co. v. Rice*, 137 P. 1001.

(D) Transfer of Shares.

§ 120 (Cal.App.) Where a seller of certain corporate stock agreed to refund if the buyer was dissatisfied in 12 months from date, the buyer was entitled to express his dissatisfaction at any time during the life of the contract, and was not limited to the last day of the period.—Union Collection Co. v. Oliver, 137 P. 1082.

V. MEMBERS AND STOCKHOLDERS.**(A) Rights and Liabilities as to Corporation.**

§ 182 (Mont.) The acquisition of all the capital stock of a corporation does not vest the owner with legal title to the corporate property.—Barnes v. Smith, 137 P. 541.

In view of Rev. Codes, § 3833, and despite section 3892, the owner of the entire capital stock of a corporation, having taken up one of the corporation's notes, after selling its property with an agreement that the corporation would not be liable on such obligation, cannot recover against dummy directors who signed the note as sureties.—Id.

(D) Liability for Corporate Debts and Acts.

§ 228 (Wash.) Where the capital stock of a corporation was wrongfully issued for a nominal consideration, the subscribers on its insolvency were liable to its creditors on their subscriptions.—German-American State Bank v. Soap Lake Salts Remedy Co., 137 P. 461.

§ 232 (Cal.App.) A judgment creditor of an insolvent corporation may enforce payment to it of the full par value of the stock less the price actually paid for it by the stockholder.—Merchants' Mut. Adjusting Agency v. Davidson, 137 P. 1091.

§ 252 (Cal.) The creditor need not resort to the assets of the corporation before proceeding against the stockholders.—Eva v. Andersen, 137 P. 16.

§ 252 (Cal.App.) A creditor's claim against a corporation must be reduced to judgment and execution thereon issued and returned unsatisfied before he can invoke the aid of equity in enforcing collection against a stockholder who has not fully paid for his stock.—Merchants' Mut. Adjusting Agency v. Davidson, 137 P. 1091.

Where a corporation is wholly insolvent and without assets other than claims for unpaid stock subscriptions, which the judgment creditor has made a futile attempt to reach by execution, the showing of a return nulla bona of a general execution against the company is not a prerequisite to an action.—Id.

§ 269 (Cal.App.) A judgment against a corporation and execution unsatisfied are evidence of insolvency and of inability to collect, but not the only evidence.—Merchants' Mut. Adjusting Agency v. Davidson, 137 P. 1091.

Evidence, in an action to enforce a stockholder's liability upon his unpaid stock, held not sufficient to show that the stock was sold to him and the certificate therefor issued as "paid-up" stock.—Id.

VI. OFFICERS AND AGENTS.**(B) Authority and Functions.**

§ 306 (Or.) Where a corporation officer or agent has been guilty of fraud, he is liable; but a director or other officer who had no part therein is not liable.—McFarland v. Carlsbad Hot Springs Sanitarium Co., 137 P. 209.

VII. CORPORATE POWERS AND LIABILITIES.**(A) Extent and Exercise of Powers in General.**

§ 394 (Wash.) Public Service Commission Act (Laws 1911, c. 117, § 86), authorizing applica-

tions within 30 days for the review of orders of the commission, does not limit the review to final orders.—State v. Public Service Commission of Washington, 137 P. 132.

(B) Representation of Corporation by Officers and Agents.

§ 432 (Cal.) Evidence held to require a finding that the president and general manager of defendant corporation was authorized to bind it by consenting to the statement of an account between the corporation and plaintiff's assignor.—E. W. McLellan Co. v. East San Mateo Land Co., 137 P. 1145.

On an issue as to the authority of defendant's president and general manager to state an account between plaintiff's assignor and the corporation, the corporation's by-laws, prescribing the duties of the president and general manager as to the execution of written contracts but not limiting his power as to parol contracts, held irrelevant.—Id.

(D) Contracts and Indebtedness.

§ 455 (Wash.) A lease executed by a corporation's president and secretary on its behalf, but to which the corporate seal was not attached, held inadmissible to bind the corporation, over a plea that such officers had no authority to execute it, in the absence of other proof of authority, ratification, or estoppel.—Oldfield v. Angeles Brewing & Malting Co., 137 P. 469.

(E) Torts.

§ 492 (Cal.App.) Secretary and treasurer of corporation engaged in selling automobiles held to have no authority as such to enter an automobile in a race in its name, and, where he did so without authority, it was not liable to a person injured by such automobile while watching such race.—Johnson v. Reliance Automobile Co., 137 P. 603.

§ 495 (Or.) A corporation guilty of fraud is liable.—McFarland v. Carlsbad Hot Springs Sanitarium Co., 137 P. 209.

(F) Civil Actions.

§ 521 (Cal.) In an action on an account stated between plaintiff's assignor and defendant, findings construed and held to mean that defendant's president and manager were without authority to state an account.—E. W. McLellan Co. v. East San Mateo Land Co., 137 P. 1145.

VIII. INSOLVENCY AND RECEIVERS.

§ 542 (Idaho) A corporation cannot fraudulently dispose of its property to the injury or damage of its creditors.—Wilson v. Baker Clothing Co., 137 P. 896.

§ 544 (Idaho) The rule that the property of a corporation is a trust fund for the payment of its debts merely prohibits distribution of its property among its stockholders or application to any purpose foreign to its business until its debts are paid.—Wilson v. Baker Clothing Co., 137 P. 896.

An insolvent corporation is not prohibited from preferring certain creditors over others in the due course of business, where such preference is not collusively or fraudulently made.—Id.

§ 559 (Idaho) Except so far as the control of a corporation is placed in the hands of a receiver, its officers and directors, except when enjoined, continue to exercise their functions as if no receiver had been appointed. (Per Stewart, J.)—Rowe v. Stevens, 137 P. 159.

XII. FOREIGN CORPORATIONS.

§ 641 (Cal.App.) A statute purporting to curtail the privilege of foreign corporations should not be construed to extend beyond the plain meaning of its terms.—Winston v. Idaho Hardwood Co., 137 P. 601.

§ 642 (Okl.) A foreign corporation engaged in interstate commerce may sue on a contract of employment entered into with a citizen of Oklahoma, though it has not filed a copy of its articles of incorporation, or appointed a service agent in the state pursuant to Rev. Laws 1910, §§ 1338, 1341, the appointment of an agent not constituting doing business in the state.—Kibby v. Cubie, Heimann & Co., 137 P. 352.

§ 651 (Idaho) While a foreign corporation which has forfeited its right to do business in the state cannot defend in an action against it, it may still have a legal existence elsewhere, and is not dead in the sense of a domestic corporation which has been dissolved or expired. (Per Ailshie, C. J.)—Rowe v. Stevens, 137 P. 159.

§ 656 (Or.) A foreign corporation which has not complied with the requirements of L. O. L. § 6727, has no right to take an assignment of a lease of an island in the state for fishing purposes.—Johnson v. Seaborg, 137 P. 191.

§ 661 (Cal.App.) Though a foreign corporation fails to file articles of incorporation with the Secretary of State, in accordance with Civ. Code, §§ 408, 409, it is not precluded from defending an action brought against it; the only punishment being under section 410.—Winston v. Idaho Hardwood Co., 137 P. 601.

In view of Civ. Code, §§ 408, 409, 405, the failure of a foreign corporation doing business in the state to file with the Secretary of State a designation of a process agent *held*, in spite of section 408, not to preclude it from defending actions.—Id.

§ 662 (Idaho) The mortgagee, in a mortgage given by a foreign corporation having a right to do business in the state, need not, before foreclosing the mortgage, investigate to determine whether the corporation has terminated its existence in the state by failing to comply with the law. (Per Ailshie, C. J.)—Rowe v. Stevens, 137 P. 159.

§ 667½ (Idaho) Where the directors of a foreign corporation have appeared to defend on its behalf and upon trial discovered that the corporation, having forfeited its right to do business in the state, is no longer entitled to defend, they should intervene and defend the action if they desire to prevent the appointment of a trustee to make such defense. (Per Ailshie, C. J.)—Rowe v. Stevens, 137 P. 159.

§ 668 (Cal.App.) Where a foreign corporation wholly fails to file articles of incorporation with the Secretary of State, in accordance with Civ. Code, §§ 408, 409, service could not be had against it by serving the Secretary of State in accordance with section 405.—Winston v. Idaho Hardwood Co., 137 P. 601.

§ 672 (Okl.) Where defendant in a suit by a foreign corporation answers to the merits, he admits the capacity of plaintiff to sue, and where defendant filed a supplemental answer alleging that plaintiff had not complied with the Statutes of Oklahoma, a demurrer to such supplemental answer was properly sustained.—Kibby v. Cubie, Heimann & Co., 137 P. 352.

§ 679 (Or.) A certificate of authority issued under L. O. L. § 6728, to a foreign corporation while insolvent and its assets in the hands of a receiver, does not give validity to its business acts.—Johnson v. Seaborg, 137 P. 191.

§ 684 (Idaho) Under Const. art. 5, § 20, and Rev. Codes, § 3830, enacted pursuant thereto, the district court has jurisdiction to appoint a receiver or trustee to defend for a foreign corporation which has forfeited its right to do business in the state. (Per Stewart, J.)—Rowe v. Stevens, 137 P. 159.

Rev. Codes, § 2787, providing that unless other persons are appointed by the court, the directors or managers of a corporation at its dissolution shall have power to settle its affairs as trustees, though not affected by Ex. Sess. Laws 1912, p. 13, applies only to the right to do business in the state, and not to the right

to appoint trustees to represent a defendant foreign corporation which has forfeited its right to do business. (Per Stewart, J.)—Id.

Where a foreign corporation gives a mortgage and then forfeits its right to do business and on foreclosure against it without knowing of the forfeiture the directors employed an attorney who appeared in the suit, the court had jurisdiction, under Ex. Sess. Laws 1912, p. 18, § 11, and Rev. Codes, § 4329, subds. 5 and 6, to appoint a trustee to defend for the corporation.—Id.

CORPUS DELICTI.

See Homicide, § 228.

CORRECTION.

See Taxation, §§ 468-497.

COSTS.

See Criminal Law, § 260; Mortgages, § 581; Partition, § 114; Quieting Title, § 54; Taxation, § 598;

VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

§ 221 (Wash.) In the absence of statute the clerk of this court did not err, when, in taxing costs on appeal to the Supreme Court of the United States, he disallowed certain items expended in the preparation of that appeal and paid without the intervention of this court or of his office.—Ettor v. City of Tacoma, 137 P. 820.

COTENANCY.

See Tenancy in Common.

COUNTERCLAIM.

See Set-Off and Counterclaim.

COUNTIES.

See Animals, §§ 50, 92; Highways; Injunction, § 223; Justices of the Peace, § 15; Levees, § 19; Quo Warranto, § 28; Records, § 5; Registers of Deeds, § 7; Schools and School Districts, §§ 37, 39; Taxation, §§ 276, 317, 446½; Waters and Water Courses, § 257.

II. GOVERNMENT AND OFFICERS.

(C) County Board.

§ 58 (Idaho) To try "anew" within Rev. Codes, § 1953, providing that on appeal from an order of the board of county commissioners the matter must be heard anew, implies that the case has been heard before, and hence, where no issue has been tried before the board, there is no issue to try anew.—Gaiser v. Steele, 137 P. 889.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 190 (Or.) The county court in the exercise of its taxing power is one of special and limited jurisdiction, which must be conferred either in direct terms or by necessary implication.—Obenchain v. Daggett, 137 P. 212.

Under L. O. L. § 937, subd. 1, and sections 3662, 3663, 3675, a county court may create by taxation a special fund for the erection of a courthouse, though the general fund is in debt in excess of the constitutional limit.—Id.

§ 191 (Or.) The building of a courthouse is not a "county purpose" within L. O. L. § 3662, relating to raising revenues for county purposes.—Obenchain v. Daggett, 137 P. 212.

§ 192 (Or.) In L. O. L. § 937, subd. 1, giving the county court power to provide for the erection of courthouses, the term "provide" implies power to raise a fund for the purpose by taxation.—Obenchain v. Daggett, 137 P. 212.

COURTS.

See Appeal and Error, §§ 399, 515, 621, 724, 748, 756, 757, 765, 773, 1203; Appearance, § 19, 22; Charities, § 31; Clerks of Courts, § 37; Constitutional Law, § 70; Corporations, § 684; Counties, § 190; Criminal Law, § 1083; Divorce, § 62; Garnishment, § 135; Judges; Justices of the Peace; Motions, § 2; Municipal Corporations, § 633; Pleading, § 406; Quo Warranto, § 28; Railroads, § 9; Removal of Causes; Trial, §§ 191, 194, 391-405; Wills, § 263.

I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

§ 1 (Kan.) The courts possess inherent power to prevent any abuse of their process.—Patterson v. Imperial Window Glass Co., 137 P. 955.

§ 12 (Nev.) The Legislature may permit an action by nonresident plaintiff against a resident defendant.—Tiedemann v. Tiedemann, 137 P. 824.

§ 39 (Or.) The authority of a court to hear a cause depends on the initial pleading, and not on the facts.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766.

II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

§ 58 (Mont.) Under Rev. Codes, §§ 2894, 3010, 3026, and 6302, district court *held* to have no power to appoint an attendant, fix his compensation, and require payment by the county, where the sheriff was ready to perform the duties of bailiff; such sections not invading the inherent powers of the court, as they merely declare the law which existed when the Constitution was adopted.—State v. Sullivan, 137 P. 392.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89 (Cal.App.) Where a writ of prohibition had been granted in a previous proceeding in which the facts, except as to the parties, were identical with those of the present application, the writ will be granted upon the authority of that decision.—Craycroft v. Superior Court in and for Kern County, 137 P. 266.

V. COURTS OF PROBATE JURISDICTION.

§ 202 (Okl.) Under Rev. Laws 1910, § 1820, and Laws 1907-08, c. 27, art. 1, § 6, an appeal lies to the district court from the county court in probate matters.—In re Theimer, 137 P. 358.

VI. COURTS OF APPELLATE JURISDICTION.

(A) Grounds of Jurisdiction in General.

§ 207 (Ariz.) In cases, such as quo warranto against state officers, in which the superior and Supreme Courts have concurrent jurisdiction, the Supreme Court will decline to take original jurisdiction unless the complaint shows special reasons why it should do so and the complaint may be filed only on leave of that court.—State v. Jones, 137 P. 544.

§ 207 (Cal.) An application for mandamus to compel directors of an irrigation district to call an election upon the question of an assessment, involving the hearing of evidence and a determination as to the genuineness of 681 signatures to the election petition, in view of the time required, would not be taken up where the superior court or some other court had concurrent jurisdiction.—Imperial Land Co. v. Imperial Irr. Dist., 137 P. 234.

VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.

(A) Courts of Same State, and Transfer of Causes.

§ 472 (Ariz.) Under Const. art. 6, §§ 4, 6, jurisdiction of Supreme Court in habeas corpus, quo warranto, and mandamus as to state officers *held* not exclusive but concurrent with the superior courts.—State v. Jones, 137 P. 544.

Under Const. art. 6, §§ 4, 6, if act April 1, 1913 (Laws 1913, c. 37), relative to actions of quo warranto, was intended to make the Supreme Court's jurisdiction, where it has jurisdiction, exclusive, it is invalid.—Id.

§ 487 (Okl.) Under Sess. Laws 1910, c. 19, relating to the county court in Ellis county, and requiring the party desiring to remove a cause to give notice, where the opposite party is present at the time the motion for removal is made and participates in the hearing without objection based on want of notice, he waives such notice.—Rauh v. Morris, 137 P. 1174.

(B) State Courts and United States Courts.

§ 493 (Or.) Where either a state or federal court first secures jurisdiction of a cause, the other cannot interfere.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766.

CREDIBILITY.

See Witnesses, §§ 345-414.

CREDITORS.

See Assignments for Benefit of Creditors; Fraudulent Conveyances.

CRIME AGAINST NATURE.

See Sodomy.

CRIMINAL LAW.

See Abortion; Bail; Burglary; Embezzlement; Extradition; Forgery; Homicide; Incest; Indictment and Information; Intoxicating Liquors, § 146; Larceny; Pardon; Parent and Child, § 17; Rape; Sodomy.

IV. JURISDICTION.

§ 104 (N.M.) On collateral attack jurisdiction to render a judgment in a criminal case will be presumed, though the record is silent as to jurisdictional facts.—Ex parte Cica, 137 P. 598.

VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 231 (Cal.App.) Where accused appeared before the magistrate with counsel, the magistrate was not required to advise him of the right to aid of counsel as required by Pen. Code, § 858; section 860 providing that if accused appear with counsel, the magistrate must proceed to examine the case.—People v. Stein, 137 P. 271.

Under Pen. Code, § 858, requiring the magistrate to "inform" an accused of the charge against him, a mere statement in a general way by the magistrate of the nature of the charge is sufficient.—Id.

§ 260 (N.M.) Where the prosecuting witness appeals from a judgment of a justice of the peace under Sess. Laws 1907, c. 61, § 3, taxing him with costs, the case should be docketed in the district court in the name of the state against the prosecuting witness, and not as originally entitled.—State v. Coats, 137 P. 597.

Where a prosecuting witness appeals to the district court, pursuant to Comp. Laws 1897, § 3305, from a judgment of a justice of the peace taxing him with costs pursuant to Sess. Laws

1907, c. 61, § 3, the district court must, under Comp. Laws 1897, § 3317, try the question de novo as to whether the prosecution was instituted maliciously or without probable cause, and enter its own independent judgment thereon.—Id.

On an appeal by the prosecuting witness from a judgment taxing costs against him, the burden is on the state to prove that the prosecution was instituted maliciously or without probable cause.—Id.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 273 (Okla.Cr.App.) In a murder case, the court may, without the county attorney's consent, dismiss the charge, and permit defendant to plead guilty to manslaughter in either degree.—State v. McDonald, 137 P. 362.

X. EVIDENCE.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 351 (Wash.) The attempt of a party, immediately following the commission of a crime, to leave the jurisdiction is competent to show a guilty knowledge, and is received as a qualified admission of guilt; its weight being for the jury.—State v. Pettit, 137 P. 335.

A departure from the place of a crime, induced by fear of arrest, is a flight, and an instruction submitting the question of flight need not require a finding of escape and concealment for the purpose of avoiding arrest.—Id.

§ 358 (Ariz.) Where the date of the arrest of accused was a contested question because of the defence of alibi, the admission in evidence of the warrant under which accused was arrested, solely to prove the date, was not erroneous.—Rain v. State, 137 P. 550.

§ 361 (Okla.Cr.App.) Where a witness for defendant testified that a third person was near the place where the stolen horses were found to show that such person was the real thief, the state was properly permitted to show why such person was there.—Jones v. State, 137 P. 121.

§ 364 (Wash.) In a prosecution for larceny, evidence that, after the prosecuting witness had deposited money with accused, accused made purchases of valuable personal property is admissible as part of the res gestæ.—State v. Pettit, 137 P. 335.

(C) Other Offenses, and Character of Accused.

§ 369 (Cal.App.) Proof of an offense distinct from and wholly unconnected with the particular crime charged against a defendant is not admissible.—People v. King, 137 P. 1076.

§ 371 (Cal.App.) Though evidence of other offenses is admissible to show guilty intent, in a trial for embezzlement, where the defenses was that the money received by defendant had been returned, evidence of previous misappropriations was inadmissible.—People v. King, 137 P. 1076.

(E) Best and Secondary and Demonstrative Evidence.

§ 404 (Ariz.) On a trial for burglary, the goods stolen at the time of the burglary are admissible in evidence in connection with the testimony of the officers and of the prosecutor, as showing the purpose with which the entry was made, whether accused, or third persons jointly charged, made the entry.—Rain v. State, 137 P. 550.

§ 404 (Cal.App.) Where some of the articles in evidence were identified as taken from the burglarized store, and others were shown to be of a similar make to those in the store, they were sufficiently identified to be admissible.—People v. Wing, 137 P. 47.

(F) Admissions, Declarations, and Hearsay.

§ 406 (Ariz.) On a trial for rape on a female under the age of 17 years, an instrument executed by accused, wherein he admitted that he was the father of the unborn child of prosecutrix, held admissible.—Lenord v. State, 137 P. 412.

§ 406 (Okla.Cr.App.) In a prosecution under the liquor law, defendant's verified answers in a prior civil suit against him for the price of liquor sold him containing admissions of his purchases were admissible to show that he was engaged in the business of selling whisky.—Stitch v. State, 137 P. 887.

§ 413 (Okla.Cr.App.) Where it appears that defendant was gone from home for several months, it was not competent for him to prove when he returned or any statements which he may have made relative to his absence.—Jones v. State, 137 P. 121.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 423 (Okla.Cr.App.) Where the evidence tends to establish a conspiracy to steal cattle and horses, conversations with, or statements to or by, persons connected with the conspiracy, and during its continuance, are admissible against any coconspirator.—Jones v. State, 137 P. 121.

§ 423 (Wash.) One who enters into a conspiracy to commit larceny is deemed a party to every act done by the others in the furtherance of the common design, whether before or after the property is actually asported.—State v. Pettit, 137 P. 335.

(H) Documentary Evidence and Exclusion of Parol Evidence Thereby.

§ 438 (Cal.) Photographs of the body of deceased showing the entrance and exit of the bullet by which he was killed were admissible.—People v. Lee Nam Chin, 137 P. 917.

(J) Testimony of Accomplices and Codefendants.

§ 507 (Ariz.) A witness held not an accomplice.—Rain v. State, 137 P. 550.

§ 510½ (Ariz.) The testimony of the mother of a third person, jointly charged with defendant with crime, that after defendant was released from jail he requested her to tell her son to say that defendant was not present was admissible to corroborate the testimony of the son, testifying for the state.—Rain v. State, 137 P. 550.

§ 511 (Okla.Cr.App.) To authorize a conviction, the evidence need not corroborate the testimony of an accomplice beyond a reasonable doubt but need merely tend to connect defendant with the crime.—Jones v. State, 137 P. 121.

(L) Evidence at Preliminary Examination or at Former Trial.

§ 547 (Cal.App.) A transcript of the testimony of a Chinese witness, taken at the coroner's inquest, is inadmissible as hearsay, unless the interpreter or some other witness familiar with the language, who heard the testimony, testified as to the accuracy of the transcript.—People v. Ong Git, 137 P. 283.

(M) Weight and Sufficiency.

§ 556 (Nev.) State held not bound by explanations given by defendants at the time of their arrest for burglary, though they were proved by the state and their weight was for the jury.—State v. Patchen, 137 P. 406.

§ 572 (Cal.App.) A finding against accused's claim of alibi held warranted by the evidence.—People v. Kawasaki, 137 P. 287.

XII. TRIAL.

(B) Course and Conduct of Trial in General.

§ 659 (Cal.App.) It is not ground for the exclusion of one whom the defense claimed had

been coaching and tampering with witnesses, that he was guilty of improper conduct at the preliminary examination before a magistrate.—*People v. Ong Git*, 137 P. 283.

Bare assertion that the presence of one whom accused desired excluded had intimidated witnesses and would cause them to falsely testify, if allowed to remain in court, is not sufficient to make the refusal of an order of exclusion error.—*Id.*

(C) Reception of Evidence.

§ 665 (Cal.App.) While Code Civ. Proc. § 2043, providing for putting witnesses under the rule, strictly applies only to a witness of the party adverse to the one making the request, it may be liberally construed so as to apply to a hostile witness who in good faith has been subpoenaed.—*People v. Ong Git*, 137 P. 283.

It is not an abuse of discretion to refuse to put a witness under the rule where he had apparently been subpoenaed by accused only to bring him within the scope of the exclusion rule.—*Id.*

§ 665 (Okla.Cr.App.) Where the order excluding witnesses is willfully violated, it is within the discretion of the court to exclude the testimony of such witnesses.—*Kilgore v. State*, 137 P. 364.

§ 670 (Cal.App.) The exclusion of apparently immaterial evidence which was admissible only on the question of alibi is proper where it was not stated for what purpose the accused desired to elicit the evidence.—*People v. Kawasaki*, 137 P. 287.

§ 678 (Cal.App.) Where a single act of intercourse is charged and a series is proven in a prosecution for rape, the prosecution must make an election.—*People v. Mancuso*, 137 P. 278.

§ 680 (Ariz.) The order in which evidence may be received is in the discretion of the trial court.—*Rain v. State*, 137 P. 550.

§ 683 (Idaho) Where defendant admitted the cutting which he claimed was in self-defense, evidence relative to the particular knife with which the cutting was done, being immaterial, was properly excluded when offered on rebuttal.—*State v. Grigg*, 137 P. 371.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 696 (Ariz.) Where, after the admission in evidence of an instrument executed by accused on a trial for rape, he offered evidence that the instrument was signed under duress, but made no motion to exclude it on that ground, the evidence bore only on the weight the jury would give to the instrument as evidence.—*Lenord v. State*, 137 P. 412.

§ 698 (Cal.App.) Where accused's counsel, being surprised by a witness, did not examine him as to statements made out of court, accused is bound, the state having been allowed without objection to cross-question the witness as to such statements, by the witness' answers.—*People v. Kawasaki*, 137 P. 287.

(E) Arguments and Conduct of Counsel.

§ 699 (Okla.Cr.App.) An attorney's practice of making dilatory pleas, and objections, and exceptions, without reference to substantial merits, should not be tolerated.—*Price v. State*, 137 P. 736.

§ 703 (Cal.) Where counsel for defendant examined a witness as to his acquaintance with defendant, the misconduct of the prosecutor in cross-examining the witness as to whether defendant had left a certain place because his saloon license was taken away did not require reversal.—*People v. Allen*, 137 P. 1148.

§ 713 (Wash.) Argument of the prosecutor held not necessarily erroneous.—*State v. Jakubowski*, 137 P. 448.

§ 720 (Cal.App.) The fact that certain evidence was developed on cross-examination of the people's witnesses did not preclude the district attorney from commenting thereon in argument, if such comments were otherwise proper.—*People v. Guaragna*, 137 P. 279.

§ 722 (Cal.App.) A statement by the district attorney in argument that, if there was ever a case in which there was shown an abandoned and malignant heart by one charged with murder, it was this case was proper, where the evidence showed that accused deliberately shot into a crowd while partially intoxicated.—*People v. Stein*, 137 P. 271.

§ 730 (Cal.App.) Improper argument by the prosecutor, to the effect that he could not go fully into defendant's story of the case because of his very meager direct examination, is rendered harmless, where the jury were admonished to disregard it.—*People v. Mancuso*, 137 P. 278.

§ 730 (Cal.App.) Where the court directed accused's counsel to note and assign as misconduct any remark which they deemed objectionable at the close of the argument, and then gave an instruction which cured the errors, the change in the ordinary practice was not error.—*People v. Ong Git*, 137 P. 283.

Where the court charged that arguments of counsel were of no value except as they were based on testimony, and that any outside matters brought into the case by counsel should have no bearing, erroneous argument by the prosecutor not based on evidence was cured.—*Id.*

(F) Province of Court and Jury in General.

§ 732 (Ariz.) Pen. Code 1901, § 921, subd. 6, relating to instructions, held not in conflict with Const. art. 6, § 12, providing that judges shall not charge on matters of fact.—*Lenord v. State*, 137 P. 412.

§ 757 (Wyo.) An instruction with reference to the weight to be given by the jury to testimony of certain detectives who had testified for the state held erroneous as interfering with the jury's right to weigh the evidence.—*Murdica v. State*, 137 P. 574.

§ 763, 764 (Okla.Cr.App.) An instruction that under stated circumstances "the requirements of the law as to the sufficiency of circumstantial evidence will be satisfied" held error as invading the jury's province.—*Harris v. State*, 137 P. 365.

(G) Necessity, Requisites, and Sufficiency of Instructions.

§ 773 (Cal.App.) An instruction that the defense of insanity should be carefully examined, "lest an ingenious counterfeit of the malady furnish protection to the guilty," though subject to criticism is not reversible error.—*People v. Stein*, 137 P. 271.

§ 778 (Okla.Cr.App.) An instruction that, if the jury find that accused did not sell or assist in the sale of certain liquor, to acquit was erroneous as substantially instructing against the presumption of innocence until guilt has been established beyond a reasonable doubt.—*Remillard v. State*, 137 P. 370.

§ 780 (Ariz.) An instruction that a conviction cannot be had on the testimony of an accomplice, unless corroborated by other evidence which in itself tends to connect him with the offense, etc., held to properly charge on corroborative evidence.—*Rain v. State*, 137 P. 550.

Under Pen. Code 1901, § 938, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated, an instruction on corroborative testimony held properly refused.—*Id.*

§ 784 (Okla.Cr.App.) It is error to instruct upon the chain and link theory with respect to circumstantial evidence.—*Harris v. State*, 137 P. 365.

§ 789 (Okl.Cr.App.) An instruction defining a reasonable doubt, *held* erroneous, though in the language of Rev. Laws 1910, § 5876; such statute being violative of Constitution, Bill of Rights, §§ 6, 8, as depriving defendant of the presumption of innocence, and shifting the burden of proof to defendant.—*Harris v. State*, 137 P. 385.

§ 798½ (Cal.App.) Under Penal Code, § 190, it was improper to submit a form of verdict designating the particular prison in which accused should be incarcerated.—*People v. Stein*, 137 P. 271.

§ 800 (Okl.Cr.App.) An instruction that it was essential that the testimony of an accomplice be corroborated by evidence tending "to connect the defendant with the commission of the crime charged against him" *held* not erroneous for failure to define the words quoted.—*Jones v. State*, 137 P. 121.

§ 807 (Cal.App.) An instruction to view with care the testimony of those testifying to defendant's identity was properly refused, being argumentative.—*People v. Kawasaki*, 137 P. 287.

§ 811 (Cal.App.) An instruction to view with care the testimony of those testifying to defendant's identity was properly refused as directing special attention to one particular feature of the testimony.—*People v. Kawasaki*, 137 P. 287.

§ 822 (Ariz.) The instructions must be considered as a whole in determining their correctness, and, when so construed, if the law applicable to the facts is correctly stated, an error in an instruction standing alone is not ground for reversal.—*Lenord v. State*, 137 P. 412.

§ 822 (Cal.) An instruction on flight considered as a whole *held* not fatally defective in that it did not require the jury, before considering the evidence of flight, to find that defendant knew that deceased had been killed, and that he was charged with the killing at the time he fled.—*People v. Lee Nam Chin*, 137 P. 917.

§ 823 (Ariz.) An instruction on corroborative testimony of accomplices, *held* not objectionable as taking from the jury the question of reasonable doubt on all the evidence but that of the accomplices, in view of other instructions.—*Rain v. State*, 137 P. 550.

(H) Requests for Instructions.

§ 825 (Ariz.) Where the trial court declares in its instructions the general principles of law which must be applied by the jury in reaching a verdict, accused, if dissatisfied, must request others.—*Lenord v. State*, 137 P. 412.

§ 829. The refusal of requested instructions covered by the charge given is not error.

—(Ariz.) *Rain v. State*, 137 P. 550;

(Cal. App.) *People v. Ong Git*, 137 P. 283;

(Wash.) *State v. Pettit*, 137 P. 335.

§ 829 (Ariz.) The refusal of a requested charge on corroborative testimony *held* not erroneous, in view of a charge given.—*Rain v. State*, 137 P. 550.

§ 829 (Cal.App.) Requested instructions were properly refused, the subject-matter of which was fully covered by instructions given.—*People v. Guaragna*, 137 P. 279.

§ 829 (Cal.App.) Where the court fully charged on the defense of alibi, the refusal of a requested instruction adding nothing to the one given was proper.—*People v. Kawasaki*, 137 P. 287.

In view of instructions given, *held*, that the refusal of a special instruction cautioning the jury against evidence of identity was proper.—*Id.*

§ 830 (Ariz.) Under Civ. Code 1901, par. 1409, and Pen. Code 1901, § 955, relating to the giving or refusal of instructions, the court may refuse an instruction containing both incorrect and correct propositions of law.—*Rain v. State*, 137 P. 550.

§ 834 (Nev.) Modification of instruction by drawing line through certain words, leaving

them still legible, was not error, when the instruction, without such modification, would have been correct.—*State v. Patchen*, 137 P. 406.

The practice of modifying instructions by striking out portions thereof in such manner as to leave the words stricken out legible should not be followed.—*Id.*

(J) Custody, Conduct, and Deliberations of Jury.

§ 855 (Ariz.) A verdict will not be set aside because the janitor and his assistants entered the jury room to replenish the supply of ice water during the jury's deliberations, and conversed with them, in the absence of evidence of dishonesty and corruption influencing the verdict.—*Rain v. State*, 137 P. 550.

§ 858 (Idaho) Under Rev. Codes, § 7902, the jury may take with them to the jury room the written instructions, but are not obliged to do so.—*State v. Grigg*, 137 P. 371.

(L) Waiver and Correction of Irregularities and Errors.

§ 901 (Ariz.) The error, if any, in overruling a motion for acquittal, made at the close of the state's case, is waived by accused proceeding with the trial and introducing evidence which, if curing defects or omissions in the state's case, must be considered in determining his guilt.—*Rain v. State*, 137 P. 550.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 938 (Cal.App.) Applications for new trial for newly discovered evidence are addressed to the discretion of the trial court.—*People v. Kawasaki*, 137 P. 287.

§ 938 (Idaho) Denial of new trial on the ground of newly discovered evidence *held* not error, where most of such evidence was merely cumulative and impeaching, and much immaterial, and no effort was made to produce it at the trial.—*State v. Grigg*, 137 P. 371.

§ 942 (Cal.App.) Newly discovered evidence which tends only to impeach the testimony of witnesses for the prosecution does not require the grant of a new trial.—*People v. Ong Git*, 137 P. 283.

§ 959 (Cal.App.) There was no abuse of discretion in denying accused's fourth application for a continuance of a motion for new trial, where the last applications carried the case up to within one day of the time on which, under Pen. Code, § 1191, the court must pronounce judgment after verdict, and accused had reasonable opportunity to prepare for the hearing.—*People v. Wing*, 137 P. 47.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 980 (Okl.Cr.App.) Where accused pleads guilty, the court need not submit the question of punishment to the jury unless accused so demands.—*State v. McDonald*, 137 P. 362.

§ 991 (N.M.) A sentence is legal, though excessive, so far as within the provisions of the law and the court's jurisdiction, and is void only as to the excess where such excess is separable.—*Ex parte Cica*, 137 P. 598.

§ 1001 (N.M.) Prior to Sess. Laws 1909, c. 32, § 1, district courts were without power to stay the execution of judgments in criminal cases or to withhold commitments; and an order that the commitment should not issue so long as defendant absented himself from the territory of New Mexico was void.—*Ex parte Lujan*, 137 P. 587.

Where a duly sentenced defendant is permitted to remain at large under a void order staying commitment, he may be compelled to serve his sentence, even though a longer period of time than that for which he was sentenced has elapsed since imposition of the sentence.—*Id.*

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1023 (Cal.App.) No appeal lies from a motion in arrest of judgment or from a verdict or order suspending judgment and placing accused on probation.—*People v. Hartman*, 137 P. 611.

Under Pen. Code, §§ 1237, 1239, 1247, an appeal lies from an order denying a motion of accused for a new trial before judgment.—*Id.*

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1035 (Cal.App.) Accused cannot complain that the court ordered one of his witnesses into custody on a pending misdemeanor charge in the presence of the jury, thereby discrediting such witness, where accused did not call him as a witness or assign the court's action as misconduct.—*People v. Wing*, 137 P. 48.

§ 1036 (Cal.App.) Where a specific act was alleged in the information, and proof of that act and a great many others was made without objection, accused, who made no complaint that he was in doubt as to which act was relied on, cannot object on appeal that the state made no election.—*People v. Mancuso*, 137 P. 278.

§ 1037 (Cal.App.) To review improper argument by the district attorney, an objection must have been taken thereto in the trial court.—*People v. Stein*, 137 P. 271.

§ 1037 (Cal.App.) Improper argument cannot be taken advantage of, where the trial court was not requested to instruct the jury to disregard it.—*People v. Mancuso*, 137 P. 278.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1077 (Okla.Cr.App.) Refusal to require the court stenographer to extend the testimony without expense to accused held not erroneous, though appellant filed a pauper's affidavit, where it appeared that counsel employed by defendant at his own expense represented him at the trial, and no reason was shown why such attorney could not prepare a sufficient case-made without the court stenographer's assistance.—*Harris v. State*, 137 P. 365.

§ 1081 (Okla.Cr.App.) Under Rev. Laws 1910, § 5997, construed with section 5992 relative to notice of appeal, an appeal will not be dismissed because a summons in error was not served or waived, where the notices required by the statute were served on the county attorney and the clerk of the trial court.—*State v. McDonald*, 137 P. 362.

Failure to serve notices of appeal by Rev. St. 1910, § 5992, may be cured by a service of summons in error upon the Attorney General, or by securing a waiver thereof.—*Id.*

§ 1083 (Okla.Cr.App.) An appeal from a conviction terminates the jurisdiction of the trial court to make any order or render any judgment except as directed by the Criminal Court of Appeals.—*Reed v. State*, 137 P. 369.

(D) Record and Proceedings Not in Record.

§ 1088 (Wash.) Where the record did not contain alleged objectionable argument by the prosecutor but merely set out an exception by accused, which was allowed, the certification of the record by the trial judge merely showed that the exception had been made and does not establish the objectionable nature of the argument.—*State v. Jakubowski*, 137 P. 448.

The recital of matters occurring in the presence of the court in the affidavit submitted on motion for a new trial is an insufficient preservation of the record for the purpose of reviewing the error.—*Id.*

§ 1119 (Cal.App.) Where the record wholly fails to show alleged prejudicial remarks during argument or any objection thereto at the time or

any request for instruction to disregard it, an assignment of error in failing to instruct the jury thereon will not be considered.—*People v. Horvath*, 137 P. 1069.

§ 1122 (Okla.Cr.App.) Accused should cause enough of the evidence to be incorporated in the record to show that he was injured by instructions.—*Harris v. State*, 137 P. 365.

(E) Assignment of Errors and Briefs.

§ 1130 (Cal.App.) To have reviewed rulings on instructions, appellant must point out the particular rulings relied on, the appellate court not being required to search the record for prejudicial error.—*People v. Stein*, 137 P. 271.

§ 1130 (Cal.App.) Where appellant's brief does not disclose a particular point concerning some 18 rulings on evidence assigned as error but merely refers to the pages and folios of the transcript where the rulings and objections are found, the appellate court will not review such alleged error.—*People v. Guaragna*, 137 P. 279.

§ 1130 (Okla. Cr. App.) Typewritten briefs should be legible, and upon paper of standard weight.—*Price v. State*, 137 P. 736.

(F) Dismissal, Hearing, and Rehearing.

§ 1133 (Okla.Cr.App.) The ground relied on by accused in a petition for rehearing must be definitely set forth.—*Jones v. State*, 137 P. 121.

(G) Review.

§ 1134 (Ariz.) The refusal of the trial court to grant a certificate of probable cause for appeal raises no question on appeal.—*Lenord v. State*, 137 P. 412.

§ 1144 (Cal.App.) Where the court admonished the jury to disregard improper argument, it will be presumed that the instruction was followed.—*People v. Ong Git*, 137 P. 283.

§ 1144 (Okla.Cr.App.) Unless it otherwise appears from the record, it will be presumed that the errors complained of did not involve the trial court's jurisdiction or deprive accused of a substantial right.—*Jones v. State*, 137 P. 121.

§ 1153 (Ariz.) Discretion of trial court as to the order in which evidence may be received will not be reviewed except in case of abuse.—*Rain v. State*, 137 P. 550.

§ 1156 (Cal.App.) Applications for new trial for newly discovered evidence being addressed to the discretion of the trial court, it will be presumed that such discretion was properly exercised.—*People v. Kawasaki*, 137 P. 287.

§ 1158 (Cal.App.) The granting of a new trial will not be disturbed where the evidence as to accused's guilt was conflicting.—*People v. Ostrander*, 137 P. 619.

§ 1159 (Ariz.) The jury are the sole judges of the credibility of the witnesses and the weight of the evidence, and a verdict sustained by evidence will not be disturbed on appeal.—*Rain v. State*, 137 P. 550.

§ 1159 (Okla.Cr.App.) Where there is a direct contradiction between the testimony of complaining witness and that of defendant, the verdict will be sustained.—*Remillard v. State*, 137 P. 370.

§ 1159 (Okla.Cr.App.) A verdict of guilty, when supported by testimony of the prosecuting witness, will ordinarily be sustained, though such testimony is contradicted by accused.—*Jones v. State*, 137 P. 740.

§ 1159 (Wash.) Where the evidence was sufficient to go to the jury, a conviction cannot be reversed because of a sharp conflict in evidence.—*State v. Jakubowski*, 137 P. 448.

§ 1163 (Idaho) That the court inadvertently marked an instruction "guilty" instead of "given" held not ground for reversal, where it did not appear that the jury saw the instruction,

or that defendant was prejudiced by the mistake.—*State v. Grigg*, 137 P. 371.

§ 1163 (Okla. Cr. App.) Where the testimony is not incorporated in the record, erroneous instructions will not be ground for reversal, if, under any conceivable state of facts, the accused could not have been injured thereby.—*Harris v. State*, 137 P. 365.

§ 1166 (Cal. App.) Failure of the magistrate to inform accused of the charge against him under Pen. Code, § 858, was not reversible if, because accused knew the nature of the charge and already had counsel, he was not injured thereby so that there was no miscarriage of justice, as contemplated by Const. art. 6, § 4½, to authorize reversal.—*People v. Stein*, 137 P. 271.

§ 1169 (Cal. App.) In a prosecution for embezzlement, where the only disputed fact was as to whether the money admitted to have been received by defendant had been returned, the erroneous admission of evidence as to previous misappropriations by defendant was reversible error.—*People v. King*, 137 P. 1076.

§ 1169 (Okla. Cr. App.) Error in admitting hearsay evidence is harmless where the same facts are shown by direct testimony.—*Jones v. State*, 137 P. 121.

§ 1170½ (Ariz.) Where a prosecution for rape was instituted by one interested on behalf of accused, and prosecutrix admitted that she had requested and been refused money from accused, the sustaining of an objection to her cross-examination as to threats against accused if he did not pay her a specified sum held not prejudicial.—*Lenord v. State*, 137 P. 412.

§ 1170½ (Cal.) Where defendant on direct examination stated that he had been in the saloon business, but had sold the saloon, cross-examination as to whether when he left he and his bartender were not charged with beating a man up in the saloon held harmless, in view of the court's prompt instruction to disregard the question.—*People v. Allen*, 137 P. 1148.

§ 1171 (Cal. App.) Where accused testified on cross-examination that he had been convicted of a felony, a statement in argument by the district attorney that accused was in the habit of planning burglaries was not prejudicial.—*People v. Wing*, 137 P. 48.

§ 1171 (Cal. App.) In a criminal prosecution, improper argument by the district attorney that accused had served a term of imprisonment is harmless, where a statement to the same effect had inadvertently crept into the case before the argument.—*People v. Mancuso*, 137 P. 278.

§ 1172 (Ariz.) Where, on a trial for rape, the evidence fixed the age of prosecutrix as under 17 years, an instruction that, if the jury were convinced that she was 17 years old or more, the verdict must be not guilty was not prejudicial, as placing on accused the burden of establishing her age at 17 or over before acquittal.—*Lenord v. State*, 137 P. 412.

§ 1172 (Cal. App.) The submission of a form of verdict to the jury, which contained the name of a particular penitentiary, was not reversible error.—*People v. Stein*, 137 P. 271.

§ 1172 (Okla. Cr. App.) Instructions upon the weight of the evidence held harmless where the evidence of guilt was conclusive.—*Harris v. State*, 137 P. 365.

§ 1174 (Ariz.) That a juror unaccompanied by a bailiff was permitted, without leave of court, to separate from the jury, after their retirement, is not ground for new trial, unless prejudice to accused resulted therefrom, or the evidence reasonably warrants the inference of prejudice.—*Rain v. State*, 137 P. 550.

(H) Determination and Disposition of Cause.

§ 1183 (Okla. Cr. App.) The power to reduce a sentence cannot be exercised arbitrarily by the appellate court but can be exercised to prevent injustice.—*Jones v. State*, 137 P. 121.

§ 1184 (Okla. Cr. App.) Under Rev. Laws 1910, § 6003, the Criminal Court of Appeals can modify any judgment by reducing the sentence.—*Kilgore v. State*, 137 P. 364.

§ 1186 (Okla. Cr. App.) Under Rev. Laws 1910, § 6006, providing that a judgment shall not be set aside for harmless errors, a conviction will not be reversed upon technical objections.—*Jones v. State*, 137 P. 121.

A "technicality" within Rev. Laws 1910, § 6005, providing that a conviction will not be reversed for technicalities, is a proposition of law which in the abstract is correct, but it does not involve the jurisdiction of the court or its substantial rights of the defendant.—*Id.*

§ 1192 (Okla. Cr. App.) After a case has been affirmed by the Criminal Court of Appeals and remanded, the trial court cannot set aside a judgment, but must enforce it pursuant to the mandate.—*Reed v. State*, 137 P. 369.

XVII. PUNISHMENT AND PREVENTION OF CRIME.

§ 1208 (Okla. Cr. App.) Where the evidence showed not only that defendant was guilty of larceny, but that he induced two young men to join him in the crime and manufactured an alibi, a sentence imposing the maximum penalty was not excessive.—*Jones v. State*, 137 P. 121.

CROPS.

See Damages, § 40; Landlord and Tenant, § 328.

CROSS-EXAMINATION.

See Witnesses, §§ 268-288.

CROSSINGS.

See Railroads, §§ 327-351.

CRUELTY.

See Divorce, § 27.

CUSTOMS AND USAGES.

§ 12 (Or.) In proving a custom it is necessary to show that it was known to the parties contracting with reference thereto or was of such general acceptance that knowledge is necessarily implied.—*Barnard & Bunker v. Houser*, 137 P. 227.

§ 15 (Or.) Custom is used only as a means of interpretation of a contract.—*Barnard & Bunker v. Houser*, 137 P. 227.

§ 16 (Or.) Custom cannot be used to import new terms into a contract.—*Barnard & Bunker v. Houser*, 137 P. 227.

§ 17 (Or.) Custom cannot be relied on to show an agreement to furnish a certificate that barley sold is of a certain quality, in contradiction of contract making payment and delivery dependent covenants.—*Barnard & Bunker v. Houser*, 137 P. 227.

DAMAGES.

See Appeal and Error, §§ 204, 231, 1002, 1004, 1052, 1195; Assignments, § 121; Carriers, § 319; Death, §§ 95, 99; Eminent Domain, §§ 128, 145, 204, 205; Fraud, § 59; Municipal Corporations, §§ 385, 751; Physicians and Surgeons, §§ 15, 18; Replevin, § 76; Sales, § 384; Telegraphs and Telephones, § 67; Trial, § 244; Trover and Conversion, § 44; Usury, § 102.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

§ 18 (Cal.) Where in view of Civ. Code, § 19, plaintiff had notice of facts which would put him on inquiry as to the probable cost before he let the contract for the repair of a building, the error of the architects in under-

estimating the cost of construction was not the proximate cause of his injury because of the increased cost.—*Benenato v. McDougall*, 137 P. 8.

§ 40 (Ok.) In an action for breach of a contract to furnish supplies for the making of a crop, loss of profits or damage to the crop is recoverable when within the contemplation of the parties, and flowing proximately from the breach.—*First State Bank of Mannsville v. Howell*, 137 P. 657; *Same v. Lawson*, Id. 661.

§ 40 (Wash.) Where defendant breached a partnership contract to engage in the fur business, and there was no established business by which the profits could be measured, plaintiff cannot recover for prospective profits; the matter being one of speculation.—*Webster v. Beau*, 137 P. 1013.

§ 45 (Wash.) Where defendant breached a contract to engage in the fur trade, plaintiff is entitled to recover such losses as he actually sustained in the way of expenses in performing his part of the agreement, and for the loss of time while so engaged.—*Webster v. Beau*, 137 P. 1013.

IV. LIQUIDATED DAMAGES AND PENALTIES.

§ 78 (N.M.) A stipulation in a contract for the exchange of property that the contract was deposited in escrow, together with the note of each party, "as evidence of good faith and as a forfeit," held to be a penalty.—*Keinath, Schuster & Hudson v. Reed*, 137 P. 841.

The word "forfeit," in its ordinary use in cases, is synonymous with "mulct," "fine," or "penalty."—Id.

§ 78 (Wash.) A contract for the planting and care of an orchard, providing for payment by defendant of \$60 for each acre remaining unplanted at the close of the planting season of 1912, held a provision for a penalty, and not for liquidated damages.—*Sledge v. Arcadia Orchards Co.*, 137 P. 1051.

§ 81 (Wash.) A contract for the conveyance of land which provided for the assignment to the vendor of the purchaser's rights in other lands as security and also for forfeiture held to be in the nature of a penalty and not liquidated damages.—*Miller v. Moulton*, 137 P. 491.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 130 (Wash.) An award of \$3,000 in favor of an injured switchman, whose leg was broken, held not excessive.—*Altier v. Hainsworth*, 137 P. 345.

§ 132 (Wash.) A verdict for \$3,000 is not so excessive as to warrant reduction; plaintiff's wrist having been broken and the bones thereof crushed, and his shoulder badly injured, and there being evidence that the injury to the wrist will be permanent.—*Schwartz v. Northern Pac. Ry. Co.*, 137 P. 317.

§ 132 (Wash.) A verdict of \$4,500 for a severe sprain in a servant's left ankle and a breaking down of the instep, causing what is ordinarily known as flat foot, at times swelling so as to prevent work at hard labor, held excessive, so as to require a reduction to \$2,500.—*Magnuson v. MacAdam*, 137 P. 485.

§ 132 (Wash.) An award of \$18,000 in favor of a miner capable of earning \$4 per day and his board and lodging, and who was only 29 years old at the time of the injury, was not excessive, where he was very severely crushed and injured.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

(B) Evidence.

§ 188 (Ok.) Where plaintiff testified in an action for the killing of one cow and injuring

another, that one cow was worth \$75 to him, and there was evidence that the animal killed was a first-class Jersey cow, fresh and in good order, and that the animal injured was a half-sister, held, that there was sufficient proof of the market value of the cattle.—*St. Louis S. F. Ry. Co. v. Smith*, 137 P. 714.

DAMS.

See *Waters and Water Courses*, § 83.

DEATH.

See *Electricity*, §§ 16, 19; *Municipal Corporations*, § 857; *Pleading*, § 236; *Street Railroads*, § 114; *Trial*, §§ 68, 253; *Wills*, § 523.

IX. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 8 (Kan.) Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, does not confer a right of action for an injury inflicted in another state.—*Metrakos v. Kansas City, M. & O. Ry. Co.*, 137 P. 953.

§ 11 (Ok.) St. 1893, § 4313 (Rev. Laws 1910, § 5281), authorizing recovery for wrongful death, confers upon the beneficiary thereof a property right in the pecuniary value to him of the decedent's life, and gives him a new cause of action for the pecuniary loss which he has sustained from such death.—*City of Shawnee v. Cheek*, 137 P. 724.

§ 23 (Ok.) In an action for the death of a 9 year old boy from falling into a pit maintained in a dangerous condition by the defendant city, the character of the decedent's trespass is a circumstance to be considered in ascertaining whether he was guilty of contributory negligence.—*City of Shawnee v. Cheek*, 137 P. 724.

§ 29 (Ok.) A cause of action arising under St. 1893, § 4313 (Rev. Laws 1910, § 5281), for wrongful death, will survive the death of the beneficiary named therein, and may be revived and prosecuted by his administratrix.—*City of Shawnee v. Cheek*, 137 P. 724.

§ 31 (Kan.) A special administrator, appointed in another state where the deceased left property, held not entitled to sue under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), to recover for the next of kin damages for the death of deceased whose residence and death were in the state.—*Metrakos v. Kansas City, M. & O. Ry. Co.*, 137 P. 953.

An administrator appointed in another state may sue to recover under Code Civ. Proc. § 419, (Gen. St. 1909, § 6014), for the death in Kansas of a resident of such other state.—Id.

An administrator appointed in another state cannot proceed under Code Civ. Proc. § 419, (Gen. St. 1909, § 6014), authorizing recovery for wrongful death where the law of his state prohibits him from maintaining an action there.—Id.

The widow of a nonresident whose death occurred in Kansas may recover as such widow under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, though not entitled to recover as administratrix.—Id.

Alien parents may recover under Code Civ. Proc. § 419 (Gen. St. 1909, § 6014), authorizing recovery for wrongful death, for the death in Kansas of a minor son.—Id.

§ 31 (Kan.) No recovery can be had by a parent for the death of a child except in virtue of the statute.—*Siegrist v. Atchison, T. & S. F. Ry. Co.*, 137 P. 975.

§ 31 (Ok.) An action for the wrongful death of a husband may be maintained by the surviving wife for the benefit of herself and minor children, under Rev. Laws 1910, § 5281, where

there has been no administration of decedent's estate.—*Big Jack Mining Co. v. Parkinson*, 137 P. 678.

(E) **Damages, Forfeiture, or Fine.**

§ 95 (Okla.) The measure of damages for the wrongful death of the husband and father was the pecuniary loss suffered by the widow and minor children by being deprived of his care and support, as determined by his age, physical condition, occupation, earning capacity, and the use made by him of his earnings.—*Big Jack Mining Co. v. Parkinson*, 137 P. 678.

§ 99 (Okla.) A recovery of \$15,000 for death of an employé who had earned as much as \$160 a month and was 30 years old, sober and healthy, and who left a wife and small child, *held* not excessive in view of Const. art. 23, § 7 (Williams' § 356), providing that the damages for wrongful death shall not be subject to any statutory limitation.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

(F) **Trial, Judgment, and Review.**

§ 104 (Kan.) In an action against an electric railway company for the death of a pedestrian, it was error to instruct that, because of the instinct of self-preservation, a presumption must be indulged that decedent was using due care and did not intend to commit suicide, without referring to testimony on the subject and telling the jury when such presumption would cease to operate.—*Jones v. Joplin & P. Ry. Co.*, 137 P. 796.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors.

DECEIT.

See Fraud.

DECLARATION.

See Pleading.

DECLARATIONS.

See Criminal Law, § 413; Evidence, §§ 291, 295.

DEDICATION.

See Limitation of Actions, § 11.

I. NATURE AND REQUISITES.

§ 15 (Wash.) The dedication of a strip of land for a public alley is a question of intention.—*Humphrey v. Krutz*, 137 P. 806.

§ 18 (Wash.) Where an owner so fences his property as to leave a passageway connecting two public streets, which passage is continuously used by people having business with the abutting owners for more than 10 years, and subsequently he sells all the abutting property, retaining legal title to the strip, such strip becomes a public alley by parol dedication to the public, where the use is with the legal owner's consent.—*Humphrey v. Krutz*, 137 P. 806.

§ 19 (Colo.) Where recorded plat showed boundary of lots as excluding street, accompanying statement, reciting that the measurements of the lots were from the center of the street, *held* not in conflict therewith, but, if it was, the map controlled, and the lots did not include any part of the street.—*McDonald v. Kummer*, 137 P. 51.

Where owner of tract divided it into lots and filed a plat showing their boundaries as excluding the street, purchaser of west half of lot on the east side of the street *held* entitled to one-half the length of the lot, excluding the street, notwithstanding his contingent right of reversion upon vacation of the street under Mills' Ann. Stat. 1912, § 7221.—*Id.*

§ 31 (Cal.App.) The mere laying out of lots, and the making of a map showing streets, does not deprive the owner of the right to use the

property until the dedication is accepted.—*Davidow v. Griswold*, 137 P. 619.

§ 39 (Cal.App.) Where the owner of land, after platting streets and public parks, sold lots to purchasers, who relied on the dedication as shown by the plat, neither the owner nor his grantees could thereafter claim that there was no valid dedication to the public.—*Davidow v. Griswold*, 137 P. 619.

§ 39 (Wash.) That the owners of the legal title to a strip of land dedicated for use as a public alley paid certain taxes and assessments thereon did not estop either the city or the abutting owners to assert its public character.—*Humphrey v. Krutz*, 137 P. 806.

§ 43 (Wash.) Where the dedication rests in parol, it is provable by parol testimony.—*Humphrey v. Krutz*, 137 P. 806.

DEEDS.

See Boundaries, § 20; Cancellation of Instruments; Champerty and Maintenance, § 7; Esrows; Estoppel, § 15; Fraudulent Conveyances; Indians, § 15; Infants, §§ 28-31; Larceny, § 5; Lost Instruments, § 2; Mines and Minerals, § 55; Mortgages; Partition, § 109; Pleading, §§ 8, 34; Public Lands, § 121; Quieting Title, § 44; Reformation of Instruments, § 43; Registers of Deeds; Taxation, §§ 742, 788, 810.

I. REQUISITES AND VALIDITY.

(D) Delivery.

§ 60 (Cal.App.) Under Civ. Code, § 1056, the delivery of a deed to the grantee, with the intent that it should convey title only upon the event that the grantor should not survive an operation, was absolute and final.—*Fisher v. Fisher*, 137 P. 1094.

§ 61 (Cal.) The absolute delivery of a deed in escrow to be delivered to the grantee upon the grantor's death is valid and will pass title.—*Long v. Ryan*, 137 P. 29.

An owner of land delivering a deed in escrow to hold until 1910, then to return it to her, if living, if not to deliver it to grantees, she retained such control that the delivery was ineffectual to pass title, notwithstanding her death prior to 1910.—*Id.*

(E) Validity.

§ 70 (Wash.) A deed *held* obtained by the fraud of the grantee justifying setting it aside.—*Chilberg v. Boyd*, 137 P. 487.

III. CONSTRUCTION AND OPERATION.

(B) Property Conveyed.

§ 112 (Colo.) Deed referring to plat or map will be construed in connection therewith, though other means of identifying the property not in conflict with the map may be resorted to.—*McDonald v. Kummer*, 137 P. 51.

(D) Exceptions and Reservations.

§ 141 (Kan.) A clause of a deed conveying a farm from parents to their son, inserted immediately after the description and stipulating that such conveyance was made upon the express condition that the grantors should each have an estate for life in the lands *held* effectual to reserve a life estate.—*Scott v. Scott*, 137 P. 971.

IV. PLEADING AND EVIDENCE.

§ 194 (Cal.App.) There is a presumption that a deed found in the hands of the grantee was rightfully delivered.—*Fisher v. Fisher*, 137 P. 1094.

DEFAULT.

See Judgment, §§ 106-158.

DELAY.

See Carriers, § 106; Contracts, § 294.

DELEGATION OF POWER.

See Railroads, § 9.

DELIVERY.

See Deeds, §§ 60, 61, 194; Pleading, §§ 8, 84; Sales, § 82.

DEMAND.

See Appeal and Error, § 1001; Limitation of Actions, § 68.

DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404.

DEMURRER.

See Pleading, §§ 192-214.

DENIALS.

See Pleading, §§ 122, 382.

DE NOVO.

See Appeal and Error, § 1009; Justices of the Peace, §§ 171, 174.

DEPOSITARIES.

See Municipal Corporations, § 880.

DEPOSITS.

See Banks and Banking, §§ 80, 126-152.

DESCENT AND DISTRIBUTION.

See Executors and Administrators; Fraudulent Conveyances, § 221; Taxation, §§ 859, 895; Wills.

DESCRIPTION.

See Boundaries, § 20; Parties, § 71; Partition, § 95; Wills, §§ 523, 535, 577.

DESERTION.

See Divorce, §§ 37, 147.

DEVICES.

See Wills.

DISCHARGE.

See Guaranty, § 53; Principal and Surety, §§ 108-123.

DISCOVERED PERIL.

See Negligence, § 83.

DISCOVERY.

II. UNDER STATUTORY PROVISIONS.

(A) Interrogatories and Examination of Parties and of Other Persons.

§ 29 (Okl.) Where an order committing a witness to prison does not specify the cause of arrest or commitment, and does not state the question for refusal to answer which the witness has been ordered committed, which statements are required by Rev. Laws 1910, § 5061, he will be discharged on habeas corpus.—*Ex parte Waugh*, 137 P. 105.

DISCRETION OF COURT.

See Appeal and Error, §§ 460, 974, 978; Criminal Law, §§ 665, 680, 959, 1153, 1156; Divorce, §§ 235, 240; Insane Persons, § 34; Justices of the Peace, § 174; New Trial, §§ 104, 105; Pleading, §§ 236, 245, 259; Trial, §§ 59, 68, 349, 350; Vendor and Purchaser, § 114.

DISMISSAL AND NONSUIT.

See Appeal and Error, §§ 78, 334, 425, 430, 756, 781, 786, 796, 837; Certiorari, § 70; Criminal Law, §§ 273, 1081; Justices of the Peace, §§ 159, 167; Municipal Corporations, § 697; Negligence, § 136; Replevin, § 89; Trial, § 165.

DISQUALIFICATION.

See Judges, §§ 39-51.

DISSOLUTION.

See Attachment, § 239.

DISTRIBUTION.

See Mortgages, § 567.

DISTRICT AND PROSECUTING ATTORNEYS.

See States, § 68.

DIVORCE.

See Insurance, §§ 793, 797, 817; Parent and Child, § 17.

II. GROUNDS.

§ 27 (Okl.) Unjustifiable conduct so grievously wounding the wife's feelings, or so utterly destroying her peace of mind as to seriously impair her health, constitutes extreme cruelty within Rev. Laws 1910, § 4962, Comp. Laws 1909, § 6172, though no physical violence is inflicted or threatened.—*Hildebrand v. Hildebrand*, 137 P. 711.

False and groundless charges of adultery made by a husband against his wife held to constitute extreme cruelty within the divorce statute (Rev. Laws 1910, § 4962, Comp. Laws 1909, § 6172).—*Id.*

§ 37 (Cal.) Under Civ. Code, § 101, providing that a consent to a separation is revocable, a wife alleging desertion must show that she in good faith after separation by mutual consent sought a reconciliation and restoration and that the husband refused.—*Borden v. Borden*, 137 P. 27.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) Jurisdiction, Venue, and Limitations.

§ 62 (Nev.) It is competent to permit a resident plaintiff to maintain an action for divorce in the county where the defendant may be found.—*Tiedemann v. Tiedemann*, 137 P. 824.

Under Rev. Laws, § 5838, the district court of the county in which personal service is had on the defendant has jurisdiction in view of St. 1861, c. 103, tit. 3, § 28, to dispose of an action of divorce by a plaintiff who had not resided the length of time required by statute, to give the court jurisdiction regardless of defendant's residence.—*Id.*

(D) Evidence.

§ 127 (Cal.) In an action for divorce on the ground of desertion, a finding that there was no desertion held warranted in view of Civ. Code, § 130, requiring corroboration.—*Borden v. Borden*, 137 P. 27.

§ 130 (Wash.) Where both husband and wife seek a divorce for cruelty, but neither produces evidence sufficient to sustain the charge, a divorce cannot be granted.—*Ellis v. Ellis*, 137 P. 453.

§ 133 (Cal.) Separation by consent within Civ. Code, § 99, declaring such separation is not desertion, may be implied from circumstances.—*Borden v. Borden*, 137 P. 27.

(E) Dismissal. Trial or Hearing, and New Trial.

§ 147 (Cal.) The court in a suit for divorce on the ground of desertion must determine whether there was an absence of consent to living apart, essential to constitute desertion justifying a divorce.—*Borden v. Borden*, 137 P. 27.

(F) Judgment or Decree.

§ 169 (Kan.) Complete dissolution of the marriage relation immediately follows the rendition of a divorce decree.—*Johnson v. Grand Lodge A. O. U. W. of Kansas*, 137 P. 1190.

(G) Appeal.

§ 184 (Cal.App.) Findings on conflicting evidence will not be reversed, where there is some evidence to support them.—*Young v. Young*, 137 P. 1065.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

§ 235 (Okla.) Where a divorce is granted to the wife for the husband's fault, alimony is to be allowed in the court's discretion.—*Hildebrand v. Hildebrand*, 137 P. 711.

§ 240 (Okla.) An allowance, as alimony to the wife, of property worth approximately \$10,000, mainly the homestead, where the remainder of the husband's estate, exclusive of life insurance policies, was between \$7,500 and \$8,000, and the wife was given the custody of three minor children, held not an abuse of discretion.—*Hildebrand v. Hildebrand*, 137 P. 711.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 308 (Cal.App.) A divorce decree awarding the custody of a minor child to the wife construed and held to contain no provision requiring the husband to contribute to its support.—*People v. Hartman*, 137 P. 611.

VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

§ 321½ (Wash.) Where a husband assigned a contract to purchase land to his aunt and the land was subsequently conveyed to her, and his wife, having obtained a divorce granting all the husband's property to her, sued to recover the same, she was entitled on proof of fraud to recover the part of the land retained by the aunt and the value of that conveyed to an innocent purchaser.—*Hay v. Boggs*, 137 P. 474.

§ 323 (Wash.) A default decree of divorce against a nonresident wife on service by publication held not conclusive on the husband's liability to support a minor child of the marriage, where the child was not within the jurisdiction, and was not mentioned in the complaint, though Rem. & Bal. Code, § 989, gives the court jurisdiction to determine the custody and support of the child.—*Schoennauer v. Schoennauer*, 137 P. 325.

The natural duty of a father imposes upon him the legal obligation of supporting his minor children, and he cannot escape such duty by obtaining a decree of divorce from his nonresident and absent wife, upon constructive service, where he in effect abandoned her and the child.—*Id.*

§ 332 (Kan.) While the action of a court of another state in modifying a decree in a divorce suit after death of the wife so as to give the father the custody of his child was not conclusive, in habeas corpus in the state to obtain its custody on the question of his fitness, it was competent evidence thereof.—*Pinney v. Sulzen*, 137 P. 987.

DOCTORS.

See Physicians and Surgeons.

DOMICILE.

See Divorce, § 62.

DRAINS.

See Levees, § 19; Municipal Corporations, § 293.

II. ASSESSMENTS AND SPECIAL TAXES.

§ 76 (Okla.) Where notice of the hearing on the report of viewers in drainage district assessment proceedings is not given as required by Comp. Laws 1909, § 3052, the assessment is void as to all property owners not appearing or otherwise waiving the issuance and publication of such notice.—*Davis v. Board of Com'rs of Lincoln County*, 137 P. 114.

Failure of the viewers in drainage district assessment proceedings to take the oath prescribed by Comp. Laws 1909, § 3047, renders the proceedings void, where the property owners affected do not waive such irregularity.—*Id.*

The notice of a hearing on the report of viewers in drainage district assessment proceedings was void, where they did not contain in appropriate columns a tabulated description of every lot and parcel of land to be affected by the proposed improvement, as required by Comp. Laws 1909, § 3052.—*Id.*

§ 91 (Okla.) Where the commissioners of a drainage district have acquired jurisdiction under Comp. Laws 1909, §§ 3043-3077, to make assessments, the property owners cannot enjoin assessments as greater than the benefits, or not levied equitably, there being an adequate remedy by appeal under Comp. Laws 1909, § 3050.—*Davis v. Board of Com'rs of Lincoln County*, 137 P. 114.

Where the assessments in a drainage district have been made and a cloud created upon the title to the lands, the landowners may enjoin the district commissioners from creating an indebtedness for the improvements, where such assessments are void and the further act of the commissioners will further complicate the titles.—*Id.*

DRAMSHOPS.

See Intoxicating Liquors.

DRUG HABIT.

See Limitation of Actions, §§ 74, 100.

DUE PROCESS OF LAW.

See Constitutional Law, §§ 275-311.

EASEMENTS.

See Dedication, §§ 15, 18, 19, 31, 39; Limitation of Actions, § 58; Municipal Corporations, § 648; Quietting Title, § 2; Vendor and Purchaser, §§ 231, 239.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 1 (Wash.) An "easement," although an incorporeal right, is an interest in land.—*Humphrey v. Krutz*, 137 P. 806.

§ 3 (Cal.) Where plaintiff's predecessor in title agreed with defendant that the latter should have a right of way over his land, and upon conveying the property, reserved the right of way agreed upon, the reservation was not merely of an easement in gross, but was appurtenant to defendant's land and a conveyance to defendant passes title.—*Myers v. Berven*, 137 P. 260.

§ 5 (Cal.) Where defendant paid a valuable consideration for a way, his use, pursuant to the agreement between himself and other landowners, under a claim of right, and adverse to the owners of the land over which it extended, and continued for the prescriptive period, ripen-

ed into an easement by prescription.—*Myers v. Berven*, 137 P. 260.

§ 7 (Cal.) The adverse use of a right of way must be uninterrupted to constitute the basis of title by prescription, but it is not necessary that the right of way be used every day, it being sufficient if the adverse occupant use it whenever it is needed, and his use be not hostilely obstructed.—*Myers v. Berven*, 137 P. 260.

§ 17 (Cal.) Where defendant and others purchased a tract of land, and defendant paid more than his share because he desired a right of way over the land of the other purchasers, defendant has an equitable title to the right of way, where he used it without objection by the other owners and it was generally recognized as his.—*Myers v. Berven*, 137 P. 260.

§ 18 (Wash.) At common law a way of necessity was an easement which passed with a grant of land, wholly surrounded by the land of the grantor, and it depended solely on contract.—*State v. Superior Court of Cowlitz County*, 137 P. 994.

§ 30 (Cal.App.) Nonuser of an easement acquired by grant, coupled with an actual and physical interference with an exercise of the right for the period prescribed by law, will extinguish it.—*City and County of San Francisco v. Main*, 137 P. 281.

§ 36 (Cal.App.) Evidence held sufficient to show that the intervenor's use of the way was adverse in nature, so that he acquired a right of way.—*Davidow v. Griswold*, 137 P. 619.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 51 (Cal.) A private way, granted or reserved to one person for use in connection and as an appurtenance to specified land, cannot be used as of right for the benefit of another parcel.—*Myers v. Berven*, 137 P. 260.

§ 61 (Cal.) In view of Civ. Code, § 1007, a cross-complaint in an action to enjoin defendant from trespassing on plaintiff's land, which alleged that defendant was the owner of a right of way over the land, is sufficient to authorize proof of an easement by prescription, though not averring that the title was prescriptive.—*Myers v. Berven*, 137 P. 260.

In an action where the existence of a way over plaintiff's property was in issue, evidence of defendant's agreement with plaintiff's predecessors in title as to the way and his use under the agreement is admissible to establish an adverse title.—*Id.*

EJECTMENT.

See Evidence, § 291; Limitation of Actions, § 187; Witnesses, § 345.

I. RIGHT OF ACTION AND DEFENSES.

§ 5 (Kan.) Grantors in deed reserving life estate held not limited to an action for damages.—*Scott v. Scott*, 137 P. 971.

V. DAMAGES, MESNE PROFITS, IMPROVEMENTS, AND TAXES.

§ 143 (Kan.) Grantors in deed reserving life estate held entitled to recover possession of the property and the value of its use, subject to deduction for taxes and interest paid, and any other equitable counterclaims, though they had made no formal demand.—*Scott v. Scott*, 137 P. 971.

ELECTION.

See Criminal Law, § 678; Wills, §§ 782-800.

ELECTION OF REMEDIES.

§ 3 (Wash.) Defendants could not rescind a contract for the purchase of a harvester and

threshing machine and at the same time recover damages for loss of crops and expenses incurred in a futile attempt to operate the machine.—*Holt Mfg. Co. v. Strachan*, 137 P. 1008.

§ 15 (Wash.) The definite adoption of one of two or more inconsistent remedies by a party cognizant of the material facts is a conclusive bar to his resort to the alternative remedy.—*Holt Mfg. Co. v. Strachan*, 137 P. 1008.

ELECTIONS.

See Municipal Corporations, §§ 46, 48.

VII. BALLOTS.

§ 164 (Cal.App.) A "ballot" is a single piece of paper containing the name of candidates and the offices for which they are designated.—*Dennen v. Jastro*, 137 P. 1069.

§ 172 (Cal.App.) While Pol. Code, § 1197, impliedly prohibits the printing of the name of a candidate of more than one political party on a ballot a second time, such provision is directory only, and the failure to comply therewith does not render the election void.—*Dennen v. Jastro*, 137 P. 1069.

X. CONTESTS.

§ 269 (Cal.App.) Where an irregularity in the printing of the names on a ballot renders the ballot void, there is no election, and the remedy is not by a contest as between the two highest candidates.—*Dennen v. Jastro*, 137 P. 1069.

ELECTRICITY.

See Contracts, § 220; Municipal Corporations, §§ 762, 763, 789.

§ 14 (Wash.) The degree of care required of one handling electricity depends upon the danger from the current, slight care being sufficient where the current would not injure persons with whom it came in contact, and the highest care being necessary where the current would be fatal to human life.—*Card v. Wenatchee Valley Gas & Electric Co.*, 137 P. 1047.

§ 16 (Wash.) In an action for death by the current from a high power electric wire which was only 17 feet from the ground, defendant cannot excuse itself upon the ground that its negligence was not the proximate cause of the injury, it appearing that deceased in fixing an irrigation flume inadvertently brought an iron pipe in contact with the uninsulated wire.—*Card v. Wenatchee Valley Gas & Electric Co.*, 137 P. 1047.

§ 19 (Wash.) In an action for the wrongful death of one killed by the current, carried by defendant's wire, the question of defendant's negligence in stringing high power wires within 17 feet of the ground and over decedent's land, held, under the evidence, for the jury.—*Card v. Wenatchee Valley Gas & Electric Co.*, 137 P. 1047.

In an action for the wrongful death of one killed by a high current electric wire, the question of his contributory negligence held, under the evidence, for the jury.—*Id.*

EMBEZZLEMENT.

See Criminal Law, §§ 371, 1169.

§ 2 (Okla.Cr.App.) Comp. Laws 1909, § 271, relating to disbarment for embezzlement, applies only in disbarment proceedings, and has no application to a prosecution of an attorney for embezzlement in violation of Rev. Laws 1910, § 2673.—*Price v. State*, 137 P. 736.

§ 5 (Wash.) In a prosecution for larceny by a pledgee who failed to redeliver money which had been deposited with him as security for bonds he gave for the benefit of the complaining witness, the question of his guilt depended upon

his good faith in appropriating the money to his own use.—*State v. Jakubowski*, 137 P. 448.

§ 16 (Wash.) Under Rem. & Bal. Code, § 2601, subd. 3, accused, who accepted money from the complaining witness under an agreement that he should redeliver it upon a release of bonds executed by accused, is guilty of larceny, where he failed and refused to deliver the money upon the release of the bonds.—*State v. Jakubowski*, 137 P. 448.

§ 17 (Okla.Cr.App.) In a prosecution of an attorney for embezzlement of a client's money, it was no defense that he had never been legally admitted to the bar of Oklahoma.—*Price v. State*, 137 P. 736.

§ 44 (Okla.Cr.App.) Evidence, in a prosecution of an attorney for embezzlement, *held* to sustain a conviction.—*Price v. State*, 137 P. 736.

§ 47 (Wash.) In a prosecution for larceny by a pledgee, evidence of accused's guilt *held* sufficient to go to the jury.—*State v. Jakubowski*, 137 P. 448.

EMINENT DOMAIN.

See Municipal Corporations, §§ 283-568.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 1 (Wash.) The power of eminent domain exists independent of state Constitutions, being an incident of sovereignty, and, apart from constitutional inhibitions, it is unnecessary that the condemnation be for a public purpose.—*State v. Superior Court of Cowlitz County*, 137 P. 994.

§ 2 (Cal.) Order of Railroad Commission requiring local and long-distance telephone company to permit connection between its long-distance lines and local lines of competing companies, with no provision for compensation except apportionment of tolls, *held* a taking of property without compensation, in violation of the federal Constitution.—*Pacific Telephone & Telegraph Co. v. Eshleman*, 137 P. 1119.

§ 2 (Wash.) The regulation of railroad rates by the state is not a taking or damaging of property without compensation.—*State v. Public Service Commission of Washington*, 137 P. 132.

Public Service Act (Laws 1911, c. 117, § 57), empowering the Public Service Commission to order railroads to establish through routes and a joint rate, construed to authorize an order for interchange of cars between connecting carriers, *held* not to provide for a taking or damaging of property without compensation, in violation of Const. art. 1, § 16.—*Id.*

§ 47 (N.M.) Under Laws 1907, c. 49, old community acquias may be enlarged by condemnation proceedings.—*Pueblo of Isleta v. Tondre*, 137 P. 86.

§ 47 (Wash.) Under Laws 1911, c. 11, § 7, subd. "a," authorizing waterway districts to condemn the property of individuals and private corporations for waterway improvements, and subdivision "d," empowering the commissioners to acquire by eminent domain all necessary rights of way, they could condemn, if necessary, property already devoted to a public use.—*Newell v. Loeb*, 137 P. 811.

Property devoted to a public use cannot be condemned for another public use without express or implied legislative grant.—*Id.*

§ 56 (Wash.) Under Const. art. 12, § 19, and Rem. & Bal. Code, §§ 9300, 9302, 9304, telegraph and telephone company *held* authorized to condemn right of way for telephone line, though the property sought to be appropriated was adjacent to a railroad right of way, and though there was space available within the railroad right of way sufficient for its use.—*State v. Superior Court of Snohomish County*, 137 P. 811.

§ 61 (Wash.) Under Const. art. 1, § 16, authorizing the taking of private property for private ways of necessity, Laws 1913, c. 133,

§ 1, authorizing the condemnation of a private right of way to afford a means of ingress and egress, over which to carry timber and the like, is constitutional.—*State v. Superior Court of Cowlitz County*, 137 P. 994.

All property is derived from society; and hence there is no natural prohibition against the condemnation of the property of a private individual for a private use.—*Id.*

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 101 (Wash.) Property owners abutting a public highway owned by the county and subject to the jurisdiction of county commissioners cannot recover damages for an improvement of the highway or for a change in its grade.—*Ettor v. City of Tacoma*, 137 P. 820.

(C) Measure and Amount.

§ 128 (Wash.) Measure of damages for appropriation of railroad right of way by another railroad company stated.—*Northern Pac. Ry. Co. v. Union Lumber Co.*, 137 P. 306.

§ 145 (Wash.) Under Rem. & Bal. Code, § 7782, special benefits for the public improvement may be offset against compensation for the taking of land.—*In re Queen Anne Boulevard*, 137 P. 435.

Where an existing boulevard was improved and land necessary to the improvement was taken by condemnation, special benefits to the property taken or damaged may be set off, regardless of any equalization of benefits flowing to other property abutting on the improvement.—*Id.*

The benefit resulting to one lot or tract from an improvement cannot be set off in determining the compensation or damages due to the same owner for the taking or injuring of a separate, although contiguous, tract.—*Id.*

§ 145 (Wash.) Since under the Waterway Statute (Laws 1911, c. 11, § 14) requiring the jury to find a maximum amount of benefits per acre or per lot or tract to be derived by each owner, the jury should determine the maximum benefits to the property as it was at the time, whether it might be platted in the future or not, an objection that the assessments upon unplatted property were greater than upon platted property because no deductions were made for streets was untenable.—*Newell v. Loeb*, 137 P. 811.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSES COMPENSATION.

§ 167 (Wash.) Where a municipal corporation condemned land for a boulevard, compensation being made by special assessments, the municipality could thereafter proceed with the physical improvement of the boulevard upon the local improvement and assessment plan.—*In re Queen Anne Boulevard*, 137 P. 435.

§ 186 (Cal.) In view of Civ. Code, § 1001, and Code Civ. Proc. § 1238, it is not a condition precedent to condemnation of land for a railroad that the railroad company file the profile and map required by Civ. Code, § 466.—*Northwestern Pac. R. Co. v. Lambert*, 137 P. 1116.

§ 203 (Wash.) Evidence that the value of sawmill and plant would be decreased by construction of railway across logging railroad, a part of the plant, *held* properly excluded as remote and speculative.—*Northern Pac. Ry. Co. v. Union Lumber Co.*, 137 P. 306.

§ 204 (Wash.) In a proceeding by a municipality to condemn land for a public improvement, evidence of the resolution of the board of park commissioners, and other ordinances relating to the general scheme of the improvement, is admissible to show special benefits, even though the condemnation ordinance did not

in terms refer to such ordinance and resolution.—*In re Queen Anne Boulevard*, 137 P. 435.

In condemnation proceedings where special benefits were to be offset against the damages, the expenses of the improvement being paid for by the municipality, evidence of the amounts which would have been chargeable against the property taken, as special assessments, if the improvement were being constructed upon the local improvement and assessment plan, is admissible.—*Id.*

§ 205 (Wash.) Petitioner's evidence held to justify assessment of damages by jury, though no witness testified what the amount of damages would amount to.—*Northern Pac. Ry. Co. v. Union Lumber Co.*, 137 P. 306.

§ 216 (Wash.) Even if the general statute relating to peremptory challenges of jurors applies to a proceeding under Laws 1911, c. 11, for improving a river channel, all of the defendants must join in the challenge, since the statute contemplates but one jury trial to determine all the questions involved, and does not itself provide for peremptory challenges.—*Newell v. Loeb*, 137 P. 811.

§ 219 (Wash.) Where, though plan of improvement was received without stipulation showing what petitioner desired to do, a stipulation conforming to the plan was subsequently made, admission of the plan held not error.—*Northern Pac. Ry. Co. v. Union Lumber Co.*, 137 P. 306.

§ 219 (Wash.) In view of the whole act, the provision of Laws 1911, c. 11, § 14, requiring the jury to find the maximum amount of benefits in proceedings for improving a waterway merely contemplates that the maximum amount fixed shall be the basis upon which the assessments shall be made, and limits its extent.—*Newell v. Loeb*, 137 P. 811.

Since the Waterway Statute (Laws 1911, c. 11), in effect requires that the benefits from an improvement shall be determined by the jury in one proceeding, there should not be separate hearings upon the assessment of maximum benefits resulting to each tract.—*Id.*

§ 220 (Wash.) Where, in condemnation proceeding, after view of premises, juror was excused by consent and another juror selected, court held not to have erred in refusing to permit view by the new juror.—*Northern Pac. Ry. Co. v. Union Lumber Co.*, 137 P. 306.

§ 221 (Wash.) In condemnation for a public improvement, held improper for the court to treat, as a matter of law, defendant's two vacant, contiguous lots as one tract of land so that the benefits to one of the parcels might be offset against damages to the one injured.—*In re Queen Anne Boulevard*, 137 P. 435.

Whether two adjoining tracts shall be treated as one tract or two, in a condemnation proceeding for a public improvement, is a question of fact, unless the undisputed evidence as to their use and situation leaves no room for different views on the question.—*Id.*

§ 222 (Wash.) In proceeding to assess damages from condemnation of an easement for railway across logging road used as a part of a sawmill plant and property, instructions held to fairly cover the law of the case.—*Northern Pac. Ry. Co. v. Union Lumber Co.*, 137 P. 306.

§ 222 (Wash.) An instruction, in a condemnation proceeding, that one of the objects of the view had by the jury was that they might acquire information as to the physical conditions of the premises, since "what the jury sees they know," and if the evidence conflicted as to the benefits they should resort to the knowledge gained by their view in weighing the evidence, held not erroneous.—*Newell v. Loeb*, 137 P. 811.

In proceedings to condemn some 10,000 different tracts of land for waterway improvements, there was no prejudicial error in permitting the

jury to take with them to the jury room the estimates of the witnesses as to the benefits to the various tracts.—*Id.*

§ 243 (Wash.) Where a municipality condemned land for a boulevard, compensation being paid out of special assessments, the judgment is not a bar in a subsequent proceeding to condemn additional land to the setting off of special benefits for the land so taken.—*In re Queen Anne Boulevard*, 137 P. 435.

IV. REMEDIES OF OWNERS OF PROPERTY.

§ 274 (Cal.App.) Upon a city's taking of land for the extension of a public street in violation of the park purposes for which it was held in trust, resulting in damage from the new and different public use of land adjacent to plaintiff's property, held, that plaintiff was entitled to anticipate the injury and to prevent it by injunction.—*Mulvey v. Wangenheim*, 137 P. 1106.

EMPLOYERS' LIABILITY ACTS.

See Appeal and Error, § 171; Master and Servant, §§ 107, 179, 182, 204, 228.

EMPLOYÉS.

See Master and Servant.

EQUALIZATION.

See Taxation, §§ 449, 450.

EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, § 229.

EQUITABLE ESTOPPEL

See Estoppel, §§ 65, 66.

EQUITY.

See Action, § 25; Appeal and Error, §§ 515, 1009, 1169; Cancellation of Instruments; Corporations, § 252; Discovery; Estoppel, §§ 65, 66; Injunction; Mechanics' Liens, § 245; Partition; Quieting Title; Receivers; Reformation of Instruments; Set-Off and Counterclaim; Specific Performance; Trusts; Usury, § 93.

IV. PLEADING.

(E) Demurrer, Exceptions, and Motions.

§ 262 (Or.) A motion for decree on the pleadings, without stating what decree is desired or any ground therefor, is properly denied.—*State v. Warner Valley Stock Co.*, 137 P. 746.

Where the answer contained no material denials or facts constituting a defense, there was no error in dismissing it without a trial of defendants' claims.—*Id.*

ERROR, WRIT OF.

See Appeal and Error.

ESCROWS.

See Deeds, § 61.

§ 12 (Okla.) A deed placed in escrow will ordinarily take effect on final delivery to the grantee after compliance with the escrow agreement.—*McMurtrey v. Bridges*, 137 P. 721.

A warranty against taxes "at time of delivery" held to so warrant as of the time of final delivery from escrow in which the deed was placed.—*Id.*

§ 13 (Okla.) That the taxes had not become due or a lien when the deed was made and placed in escrow held not to preclude the grantee's recovery of the amount of such taxes from the

grantor pursuant to a warranty against taxes at time of delivery of the deed from escrow.—*McMurtrey v. Bridges*, 137 P. 721.

ESTATES.

See Executors and Administrators; Life Estates; Tenancy in Common; Wills.

ESTOPPEL.

See Appeal and Error, § 882; Dedication, § 39; Infants, §§ 29, 30; Pleading, § 176; Registers of Deeds, § 7; Wills, § 740.

II. BY DEED.

(A) Creation and Operation in General.

§ 15 (Or.) A deed whereby husband and wife bargain, sell, and quitclaim land does not merely release her inchoate right of dower, and neither the grantors nor those claiming under them can assert that it conveys less than fee simple.—*Keady v. Martin*, 137 P. 856.

III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

§ 65 (Wash.) A corporation having sold certain of its stock belonging to defendant, and having received and continued to hold the proceeds, held estopped to deny the validity of the sale.—*Gold Ridge Mining & Development Co. v. Rice*, 137 P. 1001.

§ 66 (Wash.) Where a corporation sold certain of its stock belonging to defendant and accepted the purchaser's note for the price, used it as collateral and claimed to own it, it was no defense to its liability to account for the price that the note had not been paid.—*Gold Ridge Mining & Development Co. v. Rice*, 137 P. 1001.

EVIDENCE.

See Accord and Satisfaction, § 26; Adverse Possession, § 110; Agriculture, § 15; Appeal and Error, §§ 204, 231, 260, 302, 515, 548, 694, 696, 701, 757, 758, 837, 931, 987, 1001, 1002, 1004, 1005, 1008, 1009-1012, 1052-1054, 1056, 1099, 1210; Attorney and Client, § 167; Bail, §§ 43, 49; Bills and Notes, §§ 493, 497, 520, 523, 525, 527; Brokers, §§ 38, 48, 84-86; Burglary, § 38, 41; Carriers, § 316; Compromise and Settlement, § 23; Contracts, §§ 175, 322; Corporations, §§ 32, 269, 432; Criminal Law, §§ 104, 260, 351-572, 938, 942, 1122, 1144, 1158, 1159, 1169, 1172, 1208; Damages, § 188; Death, § 104; Dedication, § 43; Deeds, § 194; Discovery; Divorce, §§ 127-133; Easements, §§ 86, 61; Eminent Domain, §§ 203, 204; Executors and Administrators, § 20; Explosives, § 12; Forcible Entry and Detainer, § 29; Fraud, § 58; Frauds, Statute of, § 139; Habeas Corpus, § 85; Homicide, §§ 165-228; Husband and Wife, §§ 297, 333; Incest, §§ 13, 14; Indemnity, § 15; Insurance, §§ 797, 817; Joint Ventures, § 5; Larceny, § 50; Marriage, § 40; Master and Servant, §§ 270-279; Mechanics' Liens, § 281; Mortgages, § 270; Municipal Corporations, §§ 568, 654; Negligence, §§ 121, 122; New Trial, §§ 78, 104, 105, 128; Parent and Child, § 17; Physicians and Surgeons, §§ 18, 24; Pleading, §§ 237, 308, 376-397, 427; Principal and Agent, §§ 21, 22, 119, 121, 122; Principal and Surety, § 145; Quieting Title, § 44; Railroads, §§ 347, 348, 441, 443; Rape, §§ 35, 51; Reformation of Instruments, §§ 43, 45; Sales, § 52; Specific Performance, § 121; Street Railroads, § 114; Submission of Controversy, § 17; Taxation, §§ 251, 468, 788, 810; Trial, §§ 59-94, 139-143, 165, 178, 194, 251-253, 255, 393; Trusts, § 44; Usury, § 117; Waters and Water Courses, §§ 33, 98, 263; Wills, §§ 288, 487; Witnesses.

Reception of, see Criminal Law, §§ 665-683; Trial, §§ 59-94.

I. JUDICIAL NOTICE.

§ 43 (Colo.App.) Where the laws of another state are involved, the courts may and should take notice of the decisions of the highest courts of such state construing such laws.—*Baxter v. Beckwith*, 137 P. 901.

II. PRESUMPTIONS.

§ 56 (Ok.) Where, in an action to reform a lease, nothing appears to the contrary, the lessor will be presumed to have been an adult at the time of making the lease.—*Giles v. Latimer*, 137 P. 113.

§ 78 (Kan.) Where one plaintiff, testifying by deposition in an action on notes, stated that he had an agreement material to the issues, but on the advice of counsel refused to produce it, the legitimate inference was that such agreement would be detrimental to plaintiffs' case.—*Ireland v. Shore*, 137 P. 926.

§ 80 (Cal.) In the absence of evidence to the contrary, the law of Illinois with reference to the validity, as to one defendant, of a joint judgment, void as to the other defendant, will be presumed to be the same as that of California.—*Cellulose Package Mfg. Co. v. Calhoun*, 137 P. 238.

§ 80 (Cal.) It is presumed that the law of a sister state governing the distribution of the property of deceased persons is the same as the law of California on that subject.—*Wills v. Wills*, 137 P. 249.

III. BURDEN OF PROOF.

§ 94 (Wash.) A presumption of fact is not evidence, but a rule of law fixing the order of proof; and, where proof is offered to rebut the presumption, the burden shifts, and it is incumbent upon the opposing party to sustain his case.—*Nicholson v. Neary*, 137 P. 492.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) Facts in Issue and Relevant to Issues.

§ 113 (Wash.) That land was valued for purposes of exchange at \$4,450 held insufficient to show that such was its reasonable value.—*Hay v. Boggs*, 137 P. 474.

(B) Res Gestæ.

§ 119 (Cal.) A contract of agency given plaintiff, a broker, by a third person, is not competent as evidence of the terms of such a contract given plaintiff by defendant, though both were prepared by plaintiff about the same time; it being no part of the res gestæ.—*Ernst v. Ganahl*, 137 P. 256.

§ 121 (Kan.) In an action to recover corporate stock represented by a certificate, declarations of ownership by the person, since deceased, among whose papers the certificate was found after his death, were admissible as part of the res gestæ to explain his possession of the certificate.—*Kimball v. Edwards*, 137 P. 948.

§ 123 (Wash.) In an action for assault, the exclusion of evidence that, after the assault and after defendant had started away, plaintiff picked up a paper rack when he was seized by some one standing near, was not error.—*Matsuda v. Hammond*, 137 P. 328.

(C) Similar Facts and Transactions.

§ 130 (Cal.) A contract of agency given plaintiff, a broker, by a third person, is not competent as evidence of the terms of such a contract given plaintiff by defendant, though both were prepared by plaintiff about the same time.—*Ernst v. Ganahl*, 137 P. 256.

V. BEST AND SECONDARY EVIDENCE.

§ 157 (Ok.) If the best evidence possible cannot be produced, then the next best evidence should be admitted.—*Commercial Union Assur. Co., Limited, of London, England, v. Wolfe*, 137 P. 704.

§ 166 (Okl.) Rev. Laws 1910, § 5114, authorizing the introduction of books of account as evidence, does not exclude a witness' testimony as to his present knowledge of transactions covered by book entries.—Whitcomb v. Oller, 137 P. 709.

§ 178 (Okl.) Where the books of the assured have been lost or stolen through no fault of his, oral proof to establish the property destroyed by fire is admissible.—Commercial Union Assur. Co., Limited, of London, England, v. Wolfe, 137 P. 704.

VII. ADMISSIONS.

(C) By Grantors, Former Owners, or Privies.

§ 231 (Okl.) Where, in replevin, one defense was that the property was fraudulently conveyed to plaintiff by her husband, testimony as to statements by the husband, in the absence of plaintiff, when he executed the bill of sale, to show his purpose to defraud was properly admitted.—Rauh v. Morris, 137 P. 1174.

(D) By Agents or Other Representatives.

§ 244 (Wash.) The testimony of a shipper of freight that the agent of the railroad company admitted that a delay in transportation was due to the carrier's fault was inadmissible as hearsay as against the carrier, in the absence of proof of the authority of the agent to speak for the carrier.—Auditorium Theatre Co. v. Oregon-Washington R. & Navigation Co., 137 P. 489.

VIII. DECLARATIONS.

(C) As to Pedigree, Birth, and Relationship.

§ 291 (Okl.) It was not error in ejectment to exclude from evidence an affidavit of the deceased mother of an alleged minor concerning his age, where it was not shown that the affidavit was made in good faith, unbiased by any issue between the parties, and made before commencement of the litigation.—Perkins v. Baker, 137 P. 661.

§ 295 (Cal.) Statements by members of decedent's family concerning family history and relationship, made after the controversy as to the right of the estate of decedent had arisen, held inadmissible.—In re Walden's Estate, 137 P. 35.

IX. HEARSAY.

§ 317 (Okl.) Where one defense was that the property was conveyed to plaintiff by her husband in fraud of creditors, it was error to admit evidence of statements by plaintiff's minor son, in her absence, that his father owned the property.—Rauh v. Morris, 137 P. 1174.

§ 318 (Okl.) A certified copy of the enrollment records offered to prove the age of a Seminole allottee at the time he executed a deed in January, 1906, held incompetent as hearsay.—Perkins v. Baker, 137 P. 661.

XII. OPINION EVIDENCE.

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Wash.) In an action by a theatrical company for delay in transportation of scenery, testimony of plaintiff's manager that a prior arrangement with the carrier was merged in a subsequent contract held objectionable as a conclusion of the witness on a question for the jury.—Auditorium Theatre Co. v. Oregon-Washington R. & Navigation Co., 137 P. 489.

§ 474 (Wash.) Witnesses who testified on direct examination that they were acquainted with lands claimed to be damaged by the improvement of a river and with their value and the benefits accruing by reason of the improvement were qualified to testify as to such value; any lack of such knowledge by them, shown on cross-examination, going only to the weight of their testimony.—Newell v. Loeb, 137 P. 811.

§ 477 (Kan.) That a witness is not an expert does not necessarily render him incompetent to testify as to the bodily condition and health of persons.—Ewing v. Wichita R. & Light Co., 137 P. 940.

§ 492 (Or.) In an action for injuries from being struck by an electric car, plaintiff's testimony as to the speed of the car is competent.—Oberstock v. United Rys. Co., 137 P. 185.

(B) Subjects of Expert Testimony.

§ 528 (Okl.) Where injuries are of such a character as to require professional men to determine the cause and extent, the question must be determined by skilled experts.—St. Louis & S. F. R. Co. v. Criner, 137 P. 706.

(D) Examination of Experts.

§ 553 (Utah) Hypothetical questions may be framed either upon all the facts of the case, or upon any part of the facts.—Lindsay Land & Livestock Co. v. Smart Land & Livestock Co., 137 P. 837.

XIV. WEIGHT AND SUFFICIENCY.

§ 587 (Mont.) Circumstantial evidence in a civil case need only produce as provided by Rev. Codes, § 7856, moral certainty in an unprejudiced mind; and where it furnishes support for plaintiff's theory, and tends to exclude any other theory, it is sufficient to support a verdict for him.—Gilmore v. Ostronich, 137 P. 378.

§ 597 (Or.) Evidence to support the verdict or findings of fact must cover all material issues as to which the prevailing party had the burden of proof.—Fields v. Western Union Telegraph Co., 137 P. 200.

§ 597 (Or.) To support a verdict, there must be some legal evidence of every issue on which the prevailing party had the burden of proof.—Wasiljeff v. Hawley Pulp & Paper Co., 137 P. 755.

EXAMINATION.

See Evidence, § 553; Witnesses, §§ 230-288.

EXCEPTIONS.

See Appeal and Error, §§ 248-265; Pleading, §§ 192-214.

EXCEPTIONS, BILL OF.

See Appeal and Error, §§ 497, 525, 544, 553, 563, 613, 701, 713, 758, 864, 907.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 18 (Or.) A paper including only a copy of the instructions, with exceptions to four of them, without the evidence or other matter necessary to explain it, as provided by L. O. L. § 171, is not a proper bill of exceptions, though accompanied by a transcript.—Willis v. Horticultural Fire Relief of Oregon, 137 P. 761.

§ 20 (Cal.App.) Documents entitled "Bill of Exceptions" which contain several specifications of the insufficiency of the evidence, intermingled with argument, and authorities, and certain errors of law, but not setting out the evidence, and not authenticated by the trial judge, or referred to in the authenticated statement of the case, cannot be considered as a bill of exceptions.—Hastaran v. Marchand, 137 P. 297.

EXCHANGE OF PROPERTY.

See Brokers; Damages, § 78; Fraud, § 12; Pleading, § 389; Specific Performance, § 21.

EXCUSE.

See Contracts, § 303.

EXECUTION.

See Limitation of Actions, § 44.

EXECUTORS AND ADMINISTRATORS.

See Death, § 81; Judgment, §§ 713, 736; Trusts; Wills.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 9 (Kan.) Power to grant letters of administration is not dependent upon the existence of debts left by the deceased or assets legally applicable to their payment.—*Metrakos v. Kansas City, M. & O. Ry. Co.*, 137 P. 953.

§ 11 (Kan.) For the purpose of the appointment of an administrator for the prosecution of a death claim, the personal property left by the deceased may be merely nominal.—*Metrakos v. Kansas City, M. & O. Ry. Co.*, 137 P. 953.

A claim under Code Civ. Proc. 419 (Gen. St. 1909, § 6014), authorizing recovery of damages for wrongful death, is not an estate of the deceased to be administered within the state.—*Id.*

§ 17 (Cal.) Ordinarily the widow is entitled to letters of administration, unless she waives such right.—*In re Martin's Estate*, 137 P. 2.

The rendition of an interlocutory decree of divorce against a wife before her husband's death would not take away her right to administer the estate.—*Id.*

The fact that, after a husband and wife had executed a contract embodying a mutual waiver of all rights in each other's estate, they had sexual relations, but without occupying the same habitation as husband and wife, would not entitle the wife to letters of administration on the husband's subsequent death.—*Id.*

§ 17 (Mont.) It is the policy of the law that intestate's widow shall control in limine the administration of his estate, and she may either administer it herself, or nominate a competent person to do so.—*In re Blackburn's Estate*, 137 P. 381.

The fact that the widow claims property which the other heirs claim belongs to the estate does not make her or her nominee incompetent to administer the estate; that not being made a ground of incompetency by Rev. Codes, § 7436.—*Id.*

One who was appointed administrator as the widow's nominee should have candidly informed her, pending his appointment that her claims to the estate might be questioned, and should not have concealed his hostile attitude toward such claims until after his appointment.—*Id.*

Whether intestate's widow was herself competent to be appointed administratrix of his estate or not, she yet had a right to nominate the administrator.—*Id.*

§ 19 (Mont.) Under Rev. Codes, §§ 7432, 7444, 7447, 7450, held that a widow's right of administration, once waived, pursuant to section 6181, permitting the waiver of laws intended for one's own benefit, could not be reasserted if the renunciation was fairly procured and freely given.—*In re Blackburn's Estate*, 137 P. 381.

If a widow's nominee for administrator pending her assent to his appointment intentionally caused her to believe that he was not hostile to her claims, and thereby obtained her consent to his appointment, her waiver of her right to administration cannot be said to have been fairly procured, or freely given, so as to prevent her from reasserting such right.—*Id.*

§ 20 (Cal.) Evidence in a proceeding by a widow, who was divorced by interlocutory decree before her husband's death, for appointment as administratrix held not to show the resumption of marital relations or the abandonment of a divorce proceeding after the husband's death.—*In re Martin's Estate*, 137 P. 2.

§ 21 (Cal.) Under the direct provisions of Code Civ. Proc. § 1350a, the granting of letters with

the will annexed in a case where the testator appointed no executor must be made in accordance with the rules for the granting of administration in ordinary cases of intestacy.—*In re Winbigger's Estate*, 137 P. 1.

Under Code Civ. Proc. § 1365, the heir at law of a decedent, who made a will disposing of his entire estate but appointing no executor, is not entitled to letters of administration with the will annexed unless he takes some part of the testator's personal estate under the will.—*Id.*

§ 35 (Mont.) Evidence, in a petition by intestate's widow for the removal of an administrator appointed at her instance, held to show that his appointment was not fairly procured, in that his hostile attitude toward her claims was intentionally concealed until after his appointment.—*In re Blackburn's Estate*, 137 P. 381.

In proceedings by a widow for removal of an administrator nominated by her, a party should not be required to observe the technical rules of pleading; it being sufficient if the complaint inform the administrator of its nature and proper scope.—*Id.*

VII. DISTRIBUTION OF ESTATE.

§ 315 (Cal.) A decree of distribution that the estate of testator be decreed to his widow in fee, rendered on the petition of the executors, conclusively adjudges that the widow takes the estate freed from any trust in favor of an executor claimed to have been created by the will.—*Wills v. Wills*, 137 P. 249.

It is only when by apt language a will is incorporated in a decree of distribution that resort may be had to the will to determine the distributees and their rights, and in all other cases the decree alone determines the rights of the parties.—*Id.*

X. ACTIONS.

§ 439 (Nev.) Where the holder of a miner's lien died after assigning the claim to another, the assignee was entitled to collect the claim and enforce the lien without making the assignor's administrator a party.—*State v. Langan*, 137 P. 517.

§ 453 (Okla.) A judgment rendered against "A. A., administrator of the estate of Z. T. A., deceased," is not a personal judgment, but a judgment against him in his official capacity.—*Collier v. Gannon*, 137 P. 1179.

EXEMPTIONS.

See Homestead; Process, § 120; Taxation, §§ 233, 251.

EXPLOSIVES.

See Master and Servant, § 319; Trial, § 296.

§ 12 (Wash.) A complaint, alleging that defendant without warning set off a blast in a populous city directly opposite plaintiff's residence, and that plaintiff was injured by dust therefrom, held sufficient without alleging that such acts were negligent.—*Britz v. Houlehan*, 137 P. 1035.

Setting off a heavy explosion in defendant's brickyard, in a populous portion of a city opposite plaintiff's residence, held prima facie evidence of defendant's negligence.—*Id.*

EX POST FACTO LAWS.

See Statutes, § 270.

EXTRADITION.

II. INTERSTATE.

§ 30 (Nev.) Where a husband and wife in Pennsylvania agree to separate, he to pay her a monthly sum for her support and that of a minor child, and prior to any default he left the state, he was not a fugitive from justice from Pennsylvania, based on a criminal charge for

failure to maintain his wife and child in Pennsylvania.—Ex parte Kuhns, 137 P. 83.

§ 32 (Nev.) Where an alleged fugitive from justice is arrested in extradition proceedings and the accompanying indictment charges an offense within the period of limitations, it is immaterial that the copy of the indictment under which he was first arrested contained a clerical error so as to charge a crime barred by limitations.—Ex parte Kuhns, 137 P. 83.

§ 32 (Wash.) Under Const. U. S. art. 4, § 2, and Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), providing for the return of fugitives from justice, the fugitive must be demanded as such by the executive of the state from which he fled, the demand must be accompanied by a copy of the indictment, or affidavit made before a magistrate, charging the fugitive with crime in the demanding state, and a copy of the indictment, or affidavit, must be certified to by the executive of the demanding state.—Thorp v. Metzger, 137 P. 330.

§ 36 (Wash.) An extradition warrant, reciting that accused was charged in the demanding state with the crime of buying and receiving stolen property; that he was a fugitive from the justice of that state; that a demand had been made by the Governor thereof, accompanied by a copy of the complaint, information, or indictment, certified by the Governor to be authentic, was sufficient.—Thorp v. Metzger, 137 P. 330.

FACTORS.

See Brokers.

FALSE IMPRISONMENT.

I. CIVIL LIABILITY.

(A) Acts Constituting False Imprisonment and Liability Therefor.

§ 7 (Wash.) Plaintiff, having taken no steps to have a judgment convicting him of contempt reviewed but having paid his fine and costs after remaining a few days in jail, could not maintain an action against the judge and sheriff for false imprisonment.—Pierce v. Mitchell, 137 P. 1008.

§ 12 (Idaho) Under Rev. Codes, § 2035, held that a commitment, regular on its face and issued by a court of competent jurisdiction, was a protection to the sheriff against liability in damages for false imprisonment.—Peterson v. Merritt, 137 P. 526.

Where a sheriff acts under a process regular on its face and issued by a court of competent jurisdiction and arrests the person against whom it is issued under its directions, he is not liable for false imprisonment, though irregularities were committed or the process obtained wrongfully, fraudulently, or unlawfully.—Id.

FALSE REPRESENTATIONS.

See Fraud.

FEES.

See Attorney and Client, §§ 140, 167; Clerks of Courts, § 37; Records, § 5; Witnesses, § 26.

FELLOW SERVANTS.

See Master and Servant, §§ 159-182, 262, 271, 279, 287.

FENCES.

See Adverse Possession, § 16; Animals, § 92; Railroads, § 446.

FINDINGS.

See New Trial, §§ 73, 78; Reference, § 106; Trial, §§ 349-357, 391-405; Waters and Water Courses, § 33.

FIRE INSURANCE.

See Insurance.

FISH.

See Judgment, § 829; Monopolies, § 4.

§ 5 (Or.) A tideland riparian owner has the exclusive right to draw a seine on his own land, but cannot fish in a manner different from that which may be legally asserted by every other citizen.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766.

FIXTURES.

§ 27 (Wash.) A refrigerator, sink, etc., which might or might not be a trade fixture, if put thereon by the tenant under an agreement that he might remove them, would belong to the tenant.—O'Daniel v. Streeby, 137 P. 1025.

FLIGHT.

See Criminal Law, §§ 351, 822.

FLOWAGE.

See Waters and Water Courses, §§ 262, 263.

FORCIBLE DEFILEMENT.

See Rape.

FORCIBLE ENTRY AND DETAINER.

See Justices of the Peace, § 36.

I. CIVIL LIABILITY.

§ 5 (Okla.) A lessor in possession through his tenants may maintain forcible entry and detainer against a person who, at the expiration of the tenancy but before the tenants have moved, went upon the land without objection from the tenants and claimed title superior to that of plaintiff.—Bilby v. Brown, 137 P. 102.

§ 6 (Kan.) In forcible entry and detainer, the title of property cannot be in issue in the sense of being the final matter to be determined.—Linder v. Warnock, 137 P. 962.

§ 6 (Okla.) In forcible entry and detainer, the right of possession only, and not the title, can be tried.—Bilby v. Bean, 137 P. 691.

§ 29 (Okla.) Where, in forcible entry and detainer, the undisputed evidence showed that plaintiff had been in possession for several years and that defendant during his temporary absence and without his consent entered and held possession by force, plaintiff was entitled to recover.—Bilby v. Bean, 137 P. 691.

FORECLOSURE.

See Mechanics' Liens, §§ 245-291; Mortgages, §§ 401-581.

FOREIGN CORPORATIONS.

See Certiorari, §§ 5, 33; Commerce, § 46; Corporations, §§ 641-684.

FORFEITURES.

See Damages, § 78; Insurance, §§ 328-392; Limitation of Actions, § 30; Mines and Minerals, §§ 25, 27; Railroads, § 85.

FORGERY.

§ 15 (Cal.App.) The word "instrument," as used in Pen. Code, § 115, making the filing or offering of a false or forged instrument entitled to be recorded a felony, is limited to the ordinary meaning of the word in the statutes.—People v. Fraser, 137 P. 276.

The filing of a false and fraudulent birth certificate does not come within Pen. Code, § 115, providing that any person who procures or of-

fers for record a false or forged instrument entitled to recordation is guilty of a felony.—Id.

§ 29 (Wash.) An information for forgery setting out as the subject of the forgery: "Great Northern Railway Co. Certificate of Identification. Issue for the month of Feby. 1913, Cascade Division, Section Gang No. 325, Working no. Seven. Signature of Workman: John Hauser. Dan Armstrong, Foreman," held sufficient without the averment of extrinsic facts showing its legal efficacy; it being an instrument specifically made the subject of forgery by Rem. & Bal. Code, § 2583.—State v. Smith, 137 P. 1008.

FORGETFULNESS.

See Negligence, § 69.

FRANCHISES.

See Banks and Banking, § 73.

FRAUD.

See Account, § 17; Attorney and Client, § 167; Banks and Banking, §§ 74, 116; Bills and Notes, §§ 103, 315, 520; Corporations, §§ 806, 495; Deeds, § 70; Frauds, Statute of; Fraudulent Conveyances; Limitation of Actions, § 100; Mortgages, § 239; Pleading, §§ 8, 369; Principal and Agent, § 71; Specific Performance, § 53; Taxation, § 592; Trusts, § 283.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 9 (Or.) An action of deceit cannot be maintained, unless representations were false, either knowingly or recklessly made, with intent they should be acted on, and they were acted on, and the party injured.—McFarland v. Carlsbad Hot Springs Sanitarium Co., 137 P. 209.

§ 12 (Kan.) False representations, on an exchange of property, that one defendant was ready and able to take at a certain price the land traded for by plaintiff, being a pretense concerning an existing condition, is fraud authorizing recovery of damages.—Hinchey v. Starrett, 137 P. 81.

§ 20 (Cal.) To entitle a person to redress because of a false representation, it is not enough to show that it was material, known by the maker to be false, and made with the intent to deceive, but it must be shown that it actually misled and deceived the party complaining.—Maxon-Nowlin Co. v. Norswing, 137 P. 240.

§ 20 (Wash.) Plaintiff having been induced to trade a store for a lot alleged to be worth \$300, defendant's misrepresentations as to its location held not barred from relief because he had inquired of a friend as to the value of the lot and had been informed that if located as represented it was worth from \$600 to \$1,000.—Lamb v. Levy, 137 P. 1024.

§ 21 (Cal.) A party who relies upon and is deceived by misrepresentation may claim relief, even though he had an opportunity to learn the truth by prosecuting inquiries or otherwise; but one with actual knowledge of the truth cannot recover.—Maxon-Nowlin Co. v. Norswing, 137 P. 240.

II. ACTIONS.

(B) Parties and Pleading.

§ 41 (Or.) Complaint held to state a cause of action for deceit, though containing statements which did not constitute fraud and indefinite allegations.—McFarland v. Carlsbad Hot Springs Sanitarium Co., 137 P. 209.

(C) Evidence.

§ 58 (Cal.) Evidence, in an action to recover for fraudulent misrepresentations as to the size of a parcel of land made in connection with a transfer thereof, held to sustain findings that the plaintiff did not believe and did not rely on

the alleged representations.—Maxon-Nowlin Co. v. Norswing, 137 P. 240.

§ 58 (Or.) Evidence that the name of a defendant appears on a prospectus as director of the corporation issuing it does not sustain an action against him for fraud in the prospectus, without connecting him with its circulation.—McFarland v. Carlsbad Hot Springs Sanitarium Co., 137 P. 209.

(D) Damages.

§ 59 (Kan.) The measure of damages for false representations that one defendant was ready to take at a certain price the land for which plaintiff exchanged his automobile was the difference between the value of the automobile and the sum thus agreed to be paid for the land.—Hinchey v. Starrett, 137 P. 81.

§ 59 (Wash.) The measure of damages, in an action by a purchaser of realty for damages from fraudulent representations as to the thickness of the walls, etc., is the difference between the value of the property at the time of sale and its value had it been as represented.—Hunt v. Allison, 137 P. 322.

(E) Trial, Judgment, and Review.

§ 64 (Or.) Evidence that defendant assisted in the preparation of a fraudulent prospectus for a corporation is sufficient as against him to go to the jury.—McFarland v. Carlsbad Hot Springs Sanitarium Co., 137 P. 209.

FRAUDS, STATUTE OF.

III. PROMISES TO ANSWER FOR DEBT, DEFAULT, OR MISCARriage OF ANOTHER.

§ 23 (Wash.) A parol contract by defendant to pay plaintiff for goods furnished to N. held only a collateral promise to answer for the debt or default and void under the statute of frauds.—Pressentin v. Hawkeye Timber Co., 137 P. 999.

IX. OPERATION AND EFFECT OF STATUTE.

§ 129 (Wash.) The execution of a will is not such part performance of an oral contract to bequeath property as will take the contract out of the statute of frauds.—McClanahan v. McClanahan, 137 P. 479.

§ 133 (N.M.) Where the purchaser at a foreclosure sale made a parol agreement with the mortgagor to pay him the difference between the price he was required to pay at the sale and \$35,000, and was put in possession, the agreement to pay the difference could be enforced by the mortgagor.—Harris v. Hardwick, 137 P. 581.

The statute of frauds is no bar to an action for the price of land actually conveyed, where the deed has been accepted or title otherwise passed.—Id.

§ 139 (Cal.App.) Parol evidence, though involving the subject of an executory contract which in itself would be within the statute of frauds, may be resorted to to prove performance in satisfaction of an accord.—B. & W. Engineering Co. v. Beam, 137 P. 624.

FRAUDULENT CONVEYANCES.

See Limitation of Actions, § 44.

I. TRANSFERS AND TRANSACTIONS INVALID.

(H) Preferences to Creditors.

§ 115 (Wash.) A debtor may prefer a creditor except in cases of insolvency.—Pacific Coast Biscuit Co. v. Oswald, 137 P. 483.

(I) Retention of Possession or Apparent Title by Grantor.

§ 147 (Idaho) Where a retailer sold a wagon, received the price, and placed upon it a notice of

sale, but retained possession, *held*, that there was a sufficient change of possession under Rev. Codes, § 3170, as against the manufacturer who sold the wagon to the retailer under a conditional sale contract, though a receiver took charge of the retailer's property before removal of the wagon.—*Trousdale v. Winona Wagon Co.*, 137 P. 372.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(A) Persons Entitled to Assert Invalidity.

§ 210 (Okla.) A subsequent creditor, who extends credit after actual or constructive notice of a fraudulent conveyance, cannot attack same.—*Rauh v. Morris*, 137 P. 1174.

§ 213 (Idaho) A manufacturer, who sold a wagon to a retailer who resold it to a consumer, but retained possession, placing upon it a notice of sale, *held* not a "creditor" within Rev. Codes, § 3170, providing that transfers of personalty unless accompanied by change of possession shall be void against creditors of the seller while he is in possession.—*Trousdale v. Winona Wagon Co.*, 137 P. 372.

§ 221 (Cal.) The allowance of a claim against a decedent's estate has the effect of a judgment, and the claimant may, by reason thereof, maintain an action to set aside fraudulent transfers made by decedent and to subject the property to the satisfaction of the judgment.—*Scholle v. Finnell*, 137 P. 241.

FUGITIVES FROM JUSTICE.

See Extradition.

GAME.

See Fish.

GARNISHMENT.

See Appeal and Error, § 920.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

§ 13 (Wash.) If there is no present indebtedness from the garnishee, there is nothing upon which the writ can be operated.—*Barkley v. Kerfoot*, 137 P. 1046.

§ 41 (Wash.) Under Rem. & Bal. Code, § 693, providing that if the garnishee is indebted to the principal defendant, but that such debt has not matured, he shall pay such sum into court when due, a covenant to pay future installments of rent under the lease *held* too uncertain to be regarded as an absolute present but not matured indebtedness.—*Barkley v. Kerfoot*, 137 P. 1046.

Under Rem. & Bal. Code, § 8766, providing that conveyances of community property between husband and wife are valid except as to existing equities in favor of creditors, the term "existing equities" embraces both existing and contingent liabilities and does not include existing debts or apply to a garnishment of rent to be due under a lease.—*Id.*

VI. PROCEEDINGS TO SUPPORT OR ENFORCE.

§ 135 (Or.) Appearance of garnishee, who has denied liability, does not give a court jurisdiction to render judgment against him, without the service of allegations and interrogatories.—*Fraleigh v. Hoban*, 137 P. 751.

§ 175 (Or.) A judgment against a garnishee which does not refer to nor perpetuate the lien of the attachment is erroneous.—*Fraleigh v. Hoban*, 137 P. 751.

GIFTS.

See Charities, § 31; Wills, § 523.

GOOD FAITH.

See Sales, § 235; Vendor and Purchaser, §§ 231, 239.

GRANTS.

See Monopolies, § 4; Public Lands.

GROUND RENTS.

See Landlord and Tenant, § 231.

GUARANTY.

See Assignments, §§ 10, 58; Bills and Notes, § 267; Judgment, § 601; Landlord and Tenant, § 184; Principal and Surety.

II. CONSTRUCTION AND OPERATION.

§ 27 (Wash.) Guarantors are not liable beyond the express terms of their engagement.—*Simpson Logging Co. v. Northwest Bridge Co.*, 137 P. 127.

§ 39 (Cal.App.) Where a guaranty of rent expressly required the guarantors, on failure of the lessee to pay the rent, to forthwith pay the same, the guarantors were not entitled to notice of the lessee's election to surrender and its acceptance by the lessors.—*Boschetti v. Morton*, 137 P. 1085.

§ 46 (Cal.App.) Under Civ. Code, §§ 2807, 2808, guarantors of payment of rent under a lease *held* not entitled to notice within a reasonable time after the lessee's default in order to fix their liability.—*Boschetti v. Morton*, 137 P. 1085.

III. DISCHARGE OF GUARANTOR.

§ 53 (Cal.App.) Where lessors merely accepted the lessee's surrender of the premises without eviction, there was no change in the contract or rights of the parties so as to release a guarantor of the rent under Civ. Code, § 2819.—*Boschetti v. Morton*, 137 P. 1085.

IV. REMEDIES OF CREDITORS.

§ 82 (Cal.App.) In an action on a guaranty of a lease, the lessee was not a necessary party, especially where he was insolvent, under Civ. Code, §§ 2800, 2801.—*Boschetti v. Morton*, 137 P. 1085.

GUARDIAN AND WARD.

See Infants, § 115; Insane Persons, § 34; Juvenile, § 14.

HABEAS CORPUS.

See Courts, § 472; Discovery, § 29; Divorce, § 332.

I. NATURE AND GROUNDS OF REMEDY.

§ 4 (N.M.) A writ of habeas corpus is not a writ of error, and cannot discharge the functions of such writ.—*Ex parte Cica*, 137 P. 598.

§ 30 (N.M.) Errors or irregularities, which would be ground for reversal, cannot be grounds for the release of a prisoner on habeas corpus.—*Ex parte Cica*, 137 P. 598.

Error in imposing a sentence of both fine and imprisonment for violation of a city ordinance, where such ordinance provided for fine or imprisonment, *held* not to render the judgment wholly void, so as to entitle defendant to release on habeas corpus before he had paid the fine or suffered the imprisonment.—*Id.*

§ 33 (Ariz.) Anyone in custody on a criminal charge for want of bail is entitled to a writ of habeas corpus for admission to bail.—*In re Haigler*, 137 P. 423.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 54 (Ariz.) One in custody on a criminal charge, applying for writ of habeas corpus for admission to bail, need only allege that he is confined for want of bail under House Bill 1, entitled "An act to establish a Penal Code."—*In re Haigler*, 137 P. 423.

§ 56 (Wash.) A petitioner for a writ of habeas corpus, who elects to stand on his demurrer to the return, thereby admits all the allegations thereof.—*Thorp v. Metzger*, 137 P. 330.

§ 85 (Kan.) A father will not be deprived, at the instance of a third person, of the custody of his child after the death of its mother, on the ground that he is unfit, unless his unfitness is shown by satisfactory proof.—*Pinney v. Sulzen*, 137 P. 987.

Evidence in habeas corpus to obtain custody of a child *held* insufficient to establish that the father was unfit to be intrusted with its custody and guardianship.—*Id.*

§ 99 (Kan.) Upon death of the wife, the husband is entitled to the custody of a child awarded to the wife by a divorce decree, where he is not an unfit person.—*Pinney v. Sulzen*, 137 P. 987.

In determining to whom the custody of a child should be awarded, its welfare should be regarded more than the technical right of the parent.—*Id.*

A parent will not be deprived of the custody of his child because a third person, seeking its custody, has larger means and is able to give the child greater advantages.—*Id.*

§ 99 (Okla.) The right of the mother of a minor child, its father being dead, to its custody and control, is superior to that of a third person who has supported and cared for the child for two or three years.—*In re Butler*, 137 P. 673.

A third person whose wife undertook the care of an infant child for an uncertain compensation, and cared for and supported it for two or three years, *held* to have no legal right to the child's custody as against its mother.—*Id.*

§ 99 (Wash.) In determining the right to the custody of a child as between a parent and a third person who had adopted it, *held* that the wishes of the parent were subordinate to the moral, intellectual, and material welfare of the child.—*Viereck v. Sullivan*, 137 P. 456.

§ 107 (Ariz.) Where one accused of a capital offense seeks admission to bail, the court should hear all of the evidence, and unless it clearly shows the offense to be capital and the presumption of guilt to be great, the accused should be admitted to bail.—*In re Haigler*, 137 P. 423.

HARMLESS ERROR.

See Appeal and Error, §§ 1026-1071; Criminal Law, §§ 1163-1174.

HEARSAY EVIDENCE.

See Criminal Law, § 547; Evidence, §§ 317, 318.

HIGHWAYS.

See Bridges; Eminent Domain, § 101; Municipal Corporations, §§ 648-705, 762-809; Navigable Waters, §§ 1-16; Railroads, §§ 327-351.

I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§ 18 (Okla.) A "public highway," as distinguished from a private road, is one which is open to the travel of the public.—*St. Louis & S. F. Ry. Co. v. Smith*, 137 P. 714.

II. HIGHWAY DISTRICTS AND OFFICERS.

§ 96 (Cal.) A resolution of the board of county supervisors authorizing one of their number to construct a road along a way with money subscribed by private individuals *held* not to make the building of the road a part of the supervisor's official duty.—*Jost v. King*, 137 P. 4.

A complaint against a county supervisor for damages for the nonconstruction of a proposed road *held* insufficient.—*Id.*

In such action, no recovery can be had upon a mere speculative estimate of the increase in the value of the realty which would result from the improvement.—*Id.*

§ 97 (Cal.) Where a county supervisor in constructing a road was a mere volunteer not acting in his official capacity, his sureties cannot be joined in an action against him for damages for failure to complete the road.—*Jost v. King*, 137 P. 4.

III. CONSTRUCTION, IMPROVEMENT, AND REPAIR.

§ 105 (Or.) A highway is free, and at all times controlled by legislative authority.—*Yocom v. City of Sheridan*, 137 P. 222.

V. REGULATION AND USE FOR TRAVEL.

(B) Use of Highway and Law of the Road.

§ 184 (Cal.App.) Evidence *held* insufficient to show that corporation engaged in selling automobiles, sued by person injured while watching an automobile race, was the owner or in possession of the automobile which injured him, that it entered the automobile in such race, or that the driver was its employé or agent.—*Johnson v. Reliance Automobile Co.*, 137 P. 603.

Evidence *held* insufficient to show negligence of driver of automobile, which during race on highway left the highway and ran into a person.—*Id.*

§ 184 (Wash.) An instruction, in an action by one injured when his horse took fright at defendant's automobile, *held* not erroneous in limiting the consideration of defendant's negligence.—*Yttregard v. Young*, 137 P. 1043.

(C) Injuries from Defects or Obstructions.

§ 198 (Mont.) A supervisor of a highway district in which a washout occurred, who, though promptly advised of it, provided no barrier or warning of any kind, in consequence of which plaintiff, who did not know of it, was injured, *held* prima facie liable to plaintiff for such injury.—*Smith v. Zimmer*, 137 P. 538.

§ 214 (Mont.) Instructions, in an action against a highway supervisor for negligence as to a defect in a highway, on the theory that defendant was not liable if his failure to repair was due to lack of funds, and ignoring his duty to warn the public, and, if necessary, to erect a barrier, *held* properly refused.—*Smith v. Zimmer*, 137 P. 538.

HOMESTEAD.

See Public Lands, § 35.

III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§ 150 (Wash.) Where, under Rem. & Bal. Code, § 1465, deceased's children after his death selected a homestead from his separate property, it was error to set it apart to them in fee, but it could only be for a limited time.—*In re Hedemark's Estate*, 137 P. 1031.

HOMICIDE.

See Criminal Law, §§ 273, 438, 722, 822.

II. MURDER.

§ 13 (Cal.App.) Malice will be implied when one deliberately and unnecessarily discharges a gun into a crowd of people with utter disregard of the consequences, though he had no malice against the particular person shot or any one else in the crowd.—People v. Stein, 137 P. 271.

VII. EVIDENCE.**(B) Admissibility in General.**

§ 165 (Cal.) In defendant's trial for the murder of his wife, evidence that the relation between them had been most friendly and that he had provided for her well *held*, in view of the state's evidence as to intent, to be inadmissible.—People v. Allen, 137 P. 1148.

(E) Weight and Sufficiency.

§ 228 (Cal.) Evidence *held* sufficient to prove the corpus delicti.—People v. Allen, 137 P. 1148.

§ 228 (Cal.App.) Evidence that deceased was killed by a gunshot wound is sufficient to establish the corpus delicti; an autopsy upon the body not being necessary.—People v. Ong Git, 137 P. 283.

VIII. TRIAL.**(B) Questions for Jury.**

§ 270 (Cal.) Evidence that defendant had been drinking and was intoxicated on the day of the shooting *held* sufficient to permit the jury to consider the intoxication of accused under Pen. Code, § 22, in determining his intent.—People v. Allen, 137 P. 1148.

(C) Instructions.

§ 294 (Cal.App.) Instructions that an act committed by one while voluntarily intoxicated was not less criminal by reason of such condition, but evidence of intoxication could be considered on account of intent, *held* applicable in a homicide case, where the sole defense was that accused was partially insane from intoxication when he committed the offense.—People v. Stein, 137 P. 271.

§ 309 (Cal.App.) Where the evidence was such that accused could only have been found guilty of murder or acquitted, and the sole defense was mistaken identity, the refusal of requested charges on manslaughter was proper.—People v. Ong Git, 137 P. 283.

X. APPEAL AND ERROR.

§ 340 (Cal.App.) An instruction that, even if accused at the time of the killing was capable of appreciating the wrongfulness of his act, he could not be convicted if he did not have sufficient will power to restrain his homicidal tendency was favorable to accused.—People v. Stein, 137 P. 271.

HOURS OF LABOR.

See Constitutional Law, §§ 205, 238, 275; Master and Servant, § 13.

HUMANITARIAN DOCTRINE.

See Negligence, § 83.

HUSBAND AND WIFE.

See Death, §§ 31, 95; Divorce; Executors and Administrators, § 17; Extradition, § 30; Garnishment, § 41; Habeas Corpus, §§ 85, 99; Homicide, § 165; Insurance, §§ 585, 793, 797, 817; Marriage; Rape, §§ 51, 59; Specific Performance, § 21; Trial, § 396; Wills, §§ 11, 64, 577.

VII. COMMUNITY PROPERTY.

§ 255 (Wash.) A husband, though named as grantee in deed, *held* not to acquire community interest in property paid for almost, if not entirely out of the separate property of the wife.—In re Deschamps' Estate, 137 P. 1009.

§ 258 (Wash.) Husband *held* not to acquire community interest in real estate owned by the wife at time of marriage by paying out money in repairs and up-keep.—In re Deschamps' Estate, 137 P. 1009.

§ 262 (Wash.) The presumption that property standing in the name of either spouse or both spouses is community property is rebuttable, and the courts will look beyond the terms of the conveyance and ascertain, if possible, the true intention and purpose of the parties.—In re Deschamps' Estate, 137 P. 1009.

§ 273 (Ariz.) Civ. Code 1901, pars. 2124, 2125, 3102, 3104, 3108-3110, defining separate and community property, recognize a marital community where husband and wife are equal, and the interest of the wife is not a mere possibility or an expectancy, and, on the death of the husband, she acquires the right to control her share.—La Tourette v. La Tourette, 137 P. 426.

§ 276 (Ariz.) The court, in administering community property disposed of by the will of the deceased husband, may assume jurisdiction of the whole of the community estate to determine debts chargeable against it, and to direct their payment out of the community property.—La Tourette v. La Tourette, 137 P. 426.

VIII. SEPARATION AND SEPARATE MAINTENANCE.

§ 297 (Cal.App.) Evidence, in an action for separate maintenance, *held* to show that defendant, after learning that his wife had consumption, resolved not to longer live with her and abandoned her.—Murdough v. Murdough, 137 P. 267.

§ 298 (Cal.App.) Where a husband willfully deserted his wife, who was willing to live with him, and neglected to support her, and his income was \$200 a month, with board and lodging free, and his expenses did not exceed \$100 a month, an award of \$40 a month to his wife for separate maintenance was proper.—Murdough v. Murdough, 137 P. 267.

X. ENTICING AND ALIENATING.

§ 332 (Kan.) The petition in a husband's action for alienation need plead only the ultimate facts and not necessarily the specific artifices by which the wrong was accomplished.—Warnock v. Moore, 137 P. 959.

Where the petition pleaded certain conduct between certain dates, and further pleaded various other means of alienation, which plaintiff could not, for want of knowledge, describe with particularity, plaintiff was not limited in his proof to the conduct and dates specially pleaded.—Id.

§ 333 (Kan.) In a husband's action for alienation, evidence that defendant foreclosed a chattel mortgage on plaintiff's property soon after eloping with plaintiff's wife was admissible on the question of malice.—Warnock v. Moore, 137 P. 959.

Evidence, in a husband's action for alienation, *held* to show that the elopement of plaintiff's wife with defendant, and in their living together as man and wife, was the result of defendant's siege of the wife's affections.—Id.

§ 334 (Kan.) A verdict for \$7,250 actual damages for alienation of a wife's affections *held* not excessive.—Warnock v. Moore, 137 P. 959.

§ 335 (Kan.) Where, in a husband's action for alienation, the evidence showed that the wife left home with defendant, who furnished the conveyance and supplied her with money, and that they passed as husband and wife, it was

proper to instruct that defendant's conduct in such connection could be considered.—*Warnock v. Moore*, 137 P. 959.

HYPOTHETICAL QUESTIONS.

See Evidence, § 553.

IMPEACHMENT.

See Witnesses, §§ 345-414.

IMPLIED CONTRACTS.

See Money Lent; Use and Occupation.

IMPROVEMENTS.

See Mechanics' Liens; Municipal Corporations, §§ 35, 283-568; Waters and Water Courses, § 33.

IMPUTED NEGLIGENCE.

See Negligence, §§ 93, 96, 136.

INCEST.

§ 13 (Okl.Cr.App.) In a prosecution for incest, evidence of prior acts of incest held admissible as indicating continuousness of the illicit relation and tending to corroborate the testimony of prosecutrix as to the particular act charged.—*Ellsworth v. State*, 137 P. 1188.

§ 14 (Okl.Cr.App.) Evidence held to sustain a conviction of incest.—*Ellsworth v. State*, 137 P. 1188.

INDEMNITY.

See Principal and Surety.

§ 10 (Cal.) Under Civ. Code, § 2778, subds. 4-6, relating to notice to indemnitor, a buyer of corporate stock agreeing to save the seller harmless from any liability as stockholder is not entitled to notice of any suit against the seller, or an opportunity to defend any suit.—*Eva v. Andersen*, 137 P. 16.

§ 11 (Cal.) A right of recovery on a contract to hold the seller of corporate stock harmless from any liability as stockholder arises as soon as a liability is incurred.—*Eva v. Andersen*, 137 P. 16.

§ 15 (Cal.) Where a buyer of corporate stock agreed to hold the seller harmless from any liability on the stock, the seller might pay a claim due from the corporation and then sue the buyer, or, in view of Civ. Code, § 2773, subd. 1, he could sue the buyer before payment.—*Eva v. Andersen*, 137 P. 16.

A complaint in an action by a seller of corporate stock on the buyer's agreement to hold him harmless from liability, which alleges a payment because of his liability for a debt of the corporation evidenced by a note, held not defective for failing to allege that the note was due, or averring its face value, or that it was unpaid.—*Id.*

The complaint need not plead that limitations were not available against the debt due from the corporation.—*Id.*

Where a person indemnified paid any sum on the theory that he is liable, he must show in a suit against the indemnitor that the liability existed, but he need not await and defend an action to establish his liability.—*Id.*

INDIANS.

See Marriage, §§ 40, 51; Schools and School Districts, §§ 13, 151.

§ 13 (Okl.) Decisions of the Department of the Interior based purely upon findings of fact, relative to the title to Indian allotments, will not be disturbed by the courts in the absence of fraud or apparent error of law.—*Baltz v. Mitchell*, 137 P. 666.

§ 15 (Okl.) The marriage of a female Choctaw Indian under 18 years does not affect re-

strictions imposed by Congress against the sale of her allotments during minority, and such a conveyance by her without supervision of the probate court is void.—*Dodd v. Cook*, 137 P. 348.

§ 15 (Okl.) Where a Creek Indian entitled to be enrolled under Act Cong. June 23, 1893, § 21, died after April 1, 1899, but before receiving his allotment, his lands descended to his heirs, pursuant to the Original Treaty of March 1, 1901, with the Creek Indians, § 28, free from restrictions upon alienation imposed by section 7 of such treaty and section 16 of the Supplemental Treaty of June 30, 1902, and a warranty deed of such heirs after allotment to them conveyed the fee-simple title.—*Bilby v. Gilliland*, 137 P. 687.

§ 15 (Wash.) Indians are recognized as wards of the nation, and it is the duty of the court to uphold those restrictions against the alienation of their lands which the federal government has established to prevent them from impoverishing themselves.—*Felix v. Yaksum*, 137 P. 1037.

Under Acts Cong. March 3, 1875, and July 4, 1884, an Indian who received a patent to land in 1908 cannot alienate it within the next five years.—*Id.*

Where land patented to an Indian in 1908 had not been surveyed until 1884, the patent cannot be held to be the second patent provided for by Act Cong. July 4, 1884, which conveyed the land free from restrictions against alienation, for the 25-year limitation against alienation could not have expired before 1909.—*Id.*

Federal laws restricting Indians from alienating their land become part of the patents of such Indians, and the restrictions against alienation cannot be defeated because the patent does not contain them.—*Id.*

§ 27 (Wash.) In an action to enforce alienation of lands by an Indian, the court will, in view of the status of Indians, consider the defendant's power of alienation, though not shown by the record below.—*Felix v. Yaksum*, 137 P. 1037.

INDICTMENT AND INFORMATION.

See Abortion, § 5; Extradition, § 32; Forgery, § 29; Larceny, § 40; Rape, §§ 20, 35.

V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 71 (Cal.App.) An information charging that the abortion was committed by the use of "instruments in and about and within the body" of prosecuting witness, without naming the instrument used, was not demurrable for uncertainty.—*People v. Guaragna*, 137 P. 279.

§ 110 (Ariz.) Under Pen. Code 1901, §§ 418, 422, defining burglary, that offense is properly charged by a mere averment of a burglarious entry.—*Rain v. State*, 137 P. 550.

§ 110 (Wash.) An information charging the offense of larceny by a bailee is sufficient where it makes the charge in the words of the statute.—*State v. Jakubowski*, 137 P. 448.

VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§ 154 (Cal.App.) Under the express provision of Pen. Code, § 1012, an objection to the indictment on the ground of its defect in form or its uncertainty is waived in the absence of a demurrer thereto.—*People v. Horvath*, 137 P. 1069.

INDORSEMENT.

See Assignments, § 41; Bills and Notes, §§ 267, 396, 404.

INEVITABLE ACCIDENT.

See Waters and Water Courses, §§ 262, 263.

INFANTS.

See Divorce, §§ 308, 323; Habeas Corpus, §§ 85, 99; Homestead, § 150; Indians, § 15; Municipal Corporations, §§ 847, 857; Negligence, §§ 33, 96, 122; Parent and Child; Principal and Surety, § 118; Reformation of Instruments, § 46; Street Railroads, §§ 96, 114.

III. PROPERTY AND CONVEYANCES.

§ 26 (Cal.) Under Civ. Code, §§ 33-37, conveyance of land by minor under 18 *held* void.—Hakes Inv. Co. v. Lyons, 137 P. 911.

§ 29 (Cal.) A deed to land by a minor under 18 being wholly void, neither the deed nor the fact it is recorded creates an estoppel, nor can it be validated by an estoppel.—Hakes Inv. Co. v. Lyons, 137 P. 911.

One who conveyed land when 14 years old, and 14 years later filed petition to be adjudged insolvent, in which he stated that he had no real property, *held* not thereby estopped as against persons who did not purchase in reliance on the petition or any act of his.—Id.

§ 30 (Cal.) Deed by minor under 18, being absolutely void, *held* not subject to ratification, unless there is some act equivalent to the execution of a new contract, or which operates as an estoppel.—Hakes Inv. Co. v. Lyons, 137 P. 911.

§ 31 (N.M.) Where an infant purchases real estate, and disaffirms the contract and restores the property on becoming of age, the vendor cannot defeat the right to disaffirm by refusing to take back the property.—Evants v. Taylor, 137 P. 583.

VII. ACTIONS.

§ 115 (Okl.) Where a summons in error was served upon the guardian, and not upon minor plaintiffs who appeared below by guardian or attorney, such service was insufficient under Rev. Laws 1910, §§ 4721, 5238, to confer appellate jurisdiction over the minors.—Scott v. Brown, 137 P. 113.

INHERITANCE TAX.

See Constitutional Law, § 229; Taxation, §§ 859, 896.

INHERITANCE TAX LAW.

See Statutes, § 70.

INJUNCTION.

See Eminent Domain, § 274; Levees, § 19; Monopolies, § 4; Municipal Corporations, §§ 671, 697, 1028; Principal and Surety, § 145; Taxation, §§ 610, 652; Venue, § 61.

II. SUBJECTS OF PROTECTION AND RELIEF.**(C) Contracts.**

§ 59 (Cal.App.) On defendant's breach of a contract to care for and sell to plaintiff certain nursery orange trees, plaintiff could not enjoin defendant from disposing of the trees to another.—Emerzian v. Asato, 137 P. 1072.

VII. VIOLATION AND PUNISHMENT.

§ 223 (Colo.App.) In view of Rev. St. 1908, §§ 3273 and 3274, the action of the board of county commissioners in fixing a maximum water rate at the same standard as a rate which had been enjoined *held* not in violation of the injunction which prohibited the commissioners from enforcing or attempting to enforce such rate.—McCracken v. Montezuma Water & Land Co., 137 P. 903.

INSANE PERSONS.

See Criminal Law, § 773.

III. GUARDIANSHIP.

§ 34 (Wash.) There is no abuse of discretion in appointing, as guardian of an insane person, a stranger, rather than a brother; the evidence showing a probable misappropriation of his estate, and that it was not likely the property would be returned if the brother was appointed.—In re Martenson, 137 P. 840.

INSOLVENCY.

See Assignments for Benefit of Creditors; Banks and Banking, §§ 74, 77, 80; Corporations, §§ 232, 542-559, 679, 684; Fraudulent Conveyances; Reference, § 106.

INSTRUCTIONS.

To jury, see Criminal Law, §§ 732-834; Homicide, §§ 294, 309; Trial, §§ 191-296.

INSURANCE.

See Assignments, § 121; Evidence, § 178; Officers, §§ 28, 55.

III. INSURANCE AGENTS AND BROKERS.**(A) Agency for Insurer.**

§ 93 (Kan.) Where an agent insured property mortgaged to the bank of which he was cashier, making the loss payable to the mortgagee, *held*, that the agent's relation to the mortgagee did not invalidate the policy in the absence of fraud.—Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co., 137 P. 78.

V. THE CONTRACT IN GENERAL.**(B) Construction and Operation.**

§ 146 (Kan.) Where a policy prepared by insurer contains ambiguous provisions, it will be construed to uphold rather than defeat the indemnity.—Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co., 137 P. 78.

§ 151 (Colo.App.) A life policy which stipulates that insurer issues the policy in consideration of the representations in the application makes the application a part of a contract.—Germania Life Ins. Co. of New York City v. Klein, 137 P. 73.

IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.**(A) Grounds in General.**

§ 256 (Colo.App.) Where statements in an application for life insurance are false and material, they avoid the policy whether the result of intention or of mistake or whether made in good faith.—Germania Life Ins. Co. of New York City v. Klein, 137 P. 73.

(C) Matters Relating to Person Insured.

§ 290 (Colo.App.) A misrepresentation as to age by representing that applicant was 50 years old at her nearest birthday, while in fact 63, defeats only the policy pro tanto, and insurer is liable to the amount of the insurance which the premium paid would have purchased at the age of 63.—Germania Life Ins. Co. of New York City v. Klein, 137 P. 73.

§ 292 (Colo.App.) A statement in an application that the applicant had never consulted a physician, *held* a false statement materially affecting the risk so as to invalidate the policy.—Germania Life Ins. Co. of New York City v. Klein, 137 P. 73.

X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

(B) Matters Relating to Property or Interest Insured.

§ 328 (Kan.) A clause in a fire policy payable to the mortgagee, which provided that it should be forfeited on foreclosure, *held* not to relieve the insurer from liability.—*Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co.*, 137 P. 78.

(E) Nonpayment of Premiums or Assessments.

§ 360 (Ariz.) If the policy or notes provide for forfeiture for nonpayment of premium notes, and such provision is not waived, the giving of a note does not operate as a payment of the premium, but merely postpones the time for payment.—*Occidental Life Ins. Co. v. Jacobson*, 137 P. 869.

XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.

§ 372 (Ariz.) A forfeiture clause in an insurance policy for nonpayment of premiums may be waived by the insurer.—*Occidental Life Ins. Co. v. Jacobson*, 137 P. 869.

§ 388 (Ariz.) Courts readily seize upon the opportunity to bring about a waiver of a forfeiture policy by placing a liberal construction upon the acts of the insurer if such construction is demanded by justice, and not repugnant to law.—*Occidental Life Ins. Co. v. Jacobson*, 137 P. 869.

§ 392 (Ariz.) Where a policy provided that upon failure to pay a premium note when due, the policy should become void without action by the company, the company by accepting a payment of interest after a premium note was due, and also a payment of one-half of the principal of the note, waived the provision for forfeiture.—*Occidental Life Ins. Co. v. Jacobson*, 137 P. 869.

XIV. NOTICE AND PROOF OF LOSS.

§ 553 (Or.) Under the provision of a policy under L. O. L. § 4666, that it shall be void in case of fraud or false swearing, the false swearing must have been knowingly and willfully false, with the effect of deceiving and misleading.—*Willis v. Horticultural Fire Relief of Oregon*, 137 P. 761.

Instructions that false swearing, to avoid a policy, must have been with knowledge of the falsity "and with the intention of defrauding the company" *held* erroneous in using the words quoted.—*Id.*

XVI. RIGHT TO PROCEEDS.

§ 585 (Kan.) The benefit accruing from a life insurance policy payable to insured's wife, naming her, is payable to her although she secures a divorce and he remarries and is living with his second wife at the time of his death.—*Filley v. Illinois Life Ins. Co.*, 137 P. 793.

XVIII. ACTIONS ON POLICIES.

§ 640 (Okla.) Answer, in an action on a fire policy authorizing cancellation for the taking out of additional insurance without permission, *held* demurrable.—*St. Paul Fire & Marine Co. v. Bragg*, 137 P. 715.

XX. MUTUAL BENEFIT INSURANCE.

(B) The Contract in General.

§ 719 (Okla.) The terms of a benefit certificate are determined by the Constitution and laws of the society as they exist at the beginning of the membership, and as they may be lawfully amended thereafter and by agreement made pursuant

thereto.—*Hines v. Modern Woodmen of America*, 137 P. 675.

The power of a benefit society to change its regulations is a part of the contract of insurance, where the member has promised not only to conform to regulations as they then exist but also as they may be thereafter altered or amended.—*Id.*

The power reserved in a benefit society to amend or repeal its regulations does not authorize it to adopt a by-law which will divest or disturb the rights once vested in its members.—*Id.*

(E) Beneficiaries and Benefits.

§ 778 (Okla.) Where a benefit certificate payable to the member's heirs unless his mother survived him was issued subject to power to change the by-laws, *held*, that an amendment to the by-laws providing that, on the death of a named beneficiary and failure of the member to make a new designation, his wife should take in preference to his heirs controlled.—*Hines v. Modern Woodmen of America*, 137 P. 675.

§ 783 (Okla.) A beneficiary named in a benefit certificate only acquires a vested right in the benefits accruing thereunder on the member's death.—*Hines v. Modern Woodmen of America*, 137 P. 675.

§ 793 (Kan.) Under Gen. St. 1909, § 4303, a death benefit was not payable to the divorced wife of insured, unless she was dependent upon him at the time of his death.—*Johnson v. Grand Lodge A. O. U. W. of Kansas*, 137 P. 1180.

§ 797 (Kan.) Where the death of a member of a benefit association deprives his divorced wife of all means of enforcing a judgment provided for in the divorce decree, she is "dependent" upon him within Gen. St. 1909, § 4303, to the extent of her interest in the judgment, and may sue to recover the amount of the judgment and costs.—*Johnson v. Grand Lodge A. O. U. W. of Kansas*, 137 P. 1190.

Evidence that the divorced wife of a member of a benefit association had a judgment against him under the divorce decree *held* not to entitle her to recover the amount of the certificate as one "dependent" upon him within Gen. St. 1909, § 4303, where it did not appear that she could not collect her judgment.—*Id.*

(F) Actions for Benefits.

§ 817 (Kan.) In an action by the divorced wife of a member of a benefit association to recover the insurance, the burden was on plaintiff to prove that she was, at the time of the member's death, "dependent" upon him within Gen. St. 1909, § 4303, specifying who may recover death benefits.—*Johnson v. Grand Lodge A. O. U. W. of Kansas*, 137 P. 1190.

INTENT.

See Dedication, § 15; Trial, § 344; Wills, §§ 439-490.

INTEREST.

See Usury.

I. RIGHTS AND LIABILITIES IN GENERAL.

§ 18 (Cal.App.) Interest is not properly allowable on an unliquidated demand, due upon an implied contract.—*Merchants' Collection Agency v. Gopcevic*, 137 P. 609.

INTERIOR DEPARTMENT.

See Indians, § 13; Public Lands, § 103.

INTERLINEATION.

See Alteration of Instruments, § 11.

INTERPRETERS.

See Criminal Law, § 547; Witnesses, § 230.

INTERROGATORIES.

See Trial, §§ 849-857.

INTOXICATING LIQUORS.

See Criminal Law, §§ 406, 778; Landlord and Tenant, § 49.

VI. OFFENSES.

§ 146 (Okla.Cr.App.) In a prosecution for selling whisky, or having whisky in possession with intent to sell same, it was no defense that defendant represented a whisky house in another state and delivered whisky on commission to customers in Oklahoma.—*Stitch v. State*, 137 P. 887.

INTOXICATION.

See Homicide, §§ 270, 294.

INVESTMENT.

See Schools and School Districts, § 18.

IRRIGATION.

See Waters and Water Courses, §§ 238-263.

ISSUES.

See Pleading, §§ 376-397.

JOINT ADVENTURES.

§ 5 (Wash.) Evidence held not to show that the defendant agreed to assume one-half the losses occurring in speculation for which plaintiff advanced the funds.—*Lewis v. Dean*, 137 P. 341.

JOINT AND SEVERAL LIABILITY.

See Torts, § 22.

JOINT TENANCY.

See Tenancy in Common.

JOINT TORT-FEASORS.

See Judgment, § 891.

JUDGES.

See False Imprisonment, § 7; Justices of the Peace.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 3 (Kan.) The passage of an ordinance by a city of the first class operating under the commission form of government is not essential to the authority of the commissioners to appoint a police judge pursuant to Gen. St. 1909, § 1304.—*In re Carroll*, 137 P. 975.

IV. DISQUALIFICATION TO ACT.

§ 39 (Wash.) A judge is not disqualified to sit because some years previously his firm had represented plaintiff in other litigation (Rem. & Bal. Code § 209).—*Fortson Shingle Co. v. Skagland*, 137 P. 304.

§ 49 (Wyo.) The word "trial," as used in Comp. St. 1910, §§ 5147, 5148, providing for change of judge for prejudice, means any hearing in which any controverted question of law or fact is presented for determination.—*Murdica v. State*, 137 P. 574.

§ 51 (Wyo.) Where an affidavit of prejudice against the judge is filed under Comp. St. 1910, §§ 5147, 5148, no issue can be taken thereon, but the judge is absolutely disqualified to proceed or determine any further question touching the trial.—*Murdica v. State*, 137 P. 574.

After filing an affidavit of prejudice against the judge before whom a case was called for

trial, as authorized by Comp. St. 1910, §§ 5147, 5148, he was disqualified to pass on a subsequent motion for change of venue for prejudice of the inhabitants.—*Id.*

§ 51 (Wyo.) An affidavit of prejudice having been filed against the judge, he is disqualified to pass on a subsequent motion for change of venue.—*Aspoli v. State*, 137 P. 577.

JUDGMENT.

See Appeal and Error; Criminal Law, § 1001; Divorce, § 169; Eminent Domain, § 243; Executors and Administrators, § 453; Garnishment, § 175; Habeas Corpus, § 30; Mechanics' Liens, §§ 290, 291; Municipal Corporations, § 633; Names, § 4; Parent and Child, § 17; Partition, § 95; Pleading, §§ 345, 433; Principal and Surety, § 145; Quieting Title, § 52; Rape, §§ 35, 59; Replevin, § 103; Submission of Controversy, § 18; Taxation, §§ 592, 810; Trial, §§ 394, 396; Waters and Water Courses, § 152.

IV. BY DEFAULT.**(A) Requisites and Validity.**

§ 106 (Cal.) Under Code Civ. Proc. § 585, where cross-defendants' answer, though not filed within the time allowed as extended, was filed before any application to enter default and judgment, clerk held to have no authority to enter the cross-defendants' default or the judgment.—*Reher v. Reed*, 137 P. 263.

§ 107 (Okla.) There can be no judgment by default where there is any pleading raising an issue of law or fact.—*Crossan v. Cooper*, 137 P. 354.

Before a judgment can be entered, the answer or other plea must be disposed of by way of motion, demurrer, or in some other manner.—*Id.*

Where petition to recover on a foreign judgment showed that the cause of action was barred by limitations, an answer specifically set up such bar, but the court entered a purported default judgment and a trial was had, and the only evidence introduced was copies of the pleadings and the original judgment, held that, the defense being sufficient, it was reversible error to render judgment for plaintiff.—*Id.*

§ 126 (Cal.App.) In an action against a foreign corporation for salary due plaintiff, begun by constructive service, where the corporation defaulted, judgment cannot be entered by the clerk under Code Civ. Proc. § 585, subsec. 1, but plaintiff must under subsection 3 establish in open court the validity of the claim sued on.—*Winston v. Idaho Hardwood Co.*, 137 P. 601.

(B) Opening or Setting Aside Default.

§ 142 (Cal.) Under the express provisions of Code Civ. Proc. § 473, a person served by publication may come in at any time within a year and have the judgment set aside.—*Parkside Realty Co. v. MacDonald*, 137 P. 21.

§ 155 (Cal.) Notice of motion to set aside default entered after answer was on file, which motion was based on the records and on attached affidavits, held to sufficiently show the grounds of the motion, even if treated as an application under Code Civ. Proc. § 473.—*Reher v. Reed*, 137 P. 263.

Where clerk's want of authority to enter default appeared on the face of the record, whether notice of motion to set aside default sufficiently specified the grounds held immaterial.—*Id.*

§ 158 (Cal.) On an application to set aside a default, no affidavit of merits was necessary where a duly verified answer, stating a good defense, was on file.—*Reher v. Reed*, 137 P. 263.

VI. ON TRIAL OF ISSUES.

(A) Rendition, Form, and Requisites in General.

§ 199 (Wash.) In action for injuries by person who fell in stepping from cement sidewalk to plank walk, six inches lower, court *held* to have erred in granting judgment for city non obstante veredicto, as the city's negligence and plaintiff's contributory negligence were for the jury.—*Lautenschlager v. City of Seattle*, 137 P. 823.

§ 217 (Wyo.) A decree in a suit to determine water rights, fixing the priorities, specifying the amount of water to which defendant city was entitled, and enjoining interference therewith, *held* not interlocutory, but final.—*Holt v. City of Cheyenne*, 137 P. 876.

(B) Parties.

§ 238 (Cal.) Under Code Civ. Proc. §§ 414, 578, authorizing judgment against one or more joint defendants, a joint judgment against two parties to a joint contract is not invalid as to one of the parties simply because it is void as to the other who was not served with process.—*Cellulose Package Mfg. Co. v. Calhoun*, 137 P. 238.

(C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§ 250 (Ariz.) Defendant's answer alleging that consideration for commissions on sale of property, attacked by plaintiff as usurious, was services performed by him *held* not to support judgment authorizing the defendant to hold collateral as security for commissions on a future sale.—*Blaisdell v. Steinfeld*, 137 P. 555.

§ 251 (Cal.) Under Code Civ. Proc. § 580, providing that the court may grant the plaintiff any relief consistent with the complaint and embraced within the issues, relief entirely outside the issues cannot be granted.—*Simmons v. Simmons*, 137 P. 20.

§ 252 (Mont.) In action to quiet title, an answer showing title by adverse possession, *held* to support judgment establishing and quieting defendant's title, though it contained no prayer for such relief.—*Anaconda Copper Mining Co. v. Thomas*, 137 P. 880.

§ 256 (Cal.App.) Finding of an executed accord and satisfaction *held* to support a judgment for defendant, though there was no express finding of the bona fides of the dispute constituting the basis of the agreement.—*B. & W. Engineering Co. v. Beam*, 137 P. 624.

VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 326 (Cal.App.) Where the entry in the minutes does not correctly embody the judgment given, or the judgment was inadvertently made or entered, it may be corrected nunc pro tunc.—*Kowalsky v. Nicholson*, 137 P. 607.

Where an action is dismissed for want of prosecution, the judgment should direct the return to defendant of property taken from her on replevin, and if it inadvertently omits an order to that effect, the order may be entered nunc pro tunc.—*Id.*

Where a judgment did not give the successful party the full measure of the relief incident to the judgment such party is entitled to have it corrected nunc pro tunc as of the date of its original entry.—*Id.*

IX. OPENING OR VACATING.

§ 343 (Okla.) Before a judgment rendered on perjured testimony will be vacated under Rev. Laws 1910, § 5287, it must appear that the injured party has presented the matter with due diligence, and is clearly entitled to the relief sought, that the question of perjury could not have been litigated at the trial, or the relief sought obtained therein by the use of due

diligence.—*El Reno Mut. Fire Ins. Co. v. Sutton*, 137 P. 796.

§ 354 (Wash.) Trial court *held* to have no power to vacate on motion judgment which was not void but merely erroneous.—*Morgan v. Williams*, 137 P. 476.

§ 376 (Okla.) Where plaintiff had removed the insured goods from the state before the fire, and recovered on her testimony that they had been burned, and the defendant, relying on plaintiff's allegations, sought only to minimize the amount of plaintiff's loss, plaintiff's perjured testimony constituted a fraud authorizing vacation of the judgment under Rev. Laws 1910, § 5287, subd. 4.—*El Reno Mut. Fire Ins. Co. v. Sutton*, 137 P. 700.

The obtaining of a judgment by willful perjury is obtaining it by fraud within Rev. Laws 1910, § 5287, subd. 4, authorizing the vacation of judgments obtained by fraud.—*Id.*

Where the unsuccessful party has been prevented by fraud and perjury, from exhibiting fully his case, and there has never been a real contest, the judgment may be set aside.—*Id.*

XI. COLLATERAL ATTACK.

(A) Judgments Impeachable Collaterally.

§ 470 (Wyo.) Where a decree is rendered by a court having jurisdiction of the parties and subject-matter and is not void on its face, it is not subject to collateral attack.—*Holt v. City of Cheyenne*, 137 P. 876.

(B) Grounds.

§ 498 (Or.) Error in determining jurisdiction does not usually render the judgment void, but voidable only.—*Eagle Cliff Fishing Co. v. McGowan*, 137 P. 766.

§ 501 (Cal.) Under Code Civ. Proc. § 1908, declaring that the judgment of a court having jurisdiction shall be conclusive, where a court has jurisdiction of the parties and of the subject-matter, its judgment cannot be impeached collaterally, though it may appear on the face of the record that error was committed in determining the rights of the parties.—*Cellulose Package Mfg. Co. v. Calhoun*, 137 P. 238.

§ 504 (Cal.) Under the Illinois decisions, holding that in an action on a joint contract it is reversible error to give judgment against one joint defendant alone, the rendition of judgment by an Illinois court against two of three joint contractors was a mere error of law and did not affect the court's jurisdiction of the controversy, so as to open the judgment to collateral attack.—*Cellulose Package Mfg. Co. v. Calhoun*, 137 P. 238.

§ 505 (Wyo.) Where a decree establishing water rights was not void on its face, and was rendered after jurisdiction of the parties and subject-matter had been secured, an error in an award of water to defendant city, if any, could be corrected only by appeal within two years or by a proceeding to modify under Comp. St. 1910, § 4650, within three years.—*Holt v. City of Cheyenne*, 137 P. 876.

XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

(B) Causes of Action and Defenses Merged, Barred, or Concluded.

§ 601 (Cal.App.) In an action on a guaranty of payment of the rent for a term, accruing after May 15, 1907, a judgment for the rent from April 15th to May 15th was immaterial.—*Boschetti v. Morton*, 137 P. 1086.

XIV. CONCLUSIVENESS OF ADJUDICATION.

(B) Persons Concluded.

§ 678 (Wyo.) If a judgment adjudging water rights in a stream for irrigation is valid, it is binding on both the parties to the suit and their privies.—*Holt v. City of Cheyenne*, 137 P. 876.

(C) Matters Concluded.

§ 713 (Ariz.) A judgment on an application for the appointment of an administrator, that decedent was a resident of the county at the time of his death, and owned property in the territory, *held res judicata* on such question in a subsequent proceeding for specific performance of a contract, as to a person who contested the appointment.—*In re Scarry's Estate*, 137 P. 868.

§ 714 (Wash.) Under Laws 1911, c. 98, § 21, where after judgment vacating assessment for local improvement, new assessment was authorized, made and confirmed, judgment *held* not *res judicata* as to its invalidity.—*Allen v. City of Bellingham*, 137 P. 1016.

§ 717 (Mont.) In view of Rev. Codes, § 7917, declaring what is deemed adjudged by a judgment, *held* that a former decree, involving the water rights of the parties, necessarily determined that the waters of a creek did not sink and become lost between the ranches of the parties.—*Howell v. Bent*, 137 P. 49.

§ 736 (Cal.) A decree distributing the estate of a decedent is not conclusive on the question of the heirs of the sole distributee, where she subsequently died, and plaintiff claimed to be entitled to her estate even though it appeared plaintiff, if the heir of the distributee, would have been entitled to share in the estate of the first decedent.—*In re Walden's Estate*, 137 P. 85.

§ 744 (Wash.) In an action by the assignee of a salesman employed by a real estate company, and entitled to a percentage of the commissions, brought against a client of the company who was indebted to it, a denial of relief against the client is not an adjudication against the company's liability.—*Empire Realty Co. v. Ratcliff*, 137 P. 1049.

XVII. FOREIGN JUDGMENTS.

§ 829 (Or.) A decree of the United States Circuit Court determining fishing rights at specified places under a license from the fish commissioner of Washington does not bar a suit in Oregon to determine rights at the same places under Oregon laws; the courts having meantime decided that the places were within Oregon.—*Eagle Cliff Fishing Co. v. McGowan*, 137 P. 766.

XX. PAYMENT, SATISFACTION, MERGER, AND DISCHARGE.

§ 890 (Or.) Under L. O. L. § 241, subd. 3, where a judgment creditor has, at execution sale, bid a sum equal to the judgment, with accrued interest, costs, and disbursements, the debtor is entitled to have the judgment canceled.—*Vaughan v. Canby Canal Co.*, 137 P. 784.

§ 891 (Kan.) For a joint judgment debtor to be released by the payment of a subsequent judgment by his joint tort-feasor, he must show that the latter judgment was recovered for the same wrong litigated in the former action.—*Story v. Lang*, 137 P. 795.

XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 951 (Colo.App.) A certified copy of a decree without the judgment roll is inadmissible as proof of title to real property under the decree.—*Parks v. Roth*, 137 P. 76.

§ 951 (Mont.) In the absence of the pleadings in a former suit involving plaintiff's water rights and of any evidence to the contrary, *held* that it would be presumed from a decree establishing plaintiff's rights and enjoining interference therewith that the court had properly before it the relative rights of the parties and the possibility of interference with plaintiff's rights by diversion.—*Howell v. Bent*, 137 P. 40.

JUDICIAL NOTICE.

See Evidence, § 43.

JUDICIAL SALES.

See Taxation, §§ 610, 615, 652.

JURISDICTION.

See Appearance, §§ 19, 22; Counties, § 190; Courts: Criminal Law, § 104; Divorce, § 62; Garnishment, § 135; Motions, § 2; Municipal Corporations, § 638; Pleading, § 406; Quo Warranto, § 28; Railroads, § 9; Wills, § 263.

JURY.

See Appeal and Error, § 978; Criminal Law, §§ 856, 858, 1174; Eminent Domain, § 216; Trial, §§ 139-357.

II. RIGHT TO TRIAL BY JURY.

§ 14 (Kan.) In a guardian's action to rescind a transaction on the ground of mental incapacity, involving the cancellation of instruments and other equitable relief, a jury trial was properly denied.—*Kuhn v. Johnson*, 137 P. 990.

§ 19 (Cal.) The constitutional right to a trial by jury does not apply to proceedings in probate.—*In re Land's Estate*, 137 P. 246.

Under Code Civ. Proc. §§ 1312, 1330, in a proceeding to contest a will after its probate, where contestant's interest is put in issue, he is not entitled to a jury trial of that question.—*Id.*

IV. SUMMONING, ATTENDANCE, DISCHARGE, AND COMPENSATION.

§ 62 (Or.) Under Laws 1913, p. 768, § 3, and page 769, § 4, and L. O. L. § 937, subd. 9, the duty of making a jury list for Multnomah county devolves upon the county commissioners and not on the circuit court.—*State v. Holman*, 137 P. 771.

V. COMPETENCY OF JURORS, CHALLENGES, AND OBJECTIONS.

§ 135 (Wash.) The right of peremptory challenge of jurors is wholly statutory, and the Legislature may withhold the right entirely or grant it with restrictions.—*Crandall v. Puget Sound Traction, Light & Power Co.*, 137 P. 319.

§ 136 (Wash.) Under Rem. & Bal. Code, § 324, providing that the several parties on either side shall join in a challenge of jurors, defendants in tort, resisting the right of the plaintiff to recover, and seeking to shift any recovery from one to the other, *held* required to join in peremptory challenges.—*Crandall v. Puget Sound Traction, Light & Power Co.*, 137 P. 319.

JUSTICES OF THE PEACE.

See Criminal Law, § 260.

II. RIGHTS, DUTIES, AND LIABILITIES.

§ 15 (Nev.) Under Laws 1908-09, c. 177, § 10, relating to the compensation of justices of the peace in Nye county, a justice is not entitled to a greater compensation than that fixed by the board of county commissioners not to exceed \$1,800 per year.—*Haywood v. Nye County*, 137 P. 515.

III. CIVIL JURISDICTION AND AUTHORITY.

§ 36 (Kan.) A defendant who made a substantial claim that he was the equitable owner of property under a contract of purchase, it being a disputed question of fact whether his equitable interest had been lost, could not be ousted

from possession by forcible entry and detainer proceedings instituted before a justice of the peace.—*Linder v. Warnock*, 137 P. 962.

IV. PROCEDURE IN CIVIL CASES.

§ 90 (Nev.) Pleadings other than the complaint, in a justice's court, may be oral and need not be in any particular form but are sufficient if they state the cause of action or defense in ordinary and concise language without complying with any definite theory of the law.—*State v. Langan*, 137 P. 517.

§ 90 (Okl.) The same degree of particularity in pleadings is not required in actions before a justice of the peace as in a court of record.—*Whitcomb v. Oller*, 137 P. 709.

§ 91 (Nev.) In an action before a justice by an assignee of a miner's lien against the miner's attorney to recover a balance due, the complaint *held* to state a cause of action, though certain of its allegations were conclusions of law.—*State v. Langan*, 137 P. 517.

V. REVIEW OF PROCEEDINGS.

(A) Appeal and Error.

§ 150 (Okl.) That no bill of particulars as provided for in Rev. Laws 1910, § 5414, was filed in replevin was not ground for reversal, where the affidavit conformed to Rev. Laws 1910, § 5390, and contained everything necessary to be stated in a bill of particulars and no objection was made in justice court.—*Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349.

§ 159 (Mont.) Undertaking *held* sufficient under Rev. Codes, § 7124.—*Marlowe v. Michigan Stove Co.*, 137 P. 539.

Under Rev. Codes, § 7128, relating to the dismissal of an appeal for insufficiency of the undertaking, *held*, that an original undertaking was not wholly void, but was good as an undertaking to pay costs on appeal, so that its insufficiency did not prevent the preservation of an appeal upon filing of a sufficient substitute undertaking.—*Id.*

§ 160 (Mont.) The notice must convey sufficient information to enable the adverse party to know what is required of him, but it need not go further; and a notice not mentioning the amount of the judgment was sufficient.—*Marlowe v. Michigan Stove Co.*, 137 P. 539.

§ 167 (Or.) Where, on appeal from a justice of the peace, it was found that the amended complaint on which the case was tried was not in the record, the circuit court properly dismissed the case.—*West Oregon Lumber Co. v. Brady*, 137 P. 764.

§ 171 (N.M.) On appeal to the district court from a justice of the peace, a cause is triable de novo.—*Rogers v. Kemp Lumber Co.*, 137 P. 586.

§ 174 (Okl.) Under Rev. Laws 1910, § 5467, the right to new pleadings in a county court on appeal from a justice depends on whether it is in furtherance of justice to permit them, and the matter is to be in the discretion of the court.—*Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349.

§ 174 (Okl.) A pleading sufficient in a justice's court is sufficient when the case is tried de novo on appeal.—*Whitcomb v. Oller*, 137 P. 709.

KNOWLEDGE.

See Banks and Banking, § 116; Customs and Usages, § 12.

LACHES.

See Appeal and Error, § 173; Cancellation of Instruments; Quieting Title, § 29; Specific Performance, § 105.

LANDLORD AND TENANT.

See Abatement and Revival, § 8; Action, § 88; Adverse Possession, §§ 31, 48; Corpora-

tions, § 656; Evidence, § 56; Fixtures, § 27; Forcible Entry and Detainer, § 5; Guaranty, §§ 39, 46, 53, 82; Principal and Agent, § 136; Reformation of Instruments, § 46; Use and Occupation.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

§ 49 (Wash.) On defendant's refusal to accept a lease, *held* that plaintiff could recover the difference between the rent fixed in the contract and the rental value of the premises for the entire term.—*Oldfield v. Angeles Brewing & Malting Co.*, 137 P. 469.

In an action for breach of a contract to accept a lease, the value of the lease at the time of the breach must be considered in connection with limitations that the property should not be used for any illegal or immoral business, and Laws 1909, c. 134, § 62, prohibiting the granting or renewal of a license to sell liquors within 300 feet of any armory, etc.—*Id.*

In an action for breach of a contract to lease for a term, plaintiff was not entitled to show the rental value for each annual period during the term, indicating that the property had depreciated in value from year to year.—*Id.*

IV. TERMS FOR YEARS.

(D) Termination.

§ 101 (Cal.) Where a lease provided for termination on the removal of any building after two years pursuant to any municipal ordinance, the lessee removing a building under an ordinance enacted more than two years after the execution of the lease thereby terminated it.—*Bancroft v. Goldberg, Bowen & Co.*, 137 P. 18.

§ 112 (Or.) The acceptance of partial payments of rent before they fall due does not waive the landlord's right to a forfeiture for subsequent default.—*Johnson v. Seaborg*, 137 P. 191.

The acceptance of rent after it becomes due, while a waiver of default for that year, does not make a rule for subsequent years.—*Id.*

That neither of the lessors was in the state when rent became due does not waive a default when their agent, as the tenant knew, was authorized to receive it.—*Id.*

VII. PREMISES, AND ENJOYMENT AND USE THEREOF.

(E) Injuries from Dangerous or Defective Condition.

§ 166 (Wash.) Provision that lessee should hold lessor harmless for damages caused by plumbing, gas, water, steam, or other pipes or the leaking or running of washstand or waste pipes *held* not to release the landlord from liability where unknown persons broke into vacant part of the building, tore out a washstand, and broke the pipes, resulting in the flooding of the lessee's premises when the water was turned on.—*Le Vette v. Hardman Estate*, 137 P. 454.

Landlord, though not bound to repair, *held* liable where unknown persons broke into vacant portion of the leased building and tore out a washstand, resulting in the flooding of plaintiff's premises when the water was turned on.—*Id.*

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 184 (Cal.App.) In an action on a guaranty of payment of rent to accrue under a lease for a term, it was material to show that plaintiffs accepted possession of the premises from the lessee because of nonpayment of rent and that there was no eviction.—*Boschetti v. Morton*, 137 P. 1085.

§ 192 (Cal.App.) Under Civ. Code, § 1933, the destruction of the premises *held* to relieve defendants, who had procured from the lessors an assignment of plaintiff's unexpired term of years, in consideration of making monthly pay-

ments to plaintiff, who assigned his term to the lessors, and paying an increased rent to the lessors.—*Jacoby v. Peck*, 137 P. 264.

§ 194 (Cal.App.) On surrender of the key to leased premises, the lessors may take possession and accept the surrender without being guilty of an eviction sufficient to release the lessee from liability for future rent.—*Boschetti v. Morton*, 137 P. 1085.

§ 208 (Or.) The assignee of a lease becomes liable for the rental, but the assignor is not released.—*Johnson v. Seaborg*, 137 P. 191.

§ 213 (Or.) Where a lease provides no place of payment of rent, it is payable in the city where the lease was executed and the property located.—*Johnson v. Seaborg*, 137 P. 191.

(B) Actions.

§ 231 (Or.) Lessors, contending that a payment by assignees of the lease had been credited on an amount due for the previous year, had the burden of proving that such amount was due under the present lease.—*Johnson v. Seaborg*, 137 P. 191.

X. RENTING ON SHARES.

§ 328 (Okla.) Under Rev. Laws 1910, §§ 3806, 3807, a landlord may elect to replevin his share of the crop, or, if such share has been appropriated or disposed of, may elect to enforce his lien for rent in the value of such share by attachment.—*Collier v. Gannon*, 137 P. 1179.

LAND OFFICE.

See Public Lands, § 106.

LANDS.

See Public Lands.

LARCENY.

See Criminal Law, §§ 423, 1208; Indictment and Information, § 110; Witnesses, § 268.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 5 (Cal.App.) An undelivered deed *held* not a written instrument and not subject of larceny within Pen. Code, §§ 484, 487, 492.—*People v. Dadmun*, 137 P. 1071.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 40 (Wash.) Where accused was charged with taking one head of neat cattle from a range, and described it as a "bull," while the complaining witness described it as a "steer," such variance did not authorize the refusal of an instruction that if defendant took the animal in good faith, believing it to be one which he had purchased from an Indian, he could not be convicted.—*State v. Crossen*, 137 P. 1030.

(B) Evidence.

§ 50 (Okla. Cr. App.) The state's evidence that, a year before the larceny, defendant controlled the pasture from which the animals were stolen was admissible; the length of time merely going to its weight.—*Jones v. State*, 137 P. 121.

(C) Trial and Review.

§ 71 (Wash.) Where accused was charged with stealing one head of neat cattle from a range, and claimed that he took the animal openly and in good faith believing it to be one he had purchased from an Indian, it was error for the court to refuse to charge, under Rem. & Bal. Code, § 2608, that if such was the fact he could not be convicted.—*State v. Crossen*, 137 P. 1030.

§ 75 (Wash.) Under Rem. & Bal. Code, § 2605, subd. 4, making the taking of cattle from a range and pasture grand larceny, instructions defining grand larceny and stating the necessary elements to justify a conviction failing to require that the animal must have been taken or driven from a range or pasture were fatally defective.—*State v. Crossen*, 137 P. 1030.

LAST CLEAR CHANCE.

See Negligence, § 83.

LAW OF THE CASE.

See Appeal and Error, §§ 1097, 1099, 1195.

LEASE.

See Landlord and Tenant.

LEGACIES.

See Willa.

LEGACY TAX.

See Taxation, §§ 859, 895.

LETTERS.

See Libel and Slander, § 33.

LETTERS PATENT.

See Mines and Minerals, § 40.

LEVEES.

§ 19 (Kan.) Where the county commissioners, pursuant to Sess. Laws 1893, c. 104, as amended and supplemented, erected a levee in a city street, *held*, that the city could not by mandatory injunction compel the board to restore the street to its original use by building suitable and proper approaches; the county board having no authority to construct same.—*City of Topeka v. Board of Com'rs of Shawnee County*, 137 P. 951.

Sess. Laws 1893, c. 104, as amended and supplemented, providing for the building of levees, does not change the duty of a city to keep its streets in a safe condition; the city's prior authority over the street yielding only so far as to permit the proper construction of the levee by the drainage board.—*Id.*

LEVY.

See Taxation, §§ 317-497.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 6 (Wash.) Matter "libelous per se" is any publication which falsely and maliciously tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious or disgraceful in society.—*Wells v. Times Printing Co.*, 137 P. 457.

A publication charging plaintiff with being a "man who reviled U. S. flag," "who denounced Old Glory as a dirty rag," a "red-tinted agitator," voicing "constructive sedition and treason," "leaping beyond the last border of unloyalty and indecency," and charging that he was so regarded to the extent of a public demand that the criminal laws be invoked against him, was libelous per se without allegation or proof of special damage.—*Id.*

§ 33 (Kan.) Where a letter contains statements which are libelous per se, damages may be recovered without proof of actual damages.—*Roniger v. McIntosh*, 137 P. 792.

IV. ACTIONS.

(B) Parties, Preliminary Proceedings, and Pleading.

§ 97 (Or.) Where the language alleged in a complaint for libel is not libelous per se, and there is no innuendo, a demurrer is properly sustained.—Lafky v. Albert, 137 P. 209.

LICENSES.

See Municipal Corporations, § 763; Negligence, § 136.

I. FOR OCCUPATIONS AND PRIVILEGES.

§ 15 (Nev.) Traveling salesmen of manufacturers and wholesalers in other states cannot be taxed by this state by reason of the provision in the federal Constitution conferring upon Congress the regulation of interstate commerce, and Rev. Laws, § 3879, gives the same exemption as to traveling salesmen employed by manufacturers and jobbers having factories or stores in the state.—Byran v. City of Sparks, 137 P. 522.

Defendant, having a factory outside a city, and himself selling groceries in large and small quantities in broken and unbroken packages to restaurants, etc., in the city, held to be a "retailer" subject to a license tax of \$15 per quarter on retailers other than at a fixed place of business in the city, though entitled, under Rev. Laws, § 3879, to an exemption from licenses as a salesman of a resident manufacturer.—Id.

LIENS.

See Chattel Mortgages, §§ 154, 156; Executors and Administrators, § 439; Mechanics' Liens; Monopolies, § 4; Mortgages, §§ 213, 216; Municipal Corporations, § 568; Taxation, § 507.

LIFE ESTATES.

See Deeds, § 141.

§ 6 (Ariz.) Where a testator gave to his wife for life all the property of which he might die possessed, and empowered his executors to sell any of it for her support, and on her death gave all of the property "of which she was then possessed" to their children, the court need not require her to give security for the management of the personality.—La Tourette v. La Tourette, 137 P. 426.

LIFE INSURANCE.

See Insurance.

LIMITATION OF ACTIONS.

See Adverse Possession; Appeal and Error, § 1099; Taxation, § 805.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 11 (Cal.App.) Limitations do not run against the public, and where the number of purchasers of lots who relied upon the grantors' representations of dedication of streets and parks was considerable, limitations will not run against them.—Davidow v. Griswold, 137 P. 619.

(B) Limitations Applicable to Particular Actions.

§ 25 (Cal.) Under the express provision of Code Civ. Proc., § 337, an action on a note is barred after four years.—Merchants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

§ 28 (Wash.) An action against a corporation engaged in the business of driving logs for its failure to move logs by causing water to escape from its dams held an action on contract within the three years' statute of limitations (Rem. & Bal. Code, § 159).—Murray v. Wishkah Boom Co., 137 P. 130.

§ 28 (Wash.) An action for breach of warranty in the sale of goods evidenced by a written order silent as to price, fixed by parol, is an action within the three years' statute of limitations (Rem. & Bal. Code, § 159) and not within the six years statute (section 157).—Ingalls v. Angell, 137 P. 309.

§ 30 (Kan.) An employee's action for injuries from the master's failure to comply with the Factory Act (Laws 1903, c. 856, Gen. St. 1909, §§ 4676, 4683) is not barred by Code Civ. Proc. § 17, subd. 4 (Gen. St. 1909, § 5610), providing that an action upon a statute for a penalty or forfeiture shall be barred within one year, but is an action for injury to the rights of another not arising on contract, which carries a two years' limitation.—Slater v. Atchison, T. & S. F. Ry. Co., 137 P. 943.

§ 37 (Cal.) An action to have the conveyance declared void, held to be an action to remove a cloud on title, and not governed by the three and four years statutes of limitations (Code Civ. Proc. §§ 333, 343).—Scholle v. Finnell, 137 P. 241.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 44 (Cal.) A creditor of a debtor executing fraudulent conveyances may wait until the last day for suing on the debt, and on procuring judgment may wait until about the expiration of the period within which execution must issue before procuring execution, and on purchasing at execution sale, he may wait almost five years before suing to set aside the conveyance, though the debtor died before judgment.—Scholle v. Finnell, 137 P. 241.

§ 47 (Wash.) A warranty as to the kind or quality of goods sold, if breached at all, is generally breached when made, and limitations run from the date of sale.—Ingalls v. Angell, 137 P. 309.

Where a warranty of goods sold relates to a future event by which it will be ascertained whether the warranty will be breached or not, the warranty is not breached until the happening of the future event.—Id.

A contract of sale of fruit trees warranted to contain Carman peach trees is breached when it is demonstrated that the trees do not bear such peaches and limitations run from that time.—Id.

§ 48 (Cal.) Civ. Code, § 3135, declaring the maturity of notes payable on demand for the purpose of presentment to charge the indorser, held not to extend the time of payment, or prevent the running of the statute of limitations in favor of the maker.—Merchants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

§ 58 (Cal.App.) The right of an abutting owner to an easement over certain land which had been at one time a city street, but which had been closed by the city for more than ten years or to recover damages for the taking of such easement, held barred by limitations.—City and County of San Francisco v. Main, 137 P. 281.

(B) Performance of Condition, Demand, and Notice.

§ 66 (Colo.App.) A note payable "..... after date," with interest payable annually, to draw interest as principal, upon which no demand for payment was made for three years after which the maker made unqualified promises to pay, held a demand note not intended to become due or actionable until after demand for payment, and hence that the statute did not commence to run until demand.—Baxter v. Beckwith, 137 P. 901.

(C) Personal Disabilities and Privileges.

§ 74 (Kan.) The running of limitations in an action for damages from inducing plaintiff to become a user of morphine is not wholly suspended by the fact that the morphine so af-

fects plaintiff mentally as to render her incapable of protecting her own interest; and such action is barred under Code Civ. Proc. § 18 (Gen. St. 1909, § 5611), when not brought within one year after the disability is removed.—Gillmore v. Gillmore, 137 P. 958.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 100 (Kan.) In an action for damages from fraudulent representations as to irrigation rights, held, that the plaintiff had shown ordinary diligence to discover the fraud, and that the action was not barred, because not brought within two years from the time the fraud, if any, was discovered.—Mateer v. Great Western Land Co., 137 P. 786.

§ 100 (Kan.) An action for damages from inducing plaintiff to become a user of morphine in ignorance of its nature held not an action for relief "on the ground of fraud" within the statute of limitations, Code Civ. Proc. § 17, subd. 3 (Gen. St. 1909, § 5610) providing that action in such case does not accrue until the discovery of the fraud.—Gillmore v. Gillmore, 137 P. 958.

(H) Commencement of Action or Other Proceeding.

§ 127 (Cal.) Where a complaint stated only a cause of action upon an indorsement of the note of a third person, or upon defendant's alleged guaranty of payment, an amended complaint, sufficient only upon the theory that it was a suit upon defendant's note to plaintiff, held to state an entirely new cause of action, so that limitations ran until the amended complaint was filed.—Merchants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

§ 127 (Cal.App.) Where the original complaint counted on a contract, but alleged all facts necessary to support a recovery on a quantum meruit, an amended complaint, adding a count on a quantum meruit, does not constitute a new cause of action against which limitations would have run up to the time of the amendment.—Merchants' Collection Agency v. Gopcevic, 137 P. 609.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 167 (Cal.) A mortgagor cannot, without paying the debt barred by limitations, quiet his title, or maintain ejectment against the mortgagee.—Faxon v. All Persons, etc., 137 P. 919.

A purchaser of real estate, while the records show that a mortgage lien has become extinguished by limitations, may maintain a suit to quiet title without paying the mortgage debt.—Id.

§ 170 (Cal.) Under Civ. Code, §§ 858, 2877, 2911, 2932, the power of sale given in a mortgage to secure a note is extinguished where the note and mortgage are barred by limitations.—Faxon v. All Persons, etc., 137 P. 919.

LIMITATION OF LIABILITY.

See Carriers, §§ 151-155.

LIQUIDATED DAMAGES.

See Damages, §§ 78, 81.

LIQUOR SELLING.

See Intoxicating Liquors.

LIVE STOCK.

See Railroads, §§ 411-446.

LOCATION.

See Mines and Minerals, §§ 18-27.

LOGS AND LOGGING.

See Limitation of Actions, § 28.

§ 13 (Wash.) A corporation organized under Rem. & Bal. Code, § 7119, which improved a river by constructing splash dams in pursuance of section 7122, must render service under sections 7123, 7124, as a public service corporation, and is liable for loss caused by its unreasonable delay in moving logs by water from its dams.—Murray v. Wishkah Boom Co., 137 P. 130.

Such corporation cannot refuse to release water from its dam for a log owner because of a threatened injunction against such release by landowners downstream, where it has engaged in the service for 15 years or more, and where the applicant for water had done his logging in a justifiable belief that the corporation was able to render proper service.—Id.

LOST INSTRUMENTS.

§ 2 (Cal.) Under Civ. Code, § 3415, distributees of grantee whose deed had been lost held entitled to its restoration, even though, as claimed, it was delivered on a condition which had not been performed.—Shores v. Withers, 137 P. 7.

Under Civ. Code, § 3415, relative to the restoration of lost or destroyed instruments, if the maker of such a restored instrument has a defense not apparent upon the face thereof, he may assert it precisely as he might have done had the document not been destroyed.—Id.

LUNATICS.

See Insane Persons.

MAINTENANCE.

See Husband and Wife, §§ 297, 298.

MALICE.

See Homicide.

MANDAMUS.

See Courts, §§ 207, 472; Taxation, § 497.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 72 (Idaho) Where the action required in mandamus is judicial and discretionary in its nature, the court can only compel the officer to act, and cannot compel him to act in any particular manner.—Blomquist v. Board of Com'rs of Bannock County, 137 P. 174.

§ 85 (Mont.) The state board of land commissioners, intrusted by Const. art. 11, § 4, with the control and sale of state school lands, in determining, under Laws 1909, c. 147, § 40, whether it shall confirm a sale of state school lands, acts quasi judicially, so that its discretion in such respect, in the absence of manifest abuse, cannot be controlled by mandamus.—State v. Stewart, 137 P. 854.

§ 100 (N.M.) Where the Governor, Secretary of State, and Attorney General by elimination have left the State Treasurer but one class of securities in which to invest permanent school funds, he may be compelled by mandamus to exercise his discretion to the end that it shall be determined whether such investment shall be made.—State v. Marron, 137 P. 845.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 148 (Or.) Under L. O. L. § 4120, and Laws 1911, p. 428, a father has the right to maintain mandamus to compel a school board to permit his minor children to attend the public schools,

—Crawford v. District School Board for School Dist. No. 7, in Klamath County, 137 P. 217.

§ 160 (N.M.) Where the alternative writ of mandamus in proceedings to compel the State Treasurer to make an investment of permanent school funds was not broad enough to compel him to make a readvertisement of a sale of bonds or to bid at such sale the amount required by Laws 1912, c. 58, § 4, relief could not be granted.—State v. Marron, 137 P. 845.

§ 160 (Or.) A statement in a writ of mandamus to compel the payment of a warrant for services rendered for the corporation commissioner of his duties as defined by Gen. Laws 1913, p. 668, is superfluous.—Gibson v. Kay, 137 P. 864.

§ 163 (Or.) Demurrers to an amended alternative writ of mandamus admit all the material allegations thereof.—Crawford v. District School Board for School Dist. No. 7, in Klamath County, 137 P. 217.

§ 187 (Or.) Under L. O. L. §§ 616, 618–620, when an alternative writ of mandamus is amended, the petition and original writ cannot be considered on appeal from a judgment sustaining demurrers to the amended writ.—Crawford v. District School Board for School Dist. No. 7, in Klamath County, 137 P. 217.

MAPS.

See Dedication, §§ 19, 81; Deeds, § 112; Witnesses, § 252.

MARKETABLE TITLE

See Vendor and Purchaser, § 133.

MARKET VALUE.

See Damages, § 188.

MARRIAGE.

See Divorce; Husband and Wife; Indiana, § 15; Rape, § 51.

§ 40 (Ok.) Cohabitation and reputation will not constitute marriage under the Creek laws or customs but will merely raise a presumption of marriage, where the cohabitation is matrimonial and not meretricious.—Fender v. Segro, 137 P. 103.

A presumption of marriage under the Creek laws or customs does not arise where there has been no recognition of the marriage and a holding out of each other as husband and wife respectively.—Id.

§ 51 (Ok.) Where, in an action to recover land, the issue of heirship depended upon the validity of a marriage, the existence of facts essential to a valid marriage under the Creek laws and whether a marriage was to be inferred from cohabitation and reputation were questions, for the jury.—Fender v. Segro, 137 P. 103.

MASTER AND SERVANT.

See Agriculture, § 15; Appeal and Error, § 1050; Damages, §§ 130, 132; Death, § 99; Limitation of Actions, § 30; Trial, §§ 191, 194.

I. THE RELATION.

(B) Statutory Regulation.

§ 13 (Or.) Laws 1913, p. 90, declaring eight hours shall be a day's labor in work for the state, county, etc., is constitutional.—Ex parte Steiner, 137 P. 204.

In Laws 1913, p. 90, declaring eight hours shall be a day's labor in work for the state, county, etc., "labor" includes the engineer of the heating plant at the State Hospital.—Id.

Laws 1913, p. 91, § 6, includes the superintendent of the Oregon State Hospital among those criminally responsible for violation of the act, which fixes eight hours as a day's labor for the state or its auxiliaries.—Id.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

§ 96 (Utah) Though defendant's negligence was only a concurring cause of the injury, he would still be liable in the absence of contributory negligence.—Anderson v. Nielson, 137 P. 152.

(B) Tools, Machinery, Appliances, and Places for Work.

§§ 101, 102 (Kan.) Where a railroad company places in storage, for use of its brakemen in their lanterns, the best quality of oil obtainable, it is not liable for injuries due to the use of defective oil, unless negligent after placing the oil in storage.—Anders v. Atchison, T. & S. F. Ry. Co., 137 P. 966.

§ 107 (Or.) Employers' Liability Law, § 1, relating to precautions required of employers for safety, applies to an action for injuries to a servant in removing a belt from a moving pulley.—Wasiljeff v. Hawley Pulp & Paper Co., 137 P. 755.

Under Employers' Liability Law, § 1, the fact that there is not sufficient room for belt shifters does not justify their absence; it being the employer's duty to make room.—Id.

§ 124 (Ok.) Rev. Laws 1910, §§ 3983 and 3984, prescribing duties of mine operators, including the duty of daily inspection, applies to the operators of lead and zinc as well as coal mines.—Big Jack Mining Co. v. Parkinson, 137 P. 678.

§ 124 (Wash.) An employer was not required in the exercise of ordinary care to have discovered the absence of a rung in a ladder, if it was removed between the time the employé last safely climbed the ladder on the day of the accident and the time when he fell therefrom.—Dahl v. Puget Sound Iron & Steel Works, 137 P. 315.

(E) Fellow Servants.

§ 159 (Mont.) The negligence of a fellow servant defeats an employé's right of recovery if shown, and does not merely go to the amount of damages recoverable.—Mosher v. Sutton's New Theater Co., 137 P. 534.

§ 170 (Mont.) It is an employer's duty to use ordinary care to keep competent fellow servants, as well as to employ them in the first instance.—Mosher v. Sutton's New Theater Co., 137 P. 534.

§ 170 (Or.) The care demanded of a master in the selection and retention of servants is commensurate with the danger reasonably to be apprehended from the instrumentalities employed.—Browning v. Smiley-Lampert Lumber Co., 137 P. 777.

§ 173 (Or.) A master is liable for the negligence of the unfit servant, where he has knowledge of the unfitness.—Browning v. Smiley-Lampert Lumber Co., 137 P. 777.

A master is charged with knowledge of common reputation in the community of a servant who has been in his employ for a long time.—Id.

§ 179 (Or.) In an action within the Employers' Liability Law, the doctrine of negligence of fellow servant does not apply.—Wasiljeff v. Hawley Pulp & Paper Co., 137 P. 755.

§ 182 (Or.) An action for injuries from negligence of a head sawyer falls within Employers' Liability Act, §§ 1, 5; the head sawyer being a vice principal and not a fellow servant.—Browning v. Smiley-Lampert Lumber Co., 137 P. 777.

A "foreman" is a laborer with power to superintend those working under him, and a head sawyer is a foreman.—Id.

(F) Risks Assumed by Servant.

§ 203 (Mont.) The question of assumed risk does not go to the amount of damages an em-

ployé recovers, but defeats his entire claim if established.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

§ 203 (Okl.) "Assumption of risk" is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1158.

§ 204 (Or.) In an action within the Employers' Liability Law, the doctrine of assumption of risk does not apply.—*Wasiljeff v. Hawley Pulp & Paper Co.*, 137 P. 755.

§ 204 (Wash.) Defendant could rely upon the defense of assumed risk in an employé's action brought under the general statutes and not under the factory act.—*Dahl v. Puget Sound Iron & Steel Works*, 137 P. 315.

§ 205 (Kan.) An employé assumed only such dangers from defects of which he had no knowledge as would arise after the employer had exercised reasonable diligence to make reasonably safe the place of work and appliances.—*Rogers v. Kansas Co-Operative Refining Co.*, 137 P. 991.

§ 217 (Wash.) Where an employé used a ladder daily for more than a year and a half before the accident, so that he was acquainted with all of the defects therein, he assumed any risk of injury from a rung in the ladder being out.—*Dahl v. Puget Sound Iron & Steel Works*, 137 P. 315.

If an employé injured by falling from a ladder discovered that a step was absent or by ordinary observation could have done so and used it without informing his employer that the step was missing, he assumed the risk of injury therefrom.—*Id.*

§ 217 (Wash.) Where there are two methods by which a service may be performed—one perilous and the other safe—an employé who voluntarily chooses the perilous way assumes the risk.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

Where a miner who was riding out of the mine on the elevator was injured because the elevator was not stopped at the top in accordance with the custom when men were being carried out, a recovery cannot be defeated because there was a way out of the mine by ladder, where it did not appear that the miner knew of the danger from the elevator, or that it was dangerous if properly managed.—*Id.*

§ 219 (Wash.) A clamp in the nature of an ordinary clevis, used to fasten a steam shovel car to the track, *held* an ordinary tool; an adult employé assumed the risk of using it in a defective condition.—*Bougas v. Eschbach-Bruce Co.*, 137 P. 472.

§ 221 (Kan.) A master's promise to remedy a defect implies an agreement that, until this is done or lapse of reasonable time therefor, he and not the employé will assume the risk from the defect.—*Anders v. Atchison, T. & S. F. Ry. Co.*, 137 P. 966.

§ 222 (Wash.) A servant in the employ of contractors, who had no knowledge as to a heavy concrete mixer operated by steam, *held* entitled to rely on the directions of his foreman to hold the tongue in front when steam was applied, and hence not to have assumed the risk of injury from the tongue's violent swing.—*Magnuson v. MacAdam*, 137 P. 485.

(G) Contributory Negligence of Servant.

§ 228 (Or.) In an action within the Employers' Liability Law, the doctrine of contributory negligence does not apply.—*Wasiljeff v. Hawley Pulp & Paper Co.*, 137 P. 755.

§ 245 (Wash.) A miner who rode on the top of the elevator when leaving the mine for a lunch is not guilty of negligence, where he assumed that position in obedience to the orders

of the defendant's foreman, unless the danger was glaring and apparent.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

(H) Actions.

§ 262 (Mont.) Unless it affirmatively appears from plaintiff's own pleadings or proof, the question of assumed risk is a matter of defense which must be pleaded by defendant.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

The negligence of a fellow servant is a matter of defense which must be pleaded by defendant if it does not affirmatively appear from plaintiff's pleadings or proof.—*Id.*

§ 264 (Mont.) Though the complaint charged negligence in not furnishing a safe place of work and in not employing competent fellow servants if such grounds of negligence were not alleged as interdependent causes of action, proof of either ground entitled plaintiff to recover.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

Though the complaint alleged that the incompetent fellow servant was intoxicated when employed, as well as that he was intoxicated at the time of the injury, in absence of a motion for relief for surprise, proof merely that he was intoxicated at the time of the injury was not a fatal variance requiring reversal, in view of Rev. Codes, §§ 6585, 6593.—*Id.*

§ 270 (Kan.) In an employé's action for injuries from the master's failure to comply with the Factory Act (Gen. St. 1909, § 4679) § 4, requiring the guarding of dangerous machinery, the purpose for which a certain device was designed and used was immaterial to the question of defendant's liability, where it conclusively appeared from the evidence that when such device was in place it served as a guard, and that if it had been in place the accident would not have happened.—*Slater v. Atchison, T. & S. F. Ry. Co.*, 137 P. 943.

§ 270 (Kan.) Evidence that immediately after the employé's injury the appliances were changed was properly admitted where defendant's opening statement was that no changes were made, and that the appliances were not defective.—*Rogers v. Kansas Co-Operative Refining Co.*, 137 P. 991.

§ 271 (Wash.) Where the servant counted on the incompetency and carelessness of the foreman, evidence of independent circumstances tending to show the foreman's negligence, and also his general reputation, was admissible.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

§ 276 (Mont.) Evidence, in an action for injuries to an employé while working in a theater by scenery falling upon him, *held* to show that the proximate cause of the injury was the act of a fellow servant, and not any unsafe method of handling the scenery.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

§ 278 (Kan.) In an employé's action for injuries from the master's failure to comply with the Factory Act (Gen. St. 1909, § 4676 et seq.), evidence *held* to show that it was practicable to guard the knives of the machine causing plaintiff's injury.—*Slater v. Atchison, T. & S. F. Ry. Co.*, 137 P. 943.

§ 278 (Wash.) In an action for injuries to an employé while on a ladder leading to a traveling crane by falling from the ladder, the evidence *held* not to show that a rung in the ladder was removed between the time plaintiff had last climbed it and the time he was injured.—*Dahl v. Puget Sound Iron & Steel Works*, 137 P. 315.

§ 279 (Mont.) Evidence, in an action for an employé's injuries, *held* to sustain a finding that the coemployé whose negligence injured plaintiff was incompetent in that he was intoxicated at and before the time of the injury.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

§ 285 (Utah) The proximate cause of the injury *held* a question for the jury.—*Anderson v. Nielson*, 137 P. 152.

§ 286 (Or.) Under L. O. L. § 183, and Const. art. 7, § 3, as amended (see Laws 1911, p. 7), evidence *held* sufficient to go to the jury on the question of the master's negligence in failing to provide appliances to throw off belts from revolving pulleys.—*Wasiljeff v. Hawley Pulp & Paper Co.*, 137 P. 755.

§ 286 (Utah) Evidence, in an action against the owner of a private ferryboat for the death of plaintiff's intestate, who was drowned while assisting the owner across with the boat, *held* not sufficient to take to the jury the question whether defendant was negligent.—*Anderson v. Nielson*, 137 P. 152.

§ 286 (Wash.) In a personal injury action by a miner, who was hurt in riding out of the mine on the elevator, the question of defendant's negligence in maintaining an unsafe signal wire *held* for the jury.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

§ 287 (Or.) It is error to take from the jury a case where there is evidence of negligence in the selection or retention of a coservant whose act caused the injury.—*Browning v. Smiley-Lampert Lumber Co.*, 137 P. 777.

§ 287 (Wash.) In a personal injury action by a servant, evidence of the master's negligence in continuing to employ an incompetent, careless foreman *held* to raise a question for the jury.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

§ 288 (Kan.) In a brakeman's action for injuries from the negligent furnishing of a poor quality of oil for his lantern, where the evidence showed a complaint to the proper person and the response thereto, the meaning to be given to such complaint and reply was for the jury.—*Anders v. Atchison, T. & S. F. Ry. Co.*, 137 P. 966.

§ 288 (Okla.) Under Const. art. 23, § 6 (Williams' Const. § 355), the defense of assumption of risk must be left to the jury.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

§ 289 (Kan.) In an employe's action for injuries from the master's failure to guard dangerous machinery as required by the Factory Act (Gen. St. 1909, § 4676 et seq.) it was not error to refuse to submit to the jury the question whether plaintiff was negligent; contributory negligence not being a defense under the Factory Act.—*Slater v. Atchison, T. & S. F. Ry. Co.*, 137 P. 943.

§ 289 (Okla.) Under Const. art. 23, § 6 (Williams' Const. § 355), the defense of contributory negligence must be left to the jury.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

§ 289 (Utah) Whether it was contributory negligence for plaintiff's intestate, who was assisting the owner of a ferryboat across a stream, to keep holding to a rope until he was pulled overboard, and after he saw other men letting it go, was a question for the jury.—*Anderson v. Nielson*, 137 P. 152.

§ 289 (Wash.) On evidence in a servant's action for injury from the violent swing of the tongue of a heavy concrete mixer operated by steam, which his foreman had directed him to hold when steam was applied, *held*, that his contributory negligence was for the jury.—*Magnuson v. MacAdam*, 137 P. 485.

§ 297 (Mont.) A verdict for an injured employe was not against the law because one ground of negligence was not proved, where the verdict for plaintiff was general, and there was sufficient evidence to show another ground of actionable negligence alleged.—*Mosher v. Sutton's New Theater Co.*, 137 P. 534.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302 (Wash.) Where the manager of defendant's business in attempting to collect payment for goods which he believed a customer had taken became abusive and, when told to go

away, assaulted the customer, *held*, that the assault was not within the scope of his employment.—*Matsuda v. Hammond*, 137 P. 328.

(B) Work of Independent Contractor.

§ 319 (Wash.) Where the work in itself is inherently dangerous, and will probably result in injury to third persons, unless great care and precautions are taken, an employer cannot evade responsibility by acting through an independent contractor.—*Freebury v. Chicago, M. & P. S. Ry. Co.*, 137 P. 1044.

Where blasting is being done in a populous city, the employer cannot escape liability because it is doing the work by an independent contractor.—*Id.*

MATERIAL CHANGE

See Principal and Surety, § 117.

MAYOR.

See Municipal Corporations, § 162.

MEASURES.

See Weights and Measures.

MECHANICS' LIENS.

See Agriculture, § 15; Appeal and Error, §§ 842, 913.

I. NATURE, GROUNDS, AND SUBJECT-MATTER IN GENERAL.

§ 5 (Wash.) While mechanics' lien laws should receive liberal construction, the construction may not be unfair, even in the interests of laborers and materialmen.—*Baker v. Yakima Valley Canal Co.*, 137 P. 342.

II. RIGHT TO LIEN.

(B) Services Rendered and Materials Furnished.

§ 52 (Or.) Where cement and plaster are furnished for the manufacture of blocks and tile for a particular building, a lien against such building is maintainable when they are so used.—*Hume v. Seattle Dock Co.*, 137 P. 752.

(C) Agreement or Consent of Owner.

§ 72 (Wash.) Under Rem. & Bal. Code, § 1129, a materialman is not an agent of the owner for the purpose of giving laborers, engaged by him to prepare the material, a lien on the completed structure.—*Baker v. Yakima Valley Canal Co.*, 137 P. 342.

One engaged to furnish the sand and gravel for the reconstruction of a canal is not a contractor, subcontractor, architect, builder, or person in charge of the work within the purview of Rem. & Bal. Code, § 1129, making those classes of persons agents of the owner for the purpose of giving a mechanic's lien to laborers who work at the request of such agent, and hence a materialman's servants can have no lien.—*Id.*

(E) Subcontractors and Contractors' Workmen and Materialmen.

§ 94 (Wash.) Rem. & Bal. Code, §§ 1129, 1139, 1141, 1147, *held*, that a construction company orally agreeing with the principal contractor for a dyke to furnish a dredger and crew for a certain sum per day was entitled to a lien, as subcontractor in the order of priority fixed by the statute.—*Chavelle v. Island Gun Club*, 137 P. 511.

§ 99 (Wash.) Where a materialman did not, within five days after the first delivery of the materials, notify the owner in writing, in accordance with Laws 1911, c. 77, that he was furnishing the materials, laborers engaged by him, even if entitled to subrogation to his lien because the products of their labor went into the materials, are not entitled to a lien on the

structure.—*Baker v. Yakima Valley Canal Co.*, 137 P. 342.

§ 103 (Or.) A materialman or laborer, to be bound by a stipulation in the principal contract against liens, must have assented thereto or at least have notice thereof.—*Hume v. Seattle Dock Co.*, 137 P. 752.

III. PROCEEDINGS TO PERFECT.

§ 137 (Wash.) A subcontractor's lien notice designating an unincorporated club as a party defendant, and not the individual members composing it, but alleging that the club was a voluntary association composed of those persons, was sufficient.—*Chavelle v. Island Gun Club*, 137 P. 511.

§ 157 (Or.) In a mechanic's lien notice, overcharges occurring through error of a competent bookkeeper do not render the lien void.—*Hume v. Seattle Dock Co.*, 137 P. 752.

IV. OPERATION AND EFFECT.

(B) Property, Estates, and Rights Affected.

§ 193 (Wash.) Where the owners of property had contracted to sell it, and were not parties to a contract to construct a dyke thereon, only the interest of the purchasers was subject to a subcontractor's lien.—*Chavelle v. Island Gun Club*, 137 P. 511.

VII. ENFORCEMENT.

§ 245 (Idaho) An action to foreclose a mechanic's lien is an action in equity.—*Jensen v. Bumgarner*, 137 P. 529.

§ 281 (Cal.) Testimony that after the building was completed there was near by a pile of rough lumber does not warrant reversal of an order denying to defendant a new trial in a materialman's lien suit for insufficiency of the evidence to sustain the finding that the materials allowed for were used in the building.—*National Lumber Co. v. Ripple*, 137 P. 236.

§ 290 (Idaho) It is essential that the court make findings of fact and conclusions of law as a basis for the judgment entered.—*Jensen v. Bumgarner*, 137 P. 529.

While a jury may make special findings of fact, such findings are merely advisory and may be adopted in whole or in part or be rejected, and the court may make its own findings of fact and conclusions of law.—*Id.*

Where the court directed the jury to find a general verdict only, and the jury so found, the entry of judgment on such verdict without any findings being made by the court *held* error.—*Id.*

§ 291 (Utah) Where, in an action to foreclose a mechanic's lien against a firm and the administratrix of a deceased partner, all claims against other assets of the estate are specifically waived, and a deficiency judgment was not allowed, a judgment requiring the property to be sold and the proceeds applied to the payment of the lien and any balance paid to the administratrix sufficiently protected the rights of the parties.—*Bingham Coal & Lumber Co. v. Blom*, 137 P. 630.

MILEAGE.

See Witnesses, § 29.

MINES AND MINERALS.

See Attorney and Client, § 26; Executors and Administrators, § 439; Taxation, § 233.

I. PUBLIC MINERAL LANDS.

(B) Location and Acquisition of Claims.

§ 18 (Idaho) The locator of a mining claim cannot maintain ownership to a greater length in either direction along the ledge or lode than

is called for in his notice of location.—*Swanson v. Koeninger*, 137 P. 891.

In the location of mining claims, the monuments control the courses and distances only when such monuments are clearly ascertainable and can be definitely located.—*Id.*

It is contrary to the policy and spirit of the mining laws to permit a mining claim of excessive size to be staked.—*Id.*

§ 19 (Idaho) In case of conflict between the location notice and boundaries of a mining claim, as marked by the stakes on the ground, the stakes control only when there is no substantial variance between them and the description in the notice of location.—*Swanson v. Koeninger*, 137 P. 891.

Where the call in a location notice reads, "Claiming from this discovery notice and cut on shaft 1,000 feet in a southeasterly direction, and 500 feet in a northwesterly direction," and the map on file showed that the lode line ran almost due north 780 feet from the discovery and 620 feet in a southeasterly direction to the southerly end line of the claim, there was a fatal divergence between such description and the markings of the claim upon the ground.—*Id.*

§ 24 (Ariz.) An "abandonment" of a mining claim held by location takes place where the locator voluntarily leaves his claim to be appropriated by another, without any intention of again claiming it in the future.—*Shank v. Holmes*, 137 P. 871.

§ 25 (Ariz.) A "forfeiture" occurs by operation of law, without regard to the appropriator's intention, when he fails to comply with the statutory conditions.—*Shank v. Holmes*, 137 P. 871.

§ 27 (Ariz.) One who entered the mineral lands as a locator, by failing to make the expenditure for the year 1911, forfeited his claim thereto when another entered a claim thereto in 1912, and completed his location.—*Shank v. Holmes*, 137 P. 871.

(C) Patents.

§ 40 (Ariz.) The official survey of land entered as a mining claim may serve for a second application after the cancellation of the first entry.—*Shank v. Holmes*, 137 P. 871.

A cancellation by the General Land Office of an entry for a mining claim is conclusive that the entryman failed to comply with all the conditions of entry, such as furnishing a proper affidavit of continuous posting of notice as required by Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429).—*Id.*

The cancellation of a mineral entry by the General Land Office determines that the entryman obtained no title by his entry, and the fact that money sufficient to purchase the land remained on deposit after cancellation would not give the entryman any equitable rights in the land, nor would he acquire any title by procuring an official survey thereof.—*Id.*

Defendant, by making an application for a patent to mineral lands after cancellation of a former entry by him, accepted and acquiesced in the decision of the General Land Office canceling his former entry; his right to the land after such cancellation depending upon location made under the laws.—*Id.*

II. TITLE, CONVEYANCES, AND CONTRACTS.

(B) Conveyances in General.

§ 55 (Kan.) Where the estate in minerals in situ is severed from the estate in the surface, the owner of the latter estate has the right of subjacent support for the surface.—*Walsh v. Kansas Fuel Co.*, 137 P. 941.

Where the owner of land retains the surface estate and conveys the minerals, a conveyance or waiver of the right to subjacent support will

not be implied unless it clearly appears from the language of the deed that such was the intent of the parties.—Id.

MINIMUM WAGES.

See Municipal Corporations, § 339.

MISREPRESENTATION.

See Fraud, §§ 12-21; Insurance, §§ 290, 292; Mortgages, §§ 239, 270; Specific Performance, § 53.

MISTAKE.

See Contracts, § 93; Reformation of Instruments, §§ 43, 45.

MODIFICATION.

See Appeal and Error, § 1151; Criminal Law, §§ 834, 1184.

MONEY LENT.

See Trial, § 896.

§ 6 (Cal.) A complaint, alleging no promise except that expressed in the original note, given by the debtor, when the money was borrowed, and not alleging indebtedness in any other manner, *held* not sufficient to state a cause of action on the debtor's implied contract.—Merchants' Nat. Bank of Santa Monica v. Bentel, 187 P. 25.

MONEY RECEIVED.

See Payment, § 89; Principal and Agent, § 71; Sales, § 391; Vendor and Purchaser, § 339.

MONOPOLIES.

I. VALIDITY AND EFFECT OF GRANTS.

§ 4 (Or.) Under L. O. L. §§ 5272, 5283, 5294, 5298, 5303, 5304, relating to licenses for fishing salmon, the maintenance of fishing appliances in a river, under a license, *held* to tend to create an exclusive right of fishing which is properly enjoined.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766.

An exclusive right of fishing in a navigable stream cannot be granted under a constitution forbidding a monopoly in a lawful undertaking.—Id.

II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

§ 21 (Kan.) In an action for breach of a contract *held* that plaintiff's case was based upon an unlawful conspiracy in violation of the anti-trust laws of the United States and of the state anti-trust act and acts amendatory thereto, and he was therefore not entitled to relief.—Patterson v. Imperial Window Glass Co., 137 P. 955.

MONUMENTS.

See Mines and Minerals, § 18.

MORTGAGES.

See Adverse Possession, § 31; Appeal and Error, §§ 460, 883; Banks and Banking, §§ 77, 80; Chattel Mortgages; Corporations, §§ 662, 684; Frauds, Statute of, § 133; Insurance, §§ 93, 328; Limitation of Actions, §§ 167, 170; Partition, § 109; Specific Performance, § 53.

IV. RIGHTS AND LIABILITIES OF PARTIES.

§ 213 (Cal.) A mortgagee, entering into possession pursuant to proceedings for the enforcement of the mortgage lien instituted after the extinguishment of the lien by limitations, is

not a mortgagee in possession.—Faxon v. All Persons, etc., 137 P. 919.

§ 216 (Cal.) A mortgagee who, while the mortgage is subsisting, obtains in any lawful manner the possession may retain possession and defend it against the mortgagor or his successor, and the mortgagor's only remedy is the equitable suit for redemption.—Faxon v. All Persons, etc., 137 P. 919.

V. ASSIGNMENT OF MORTGAGE OR DEBT.

§ 239 (Or.) A mortgagee negotiating for the sale of the mortgage is responsible for false representations by the mortgagor in his presence to the proposed purchaser.—Thomson v. Swank, 137 P. 193.

§ 270 (Or.) Evidence *held* to show that a mortgagor, in the presence of the mortgagee, falsely stated to one to whom the mortgagee afterward assigned the mortgage that the property covered was valuable for coal, timber, and fruit.—Thomson v. Swank, 137 P. 193.

X. FORECLOSURE BY ACTION.

(B) Right to Foreclose and Defenses.

§ 401 (Wash.) An option contained in a mortgage to declare the whole debt due for nonpayment of interest is sufficiently exercised by the commencement of foreclosure proceedings.—Musselman v. Knottingham, 137 P. 1012.

(E) Parties and Process.

§ 438 (Cal.App.) Where a defendant, holding an inferior lien, tendered to plaintiff the sum due, together with the attorney's fees provided for in the mortgage, which was accepted, such defendant was properly subrogated to plaintiff's interest and substituted as plaintiff, under Code Civ. Proc. § 385.—Berkeley Bank of Savings & Trust Co. v. Miller, 137 P. 1101.

§ 440 (Wash.) Service by publication in foreclosure *held* authorized where the record showed that the owner was not a resident of the county; that diligent effort had been made to find him; and that service by publication was not commenced until a few days prior to the expiration of 90 days after the filing of the complaint, on an affidavit alleging that his residence was unknown.—Musselman v. Knottingham, 137 P. 1012.

(L) Disposition of Proceeds and Surplus.

§ 567 (N.M.) Where the holder of junior mortgages bid in the property at foreclosure for the mortgage debts, interest, and costs, as shown by the judgment, and after the sale the holder of the senior mortgages, discovering that he had been overpaid, paid the excess into court so long as the judgment remained in force, the mortgagor was not entitled to receive such money as surplus on the sale.—Edwards v. Fitzhugh, 137 P. 582.

(N) Fees and Costs.

§ 581 (Cal.App.) The court, in an action to foreclose a mortgage, could find that the sum allowed as attorneys' fees, which was within the limitation provided in the mortgage, was reasonable, even in absence of evidence on the question.—Berkeley Bank of Savings & Trust Co. v. Miller, 137 P. 1101.

MOTIONS.

See Equity, § 262; Judgment, §§ 155, 354; Negligence, § 136; New Trial, §§ 73, 123-162; Pleading, §§ 345-369; Trial, §§ 70, 94, 165, 178; Venue, § 61.

§ 2 (Or.) A "motion" is an application by a party to a suit or action for some kind of relief.—State v. Warner Valley Stock Co., 137 P. 746.

§ 2 (Utah) Where the court, in its original decree, after determining the rights of irrigation companies to the water of a river, retained jurisdiction for necessary supplemental orders, a motion was sufficient to invoke such further action,

and the issues formed by the original pleadings were sufficient upon which to base a supplemental order.—*Salt Lake City v. Utah & Salt Lake Canal Co.*, 137 P. 638.

§ 32 (Utah) Parties, by appearing and taking part in proceedings, waived any defect in the motion by which the action of the court was invoked.—*Salt Lake City v. Utah & Salt Lake Canal Co.*, 137 P. 638.

MUNICIPAL CORPORATIONS.

See Appeal and Error, § 1197; Bridges, §§ 7, 21; Counties; Dedication, §§ 18, 19, 31, 39; Eminent Domain, §§ 167, 204, 243, 274; Judges, § 3; Judgment, §§ 199, 714; Levees, §§ 19; Limitation of Actions, § 58; Names, § 4; Quietting Title, § 2; Schools and School Districts; Street Railroads; Waters and Water Courses, §§ 129, 144-152; Weights and Measures, § 8.

I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

(B) Territorial Extent and Subdivisions, Annexation, Consolidation, and Division.

§ 35 (Wash.) When territory is annexed to a city, the city's authority is ipso facto extended over the new territory, and it becomes subject to the city's control and supervision and to all its ordinances then and thereafter in force.—*Ettor v. City of Tacoma*, 137 P. 820.

Contracts entered into by the authorities having jurisdiction of certain territory, and not executed when such territory was annexed to a city, or of such character that that execution would be inconsistent with or tend to defeat the contract and duties of the city, and not within any constitutional guaranty, *held* thereby extinguished.—*Id.*

Where a contract for a public improvement pending upon annexation of the locality of a city is not unlawful and for that reason *ultra vires*, the city will be bound by the same rules which govern individuals in their contract dealings.—*Id.*

(C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

§ 46 (Colo.) Under Const. art. 20, §§ 4, 5, relating to the amendment of the city charter of Denver, and allowing it to be amended by the voters, the term "amendment" means an amendment in its unqualified and unlimited scope.—*People v. Perkins*, 137 P. 55.

An amendment to the charter of a city is not invalid because it is not self-executing and is to go into effect upon a contingency.—*Id.*

The submission separately of two amendments to the city charter of Denver, one contingent on the passage of the other, *held* not a violation of Denver City Charter, § 179, requiring the official ballot to show clearly the nature of the instrument to be voted on.—*Id.*

Though the mode of the submission of amendments to the charter of Denver disclosed a strong partiality for the adoption of the measure, and was to a certain extent unfair in its caption, that fact will not render the adoption invalid, where over 25,000 votes were cast for or against the amendment, and there was no suggestion that any voter was misled.—*Id.*

As Const. art. 20, § 5, providing for the submission of amendments to the charter of Denver, does not require the call for such elections to be by ordinance, and places the duty of publication on the clerk, the fact that such call was by ordinance and that the first publication was made before the ordinance went into effect, will not render the election invalid.—*Id.*

§ 48 (Colo.) Proposed changes in the city charter of Denver, which would alter the form of government and the method of elections, making them nonpartisan and providing for a

commission form, *held* amendments which may be submitted upon petition of voters without the necessity of a charter convention, as provided by Const. art. 20, § 5.—*People v. Perkins*, 137 P. 55.

Where proposed amendments, providing for a commission form of government for the city of Denver and for nonpartisan elections, were submitted separately, the fact that the amendment providing for nonpartisan elections was contingent upon the adoption of the commission form of government and was not self-executing, does not render it so invalid that the manner of submission deprived the voters of lawfully exercising their right of franchise.—*Id.*

Amendments to the city charter of Denver, providing for the commission form of government and for nonpartisan elections, *held* not to embrace more than one matter requiring the submission of numerous questions to the voters, even though working many changes in the present system of government.—*Id.*

V. OFFICERS, AGENTS, AND EMPLOYEES.

(A) Municipal Officers in General.

§ 162 (Okla.) The mayor of a city could not recover compensation as such on the ground of implied contract to pay what his services were reasonably worth.—*Rackley v. City of Purcell*, 137 P. 100.

A person acting in the capacity of a municipal officer is entitled only to such compensation as may be given him by statute.—*Id.*

§ 172 (Colo.App.) A city treasurer receiving a check from the city clerk on December 30th, who was himself cashier of the bank on which it was drawn, and knew that it was having a hard time, but who failed to present the check the next day, upon the bank's failure after an intervening holiday, *held* liable for his failure to turn over the money to his successor.—*Babcock v. City of Rocky Ford*, 137 P. 899.

A city treasurer failing to present a check within a reasonable time, so that the money was lost through the failure of the bank on which it was drawn, was not thereby released from his obligation to turn over the money to his successor.—*Id.*

(B) Municipal Departments and Officers Thereof.

§ 180 (Kan.) Although police officers are chosen by local municipal authority, they are not mere agents of the city, but are essentially state functionaries and act for the benefit of the public at large.—*Anderson v. Board of Com'rs of Shawnee County*, 137 P. 790.

VII. CONTRACTS IN GENERAL.

§ 248 (Wash.) An unauthorized contract may be ratified by a city.—*Ettor v. City of Tacoma*, 137 P. 820.

City annexing certain territory with knowledge of a railroad's contract to grade a certain street therein made when the location was under county jurisdiction, and its subsequent direction of the work *held* to thereby ratify such contract, and to subject itself to the payment of damages to abutting owners.—*Id.*

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 283 (Wash.) In the absence of statute directing that the work of constructing a public improvement in a city shall be done by contract, the city may do it either by contract or through its own officers, and assess the cost against the abutting property in proportion to benefits.—*Malette v. City of Spokane*, 137 P. 496.

Spokane City Charter, §§ 97, 98, 99, providing for public improvements at the instance of the

city council or the board of public works, does not require that such improvements shall be accomplished by contract, but vests a discretion in the council or board to do the work by day labor or contract.—Id.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 293 (Wash.) Resolution of intention to construct a sewer *held* substantially to comply with Bellingham City Charter, §§ 299, 327.—Allen v. City of Bellingham, 137 P. 1016.

(C) Contracts.

§ 330 (Wash.) Spokane City Charter, §§ 97, 98, 99, providing for public improvements at the instance of the city council or the board of public works, vests a discretion in the council or board to do the work by day labor or contract, and if done by contract, does not require the contract to be let to the lowest bidder.—Malette v. City of Spokane, 137 P. 496.

§ 339 (Wash.) Const. art. 11, §§ 10, 11, and Rem. & Bal. Code, § 7507, subd. 88, and section 7518, *held* to authorize a city of the first class to pass an ordinance fixing a minimum wage for common labor on public work within the city, whether done by the city or by a private contractor, to be paid for by special assessment, though the wage so fixed was higher than the going rate of wages for similar labor within the city.—Malette v. City of Spokane, 137 P. 496.

Spokane City Ordinance No. A4422, passed August 24, 1909, prescribing a minimum wage rate for common labor on city work higher than the prevailing rate of wages, is not in violation of any public policy of the state.—Id.

Spokane City Ordinance Aug. 24, 1909, No. A4422, providing a minimum wage rate of \$2.75 a day for common labor on public improvements, *held* not void for unreasonableness.—Id.

(D) Damages.

§ 385 (Wash.) Railroad under agreement with county officers to grade a certain street at its own expense without cost to or upon said county, and subsequently doing the work under direction of the officers of defendant city, which had annexed the location, *held* not to have assumed to pay damages to abutting owners.—Etter v. City of Tacoma, 137 P. 820.

(E) Assessments for Benefits, and Special Taxes.

§ 406 (Wash.) A city, in constructing municipal improvements to be paid for by assessments on property benefited, does not act as an agent of the owners assessed, but rather in the exercise of its governmental authority to levy special taxes.—Malette v. City of Spokane, 137 P. 496.

§ 437 (Wash.) An ordinance for the acquisition of property for an elevated road and for its construction and for the establishment of a street on the surface provides for two separate improvements, and the cost of one improvement cannot be assessed against property not benefited thereby but benefited by the other improvement.—In re West Wheeler St. in City of Seattle, 137 P. 303.

§ 444 (Wash.) A failure of taxing officers to initiate an improvement by a proper resolution did not avoid the assessment, where an opportunity was given to present objections to the assessment roll on a reassessment as authorized by statute.—Allen v. City of Bellingham, 137 P. 1016.

§ 450 (Wash.) In Laws 1911, c. 98, § 13, p. 446, providing for improvement districts, the word "block" means a square included by four streets, the term "platted property" means lands included by regularly intersecting streets, and land readily susceptible of subdivision into blocks of ordinary size is "unplatted land," and the line of an assessment district may extend back on it no further, than on adjacent platted

property.—Walter C. Sivyver & Sons Co. v. City of Spokane, 137 P. 803.

§ 514 (Wash.) Under Laws 1911, c. 98, § 21, where city council rejected reassessment roll made necessary by judgment vacating original assessment, further reassessment *held* authorized without the adoption of a new ordinance directing such further reassessment.—Allen v. City of Bellingham, 137 P. 1016.

(F) Enforcement of Assessments and Special Taxes.

§ 568 (Cal.App.) An assessment certificate, diagram, and warrant for street improvements, *held* admissible in evidence to establish the lien of the contractor, under St. 1899, pp. 166-168, §§ 8, 9, 12, even though nothing but the warrant was actually signed by the street superintendent, where the assessment recited that it was made by him as such.—Petaluma Rock Co. v. Smith, 137 P. 290.

X. POLICE POWER AND REGULATIONS.

(B) Violations and Enforcement of Regulations.

§ 633 (N.M.) Where, in a judgment covering several cases prosecuted for violations of a fire ordinance, one or more cases are included over which the court has no jurisdiction, the Supreme Court, under Laws 1907, c. 57, § 38, may modify the judgment by eliminating the cases improperly included.—City of Tucumcari v. Belmore, 137 P. 585.

Where a judgment for violating a fire ordinance is a mere fine without imprisonment, and the ordinance is not in evidence, the proceeding will be treated by the Supreme Court as a civil and not a criminal proceeding.—Id.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 648 (Wash.) Where a property owner so fences his property as to leave a passageway connecting two public streets, which is continuously used by people having business with the abutting owners for more than 10 years, and subsequently sells all the abutting property, retaining legal title to the strip, such strip becomes a public alley by prescription, where the use is without the legal owner's consent.—Humphrey v. Krutz, 137 P. 806.

§ 654 (Or.) Evidence *held* to show that defendant city had been in open, notorious, continuous, and adverse possession of land, improving it as a street, for over 30 years.—Seaman v. City of Portland, 137 P. 203.

§ 663 (Cal.App.) Municipalities may close public streets as provided by laws or by their charters and extinguish the public right of way, but the following of such statutory method does not necessarily extinguish the rights of abutting owners.—City and County of San Francisco v. Main, 137 P. 281.

§ 671 (Wash.) An action to enjoin a threatened obstruction of a public alley may be maintained by the abutting owners.—Humphrey v. Krutz, 137 P. 806.

§ 696 (Or.) A city improving a street may summarily remove a storehouse located thereon and an oil tank imbedded under its surface.—Hunter v. Clark & Henery Const. Co., 137 P. 743.

§ 697 (Wash.) Where, in an action to enjoin obstruction of a public alley, defendants answered that they proposed to exclude plaintiffs from using the alley, it was error to dismiss the action, on the ground that no obstruction was threatened, though one of the defendants testified that he had never forbidden any one to use the alley, and intended to do nothing illegal.—Humphrey v. Krutz, 137 P. 806.

§ 705 (Cal.App.) A passenger alighting from a street car is not negligent in failing to look

for approaching automobiles where an ordinance prohibits them from running within four feet of the lower steps of a car.—*Medlin v. Spazier*, 137 P. 1078.

(C) **Public Buildings, Parks, and Other Public Places and Property.**

§ 721 (Cal.App.) Act of city in taking property set apart for use only as a public park for the extension of a street for commercial purposes at the instance of property owners whose land would be increased in value *held* a violation of the trust upon which it held the land.—*Mulvey v. Wangenheim*, 137 P. 1106.

XII. TORTS.

(B) **Acts or Omissions of Officers or Agents.**

§ 751 (Wash.) In an action under Laws 1893, c. 84, § 47, and Laws 1907, c. 153, § 48, prescribing the right to recover damages consequent on the original grading of a street, the railroad company, doing the actual grading under municipal authority and direction, stands in the situation of a contractor, and where no negligence in the work is shown is not liable for damages to abutting property.—*Ettor v. City of Tacoma*, 137 P. 820.

(C) **Defects or Obstructions in Streets and Other Public Ways.**

§ 762 (Okla.) Where a city permits an electric light company to maintain electric light wiring on a sidewalk so as to constitute a menace to the public, and it has knowledge of such condition, or the circumstances are such that knowledge will be implied, it is liable to a person injured from such obstruction.—*City of Shawnee v. Sears*, 137 P. 107.

§ 763 (Okla.) A city need not inspect the wiring and appliances of an electric light plant operating under a franchise, to discover defects therein.—*City of Shawnee v. Sears*, 137 P. 107.

§ 763 (Wash.) Where the public use a street upon the invitation of the city, either express or clearly implied, it is the city's duty to use reasonable care to keep it in a reasonably safe condition for travel.—*Lautenschlager v. City of Seattle*, 137 P. 323.

§ 769 (Okla.) A city is liable for injuries from defective electrical wiring maintained lawfully in its streets by others, only when chargeable with notice of the defect and given a reasonable opportunity to remedy same.—*City of Shawnee v. Sears*, 137 P. 107.

§ 798 (Wash.) City *held* bound to provide signals or warnings where sidewalk in common use was dangerous, and it knew or should have known its condition.—*Lautenschlager v. City of Seattle*, 137 P. 323.

§ 799 (Wash.) A city undertaking to improve a street is required to use reasonable precautions to guard the public from injury, and in doing so may, if necessary, temporarily close the street from public travel.—*Lautenschlager v. City of Seattle*, 137 P. 323.

§ 807 (Wash.) A traveler may use any street which the city leaves open for travel, and is not required to avoid a particular street because there is another and safer one that he may take.—*Lautenschlager v. City of Seattle*, 137 P. 323.

§ 809 (Wash.) Contractor with city for doing of concrete work on street, which had neither touched nor taken control of the sidewalk space, where a party fell in stepping from a cement walk to a plank walk six inches lower, *held* not liable.—*Lautenschlager v. City of Seattle*, 137 P. 323.

(E) **Condition or Use of Public Buildings and Other Property.**

§ 847 (Okla.) In determining whether a city, by permitting a pit filled with water, and cov-

ered with a light layer of straw, was guilty of reckless disregard for the safety of an infant trespasser, the attractiveness and accessibility of the pit, the gravity of the danger, the time of its existence, and knowledge imputed to the city by reasonable inference were to be considered.—*City of Shawnee v. Cheek*, 137 P. 724.

§ 857 (Okla.) In an action for the death of a boy from falling into a pit at an abandoned city pumphouse, which pit was filled with water, and covered with a light layer of straw, petition *held* demurrable.—*City of Shawnee v. Cheek*, 137 P. 724.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(B) **Administration in General, Appropriation, Warrants, and Payment.**

§ 880 (Colo.App.) Under Rev. St. 1908, § 6639, requiring a city treasurer to keep all money in such place of deposit as may be designated by ordinance, the word "may" is not equivalent to "must" or "shall," and the city council may elect whether it will designate a depository, and thus take the risk of relieving him from liability in case the depository should fail, or hold him as an insurer, and decline to make such designation.—*Babcock v. City of Rocky Ford*, 137 P. 899.

XV. ACTIONS.

§ 1028 (Or.) Under L. O. L. § 41, where suit is brought against a municipal contractor to enjoin a trespass, the city may intervene to assert its right to the land as a street and to defend the removal of obstructions therefrom.—*Hunter v. Clark & Henery Const. Co.*, 137 P. 743.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 719-817.

NAMES.

See Appeal and Error, § 1170; Corporations, § 47.

§ 4 (N.M.) That the verdict in one case and the verdict and judgment in another omitted the suffix "Jr." from defendant's name as given in the complaint *held* not to invalidate the judgments imposing fines for violations of a city ordinance.—*City of Tucumcari v. Belmore*, 137 P. 585.

NAVIGABLE WATERS.

See Limitation of Actions, § 28; Logs and Logging, § 13; Waters and Water Courses.

I. RIGHTS OF PUBLIC.

§ 1 (Cal.App.) Whether or not a stream is "navigable" is, in the absence of a legislative declaration, determinable by its practical utility for navigation during ordinary stages of water at any particular time.—*City and County of San Francisco v. Main*, 137 P. 281.

§ 1 (Wash.) Where a creek has, during recurring spring freshets, sufficient water to float shingles and other forest products, it is a floatable stream and may be used as such; the fact that artificial obstructions had to be removed not affecting its navigability.—*Fortson Shingle Co. v. Skagland*, 137 P. 304.

§ 8½ [New, vol. 13 Key-No. Series]. (Wash.) The fact that a railroad right of way, assessed for benefits from river improvements, is used for railway purposes will not prevent its assessment for benefits from the waterway improvements.—*Newell v. Loeb*, 137 P. 811.

§ 16 (Cal.App.) Where a creek ceased to be a navigable stream while the lands now owned by defendant were owned by complainant, no right of way over the creek as a navigable stream ever passed to defendant or her predecessors in interest.—City and County of San Francisco v. Main, 137 P. 281.

II. LANDS UNDER WATER.

§ 36 (Or.) The state owns the bed of a navigable stream to the line of ordinary high water.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 706.

§ 36 (Wash.) Under Const. art. 17, § 1, declaring the ownership to the beds and shores of navigable waters to be in the state up to the high-water mark, riparian owners on a navigable river have no rights in the bed of the stream or its waters as against the state.—Newell v. Loeb, 137 P. 811.

Riparian owners have no rights in meanders in the bed of a navigable river which they can enforce as against the state or its agency, a waterway improvement district.—Id.

§ 37 (Or.) The state may convey tidelands to the exclusion of the riparian rights of the upland owner.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766.

§ 37 (Wash.) Under plats describing certain additions as running "to the right bank of the Duwamish river," a navigable river, "thence up stream with the meanders of said right bank," and also describing the boundaries as extending "to the meanders of Duwamish river," the title of purchasers according to such plats extended only to the bank of the river, whether the meanders were in the bed or upon the bank.—Newell v. Loeb, 137 P. 811.

III. RIPARIAN AND LITTORAL RIGHTS.

§ 39 (Or.) The occupant of lands, one border of which is the low-water line of the Columbia river, has the private right of access to and from the stream.—Eagle Cliff Fishing Co. v. McGowan, 137 P. 766.

NAVIGATION.

See Navigable Waters, §§ 1-16.

NEGATIVE PREGNANT.

See Attachment, § 109.

NEGLIGENCE.

See Assault and Battery, §§ 13, 42; Bills and Notes, § 315; Carriers, §§ 47-347; Death; Electricity; Explosives, § 12; Highways, §§ 184-214; Master and Servant, §§ 96-319; Municipal Corporations, §§ 705, 751-857; Physicians and Surgeons, §§ 15, 18; Railroads, §§ 216-446; Street Railroads, §§ 81-118; Telegraphs and Telephones, §§ 28, 67; Trial, §§ 139, 253, 260; Waters and Water Courses, §§ 262, 263.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 3 (Cal.App.) "Negligence" is a comparative term, and the degree of care which in one case would be negligence might in another be deemed the exercise of more than ordinary prudence.—Medlin v. Spazier, 137 P. 1078.

(C) Condition and Use of Land, Buildings, and other Structures.

§ 33 (Okl.) A landowner owes a trespasser a duty, in respect to safety from a dangerous artificial condition of premises, to not injure him intentionally or wantonly.—City of Shawnee v. Cheek, 137 P. 724.

A mere omission by a landowner to guard against injury to an infant trespasser may con-

stitute actionable negligence when it involves a reckless disregard for his safety.—Id.

III. CONTRIBUTORY NEGLIGENCE.

(A) Persons Injured in General.

§ 66 (Cal.) Where plaintiff, who visited defendant's premises to see to the removal of a boiler purchased by plaintiff's master from defendant, plaintiff is not chargeable with knowledge of the effect of the vibration caused by the truck on which the boiler was loaded upon a pile of lumber, because not knowing upon what substance the lumber was laid.—Roseberry v. Edward F. Niehaus & Co., 137 P. 232.

§ 69 (Cal.) Forgetfulness of a known danger will not always defeat a recovery by one injured; to forget not being negligence, unless it shows want of ordinary care.—Roseberry v. Edward F. Niehaus & Co., 137 P. 232.

§ 72 (Cal.) The conduct of plaintiff when finding himself placed in sudden peril by the negligence of defendant must be judged in view of the circumstances.—Tousley v. Pacific Electric Ry. Co., 137 P. 31.

§ 83 (Cal.App.) The doctrine of last clear chance is not applicable where defendant did not actually see or know of the danger.—Waterman v. Visalia Electric R. Co., 137 P. 1096.

(C) Imputed Negligence.

§ 93 (Cal.) The negligence of an owner in driving his automobile is not imputed to a guest, who has no control over its operation.—Tousley v. Pacific Electric Ry. Co., 137 P. 31.

§ 96 (Cal.App.) Parents are chargeable with the exercise of ordinary care in the protection of their minor children.—Waterman v. Visalia Electric R. Co., 137 P. 1096.

IV. ACTIONS.

(B) Evidence.

§ 121 (Or.) Mere proof of an accident is not per se proof of negligence.—Oberstock v. United Rys. Co., 137 P. 195.

§ 122 (Kan.) The presumption is that the instinct of self-preservation will induce a person to avoid a known danger.—Jones v. Joplin & P. Ry. Co., 137 P. 796.

§ 122 (Okl.) A child under 7 years of age, or, in the absence of evidence of capacity, between 7 and 14 years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting the question of duty of a landowner as to dangerous condition of the premises.—City of Shawnee v. Cheek, 137 P. 724.

(C) Trial, Judgment, and Review.

§ 136 (Cal.) Whether one sustaining a personal injury was guilty of contributory negligence is for the jury, and is for the court only where the facts are undisputed, and where reasonable minds can draw but one conclusion.—Loftus v. Pacific Electric Ry. Co., 137 P. 34.

§ 136 (Cal.) In an action for damages for personal injuries sustained by plaintiff while upon defendants' premises on a business errand, the question of plaintiff's contributory negligence in going near a defectively placed lumber pile held for the jury.—Roseberry v. Edward F. Niehaus & Co., 137 P. 232.

Plaintiff did not, as a matter of law, become a licensee or trespasser on defendant's premises, where he was an invitee, and after finishing his business remained a short time to say good-bye to defendant's representative.—Id.

Plaintiff, who was upon defendants' premises to see to the removal of a boiler purchased by his master, held not guilty of contributory negligence as a matter of law.—Id.

§ 136 (Cal.App.) In an action against a street railroad for damages for the loss of earnings of an infant son killed upon a track, held, that the question of imputed negligence was for the

jury.—*Waterman v. Visalla Electric R. Co.*, 137 P. 1096.

§ 136 (Kan.) The presumption that the instinct of self-preservation will induce a person to avoid a known danger being met by substantial evidence of contributory negligence, the question is for the jury.—*Jones v. Joplin & P. Ry. Co.*, 137 P. 796.

§ 136 (Okla.) Under Const. art. 23, § 6 (Williams' Const. § 355), the defense of contributory negligence must be left to the jury.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

§ 136 (Utah) Where there were several different acts of negligence charged in a complaint, either of which would support a recovery, and there was evidence tending to support one of such allegations, the court could properly refuse defendant's motion for a nonsuit and direction of verdict.—*Anderson v. Nielson*, 137 P. 152.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, §§ 938, 942; New Trial, §§ 104, 105.

NEW MATTER.

See Pleading, § 182.

NEW TRIAL.

See Appeal and Error, §§ 222, 301, 302, 345, 347, 544, 621, 832, 907, 978, 1015, 1210; Criminal Law, §§ 938-959, 1023, 1088, 1156, 1158; Mechanics' Liens, § 281.

II. GROUNDS.

(B) Misconduct of Parties, Counsel, or Witnesses.

§ 29 (Wash.) The refusal of a new trial because of improper argument of plaintiff's counsel *held* not error.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

(C) Rulings and Instructions at Trial.

§ 40 (Colo.) Where there was no objection to evidence, motion to strike it out, or for a nonsuit, or directed verdict, or objection to the instructions, *held*, that variance between complaint and evidence as to terms of contract between owner and broker could not be urged for the first time on a motion for a new trial.—*Perkins v. Russell*, 137 P. 907.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 73 (Kan.) Where, in a brakeman's action for injuries, certain findings of fact showed proper care and others negligence, and the general verdict was inconsistent with due care, a new trial should have been granted.—*Anders v. Atchison, T. & S. F. Ry. Co.*, 137 P. 966.

§ 78 (Wash.) Where two judges and one jury have determined, upon the same record, that the weight of conflicting evidence was with the defendant, and a contrary verdict was set aside by the court and its action sustained on appeal, a motion for a new trial by plaintiff for insufficiency of the evidence to support a verdict for defendant on the second trial should be denied.—*Faben v. Muir*, 137 P. 1042.

(H) Newly Discovered Evidence.

§ 104 (Cal.) The trial court may, in its discretion, deny a new trial sought on the ground of newly discovered evidence, where it is merely cumulative.—*In re Walden's Estate*, 137 P. 35.

§ 105 (Cal.) The trial court may, in its discretion, deny a new trial sought on the ground of newly discovered evidence, where it tends only

to impair the credibility of the evidence of the prevailing party.—*In re Walden's Estate*, 137 P. 35.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 123 (Cal.App.) One seeking a new trial cannot, 33 days after the entry of judgment, and 21 days after serving and filing her notice of intention to move for a new trial, amend such notice by supplying specifications of the particulars in which the evidence was insufficient to support the verdict and of errors of law which will be relied upon.—*Strange v. Strange*, 137 P. 1104.

§ 128 (Cal.App.) Where defendants moved for a new trial on agreed statement of the case which did not specify in what way the evidence was insufficient, the lower court could not resort to the statement to determine the sufficiency of the evidence.—*Holland v. Canty*, 137 P. 276.

§ 128 (Cal.App.) A motion for new trial will be denied, where it does not comply with Code Civ. Proc. § 659, by specifying the errors of law relied upon and the insufficiency of the evidence.—*Strange v. Strange*, 137 P. 1104.

Neither the amendment to Code Civ. Proc. § 647, whereby it is made unnecessary to take exceptions to the rulings of the court during trial, nor section 953a, enabling an appellant to present to the appellate court the reporter's transcript of all the proceedings, relieves a defeated party from the duty of specifying the errors of law and the insufficiency of the evidence in his motion for a new trial.—*Id.*

§ 140 (Cal.App.) Where a defeated party moved for a new trial on the grounds of accident, surprise, and newly discovered evidence, affidavits to support those grounds must be filed within ten days after the service and filing of the notice of intention or the time must be extended by stipulation.—*Strange v. Strange*, 137 P. 1104.

§ 152 (Okla.) While a motion for a new trial may be amended after the three days allowed for filing same, an amendment so filed cannot set up new and independent grounds.—*Rogers v. Quabner*, 137 P. 361.

§ 155 (Kan.) A motion for new trial filed at one term may be taken under advisement and granted at the succeeding term.—*Hinchey v. Starrett*, 137 P. 81.

§ 162 (Wash.) Where trial court's belief that verdict was the result of passion and prejudice was based solely on the size of the verdict, *held*, that he did not err in denying a new trial on condition that plaintiff accept a judgment for a smaller sum.—*Matsuda v. Hammond*, 137 P. 328.

NON OBSTANTE VEREDICTO.

See Judgment, § 199.

NONUSER.

See Easements, § 30.

NOTES.

See Bills and Notes.

NOTICE.

See Adverse Possession, § 31; Appeal and Error, §§ 413, 419, 425; Assignments for Benefit of Creditors, § 300; Chattel Mortgages, §§ 154, 156; Courts, § 487; Criminal Law, § 1081; Damages, § 18; Drains, § 76; Fraudulent Conveyances, § 210; Guaranty, § 46; Indemnity, § 10; Judgment, § 155; Justices of the Peace, § 160; Mechanics' Liens, §§ 99, 103, 137, 157; Mines and Minerals, §§ 18, 19; Municipal Corporations, §§ 762, 789; Negligence, § 66; New Trial, § 123; Principal and

Agent, §§ 101, 170, 171; Principal and Surety, §§ 112, 114, 123; Process, § 96; Sales, §§ 52, 235; Vendor and Purchaser, §§ 231, 239; Wills, § 488.

NUNC PRO TUNC.

See Appeal and Error, § 781; Judgment, § 326.

OBJECTIONS.

See Appeal and Error, §§ 197-231.

OBSTRUCTIONS.

See Municipal Corporations, §§ 671, 697.

OCCUPATION.

See Use and Occupation.

OFFICERS.

See Attorney General; Banks and Banking, §§ 116; Clerks of Courts; Constitutional Law, § 9; Highways, §§ 98, 97; Justices of the Peace; Mandamus, § 72; Municipal Corporations, §§ 162-180; Receivers; Registers of Deeds; Schools and School Districts, § 55; States, § 68; Taxation, §§ 317, 319, 446½; Witnesses, § 26.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Eligibility and Qualification.

§ 28 (Ariz.) Under Laws 1912, c. 90, §§ 1, 2, 7, 31, Corporation Commissioner *held* disqualified only by ownership of stock or bonds or pecuniary interest in public service corporation which the Commission is given power to regulate and not disqualified by ownership of stock in corporation holding stock of insurance companies.—State v. Jones, 137 P. 544.

Const. art. 14, §§ 8, 17, and article 15, § 4, *held* not to make corporations other than public service corporations subject in whole or in part to regulation by the Corporation Commission within Laws 1912, c. 90, § 7, forbidding commissioners owning stocks or bonds of corporations subject to such regulation.—Id.

Laws 1912, c. 90, § 7, disqualifying as Corporation Commissioner persons pecuniarily interested in corporation subject to its regulation, *held* not to apply to insurance companies, though under Laws 1913, c. 94, they are subject to regulation by the Commission, especially in view of section 1 of chapter 94.—Id.

§ 30 (Or.) The Legislature may prescribe a new meaning of the term "office," as used in Const. art. 2, § 10, prohibiting the holding of more than one lucrative office, or apply it to a new position.—Gibson v. Kay, 137 P. 864.

Under Gen. Laws 1913, p. 670, §§ 6, 7, relating to the appointment and oath of office of assistants to the corporation commissioner, an appointee holds an "office" within Const. art. 2, § 10, forbidding the holding of more than one lucrative office.—Id.

An appointee of the corporation commissioner, pursuant to Gen. Laws 1913, p. 668, is within Const. art. 4, § 30, relating to the holding of any civil office of profit by a senator or representative.—Id.

(F) Term of Office, Vacancies, and Holding Over.

§ 55 (Ariz.) Under Laws 1913, c. 94, § 1, ownership of stock in insurance corporation by Corporation Commissioner *held* not to cause a vacancy in his office justifying the court in quo warranto declaring the office vacant.—State v. Jones, 137 P. 544.

(G) Resignation, Suspension, or Removal.

§ 61 (Wash.) Laws 1913, c. 146, passed to carry into effect the constitutional amendment of 1912, relating to the recall of officers, superseded earlier laws.—Tabor v. City of Walla Walla, 137 P. 1040.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 99 (Nev.) A provision in a statute that an officer shall receive a salary not exceeding a specified amount does not authorize the payment of the maximum amount, unless his compensation has been so fixed.—Heywood v. Nye County, 137 P. 515.

OPINION EVIDENCE.

See Evidence, §§ 471-553.

OPTIONS.

See Mortgages, § 401; Vendor and Purchaser, § 3.

ORDERS.

See Motions.

ORDINANCES.

See Municipal Corporations, §§ 339, 633.

OWNERSHIP.

See Mines and Minerals, § 18.

PARDON.

§ 4 (Kan.) Under Laws 1909, c. 116, a judge of the police court of cities of the first class may parole persons convicted of violating city ordinances, but cannot extend the conditions of the parole beyond the term of sentence, nor can he after that time declare the conditions violated and recommit the prisoner to serve the unexpired part of his sentence.—In re Carroll, 137 P. 975.

PARENT AND CHILD.

See Death, §§ 31, 95; Habeas Corpus, §§ 85, 99; Infants; Negligence, § 96; Specific Performance, § 86.

§ 17 (Cal.App.) Where a divorce decree, awarding the custody of a minor daughter to the wife, contained no provision requiring the husband to contribute to the child's support, such support devolved on the wife, as provided by Civ. Code, § 198, and in the absence of proceedings to compel contribution by the husband, under sections 138, 139, his failure to so contribute was not a violation of Pen. Code, § 270, making such failure a felony.—People v. Hartman, 137 P. 611.

§ 17 (Utah) Evidence, in a prosecution of a father under Sess. Laws 1911, c. 105, § 1, *held* to support a finding that defendant's children were in destitute and necessitous circumstances.—State v. Bess, 137 P. 829.

In a prosecution of a father under Sess. Laws 1911, c. 105, § 1, it was no defense that the destitution of the children was relieved by the charitable acts of third persons.—Id.

In a prosecution of a father for failure to support his minor children in violation of Sess. Laws 1911, c. 105, § 1, *held*, under the evidence, a verdict should have been directed in his favor.—Id.

PARKS.

See Municipal Corporations, § 721.

PAROLE.

See Pardon.

PARTIES.

See Appeal and Error, § 334; Assignments, § 121; Banks and Banking, § 77; Contracts, § 179; Guaranty, § 82; Highways, § 97; Judgment, § 238; Mechanics' Liens, § 137; Mortgages, §§ 438, 440; Partnership, § 200; Specific Performance, § 21.

IV. DESIGNATION AND DESCRIPTION.

§ 71 (Utah) Whether one is sued as an individual or copartner or otherwise is determined from the pleadings and not from the summons or return of service.—Bingham Coal & Lumber Co. v. Blom, 137 P. 630.

V. DEFECTS, OBJECTIONS, AND AMENDMENT.

§ 75 (Or.) There is a defect of parties only when one or more have not been made parties who should have been.—Crawford v. District School Board for School Dist. No. 7, in Klamath County, 137 P. 217.

A demurrer to a complaint for defect of parties must state who the omitted party is.—Id.

PARTITION.

II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

§ 95 (Or.) Where decree in partition recites report of referees, correctly describing the tract, then further describes it, omitting one line, such description will be corrected.—Reeder v. Reeder, 137 P. 191.

§ 109 (Kan.) Where, after mortgagor's death, the first mortgage was foreclosed, the holder of the second mortgage being a party, and in a partition suit by the mortgagor's heirs a decree for sale of mortgaged property and application of proceeds to payment of first mortgage was rendered, and sale was made under foreclosure before sale in the partition action, but the purchaser in each case was the same, and he applied the certificate of purchase on foreclosure upon his bid at the second sale, the sheriff's deed issued to the purchaser at the latter sale conveyed a good title, and precluded enforcement of the second mortgage.—Bowers v. Jett, 137 P. 786.

§ 114 (Or.) Under L. O. L. § 483, the costs of partition must be paid by the parties in proportion to their interests and may be specified in the decree.—Reeder v. Reeder, 137 P. 191.

PARTNERSHIP.

See Appeal and Error, § 913; Assignments, § 32; Damages, § 40.

IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(D) Actions by or Against Firms or Partners.

§ 200 (Utah) If in an action against a copartnership one of the firm is duly served with summons, he is in court both as a partner and an individual, and, if he is such, also as a surviving partner.—Bingham Coal & Lumber Co. v. Blom, 137 P. 630.

PASSENGERS.

See Carriers, §§ 280-347.

PATENTS.

See Mines and Minerals, § 40.

PAYMENT.

See Accord and Satisfaction, §§ 19, 26; Bills and Notes, §§ 129, 427; Chattel Mortgages, § 247; Landlord and Tenant, §§ 213, 231; Money Lent; Pleading, § 237; Principal and Surety, §§ 112, 114; Taxation, § 805.

I. REQUISITES AND SUFFICIENCY.

§ 17 (Cal.) Taking a note of the debtor for a prior existing debt is no payment, unless it be expressly so agreed.—Merchants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

§ 18 (Cal.) Taking a note of a third person for a prior existing debt is no payment, unless it be expressly so agreed.—Merchants' Nat. Bank of Santa Monica v. Bentel, 137 P. 25.

V. RECOVERY OF PAYMENTS.

§ 89 (Cal. App.) Where, overlooking \$500, which plaintiff had paid defendant, they stated their account in writing, and plaintiff paid the balance, as so shown, this cannot be shown, and the \$500 recovered, in the absence of a pleading of the mistake.—Third Street Improvement Co. v. McLelland, 137 P. 1089.

PENALTIES.

See Damages, § 78; Limitation of Actions, § 30.

PERFORMANCE.

See Contracts, §§ 294-323.

PERSONAL INJURIES.

See Carriers, §§ 280-347; Damages, §§ 130, 132; Death; Master and Servant, §§ 96-319; Municipal Corporations, §§ 705, 762-809, 847, 857; Negligence; New Trial, § 73; Pleading, § 388; Railroads, §§ 327-351; Street Railroads, §§ 81-118; Trial, §§ 191, 194, 244, 251-253, 296.

PETITION.

See Pleading.

PHOTOGRAPHS.

See Criminal Law, § 488.

PHYSICIANS AND SURGEONS.

See Assault and Battery, §§ 3, 6; Pleading, § 367.

§ 15 (Okla.) Where a physician performs an operation without a patient's consent, either express or implied, he is liable in damages therefor.—Rolater v. Strain, 137 P. 96.

Where plaintiff consented that defendant surgeon should operate on her foot, providing he removed no bone therefrom, and defendant removed the sesamoid bone, he was liable in damages therefor.—Id.

§ 15 (Or.) If a regularly licensed physician with reasonable diligence employs his skill in a surgical case, he is not liable for a mistake of judgment.—Hills v. Shaw, 137 P. 229.

§ 18 (Okla.) In a patient's action against a surgeon for damages for removing a bone from her foot, without her consent, in the performance of an operation, the question whether her consent was implied from the circumstances held for the jury.—Rolater v. Strain, 137 P. 96.

§ 18 (Or.) An allegation that defendant was a physician and surgeon practicing his profession in the state implied that he had, prima facie, the requisite skill and ability to practice his profession in the state.—Hills v. Shaw, 137 P. 229.

Evidence held insufficient to sustain a verdict for plaintiff.—Id.

§ 24 (Cal. App.) In an action for compensation due a physician for professional services rendered, his testimony that he was entitled to a fee of \$10 per hour for a period of 20 days is ample to support a recovery of less than \$500.—Merchants' Collection Agency v. Gopcevic, 137 P. 609.

PLATS.

See Dedication, § 19; Deeds, § 112.

PLEADING.

See Accord and Satisfaction, § 25; Account, § 17; Adverse Possession, § 110; Agriculture, § 15;

Appeal and Error, §§ 102, 173, 197, 854, 874, 882, 913, 917, 934, 1039, 1042; Appearance, § 19; Attachment, § 119; Brokers, § 82; Compromise and Settlement, § 22; Constitutional Law, § 310; Corporations, § 672; Courts, § 39; Easements, § 61; Equity, § 262; Explosives, § 12; Fraud, § 41; Habeas Corpus, §§ 54, 56; Highways, § 96; Husband and Wife, § 332; Indemnity, § 15; Insurance, § 640; Judgment, § 107; Justices of the Peace, §§ 90, 91, 150, 174; Libel and Slander, § 97; Limitation of Actions, § 127; Master and Servant, §§ 262, 264; Money Lent, § 6; Motions, § 2; Municipal Corporations, § 857; Parties, § 75; Payment, § 89; Removal of Causes, § 89; Schools and School Districts, §§ 37, 39; Specific Performance, § 61; Taxation, §§ 592, 805; Trial, §§ 251-253; Use and Occupation, § 8; Wills, § 288.

I. FORM AND ALLEGATIONS IN GENERAL.

§ 8 (Cal.App.) Complaint *held*, not to sufficiently allege that there had been no delivery of a deed; the allegations being conclusions of the pleader.—Fisher v. Fisher, 137 P. 1094.

§ 8 (Idaho) A party who seeks to recover on the ground of collusion and fraud must plead the particular representations or facts constituting same, and not merely allege that the act was collusive or fraudulent.—Wilson v. Baker Clothing Co., 137 P. 896.

§ 8 (Or.) An allegation that defendant failed to deliver barley in accordance with contract, without showing wherein the delivery failed to comply with the contract, does not state facts, but a conclusion.—Barnard & Bunker v. Houser, 137 P. 227.

§ 18 (Utah) Complaint, in action for damages for the destruction of vegetation on plaintiff's uninclosed land by trespasses thereon by defendant's sheep, *held* not demurrable as uncertain.—Thomas v. Blythe, 137 P. 396.

§ 19 (Utah) Complaint, in action for damages for the destruction of vegetation on plaintiff's uninclosed land by trespasses thereon by defendant's sheep, *held* not demurrable as ambiguous.—Thomas v. Blythe, 137 P. 396.

§ 34 (Cal.App.) Where a complaint fails to sufficiently allege a nondelivery of a deed to defendant, it may be assumed, construing the pleading most strongly against the pleader, that there was some sort of a delivery, qualified or otherwise.—Fisher v. Fisher, 137 P. 1094.

§ 35 (Utah) In an action for damages for commingling diseased sheep with those of the plaintiff's, allegations of defendant's willfulness will be disregarded as surplusage, under Comp. Laws 1907, §§ 60, 61, and 62.—Lindsay Land & Livestock Co. v. Smart Land & Livestock Co., 137 P. 837.

III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

(C) Traverses or Denials and Admissions.

§ 122 (Cal.App.) An answer *held* not a sufficient denial on information and belief, within Code Civ. Proc. § 437.—Davidow v. Griswold, 137 P. 619.

IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 168 (N.M.) Where cross-complainant alleged that a certain release was made only on one condition, while defendant charged that the release was on the same and also on another condition, the allegations, without reply, were sufficient to raise an issue.—Lohman v. Reymond, 137 P. 375.

§ 176 (Cal.App.) In a suit to quiet title, where the question was whether plaintiffs were estopped to deny certain dedications by their grantors which appeared in plats and conveyances of record, plaintiffs cannot deny the allega-

tions of the answer, setting up those facts, by way of information and belief.—Davidow v. Griswold, 137 P. 619.

§ 182 (Ariz.) New matter alleged in the cross-complaint which was not denied is deemed admitted.—Shank v. Holmes, 137 P. 871.

V. DEMURRER OR EXCEPTION.

§ 192 (N.M.) Under Comp. Laws 1897, § 2685, subsec. 36, the defect in an allegation can only be raised by a demurrer specifying the defect as a ground of objection.—Evanta v. Taylor, 137 P. 583.

§ 192 (Okla.) Where objections to a pleading are based on its insufficiency in matters of substance, they should be taken by demurrer, and not by motion to strike.—Hailey v. Bowman, 137 P. 722.

§ 205 (Cal.) A complaint in an action by a seller of corporate stock on the buyer's agreement to hold him harmless from liability as stockholder, which alleges a payment by the seller in settlement of such liability alleges, as against a general demurrer, that the seller was liable as a stockholder.—Eva v. Andersen, 137 P. 16.

§ 205 (Okla.) Where the separate paragraphs of a petition sufficiently state a cause of action for debt and mortgage foreclosure, a general demurrer to each of such paragraphs should be overruled, though plaintiff also asks for an attorney's fee, which is not recoverable.—Hailey v. Bowman, 137 P. 722.

§ 214 (Nev.) A demurrer admits the allegations of the pleading attacked.—Tiedemann v. Tiedemann, 137 P. 824.

§ 214 (Utah) Material allegations in the complaint are admitted for the purposes of a general demurrer.—Thomas v. Blythe, 137 P. 396.

VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Colo.App.) In an action to recover balance alleged to be due for water furnished for irrigation purposes, it was error to refuse to allow defendant to file an amended answer, alleging that the county commissioners under Rev. St. 1908, §§ 3265-3268, fixed a maximum rate for water furnished, and that defendant paid such rate during all the time alleged in the complaint.—McCracken v. Montezuma Water & Land Co., 137 P. 908.

The refusal of the trial court to allow defendant to file an amendment to his answer *held* improper, even though it was not sought to be filed until six days before trial.—Id.

§ 236 (Okla.) In an action for the death of a railroad employe the allowing of an amended petition immediately before trial, which did not substantially change plaintiff's claim, was within the discretion of the court.—St. Louis & S. F. R. Co. v. Long, 137 P. 1156.

§ 237 (Cal.) In an action upon a contract for the payment of money secured by the pledge of a note and mortgage, *held*, that amendment to make the complaint conform to the proof as to consideration was justified under Code Civ. Proc. §§ 469, 470, declaring certain variances not to be material, and authorizing amendments.—Sharp v. Pitman, 137 P. 234.

§ 237 (Cal.App.) The court did not err in refusing an application to amend the complaint to conform to the proof, so as to set up a contract of absolute sale, where the evidence was insufficient to show a sale made.—Pfloh v. Porter, 137 P. 44.

§ 237 (Idaho) Under Rev. Codes, §§ 4225, 4226, it was proper to permit plaintiff to amend the complaint, describing the wagon in controversy as a 2¾-inch wagon, to conform with proof that it was a 3-inch wagon, where defendant was not prejudiced thereby.—Trousdale v. Winona Wagon Co., 137 P. 372.

§ 237 (Kan.) Where plaintiff in replevin alleged ownership and right of possession under

a chattel mortgage and the court found that plaintiff had the right of possession, though not under the chattel mortgage, *held* that plaintiff's motion to amend its petition, under Gen. St. 1909, § 5733 (Code Civ. Proc. § 140), to conform to the evidence, and for judgment, should have been sustained.—Phillips County Bank v. Lowe, 137 P. 930.

§ 245 (Cal.App.) It appearing defendants would not be prejudiced by permitting an amendment, at the trial, of the complaint in an action to recover \$500, to allege that, overlooking \$500, which plaintiff had paid defendants, they stated their account in writing, and plaintiff paid the balance as so shown, it was an abuse of discretion not to allow it.—Third Street Improvement Co. v. McLelland, 137 P. 1089.

§ 248 (Cal.App.) Notwithstanding Code Civ. Proc. § 426, a count in an amended complaint, formally declaring on the quantum meruit, does not state a cause of action different from the original complaint, which alleged facts sufficient to support a recovery on the quantum meruit, though declaring on an express contract.—Merchants' Collection Agency v. Gopcevic, 137 P. 609.

§ 248 (Cal.App.) The amendment of a complaint to recover \$500 had and received by defendants for the use and benefit of plaintiff, by alleging that, overlooking \$500, which plaintiff had paid defendants, they stated their account in writing, and plaintiff paid the balance as so shown, does not change the cause of action.—Third Street Improvement Co. v. McLelland, 137 P. 1089.

§ 259 (Cal.App.) Where during the trial it appeared that there had been an executed agreement of accord and satisfaction between the parties, it was a proper exercise of the court's discretion to permit defendants to amend their answer so as to plead such defense in bar.—B. & W. Engineering Co. v. Beam, 137 P. 624.

VIII. PROFERT, OYER, AND EXHIBITS.

§ 308 (N.M.) Where cross-complainant joined in a suit for an accounting and a receiver, and pleaded an assignment of certain claims to him to show his capacity to sue, believing that he would only be required to prove such assignment in the receivership proceeding, his cross-complaint was not based on the assignment; and hence, his failure to file the same did not preclude its admission in evidence under Code Civ. Proc. subsec. 307 (Laws 1907, c. 107).—Lohman v. Raymond, 137 P. 375.

XI. MOTIONS.

§ 345 (Mont.) Under Rev. Codes, § 6562, in action to quiet title, where plaintiff neither replied nor demurred to allegations of adverse possession of the "lands described in the complaint," defendant *held* entitled to such judgment on the pleadings as the new matter alleged warranted.—Anaconda Copper Mining Co. v. Thomas, 137 P. 380.

§ 345 (N.M.) Where the answer raises issues of law only, a motion for judgment on the pleadings is properly entertained.—Keinath, Schuster & Hudson v. Reed, 137 P. 841.

§ 345 (Okl.) Where the answer in replevin contained several defenses in addition to a general denial, a motion for judgment on the pleadings was properly overruled.—First State Bank of Mannsville v. Howell, 137 P. 657; Same v. Lawson, *Id.* 661.

§ 354 (Okl.) Where objections to a pleading are based on its insufficiency in matters of substance, they should be taken by demurrer, and not by motion to strike.—Hailey v. Bowman, 137 P. 722.

§ 367 (Or.) The refusal to require plaintiff to make more definite and certain a complaint

which alleged that defendant's negligence consisted in not bringing the broken parts of plaintiff's bone together, and while the parts overlapped in placing them in a plaster cast, and permitting them to remain in that condition, was not error.—Hills v. Shaw, 137 P. 229.

§ 369 (Kan.) A motion, in an action to recover for fraud in exchange of land, to strike allegation from an answer, which motion recited that the action was to recover damages for misrepresentations as to the character and value of the land, did not show an election to proceed on the basis of the represented value instead of the sum agreed to be paid.—Hinchey v. Starrett, 137 P. 81.

XII. ISSUES, PROOF, AND VARIANCE.

§ 376 (Cal.) Where the cross-complaint in an action to quiet title averred that, immediately upon notice that the title had been perfected, the purchaser tendered the balance of the purchase price and demanded a conveyance, and the fact of tender was admitted, it was not necessary to consider the sufficiency of the purchaser's letter as a tender.—Parkside Realty Co. v. MacDonald, 137 P. 21.

§ 377 (Cal.) A fact alleged in the complaint, and not denied by answer, need not be proved.—National Lumber Co. v. Ripple, 137 P. 236.

§ 382 (Okl.) A general denial puts in issue every fact pleaded.—First State Bank of Mannsville v. Howell, 137 P. 657; Same v. Lawson, *Id.* 661.

§ 387 (Cal.) The allegation of the complaint as to terms of sale being admitted by failure of the answer to deny, any evidence as to the terms being otherwise cannot be considered on the question of variance.—National Lumber Co. v. Ripple, 137 P. 236.

§ 388 (Wash.) Where plaintiff charged that dust or brick dust was thrown into her eyes as the result of a negligent explosion on defendant's premises, failure of the evidence to show that the substance thrown into plaintiff's eyes was brick dust did not constitute a fatal variance.—Britz v. Houlehan, 137 P. 1035.

§ 397 (Colo.) Variance between complaint and evidence as to terms of contract between broker and owner *held* immaterial, because under the evidence the amount of recovery would be the same on either theory.—Perkins v. Russell, 137 P. 907.

XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

§ 406 (Cal.) A defect in the affidavit of plaintiff, suing to quiet title in failing to aver that he was or had been in actual possession, *held* waived by defendant voluntarily appearing and submitting his claim to the court having jurisdiction under Const. art. 6, § 5.—Faxon v. All Persons, etc., 137 P. 919.

§ 406 (Utah) Defendant may waive an objection to the complaint on the ground that the cause of action sued on was split, and does waive it, if no objection be taken by demurrer or answer, pursuant to Comp. Laws 1907, § 2967.—National Union Fire Ins. Co. v. Denver & R. G. R. Co., 137 P. 663.

§ 412 (N.M.) By going to trial on the merits and not objecting to evidence, defendant waived any right he may have had consequent on cross-complainant's failure to reply to defendant's answer.—Lohman v. Raymond, 137 P. 375.

§ 427 (Wash.) Where a counterclaim was proved by evidence admitted without objection, it was immaterial that it was not pleaded.—Gold Ridge Mining & Development Co. v. Rice, 137 P. 1001.

§ 433 (Cal.App.) A complaint on a claim based on a note executed by testator, which averred that the note had not been paid and that

the executrix had refused to approve the claim, sufficiently charged that it had not been paid, when first attacked after judgment for the claimant, on a trial on the merits.—*William Nicol Co. v. Cameron*, 137 P. 270.

§ 433 (Utah) In view of Comp. Laws 1907, §§ 2902, 2489, and 2907, *held*, that an objection that the complaint showed that the action was by an assignee of only a part of a claim was waived if not taken until after judgment.—*National Union Fire Ins. Co. v. Denver & R. G. R. Co.*, 137 P. 653.

PLEDGES.

See Bills and Notes, § 96; Embezzlement, §§ 5, 47.

POLICE.

See Municipal Corporations, § 180.

POLICE POWER.

See Municipal Corporations, § 633.

POSSESSION.

See Adverse Possession; Fraudulent Conveyances, § 147; Mortgages, §§ 213, 216; Quiet-ing Title, § 2.

PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

PREFERENCES.

See Banks and Banking, §§ 74, 80.

PREMIUMS.

See Insurance, §§ 360, 372.

PRESCRIPTION.

See Adverse Possession; Limitation of Actions; Waters and Water Courses, §§ 128-152.

PRESUMPTIONS.

See Appeal and Error, §§ 905-934; Criminal Law, § 1144; Evidence, §§ 56-80.

PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Carriers, § 47; Corporations, §§ 306, 432; Evidence, § 244; Insurance, § 93; Mechanics' Liens, § 72.

I. THE RELATION.

(A) Creation and Existence.

§ 21 (Okl.) Agency may be proved by testimony of the agent.—*Whitcomb v. Oller*, 137 P. 709.

§ 22 (Okl.) Agency may not be proved by declarations of the agent.—*Whitcomb v. Oller*, 137 P. 709.

II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

(A) Execution of Agency.

§ 71 (Wash.) A principal may recover from his agent money obtained from him through false and fraudulent representations upon which the principal acts to his loss.—*Stewart v. Preston*, 137 P. 993.

III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(A) Powers of Agent.

§ 99 (Wash.) When the fact of agency is once established, the principal is bound by the acts of his agent within the apparent scope of his actual authority, or that which the principal knowingly permits him to assume.—*O'Daniel v. Streeby*, 137 P. 1025.

§ 101 (Wash.) An architect who draws plans for a building and supervises its construction for the owner has no authority to make contracts with a subcontractor binding the owner, unless the owner has conferred such authority.—*Schanen-Blair Co. Marble & Granite Works v. Sisters of Charity of House of Providence*, 137 P. 468.

Where a subcontractor, with knowledge of the principal contractor's default, supplied materials and rendered services on the faith of the statement of the architect that no legal remedy would be lost, the subcontractor could not rely thereon as a new contract with the owner made with the architect as agent.—*Id.*

§ 115 (Wash.) An agent for the sale of land had authority to represent that a meat market refrigerator, shelving in a storeroom, kitchen sink, storm sash, screen doors, and boards about the premises, such as would ordinarily be appurtenant to the realty, belonged to and were a permanent part of the realty, so that the principal was bound thereby.—*O'Daniel v. Streeby*, 137 P. 1025.

§ 119 (Wash.) The burden is upon third parties dealing with an agent to show that his acts were within the scope of his authority.—*O'Daniel v. Streeby*, 137 P. 1025.

Where an agent's acts come within the apparent scope of his authority, the principal seeking to avoid liability has the burden of showing not only that the authority to do such acts was not expressly given but was expressly withheld and that the person dealing with the agent knew that fact.—*Id.*

§ 121 (Okl.) The extent of authority may be proved by testimony of the agent.—*Whitcomb v. Oller*, 137 P. 709.

§ 122 (Okl.) The extent of authority may not be proved by declarations of the agent.—*Whitcomb v. Oller*, 137 P. 709.

§ 136 (Wash.) A lessee who dealt with a known owner and sought to enforce her cause of action for damages caused by the flooding of her premises against such owner could not hold the owner's rental agent also liable for the damages.—*Le Vette v. Hardman Estate*, 137 P. 454.

(C) Unauthorized and Wrongful Acts.

§ 147 (Wash.) Third parties dealing with an agent cannot rely on his assumption of authority, but must, at their own risk, ascertain both the fact of agency and the extent of his authority.—*O'Daniel v. Streeby*, 137 P. 1025.

§ 156 (Wash.) A purchaser of real estate from the owner's agent acting in the scope of his authority and who in answer to a direct inquiry was falsely assured that a refrigerator, sink, storm sash, screen doors, etc., were appurtenant to the realty, had the right to rely upon such assurance.—*O'Daniel v. Streeby*, 137 P. 1025.

§ 157 (Kan.) The rule that one cannot serve two masters does not apply where loyalty to one involves no duty to the other.—*Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co.*, 137 P. 78.

(D) Ratification.

§ 170 (Cal.App.) Where plaintiff's assignor did not repudiate an accord and satisfaction made by its agent with defendants, within a reasonable time after acquiring full knowledge thereof, and did not return money received but used the same in its business, there was an express ratification, and it was immaterial whether such agent had original authority to make the contract.—*B. & W. Engineering Co. v. Beam*, 137 P. 624.

§ 171 (Okl.) A person who, with full knowledge, accepts the benefits of a transaction done by one assuming to be his agent is liable thereon the same as if authority to act had been previously given.—*Whitcomb v. Oller*, 137 P. 709.

PRINCIPAL AND SURETY.

See Appeal and Error, § 1180; Highways, § 97.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§ 59 (Wash.) Sureties are not liable beyond the express terms of their engagement.—Simpson Logging Co. v. Northwest Bridge Co., 137 P. 127.

§ 75 (Or.) A railway *held* entitled to recover on a contractor's bond only if the railway performs all the conditions of the principal contract and of the bond on its part.—Astoria Southern Ry. Co. v. Pacific Surety Co., 137 P. 857.

A railway which contracts to furnish material where needed is bound, as against a surety of the contractor, to furnish it when needed for the work.—Id.

§ 82 (Wash.) Provision of a contract that if the contractor did not make a specified profit over cost, it would be made good up to a certain sum, and that cost covered labor, materials, plant items, etc., *held* to merely fix a basis upon which to ascertain if there was a profit, and not to bind the contractor or its surety to pay every item of expense that the owner might be put to had it done the work itself.—Simpson Logging Co. v. Northwest Bridge Co., 137 P. 127.

III. DISCHARGE OF SURETY.

§ 108 (Kan.) A memorandum indorsed on a note and purporting to extend the time of payment thereof, does not import a consideration under Gen. St. 1909, § 1644, when not signed; and it must be regarded as a mere voluntary promise which will not release the sureties on the note.—People's State Bank of Wellsville v. Dryden, 137 P. 928.

§ 112 (Wash.) A surety which executed a bond for the performance of a contract *held* entitled to have the owner hold the final payment until the notice to it which the contract provided should be given before the last payment.—Simpson Logging Co. v. Northwest Bridge Co., 137 P. 127.

§ 114 (Wash.) As to surety who was to have notice before last payment on contract, and who consented only to the payment of lienable items before the completion of the work, payment of nonlienable items *held* a misapplication of the funds.—Simpson Logging Co. v. Northwest Bridge Co., 137 P. 127.

§ 117 (Wash.) A paid surety on a building contractor's bond *held* not discharged by overpayments to the contractor or to his servants to pay labor claims of the contractor's employes and save the premises from liens.—Manhattan Co. v. United States Fidelity & Guaranty Co., 137 P. 1003.

An overpayment by the owner to a contractor, not equal to a credit subsequently allowed the contractor for extra work, *held* not a material change or violation of the contract so as to relieve the contractor's surety.—Id.

§ 118 (N.M.) The surety on the note of a minor, given in payment for real estate, is discharged from liability where the minor, on becoming of age, disaffirms the contract and restores the property.—Evants v. Taylor, 137 P. 583.

§ 119 (Wash.) An owner's overpayment to contractor's workmen *held* not a taking over of the work from the contractor by the owner so as to relieve the contractor's surety from liability on the bond.—Manhattan Co. v. United States Fidelity & Guaranty Co., 137 P. 1003.

§ 123 (Or.) Where a railway contractor's bond required the railway to give the surety immediate notice of any breach, the surety was

entitled to notice of breaches by subcontractors.—Astoria Southern Railway Co. v. Pacific Surety Co., 137 P. 857.

IV. REMEDIES OF CREDITORS.

§ 145 (Cal.App.) The judgment of dismissal, at the instance of plaintiff, of an injunction suit, in which, on his ex parte application, on his giving a bond under Code Civ. Proc. § 566, a receiver was appointed, is conclusive against the sureties of the appointment being wrongful.—Heim v. Mooney, 137 P. 616.

PRIORITIES.

See Chattel Mortgages, §§ 154, 156; Taxation, § 507.

PROBATE.

See Wills, §§ 229-384.

PROCESS.

See Courts, § 1; Infants, § 115; Mortgages, §§ 438, 440; Replevin; Taxation, §§ 696, 708; Wills, §§ 263, 384.

II. SERVICE.

(C) Publication or Other Notice.

§ 96 (Nev.) An affidavit *held* sufficient to comply with Comp. Laws, § 3125 (Rev. Laws, § 5026).—Veith v. Nevada Reduction Co., 137 P. 520.

§ 96 (Wash.) Rem. & Bal. Code, § 228, relating to service by publication, does not require a recital of the mailing of the copy of the summons and complaint, when the affiant alleges that defendant's place of residence is unknown to him.—Musselman v. Krottingham, 137 P. 1012.

(D) Privileges and Exemptions.

§ 120 (Kan.) A nonresident, while within the state to attend court as a witness and in actual attendance, is exempt from service of summons in a civil action.—Gillmore v. Gillmore, 137 P. 958.

PROHIBITION.

See Courts, § 89.

PROMISSORY NOTES.

See Bills and Notes.

PROMOTERS.

See Corporations, § 30.

PROPERTY.

See Mines and Minerals.

PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 732-764; Trial, §§ 191, 194.

PUBLICATION.

See Libel and Slander, § 6; Process, § 96.

PUBLIC BUILDINGS.

See Municipal Corporations, §§ 847, 857.

PUBLIC DEBT.

See Municipal Corporations, § 880; States, § 139.

PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 283-568.

PUBLIC LANDS.

See Mandamus, § 85; Mines and Minerals, §§ 18-40; Navigable Waters, §§ 36, 37; Waters and Water Courses, § 33.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

§ 35 (Idaho) Where a railway company located its right of way across public lands, and cleared and graded same before a homesteader made his entry thereon, the homesteader took subject to the railway grant of right of way under Act Cong. March 3, 1875.—*Johnson v. Spokane International Ry. Co.*, 137 P. 894.

(H) Grants in Aid of Railroads.

§ 92 (Idaho) Where a railway company complies with Act Cong. March 3, 1875, as to right of way over public lands, and actually constructs a road, it becomes a grantee, though a profile map of the road has not been filed.—*Johnson v. Spokane International Ry. Co.*, 137 P. 894.

(I) Proceedings in Land Office.

§ 106 (Ariz.) The decision of the General Land Office canceling an entry of public lands is binding upon the courts when it becomes final.—*Shank v. Holmes*, 137 P. 871.

(K) Remedies in Cases of Fraud, Mistake, or Trust.

§ 121 (Or.) The state had no right, in a suit to cancel deeds executed by it, to have the right of defendants as claimants under the land laws of the United States adjudicated.—*State v. Warner Valley Stock Co.*, 137 P. 746.

PUBLIC SCHOOLS.

See Schools and School Districts.

PUBLIC SERVICE COMMISSION.

See Carriers, §§ 10, 12, 18; Certiorari, § 70; Commerce, §§ 33, 47, 58; Constitutional Law, § 297; Corporations, § 394; Eminent Domain, § 2.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

PUBLIC UTILITIES ACT.

See Railroads, § 9.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 238-263.

PUNISHMENT.

See Criminal Law, § 980; Pardon.

PUPILS.

See Schools and School Districts, § 151.

QUESTIONS OF LAW AND FACT.

See Trial, §§ 139-143.

QUIETING TITLE.

See Adverse Possession, § 16; Appeal and Error, § 877; Judgment, § 252; Limitation of Actions, § 167; Pleading, §§ 176, 345, 376, 406; Taxation, §§ 800, 805, 810; Wills, § 698.

I. RIGHT OF ACTION AND DEFENSES.

§ 2 (Wash.) Abutting owners may sue to quiet title to an easement in an alley, and to the fee which they hold subject thereto.—*Humphrey v. Krutz*, 137 P. 806.

§ 12 (Colo.App.) Where, in a suit to quiet title, neither party was in actual possession, plaintiff had constructive possession by virtue of his record title.—*Muntzing v. Harwood*, 137 P. 71.

II. PROCEEDINGS AND RELIEF.

§ 29 (Colo.App.) In a suit to quiet title to real property which was vacant, plaintiff held not barred from relief by laches.—*Parks v. Roth*, 137 P. 78.

§ 44 (Cal.App.) In a suit over land, where defendant's claim of title was that she acquired the property by deed from plaintiff executed in 1908, it was unnecessary for plaintiff to offer evidence to show his title before that time.—*Strange v. Strange*, 137 P. 1104.

§ 44 (Colo.App.) In suit to quiet title, the court properly admitted a quitclaim deed from certain heirs of a prior owner to plaintiff, over an objection that the evidence did not sufficiently show that they were his only heirs of such ancestor.—*Muntzing v. Harwood*, 137 P. 71.

§ 52 (Kan.) A decree in a suit to quiet title, which recited proper service, default, a finding that the averments of the petition were true, and concluded with the statement "that the plaintiff * * * is the owner of the following lands, * * * and that the defendants, * * * and each of them, be excluded and forever precluded of any interest in or to the above-described lands and tenements, * * *" held to extinguish defendants' title, and leave the plaintiff as to them the full and complete owner.—*Wheeler v. Ballard*, 137 P. 789.

The ordinary purpose of a suit to quiet title being to make the plaintiff's ownership complete as against any claim asserted by the defendant, the usual effect of the decree is to bar the latter and those claiming against the plaintiff or his successors of any title or interest in the property affected.—*Id.*

§ 54 (Cal.) Code Civil Procedure relating to costs are applicable to proceedings to quiet title under the *McEnerney* act.—*Faxon v. All Persons, etc.*, 137 P. 919.

Under Code Civ. Proc. § 1022, the court, in a suit under the *McEnerney* act to quiet title may, in awarding relief to plaintiff, tax the costs against defendant contesting plaintiff's claim.—*Id.*

QUITCLAIM.

See Quieting Title, § 44.

QUO WARRANTO.

See Courts, §§ 207, 472; Officers, § 55.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 28 (Okla.) Under Comp. Laws 1909, § 5589, an action in quo warranto to test the validity of the organization of a new county is properly brought against the persons acting in a corporate capacity in the county wherein they reside or may be summoned, or in any court of general jurisdiction to which they voluntarily submit themselves.—*Saville v. Tolbert*, 137 P. 101.

RAILROAD COMMISSION.

See Railroads, § 9; Telegraphs and Telephones, § 28.

RAILROADS.

See Assignments, §§ 24, 121; Bills and Notes, § 132; Constitutional Law, § 297; Contracts, § 175; Eminent Domain; Master and Servant; Municipal Corporations, §§ 385, 751; Navigable Waters, § 8½; New Trial, § 73; Pleading, § 236; Principal and Surety, § 75; Public Lands, §§ 35, 92; Street Railroads; Taxation, § 276; Trial, § 252.

I. CONTROL AND REGULATION IN GENERAL.

§ 9 (Cal.) Under Const. art. 12, §§ 22, 23, and Public Utilities Act, § 67, no court other than the Supreme Court, and the Supreme Court only to the extent specified in the public utilities act, has jurisdiction to review or otherwise control the action of the Railroad Commission.—Pacific Telephone & Telegraph Co. v. Eshleman, 137 P. 1119.

Under Const. art. 12, §§ 22, 23, Legislature held authorized, subject only to the federal Constitution, to confer on the railroad commission any power cognate and germane to the subject of public utilities.—Id.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

§ 85 (Cal.) Civ. Code, § 468, providing for the forfeiture of the right to proceed further, if a railroad company shall fail to construct five miles of line each year, does not apply to branch lines which are part of a general system.—Northwestern Pac. R. Co. v. Lambert, 137 P. 1116.

Though the articles of incorporation described a proposed branch, which was part of a general system, as a line of railroad, yet, where it was plain that the line was merely a feeder, it will be treated as such, and not as an independent railroad, five miles of which would have to be constructed each year under Civ. Code, § 468, to preserve the right to continue construction.—Id.

Statutes declaring a forfeiture are not to be extended by implication.—Id.

Civ. Code, § 473, as amended in 1901 (St. 1901, p. 327), does not, in view of section 291, extend section 468, providing for forfeiture of a railroad company's right to extend its road for failure to extend the work five miles each year, to branch lines.—Id.

X. OPERATION.

(A) Duty to Operate.

§ 216 (Wash.) Railroad's failure to question the sufficiency of a shipper's demand for the construction of a spur track when made, and its absolute refusal to install any track whatever, held to waive a right to insist upon a demand of the road as subsequently ordered by the Public Service Commission.—State v. Public Service Commission, 137 P. 1057.

(F) Accidents at Crossings.

§ 327 (Cal.) A traveler approaching the track of an electric road on its right of way must look and listen to ascertain whether cars are approaching.—Loftus v. Pacific Electric Ry. Co., 137 P. 34.

§ 327 (Kan.) An automobile driver was guilty of contributory negligence where, though his vision was obscured by rain and snow and the highway was wet, he approached a crossing at nearly 10 miles an hour, and upon seeing the train approaching about 300 feet away, when he was 15 feet from the track, was unable to stop his car.—Gage v. Atchison, T. & S. F. Ry. Co., 137 P. 938.

§ 347 (Cal.) In an action against an interurban railway company for injuries to a traveler in a collision at a street crossing, evidence held to sustain a finding of actionable negligence in the operation of the train.—Tousley v. Pacific Electric Ry. Co., 137 P. 31.

§ 348 (Cal.) Where the established facts make it plain that a traveler looking and listening must have seen or heard the approaching electric train, the testimony that he looked and listened, but did not hear or see, will not support a verdict in his favor.—Loftus v. Pacific Electric Ry. Co., 137 P. 34.

§ 350 (Cal.) Whether the speed of an interurban train at a crossing was so excessive as to

be negligence depends on the particular circumstances, and where reasonable men may differ thereon, the question of negligence is for the jury.—Tousley v. Pacific Electric Ry. Co., 137 P. 31.

§ 350 (Cal.) Whether a traveler struck by an interurban car at a street crossing was guilty of contributory negligence held for the jury.—Loftus v. Pacific Electric Ry. Co., 137 P. 34.

§ 350 (Wash.) Under the evidence, held, it was a question for the jury whether there was contributory negligence of one struck at a double-track crossing by a train; he attempting to cross just after another train had passed in the other direction.—Schwartz v. Northern Pac. Ry. Co., 137 P. 317.

§ 351 (Cal.) An instruction, in an action against an interurban railway company for injuries to a traveler in an automobile in collision, held to properly submit the defense of contributory negligence of plaintiff as distinguished from that of the owner and driver of the machine.—Tousley v. Pacific Electric Ry. Co., 137 P. 31.

(H) Injuries to Animals on or near Tracks.

§ 411 (Okla.) In the absence of negligence, a railroad company is not liable for animals killed when they come upon the track at station grounds where no fence is required.—St. Louis & S. F. R. Co. v. Smith, 137 P. 357.

§ 441 (Okla.) Negligence will not be presumed from the mere killing of trespassing animals, where the accident is as consistent with the presumption that it is unavoidable as it is with negligence.—St. Louis & S. F. R. Co. v. Smith, 137 P. 357.

§ 443 (Okla.) Evidence that the cattle were killed at a railroad crossing, and relatively near a station platform, held insufficient to establish that the killing occurred either at a public highway or station grounds.—St. Louis & S. F. Ry. Co. v. Smith, 137 P. 714.

§ 446 (Okla.) Question whether the place of accident was such as Rev. Laws 1910, § 1435 (Comp. Laws 1909, § 1389), required to be fenced or was a part of the station grounds or public highway held for the jury.—St. Louis & S. F. Ry. Co. v. Smith, 137 P. 714.

RAPE.

See Criminal Law, §§ 406, 678, 696, 1170½, 1172.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 20 (Cal.App.) An indictment for rape, drawn in substantial compliance with Pen. Code, § 261, defining that offense, is sufficient.—People v. Horvath, 137 P. 1069.

§ 35 (Ariz.) To support a conviction for rape, the state must show by competent evidence every material allegation in the information, and every fact essential to the crime, including the fact that prosecutrix was not the wife of accused at the date of the offense.—Lenord v. State, 137 P. 412.

(B) Evidence.

§ 51 (Ariz.) Evidence held to show that prosecutrix was not the wife of accused.—Lenord v. State, 137 P. 412.

The fact of nonmarriage of accused and prosecutrix may be established by circumstantial evidence.—Id.

(C) Trial and Review.

§ 59 (Ariz.) An instruction, on a trial for rape, held not objectionable as permitting a conviction without finding that prosecutrix was not the wife of accused.—Lenord v. State, 137 P. 412.

RATE.

See Waters and Water Courses, § 257.

RATIFICATION.

See Principal and Agent, §§ 170, 171.

REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Partition; Quieting Title.

RECALL.

See Officers, § 61.

RECEIVERS.

See Appeal and Error, § 151; Banks and Banking, § 80; Corporations, §§ 559, 679, 684.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.**(A) Administration in General.**

§ 81 (Nev.) It is the duty of a receiver of an insolvent institution to faithfully collect, and enhance the assets of the institution, and administer its affairs to the end that its creditors may receive what is justly due them, and that its stockholders if any there be may receive the residue.—State v. State Bank & Trust Co., 137 P. 400.

VII. ACCOUNTING AND COMPENSATION.

§ 196 (Nev.) A receiver appointed for an insolvent institution is entitled to proper compensation for his services and to an equitable allowance for administrative expenses.—State v. State Bank & Trust Co., 137 P. 400.

RECEPTION OF EVIDENCE.

See Criminal Law, §§ 665-683; Trial, §§ 59-94.

RECORDS.

See Appeal and Error, §§ 497-714, 758, 767, 773, 905, 917; Criminal Law, §§ 104, 1088-1122; Limitation of Actions, § 167; Registers of Deeds, § 7; Sales, § 235.

§ 5 (Idaho) The county commissioners cannot require the recorder to record written instruments at any different fee than that prescribed by Rev. Codes, § 2124.—Twin Falls County v. West, 137 P. 171.

Where a company, under an agreement with the county commissioners and an order of such commissioners, recorded a large number of written instruments at a flat rate less than the legal rate, the county could recover the deficiency from the company though it had no right of action against the recorder.—Id.

REDEMPTION.

See Taxation, §§ 696, 708.

REFERENCE.

See Appeal and Error, §§ 347, 544, 1022.

III. REPORT AND FINDINGS.

§ 106 (Or.) Where the findings of a referee on a claim against an insolvent are properly set aside for error therein, the court properly made its own findings.—In re Standard Cafeteria Co., 137 P. 774.

REFORMATION OF INSTRUMENTS.**I. RIGHT OF ACTION AND DEFENSES.**

§ 16 (Or.) To reform a deed, it should be shown that the mistake did not arise from the gross negligence of plaintiff, that an unfair ad-

vantage has been gained, and that it is against good conscience to allow the mistake to stand.—Sayre v. Moir, 137 P. 215.

II. PROCEEDINGS AND RELIEF.

§ 43 (Or.) In a suit to reform a deed, the burden is on plaintiff to show that the mistake was mutual.—Sayre v. Moir, 137 P. 215.

§ 45 (Okl.) Evidence of mutual mistake to authorize the reformation of a written contract must be clear and convincing.—Schafer v. Midland Hotel Co., 137 P. 664.

§ 45 (Or.) Evidence in a suit to reform a deed for mistake held insufficient to sustain a decree for plaintiff.—Sayre v. Moir, 137 P. 215.

Relief will be granted in cases of written instruments only when there is a mistake clearly made out, and not when the evidence is loose or contradictory.—Id.

§ 46 (Okl.) In a suit to reform a lease, the issue of the lessor's infancy may be submitted to a jury pursuant to Comp. Laws 1909, § 5785, authorizing a jury trial of issues of fact.—Giles v. Latimer, 137 P. 113.

REFRESHING MEMORY.

See Witnesses, § 257.

REGISTERS OF DEEDS.

§ 7 (Idaho) Where the county commissioners directed the recorder to record certain instruments at a flat rate less than that prescribed by Rev. Codes, § 2124, and he complied with such direction and returned the fee to the county, and his reports were approved by the commissioners, the county was estopped from recovering from the recorder the difference between the fees actually received and the statutory fees.—Twin Falls County v. West, 137 P. 171.

REGISTRATION.

See Records.

REHEARING.

See Appeal and Error, §§ 832, 835; Criminal Law, § 1133; New Trial.

RELEASE.

See Assignments, § 41; Municipal Corporations, § 172; Payment; Pleading, § 168; Principal and Surety, § 108.

RELEVANCY.

See Evidence, § 113.

REMAINDERS.

See Wills, § 634.

REMOVAL.

See Executors and Administrators, § 35.

REMOVAL OF CAUSES.

See Courts, § 487.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 89 (Okl.) Where a petition for removal is denied, the files and papers must remain in the court in which the petition is filed, and the petitioner must secure certified copies, and cause same to be filed in the United States court; Williams' Const. § 431, providing for a transfer of the original papers, applying only where the case is removed.—Lawson v. Guthrie, 137 P. 1186.

REMOVAL OF CLOUD.

See Quieting Title.

REPAIRS.

See Landlord and Tenant, § 166.

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See Pleading, §§ 236-259.

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V. DAMAGES.

§ 76 (Okl.) The measure of damages for the wrongful detention of a team of work mules is the usable value thereof while they were wrongfully detained.—First State Bank of Mannsville v. Howell, 137 P. 657; Same v. Lawson, Id. 661.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 89 (Okl.) Under Rev. Laws 1910, §§ 4806, 4807, where plaintiff in replevin took property under the writ and sold it and dismissed his suit, defendant was entitled to have his right of property and right of possession determined.—Roberts v. Wilkins, 137 P. 111.

§ 103 (Okl.) Under Rev. Laws 1910, §§ 4806, 4807, where plaintiff in replevin took property under the writ and sold it, defendant on determination in his favor was entitled to judgment for its value with damages for wrongful detention.—Roberts v. Wilkins, 137 P. 111.

REPLICATION.

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I. REQUISITES AND VALIDITY OF CONTRACT.

§ 52 (Utah) Evidence, in an action for the price of machinery and supplies for an ice plant, in which the defense was that there was no contract, held to sustain a finding that defendant had knowledge of plaintiff's acceptance of the order sued on.—F. W. Niebling Co. v. James Coal & Ice Co., 137 P. 834.

II. CONSTRUCTION OF CONTRACT.

§ 82 (Or.) A contract to sell barley and deliver it f. o. b. steamer denotes that tender of payment must be made contemporaneously with delivery.—Barnard & Bunker v. Houser, 137 P. 227.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 201 (Cal.App.) Where grapes were sold on the vines to be delivered at a railroad station, and they were injured by a rain storm before they were picked, the contract was executory and the loss fell on the seller.—Pfah v. Porter, 137 P. 44.

(D) Bona Fide Purchasers.

§ 235 (Okl.) In the absence of a statute authorizing same, the filing and recording of a bill of sale does not give constructive notice of the sale.—Rauh v. Morris, 137 P. 1174.

VI. WARRANTIES.

§ 272 (Cal.App.) A contract for the sale of grapes while still on the vines held to include an implied warranty that the grapes shall be good merchantable grapes.—Pfah v. Porter, 137 P. 44.

VII. REMEDIES OF SELLER.

(E) Actions for Price or Value.

§ 345 (N.M.) For breach of an executory contract before title has passed, the seller cannot ordinarily recover on the contract price, but his right is limited to an action for damages.—Roswell Nursery Co. v. Mielenz, 137 P. 579.

§ 364 (Utah) An instruction that plaintiff's acceptance of the order sued on need not have been formally given, but would be sufficient if defendant had notice and knowledge thereof

prior to his cancellation or withdrawal from the proposal made by him to plaintiff, *held* not error.—*F. W. Niebling Co. v. James Coal & Ice Co.*, 137 P. 834.

(F) Actions for Damages.

§ 384 (N.M.) The measure of a seller's damages for breach of an executory contract of sale of trees prepared for planting is the whole contract price.—*Roswell Nursery Co. v. Mielenz*, 137 P. 579.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

§ 391 (Wash.) Where defendants purchased a harvester and were allowed a credit of \$800 for a half interest in certain other machines, defendants, on rescinding the contract for the new one, could not compel plaintiff to return the credit in money.—*Holt Mfg. Co. v. Strachan*, 137 P. 1006.

IX. CONDITIONAL SALES.

§ 472 (Idaho) Under a conditional sales contract, by which a manufacturer delivered wagons to a retail dealer to sell, *held*, that a sale by the retailer in due course of business carried with it the title to the property.—*Trousdale v. Winona Wagon Co.*, 137 P. 372.

§ 473 (Idaho) Conditional sale contracts between manufacturers and retailers will be so construed as to protect a consumer buying from the retailer without notice of the terms of such contracts.—*Trousdale v. Winona Wagon Co.*, 137 P. 372.

SATISFACTION.

See Payment.

SCHOOL BOARD.

See Schools and School Districts, § 55.

SCHOOL FUNDS.

See Schools and School Districts, § 18.

SCHOOLS AND SCHOOL DISTRICTS.

See Contracts, § 303; Mandamus, §§ 100, 148.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

§ 13 (Or.) School boards cannot, under L. O. L. § 4052, subsec. 18, and in the absence of statutory provision permitting it, establish separate schools for Indian children and compel them to attend.—*Crawford v. District School Board for School Dist. No. 7, in Klamath County*, 137 P. 217.

§ 18 (N.M.) The deposit of the permanent school fund in interest-bearing deposits in banks pursuant to Joint Res. No. 14 (Laws 1913, p. 174) is an "investment" of same within Enabling Act, § 10, and Const. art. 12, § 7.—*State v. Marron*, 137 P. 845.

Joint Res. No. 14 (Laws 1913, p. 174), insofar as it requires the deposit of permanent school funds in banks, being an attempt to control the discretion vested in the Governor, Secretary of State, and Attorney General by Const. art. 12, § 7, is void.—*Id.*

The Governor, Secretary of State, and Attorney General may by elimination limit the State Treasurer to a single class of securities in which he may invest permanent school funds.—*Id.*

(B) Creation, Alteration, Existence, and Dissolution of Districts.

§ 37 (Idaho) Under Sess. Laws 1911, c. 159, § 141, relative to the segregation of school districts, the petition for segregation and the facts upon which it is presented should be heard by

the county commissioners, and by them passed upon.—*Gaiser v. Steele*, 137 P. 889.

§ 39 (Idaho) Where county commissioners dismissed a petition for the segregation of a common school district, on the ground that Sess. Laws 1911, c. 159, § 141, authorizing such action, had been repealed by Sess. Laws 1913, c. 115, § 18, and the petitioners appealed to the district court, which decided that the board erred, there was no further issue to try "anew" pursuant to Rev. Codes, § 1953, providing that on appeal from an order of county commissioners the matter must be heard anew; and hence the district court properly remanded the petition for a hearing on the merits thereof.—*Gaiser v. Steele*, 137 P. 889.

(C) Government, Officers, and District Meetings.

§ 55 (Or.) School boards have no powers except those expressly granted, or necessarily implied from those granted.—*Crawford v. District School Board for School Dist. No. 7, in Klamath County*, 137 P. 217.

(D) District Property, Contracts, and Liabilities.

§ 89 (Or.) A school district is not liable for a tort of the directors or clerk in entering on the records the reason for dismissal of a teacher.—*Wiest v. School District No. 24, Marion County*, 137 P. 749.

(E) Pupils, and Conduct and Discipline of Schools.

§ 151 (Or.) Children of half Indian blood, citizens of the United States and of the state, conforming to the customs of civilization, are prima facie entitled to admission to the public schools.—*Crawford v. District School Board for School Dist. No. 7, in Klamath County*, 137 P. 217.

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SERVICE.

See Process.

SET-OFF AND COUNTERCLAIM.

See Ejectment, § 143; Pleading, § 427.

II. SUBJECT-MATTER.

§ 33 (Okl.) Under the statute limiting the use of a set-off (Rev. St. 1910, § 4746), a defendant, in an action for conversion, cannot set off a note given by plaintiff to a stranger to the suit, and assigned to him.—*First Nat. Bank v. Thompson*, 137 P. 668.

§ 34 (Okl.) Under Rev. St. 1910, § 4746, limiting the use of a counterclaim, a note from plaintiff to a stranger to the suit, and assigned to defendant, cannot be used as a counterclaim where it is in no way connected with, and has no relation to, the contract or transaction made the basis of plaintiff's suit.—*First Nat. Bank v. Thompson*, 137 P. 668.

SETTING ASIDE.

See Deeds, § 70; Judgment, §§ 142-158.

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SHEEP.

See Animals, §§ 22, 92.

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SHIPPING.

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SODOMY.

§ 1 (Utah) Under Comp. Laws 1907, § 2488, the definition of the infamous crime against nature with man or beast denounced by section 4228 must be sought in the common law, not being defined by statute.—State v. Johnson, 137 P. 632.

The act of copulation by one male person in the mouth of another does not constitute the infamous crime against nature denounced by Comp. Laws 1907, § 4228.—Id.

SPECIFIC LEGACIES.

See Wills, § 753.

SPECIFIC PERFORMANCE.

See Trial, § 391; Vendor and Purchaser, § 303.

I. NATURE AND GROUNDS OF REMEDY IN GENERAL.

§ 21 (Wash.) Complainant was not entitled to enforce specific performance of a contract to exchange community property where his wife was neither a party to the contract nor to the suit.—Chapman v. Hill, 137 P. 1041.

II. CONTRACTS ENFORCEABLE.

§ 25 (Cal.App.) Before a contract to make a will will be enforced, it must appear that it was prima facie fair, founded upon an adequate consideration, and definite as to the conditions imposed, and, if the consideration was personal services, the agreement for such services must be definite.—Parsons v. Cashman, 137 P. 1109.

§ 28 (Cal.App.) A decedent's agreement to make a will in favor of plaintiff, in consideration of plaintiff's becoming an inmate of decedent's home and assuming the obligations of a son and assisting her in her business and domestic affairs, cannot be specifically enforced; the time for the continuation of plaintiff's services not sufficiently appearing.—Parsons v. Cashman, 137 P. 1109.

§ 51 (Cal.App.) A contract whereby an unmarried woman agreed to make a will in favor of plaintiff if he would enter her home and assume the obligations of a son towards her is not so fair as to warrant specific performance, where it did not appear that plaintiff lost anything of value or that his services equaled the protection and support he received.—Parsons v. Cashman, 137 P. 1109.

§ 53 (Wash.) Misrepresentations as to the date of maturity of certain mortgages on lands to be exchanged, which defendant was to assume, held ground for refusal of specific performance.—Chapman v. Hill, 137 P. 1041.

§ 61 (Okl.) The rule of Rev. Laws 1910, § 986, requiring a vendor, when he elects to rescind for default of the purchaser, to restore everything of value received under the contract does not apply to defendant, in a suit for specific performance commenced by the vendee, where the vendor pleads abandonment merely as a defense, and does not set up any affirmative equitable defense.—Martin v. Spaulding, 137 P. 882.

§ 66 (Okl.) Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default, the vendor should keep any payments as liquidated damages, the vendor, in addition to suing upon the notes, could enforce specific performance.—Shelton v. Wallace, 137 P. 694.

§ 68 (Cal.App.) On seller's breach of a contract to furnish nursery orange trees, which could be bought and sold in the market, the buyer could not maintain a suit for specific per-

formance; it being presumed, as provided by Civ. Code, § 3387, that he could be fully compensated in damages.—Emerzian v. Asato, 137 P. 1072.

§ 73 (Cal.App.) Under the express provisions of Civ. Code, § 3390, a contract for personal services cannot be specifically enforced.—Emerzian v. Asato, 137 P. 1072.

On defendant's breach of a contract to care for and sell to plaintiff certain nursery orange trees, plaintiff could not compel defendant to render personal service with reference to them.—Id.

§ 86 (Kan.) Where a mother died pending appeal, in an action to set aside a family settlement made prior to the father's death and perfected by the mother's agreeing to devise the homestead to the youngest son, on his oral agreement to care for her for life, which, on differences between the son's wife and the mother, was not fully carried out, held that, where the mother died, pending suit to set aside the deed, the agreement should be specifically performed by vesting title to the homestead in the son upon his paying an amount adjudged in lieu of his mother's support, from the time she left the homestead, and her funeral expenses.—Romary v. Romary, 137 P. 982.

IV. PROCEEDINGS AND RELIEF.

§ 105 (Cal.) Upon facts stated, held, in view of the purchaser's tender and vendor's failure to offer a deed or to rescind the contract, and the absence of prejudice to any third parties, that the purchaser was guilty of no such laches as would bar recovery.—Parkside Realty Co. v. MacDonald, 137 P. 21.

§ 121 (Okl.) Evidence held sufficient to establish abandonment of a contract of purchase of realty.—Martin v. Spaulding, 137 P. 882.

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I. POLITICAL STATUS AND RELATIONS.

§ 9 (Okl.) In a suit commenced prior to statehood, though tried thereafter, the parties are entitled to a unanimous verdict.—First Nat. Bank v. Thompson, 137 P. 668.

II. GOVERNMENT AND OFFICERS.

§ 68 (Or.) So far as they concern litigation for the state, the duties for which an attorney was employed by the corporation commissioner might be performed by the Attorney General or the district attorneys, and the commissioner could not substitute his own appointee.—Gibson v. Kay, 137 P. 864.

The corporation commissioner cannot, under Gen. Laws 1913, p. 670, § 6, employ, at the expense of the state, an attorney to ascertain facts and the means of proving them, or to give counsel and legal advice.—Id.

IV. FISCAL MANAGEMENT, PUBLIC DEBT, AND SECURITIES.

§ 139 (Or.) The audit of the secretary of state and the drawing of his warrant for compensa-

tion of an appointee of the corporation commissioner do not bind the state treasurer.—*Gibson v. Kay*, 137 P. 864.

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II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 70 (Kan.) The Inheritance Tax Law held not violative of the constitutional provisions requiring uniformity in the operation of general laws.—*State v. Cline*, 137 P. 932.

VI. CONSTRUCTION AND OPERATION.

(A) General Rules of Construction.

§ 206 (Nev.) A statute should be construed so as to give effect to all of the language of the Legislature.—*Heywood v. Nye County*, 137 P. 515.

(D) Retroactive Operation.

§ 270 (Nev.) An amendment, not in force at the time an action was brought under the original statute, does not affect such action.—*Tiedemann v. Tiedemann*, 137 P. 824.

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II. REGULATION AND OPERATION.

§ 81 (Or.) The rights of a railroad along the street and of travelers must each be exercised with due regard to the other, in a reasonable and careful manner, depending on the circumstances.—Oberstock v. United Rys. Co., 137 P. 195.

§ 85 (Idaho) While the rights of a street car company and the owner of an automobile are equal in the public streets, such rights are measured by the manner in which they are to be exercised by each.—Holmes v. Sandpoint & I. R. Co., 137 P. 532.

§ 93 (Or.) Where a motorman has a clear view of a traveler on the track and fails to give warning, he is negligent, though the place is not at a street crossing.—Oberstock v. United Rys. Co., 137 P. 195.

§ 95 (Cal.App.) A motorman who carelessly failed to observe the perilous position of a child in time to prevent injury was guilty of "gross negligence."—Waterman v. Visalia Electric R. Co., 137 P. 1096.

§ 99 (Idaho) Before backing an automobile out of a garage and upon a street car line, it was the driver's duty to look and listen for an approaching street car.—Holmes v. Sandpoint & I. R. Co., 137 P. 532.

That the driver of an automobile injured by being struck by a street car after it had backed out of a garage was required, by the narrow opening in the building, to give his entire attention to the automobile, did not excuse his failure to look and listen for the approaching car.—Id.

§ 114 (Cal.App.) In an action for death of an infant son killed by an electric car alleged to have been negligently managed by defendant's servant, and not equipped with proper brakes, evidence held to support a verdict for plaintiff.—Waterman v. Visalia Electric R. Co., 137 P. 1096.

Evidence held not to show that the brakes on defendant's car were inadequate, or that defendant was negligent in respect to the condition thereof.—Id.

§ 117 (Or.) Evidence held to present a question for the jury as to the condition of the street where an accident to a traveler occurred, other than at a street crossing.—Oberstock v. United Rys. Co., 137 P. 195.

Evidence held to present a question for the jury whether plaintiff was riding between the railroad tracks and trying to escape or his horse backed upon the track just before being struck.—Id.

§ 118 (Idaho) In an action for damages to an automobile from being struck by a street car after it had backed out of a garage and upon the track, held error to refuse to instruct upon concurrent negligence.—Holmes v. Sandpoint & I. R. Co., 137 P. 532.

§ 118 (Or.) An instruction that, if the track where the accident occurred is on the public highway or street in the town of L., plaintiff could pass over it, and was not confined to a crossing, *held proper*.—*Oberstock v. United Rys. Co.*, 137 P. 195.

STREETS.

See *Municipal Corporations*, §§ 648-705, 762-809.

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See *Mines and Minerals*, § 55.

SUBMISSION OF CONTROVERSY.

§ 17 (Wash.) Under Rem. & Bal. Code, § 378, a controversy submitted upon an agreed case must be determined on the facts agreed upon, and hence the court erred in receiving other evidence.—*Leonardo v. Bunnell*, 137 P. 1033.

§ 18 (Wash.) Where a judgment was entered on an agreed case submitting a controversy without action, without granting a hearing, the court properly set the judgment aside and granted a hearing.—*Leonardo v. Bunnell*, 137 P. 1033.

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TAXATION.

See *Constitutional Law*, § 229; *Drains*, §§ 76, 91; *Escrows*, § 13; *Municipal Corporations*, §§ 406-514, 568; *Navigable Waters*, § 8½.

I. NATURE AND EXTENT OF POWER IN GENERAL.

§ 24 (Okl.) *Williams' Const.* art. 10, § 20, precluding the state from imposing taxes for municipal purposes, does not render invalid *General Revenue Law 1909* (Laws 1909, c. 38), §§ 14, 15, or "*County Excise Board Act*" 1910 (Laws 1910, c. 64) §§ 3, 4, in so far as such acts relate to counties, cities, and townships.—*Thurston v. Caldwell*, 137 P. 683.

§ 25 (Idaho) Since the scheme for the administration of the revenue laws is prescribed by the Constitution, particularly *Const.* art. 18, § 6, and article 7, § 12, the Legislature cannot

substitute another and different scheme therefor.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 37 (Mont.) If the construction of a term in a provision of the Constitution relating to revenue and taxation be doubtful, the doubt should be resolved in favor of the definition under which the public revenues will be raised, rather than one which will defeat the purpose of the constitutional provision.—*Northern Pac. Ry. Co. v. Mjelde*, 137 P. 386.

III. LIABILITY OF PERSONS AND PROPERTY.

(A) Private Persons and Property in General.

§ 62 (Mont.) Several estates in the same land may be owned by different persons for the purpose of taxation, as one may own the surface, another the growing timber, and yet another the mineral rights.—*Northern Pac. Ry. Co. v. Mjelde*, 137 P. 386.

(D) Exemptions.

§ 233 (Mont.) A reservation by a railroad company of "all mineral * * * including coal and iron" *held* not exempt as a "mine" under *Const.* art. 12, § 3, providing that "all mines and mining claims" after purchase from the United States shall be taxed at the price paid it, or exempt under *Rev. Codes*, § 2499, but to be taxable as an interest in realty under section 2501, and *Const.* art. 12, § 17.—*Northern Pac. Ry. Co. v. Mjelde*, 137 P. 386.

§ 251 (Mont.) The burden is upon one claiming an exemption from taxation to show that his property comes within the exempted class.—*Northern Pac. Ry. Co. v. Mjelde*, 137 P. 386.

IV. PLACE OF TAXATION.

§ 261 (Wash.) Under Rem. & Bal. Code, § 9125, sheep should be assessed in the county in which the land upon which they were maintained was located, even though it was not the residence of the owner.—*Porter v. Yakima County*, 137 P. 466.

§ 276 (Idaho) Where the situs of property for taxation is not wholly within a county, such as railroads, telegraph lines, etc., it may, under *Const.* art. 7, § 12, be assessed as a whole by the State Board of Equalization.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

V. LEVY AND ASSESSMENT.

(B) Assessors and Proceedings for Assessment.

§ 317 (Idaho) Under *Const.* art. 18, § 6, providing that property located wholly within a county shall be assessed by the county assessor, and article 7, § 12, providing that such assessment may be equalized by the county board, property cannot be assessed by the Legislature or any appointive board.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

§ 319 (Idaho) The words "assessor" and "county board of equalization," as used in the state Constitution, carry with them the powers usually conferred on officers or boards of similar names.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 390 (Wash.) The valuation of a strip of railroad land 100 feet by 21 miles, along the shore, from 7 to 13 times as much as that of other property, *held* grossly excessive; the railroad company having no monopoly of the shore lands under the *Deffe Act*, and in view of other assessments on similar property and previous

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assessments of the same property.—*Northern Pac. Ry. Co. v. Pierce County*, 137 P. 433.

(F) Equalization of Assessments.

§ 446½ (Idaho) Sess. Laws 1913, c. 57, creating the tax commission, does not deprive any constitutional officers or boards of duties imposed by the Constitution, or authorize the tax commission to usurp the duties of assessors or county boards of equalization.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

Sess. Laws 1913, c. 57, held not violative of the constitutional provisions in regard to the assessment, acquisition, collection, and distribution of taxes.—*Id.*

§ 449 (Idaho) The words "assessor" and "county board of equalization," as used in the state Constitution, carry with them the powers usually conferred on officers or boards of similar names.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

Where the county board of equalization in good faith equalizes the value of property for assessment, the tax commission cannot set aside such action and substitute its own judgment therefor.—*Id.*

§ 450 (Idaho) The tax commission cannot compel the county board of equalization to adopt its views or judgment in equalizing the value of certain property for taxation.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

There is no statute authorizing an appeal from the decision of the board of equalization.—*Id.*

(G) Review, Correction, or Setting Aside of Assessment.

§ 468 (Ariz.) While the action of the county board of equalization is necessarily informal, it cannot reduce a valuation in the absence of any evidence that it was erroneous.—*Arizona Copper Co. v. State*, 137 P. 417.

§ 490 (Ariz.) The order of the county board of equalization, approving the valuation of a taxpayer's property as made by the assessor, cannot be collaterally attacked in an action under Laws 1903, No. 92.—*Arizona Copper Co. v. State*, 137 P. 417.

§ 493 (Ariz.) A taxpayer may appeal under Civ. Code 1901, par. 3875, from an action of the county board of equalization merely approving the assessor's valuation.—*Arizona Copper Co. v. State*, 137 P. 417.

§ 497 (Idaho) Where the county board of equalization in good faith equalizes the value of property for assessment, the tax commission cannot, by mandamus, compel a county board to substitute for its judgment the judgment of the commission.—*Blomquist v. Board of Com'rs of Bannock County*, 137 P. 174.

VI. LIEN AND PRIORITY.

§ 507 (Wash.) Under Rem. & Bal. Code, §§ 9223, 9235, taxes for personal property are a lien upon all of the property of the person against whom they are assessed.—*Porter v. Yakima County*, 137 P. 466.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

§ 587 (Ariz.) Where a taxpayer fails to apply for a reduction of the assessment to the county board of equalization at its July meeting, as required by Civ. Code 1901, pars. 3867, 3868, he cannot set up that the assessment was unjust, as a defense in an action to collect the taxes thus assessed.—*Arizona Copper Co. v. State*, 137 P. 417.

Where, by such failure, he loses his right to appeal from an order of the board, he cannot be heard to complain that the remedy of appeal

provided by Civ. Code 1901, par. 3875, is inadequate.—*Id.*

§ 592 (Ariz.) In an action for taxes due the state, an allegation of the answer merely that the county board of equalization, actuated by personal hostility, and acting with the unlawful and malicious purpose of injuring defendant, refused to reduce the valuation of his property held not a sufficient allegation of fraud as against the board.—*Arizona Copper Co. v. State*, 137 P. 417.

Where the complaint, in an action for taxes, complies with requirements of Laws 1903, No. 92, § 87, a mere general denial is insufficient to overcome its probative force and prevent the rendition of a judgment on the pleadings.—*Id.*

§ 598 (Ariz.) Under Civ. Code 1901, pars. 1557, 1558, and Laws of 1903, Act 92, § 88, held, not error to tax attorney fees in the amount of 25 per cent. of a judgment for taxes, though the attorney's contract was not introduced in evidence where defendant did not move to retax the costs.—*Arizona Copper Co. v. State*, 137 P. 417.

(C) Remedies for Wrongful Enforcement.

§ 610 (Okla.) Before a property owner can enjoin a tax sale of his realty, he must offer to pay such amount of taxes as the facts show to be chargeable against him under a proper assessment.—*Thurston v. Caldwell*, 137 P. 633.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 615 (N.M.) Laws 1913, c. 84, § 34, directing the collector to offer for sale each parcel of property on which the taxes are delinquent, authorizes the sale of property for taxes delinquent prior to 1913.—*Crane v. Cox*, 137 P. 589.

Laws 1913, c. 84, as construed to authorize sale for taxes delinquent before the act became effective, does not operate retrospectively as to such taxes.—*Id.*

§ 652 (N.M.) A preliminary injunction will not be granted to restrain a sale for taxes, unless the taxpayer first pays as much of the tax as he admits is just.—*Crane v. Cox*, 137 P. 589.

X. REDEMPTION FROM TAX SALE.

§ 696 (Wash.) Act March 20, 1901, amending Revenue Law 1897, § 98, by changing the form of summons in tax foreclosure proceedings where service is had by publication, held not applicable to proceedings in which the publication of the summons was complete prior to the taking effect of the amendment.—*Noland v. Arnold*, 137 P. 801.

§ 708 (Wash.) Under Revenue Law 1897, § 98, prior to its amendment by Act March 20, 1901, a published summons in tax foreclosure proceedings was required to contain information that would enable the defendant to accurately determine the limit of time within which he must appear and defend.—*Noland v. Arnold*, 137 P. 801.

Statement in a published summons in tax foreclosure proceedings, following the signature of plaintiff and his attorney, that the first publication was January 12, 1901, and the last February 23, 1901, held to have the same effect as if contained in the body of the summons and sufficient to enable defendants to know when they were required to appear and defend.—*Id.*

The contents of the summons in tax foreclosure proceedings, whether served personally or by publication, held controlled by Revenue Law 1897, §§ 96, 97; the manner of service only being regulated by the general law, to wit, Rem. & Bal. Code, § 233.—*Id.*

XI. TAX TITLES.

(A) Title and Rights of Purchaser at Tax Sale.

§ 742 (Colo.App.) Where land was sold to a county for taxes, and the certificate was not

assigned until more than three years thereafter, a tax deed based on the certificate was void, on its face.—*Parks v. Roth*, 137 P. 76.

(B) Tax Deeds.

§ 788 (Or.) A sheriff's deed on sale of land for taxes bid in by the county is not prima facie evidence of regularity of the proceeding.—*Borthwick v. Johnson*, 137 P. 784.

(C) Actions to Confirm or Try Title.

§ 800 (Colo.App.) In a suit to quiet title as against a void tax deed, plaintiff was not required to tender subsequent taxes, paid by the purchaser as a condition to the maintenance of the suit.—*Parks v. Roth*, 137 P. 76.

§ 805 (Colo.App.) In a suit to quiet title as against a tax title, the short statute of limitations (Mills' Ann. St. § 3904) is not available as a plea in bar.—*Parks v. Roth*, 137 P. 76.

In an action against one claiming a tax title, defendant having paid taxes for the year 1901 in 1902, and thereafter for the years 1903, 1904, 1905, 1906, the payment in 1902 could not be counted to establish payment for seven successive years, under the seven-year statute of limitations.—*Id.*

§ 810 (Colo.App.) In a suit to quiet title, a tax deed on which defendant relied, and which was void on its face, was inadmissible.—*Muntzing v. Harwood*, 137 P. 71.

§ 810 (Colo.App.) Where, in a suit to quiet title, defendants claimed under a tax deed, but offered it in evidence only as color of title, and not as proof of the title pleaded, they failed to establish title in themselves as a defense to the action.—*Parks v. Roth*, 137 P. 76.

§ 810 (Or.) In a suit to quiet title, one claiming title under a sheriff's deed of land sold for taxes and bid in by the county is not entitled to a decree, in the absence of evidence of regularity of the sale.—*Borthwick v. Johnson*, 137 P. 784.

XIII. LEGACY, INHERITANCE, AND TRANSFER TAXES.

§ 859 (Kan.) The Inheritance Tax Law held not violative of the constitutional requirement of uniformity and equality in the rate of assessment and taxation.—*State v. Cline*, 137 P. 932.

§ 895 (Cal.App.) Under Inheritance Tax Law, § 1, subd. 4, and section 15, where a testator died, devising his estate to his widow, who was subject to an inheritance tax which was not paid during her life, and she in turn left the property to residuary legatees, the amount assessable against her should be deducted from the estate subject to taxation against the residuary legatees.—*In re Williams' Estate*, 137 P. 1067.

TAX COMMISSION.

See Taxation, §§ 446½, 449, 450.

TECHNICAL ERRORS.

See Criminal Law, § 1186.

TELEGRAPHS AND TELEPHONES.

See Eminent Domain, §§ 2, 56; Taxation, § 276.

II. REGULATION AND OPERATION.

§ 28 (Cal.) Under Const. art. 12, § 22, and Public Utilities Act, Railroad Commission, in acting on petition for order requiring telephone company to permit connection with its lines by another company, held to act judicially.—*Pacific Telephone & Telegraph Co. v. Eshleman*, 137 P. 1119.

§ 67 (Or.) Commissions which a traveling salesman would have earned while he was kept from his territory through defendant's failure

to deliver a telegram were not too remote to form the basis for damages.—*Fields v. Western Union Telegraph Co.*, 137 P. 200.

TENANCY IN COMMON.

III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

§ 55 (Okl.) One tenant in common may sue to recover realty against a third person; but his recovery is limited to such interest as he proves title in himself superior to that of defendants.—*Moppin v. Norton*, 137 P. 1182.

TENDER.

See Pleading, § 376; Principal and Surety, § 108; Sales, § 82; Taxation, § 800; Vendor and Purchaser, §§ 170, 339.

TERMINATION.

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See Appeal and Error, §§ 222, 227, 345-356, 425, 430, 564, 765, 767; Bills and Notes, §§ 129, 404; Brokers, § 49; Contracts, § 213; Damages, § 45; Guaranty, § 46; New Trial, § 140.

§ 5 (Or.) Under L. O. L. §§ 531, 7544, a claim presented to an assignee for creditors on January 12, 1911, after notice first published October 12, 1910, was on time.—*In re Standard Cafeteria Co.*, 137 P. 774.

TITLE.

See Forcible Entry and Detainer; Mines and Minerals, § 40; Navigable Waters, § 37; Partition, § 109; Quieting Title; Sales, § 472; Taxation, §§ 742-810; Vendor and Purchaser, §§ 119, 133-144, 339; Wills, § 698.

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See Assault and Battery; Corporations, §§ 492, 495; Electricity; Explosives, § 12; False Imprisonment; Fraud; Highways, §§ 184-214; Libel and Slander; Master and Servant, §§ 96-319; Municipal Corporations, §§ 751-857; Negligence; Principal and Agent, §§ 147-157; Schools and School Districts, § 89; Trover and Conversion.

§ 22 (Mont.) When two or more parties act each for himself in producing a result injurious to another, they cannot be held jointly liable for the acts of each other.—*Howell v. Bent*, 137 P. 49.

TOWNS.

See Municipal Corporations; Schools and School Districts.

TRADE FIXTURES.

See Fixtures, § 27.

TRESPASS.

See Action, § 45; Animals, § 92; Municipal Corporations, §§ 847, 1028; Negligence, §§ 33, 122, 136; Pleading, §§ 18, 19; Railroads, § 441.

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I. NOTICE OF TRIAL AND PRELIMINARY PROCEEDINGS.

§ 5 (Okl.) Prior to the adoption of Rev. Laws 1910 on May 16, 1913, it was error to compel a party, over objection, to proceed to trial earlier than ten days after the issues were made up.—*Title Guaranty & Trust Co. v. Turnbull*, 137 P. 1178.

IV. RECEPTION OF EVIDENCE.

(B) Order of Proof, Rebuttal, and Reopening Case.

§ 59 (Okl.) The order in which evidence shall be received is ordinarily within the discretion of the trial court.—*Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349.

§ 68 (Okl.) Permitting plaintiff, in an action for death of a railroad employé, to reopen her case after both parties had rested and introduce further evidence held not an abuse of discretion.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

§ 70 (Cal.App.) Motion to reopen the case for additional evidence was properly denied where it was not supported by affidavit or other evidence excusing failure to produce the evidence before the case was submitted.—*Pfoh v. Porter*, 137 P. 44.

It was not error to deny a motion to set aside the submission of the case for the introduction of further testimony which, if introduced, would not have changed the result.—*Id.*

(C) Objections, Motions to Strike Out, and Exceptions.

§ 94 (Kan.) Where the grounds of a motion to strike testimony were not stated, and no objection had been made to the admission of the testimony, the motion was properly overruled.—*Ewing v. Wichita R. & Light Co.*, 137 P. 940.

VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (Kan.) A demurrer to plaintiff's evidence should not be sustained where such evidence does not clearly disprove or fail to establish his right of recovery.—*Walsh v. Kansas Fuel Co.*, 137 P. 941.

§ 139 (Okl.) Where there is no evidence of negligence or from which negligence might be

reasonably inferred, a verdict should be directed for defendant.—*St. Louis & S. F. R. Co. v. Smith*, 137 P. 357.

§ 139 (Okl.) Where all the evidence and the reasonable inferences therefrom in defendant's favor, taken as true, will warrant a verdict in his favor, it is error to sustain plaintiff's demurrer to such evidence.—*Moppin v. Norton*, 137 P. 1182.

§ 139 (Utah) Where there was evidence tending to support a theory of defendant, it was error for the court to refuse to submit the case on such theory.—*Anderson v. Nielson*, 137 P. 152.

§ 141 (Colo.App.) Where a fact defeating a recovery by plaintiff was established by uncontradicted evidence, it was error to submit the issue to the jury.—*Germania Life Ins. Co. of New York City v. Klein*, 137 P. 73.

§ 143 (Okl.) A demurrer to the evidence, or a motion to direct a verdict, should not be sustained where there is any substantial conflict in the evidence.—*Collier v. Gannon*, 137 P. 1179.

(C) Dismissal or Nonsuit.

§ 165 (Or.) Testimony admitted without objection held proper to be considered in passing on motion for nonsuit.—*Wasiljeff v. Hawley Pulp & Paper Co.*, 137 P. 755.

(D) Direction of Verdict.

§ 178 (Or.) Testimony admitted without objection held proper to be considered in passing on motion for instructed verdict.—*Wasiljeff v. Hawley Pulp & Paper Co.*, 137 P. 755.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 191 (Cal.) An instruction in part as to the facts on matters within the exclusive province of the jury is properly refused.—*Tousley v. Pacific Electric Ry. Co.*, 137 P. 31.

§ 191 (Wash.) In a personal injury action by a servant where the jury were charged that they could allow plaintiff compensation only for the injuries shown by the evidence, a charge that for any permanent disfigurements and injuries the compensation could not exceed a sum specified, was not erroneous in assuming that the plaintiff was permanently disabled and crippled.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

§ 194 (Wash.) In a personal injury action by a servant, a charge held not on the weight of the evidence.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

(C) Form, Requisites, and Sufficiency.

§ 242 (Wash.) Instructions held confusing and misleading.—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 137 P. 337.

§ 242 (Wash.) Instructions should be brief and to the point; and, when they are such that they would tend to mislead the jury, they are properly refused.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

§ 244 (Wash.) In a personal injury action, an instruction restricting the award of damages for permanent disfigurements and injuries to the sum named in the bill of particulars is not erroneous in specifically calling the attention of the jury to the bill of particulars.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

(D) Applicability to Pleadings and Evidence.

§ 251 (Cal.App.) An instruction that defendant, who drove the machine which injured plaintiff, was entitled to assume that plaintiff was in full possession of her faculties was properly refused, where there was no claim that plaintiff was not in possession of such faculties, or that, by reason of the want thereof, any greater duty devolved on defendant.—*Medlin v. Spazier*, 137 P. 1078.

133.
§ 252 (Cal.App.) Under Code Civ. Proc. § 2061, providing that on all proper occasions the jury are to be instructed by the court that a witness false in part of his testimony is to be distrusted in others, such an instruction is applicable where the witnesses of plaintiff and defendant absolutely contradict one another.—*Medlin v. Spazier*, 137 P. 1078.

§ 252 (Okl.) Evidence held not to warrant submission to the jury as an element of damage plaintiff's subsequent miscarriage.—*St. Louis & S. F. R. Co. v. Criner*, 137 P. 705.

§ 252 (Okl.) Where uncontradicted evidence showed that safety would result from blocking dangerous open spaces between rails, and that such blocking system was used on certain other roads without introducing any new danger, it is not error to refuse to instruct that defendant's failure to so block would not render it negligent.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

§ 253 (Cal.App.) In an action for death of a child, instruction allowing plaintiff to recover where, by reason of defective brakes of a car, the injury could not have been avoided held erroneous as eliminating the doctrine of contributory negligence.—*Waterman v. Visalia Electric R. Co.*, 137 P. 1090.

§ 253 (Kan.) Where, in an action for the death of a pedestrian, defendant offered evidence tending to show contributory negligence and suicide, it was error to refuse an instruction on contributory negligence.—*Jones v. Joplin & P. Ry. Co.*, 137 P. 796.

(E) Requests or Prayers.

§ 255 (Utah) If defendant desired to present the question as to the admissibility of evidence of subsequent repairs to a canal, preventing seepage of the water, which caused the injury, to prove prior negligence, he should have requested a charge confining and limiting the evidence to the purposes for which it was admissible.—*Jensen v. Davis and Weber Counties Canal Co.*, 137 P. 635.

§ 260 (Cal.App.) The refusal of requests is proper when they are covered by the instructions given.—*Medlin v. Spazier*, 137 P. 1078.

§ 260 (Kan.) Where, in a broker's action for commission, the court instructed that to be entitled to commission plaintiff must have been the "procuring" cause of a sale, it was not error to refuse to instruct that he must have been the "efficient" and "proximate" cause.—*McClintick v. Pyle*, 137 P. 788.

§ 260 (Kan.) Refusal of certain requested instructions was not error where the court gave other instructions embodying substantially the same principles of law.—*Rogers v. Kansas Co-operative Refining Co.*, 137 P. 991.

§ 260 (Okl.) Where the court correctly defines ordinary care and contributory negligence, it is not error to refuse a differently worded instruction presenting the same matter.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

§ 260 (Or.) Where the charge, in the judge's own language, properly covers all points at issue, he may refuse requests that state the law correctly.—*Astoria Southern Ry. Co. v. Pacific Surety Co.*, 137 P. 857.

§ 260 (Utah) Where requests to charge were covered by the instructions given, their refusal is not error.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 260 (Wash.) It is not error to refuse a requested instruction embodied in substance in the instructions given.—*Murray v. Wishkah Boom Co.*, 137 P. 130.

§ 260 (Wash.) The refusal of instructions covered by those given is not error.—*Johansen v. Pioneer Mining Co.*, 137 P. 1019.

§ 263 (Wash.) It is bad practice for the court to read to the jury requested instructions, and not determine until thereafter whether they

should be given or not.—*Revilla Fish Products Co. v. American-Hawaiian S. S. Co.*, 137 P. 337.

§ 268 (Okl.) It is not error to refuse a requested instruction going beyond bare definition, as to the defenses of contributory negligence or assumption of risk, though they correctly state the law, where the jury are not instructed and the party presenting same does not request an instruction to the effect that such defenses are questions of fact for the jury.—*St. Louis & S. F. R. Co. v. Long*, 137 P. 1156.

(G) Construction and Operation.

§ 295 (Or.) Instructions are sufficient when, as a whole, they cover all the issues properly, and fairly submit the case to the jury.—*Astoria Southern Ry. Co. v. Pacific Surety Co.*, 137 P. 857.

§ 296 (Colo.App.) Where two instructions are irreconcilable and one of them is wrong, the instructions are bad as a whole.—*Germania Life Ins. Co. of New York City v. Klein*, 137 P. 73.

§ 296 (Wash.) In a passenger's action for injuries from a second assault by a fellow passenger, an erroneous instruction that, if the assault occurred, defendant was liable was harmless, where the court also specifically stated that plaintiff could not recover unless defendant had notice of the assailant's character, and reason to believe that he would renew the assault.—*Kelly v. Navy Yard Route*, 137 P. 444.

§ 296 (Wash.) In an action for injuries to plaintiff's eyes by dust thrown into them by a negligent explosion on defendant's premises, an instruction that defendant's affirmative defense of prior disease of the eyes added nothing to the pleadings was not error, when considered in connection with a subsequent instruction.—*Britz v. Houlehan*, 137 P. 1035.

VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

§ 315 (Wash.) If the jurors did not agree in advance to abide by the result arrived at by adding the amounts each juror thought plaintiff should receive and dividing the result by the number of jurors, a verdict so arrived at is not objectionable as being obtained by lot or chance.—*Loy v. Northern Pac. Ry. Co.*, 137 P. 446.

IX. VERDICT.

(A) General Verdict.

§ 337 (Cal.) A verdict contrary to an erroneous instruction is not against the law.—*Tousley v. Pacific Electric Ry. Co.*, 137 P. 31.

§ 343 (Okl.) A general jury finding in a party's favor includes a finding for him on all the material issues.—*Walters Nat. Bank v. Bankton*, 137 P. 717.

§ 344 (Colo.App.) It is not proper to attempt to test the correctness of a verdict or the scope of it by a resort to affidavits of individual jurors as to the method of reaching the verdict and the intention of the jury.—*Baxter v. Beckwith*, 137 P. 901.

(B) Special Interrogatories and Findings.

§ 349 (Utah) Under Comp. Laws 1907, § 3163, the question whether special findings shall be submitted rests in the sound discretion of the trial court.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 349 (Wash.) Whether interrogatories or special findings shall be submitted to the jury is for the trial court's discretion.—*Loy v. Northern Pac. Ry. Co.*, 137 P. 446.

§ 350 (Kan.) In a broker's action for commission, it was not an abuse of discretion to refuse a special interrogatory inquiring, "What, if anything, did plaintiff do as agent to sell

said farm to E. W. B.," evidence, rather than the ultimate fact, being apparently called for thereby.—*McClintick v. Pyle*, 137 P. 788.

§ 350 (Utah) It was not an abuse of discretion on the part of the trial court to refuse to submit special issues to the jury because there were different items of damages claimed.—*Lindsay Land & Livestock Co. v. Smart Land & Livestock Co.*, 137 P. 837.

§ 352 (Kan.) In a broker's action for commission, a special interrogatory inquiring, "Is it not a fact that E. W. B. only talked to plaintiff as a friend?" being negative and leading in form, was properly refused.—*McClintick v. Pyle*, 137 P. 788.

§ 352 (Kan.) The matter of limiting the number of special interrogatories rests in the discretion of the trial court.—*Rogers v. Kansas Co-operative Refining Co.*, 137 P. 991.

§ 355 (Kan.) An answer to a special question "We do not know" held equivalent to "No."—*Iowa City State Bank v. Claypool*, 137 P. 949.

§ 357 (Kan.) It is improper for the jury to return an answer clearly evasive or contrary to the evidence.—*Anders v. Atchison, T. & S. F. Ry. Co.*, 137 P. 966.

X. TRIAL BY COURT.

(B) Findings of Fact and Conclusions of Law.

§ 391 (Cal.App.) In a suit for specific performance of a contract for the care and sale of nursery orange trees, defendant, though having pleaded specific denials, was entitled to rely on an offer to perform, and, having introduced evidence to support such allegation, it was error for the court to omit to make any finding thereon.—*Emerzian v. Asato*, 137 P. 1072.

§ 393 (N.M.) The trial court's findings need only state the ultimate facts, and should not set out the evidence.—*Fraser v. State Savings Bank*, 137 P. 592.

§ 394 (N.M.) Findings are sufficient, where they justify the judgment, though they intermingle matters of fact and conclusions of law.—*Fraser v. State Savings Bank*, 137 P. 592.

§ 396 (Cal.) Findings on issues not made by the pleadings will not support a judgment.—*Simmons v. Simmons*, 137 P. 20.

In a suit between a husband and wife, findings that the husband had loaned his wife money held without the issues, and so would not support a judgment for money loaned.—*Id.*

§ 397 (Cal.) The rule that a decision is against law where the trial court fails to find upon numerous issues tendered by a special defense applies only where the issues upon which there are no findings are "material" in the sense of being such as would countervail or destroy the effect of the other findings.—*Sharp v. Pitman*, 137 P. 234.

§ 404 (Kan.) Findings of fact are to be construed together.—*Kuhn v. Johnson*, 137 P. 990.

§ 404 (N.M.) Findings are not to be construed with the strictness of special pleadings.—*Fraser v. State Savings Bank*, 137 P. 592.

§ 404 (Okla.) A general finding for defendant necessarily includes a special finding on every particular fact necessary to sustain the general finding.—*Schafer v. Midland Hotel Co.*, 137 P. 664.

§ 405 (Okla.) Where the court makes a general finding for plaintiff and certain special findings, but fails to cover all the issues involved, and defendant fails to call attention to the omission, his right to complain of omission is waived.—*Simpson Tp. v. Hill*, 137 P. 348.

TRIAL DE NOVO.

See Appeal and Error, § 1009; Justices of the Peace, §§ 171, 174.

TROVER AND CONVERSION.

See Set-Off and Counterclaim, § 33.

II. ACTIONS.

(D) Damages.

§ 44 (Okla.) The measure of damages for conversion is ordinarily their fair market value at the time and place of conversion, with lawful interest thereon, and fair compensation for expenses in pursuit of the property; but the owner can elect to take the highest fair market value of the property at any time between the conversion and verdict, without interest, together with cost of pursuit.—*First Nat. Bank v. Thompson*, 137 P. 668.

TRUST DEEDS.

See Mortgages.

TRUSTS.

See Appeal and Error, § 1160; Banks and Banking, §§ 77, 134, 152; Monopolies, § 21; Municipal Corporations, § 721.

I. CREATION, EXISTENCE, AND VALIDITY.

(A) Express Trusts.

§ 44 (Cal.) Evidence held to support a finding of the absence of a trust.—*Wills v. Wills*, 137 P. 249.

Evidence held to show that a daughter, who was the devisee of her deceased parent, did not hold the property in trust.—*Id.*

V. EXECUTION OF TRUST BY TRUSTEE OR BY COURT.

§ 283 (Cal.) One conveying his real estate in trust for his own use, and then conveying the same to the trustee for a valuable consideration, including an assumption by the grantee of his debts, held not defrauded of his property.—*Wills v. Wills*, 137 P. 249.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

(C) Actions.

§ 371 (Cal.App.) In an action to establish a trust in land on the ground that a deed had not been delivered, plaintiff must expressly allege nondelivery or facts as to the grantee's possession, showing that there could have been no delivery.—*Fisher v. Fisher*, 137 P. 1094.

UNITED STATES.

See Indians; Public Lands, §§ 35-121; Removal of Causes.

USE AND OCCUPATION.

§ 8 (Okla.) Under Comp. Laws 1909, § 4094, an occupant of lands is, without special contract and though the relation of landlord and tenant does not exist, liable for the rents to any person entitled to same; and hence, in an action therefor, it is not essential to allege the existence of such relation or contract.—*Bilby v. Gilliland*, 137 P. 690.

USURY.

I. USURIOUS CONTRACTS AND TRANSACTIONS.

(A) Nature and Validity.

§ 2 (Colo.App.) Parties may legally stipulate for the payment of interest according to the laws of the state where an instrument is made, or according to the laws of the place of payment, and the rate so agreed on is recoverable, although illegal under the laws of the other state.—*Baxter v. Beckwith*, 137 P. 901.

The validity of a note and its provision for interest is to be determined by the law of the state in which it was made and specifically made payable.—*Id.*

§ 11 (Ariz.) The elements of a usurious agreement are an unlawful intent, money or mon-

ey's equivalent as the subject-matter, a loan or forbearance, an absolute agreement to repay, and an exaction for the use of the loan of something in excess of what is allowed by law, and the form of the transaction is immaterial.—Blaisdell v. Steinfeld, 137 P. 555.

§ 32 (Ariz.) Consideration for agreement by plaintiff to transfer an undivided interest in real property and a certain percentage of the stock and bonds of certain corporations to the defendant *held* to be a loan of money and the extension of the time of payment, and hence the agreement was usurious.—Blaisdell v. Steinfeld, 137 P. 555.

§ 53 (Ariz.) Under agreement between plaintiff and defendant, *held*, that the consideration for the plaintiff's promise to pay the defendant 10 per cent. on the sale of property worth over \$200,000 was in part at least the loan of money and extension of time of payment, and, as the loan bore interest at 10 per cent. the agreement was usurious under Laws 1909, c. 84, §§ 1, 2.—Blaisdell v. Steinfeld, 137 P. 555.

§ 56 (Wash.) Payment to the agent of a chattel mortgagee for his services in preparing the note and mortgage and releasing a prior one *held* not to render the transaction usurious under Rem. & Bal. Code, § 6251, although 12 per cent. interest was charged.—Testera v. Richardson, 137 P. 998.

(B) Rights and Remedies of Parties.

§ 93 (Ariz.) Equity will cancel deeds and incumbrances on real property, if tainted with usury or given for a usurious consideration.—Blaisdell v. Steinfeld, 137 P. 555.

§ 102 (Ariz.) Where usurious interest has been paid by the borrower to the lender, the excess over the rate authorized by law may be recovered.—Blaisdell v. Steinfeld, 137 P. 555.

§ 117 (Ariz.) Where plaintiff attacked transfer of property to defendant as usurious, evidence *held* insufficient to show that it was transferred as a gift or that the defendant performed any services as a consideration therefor.—Blaisdell v. Steinfeld, 137 P. 555.

VACATION.

See Judgment, §§ 343-376.

VALUE.

See Damages, § 188.

VARIANCE.

See New Trial, § 40; Pleading, §§ 376-397.

VENDOR AND PURCHASER.

See Assignments, §§ 50, 88; Brokers; Damages, § 81; Fraud, § 59; Frauds, Statute of, § 133; Limitation of Actions, §§ 11, 167; Sales; Specific Performance; Taxation, § 742; Trusts.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3 (Colo.App.) Contract between vendor and purchaser construed, and *held* a mere option and not a contract for the sale of land.—Hessell v. Neal, 137 P. 72.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

§ 82 (Cal.) Where parties to a contract on June 9, 1904, agreed, one to sell and the other to buy real estate, an agreement on July 14th, signed only by the seller and merely extending the terms of the previous contract for his benefit, was not a new contract.—Parkside Realty Co. v. MacDonald, 137 P. 21.

§ 85 (Okla.) Where the vendor took notes due monthly for the deferred payments, and the pur-

chaser took possession, and the contract provided that, on default, the vendor should keep any payments as liquidated damages, such contract could not be rescinded except by consent of both parties.—Shelton v. Wallace, 137 P. 694.

(B) Rescission by Vendor.

§ 102 (Cal.) The fact that a vendor, pending the contract, had transferred the land to third parties was not in and of itself an abandonment of the contract with the purchaser.—Parkside Realty Co. v. MacDonald, 137 P. 21.

(C) Rescission by Purchaser.

§ 112 (Okla.) Vendee, in a contract for sale of real estate, where the title is not marketable, may look to the vendor upon his warranty for any loss sustained, or abandon the contract.—Martin v. Spaulding, 137 P. 882.

§ 114 (Wash.) Where a purchaser after discovery of the want of title, improved the property, and the vendor acted in good faith, and during the trial made a good title to the property, *held* not an abuse of discretion to refuse a rescission.—Wetternach v. Jones-Thompson Inv. Co., 137 P. 442.

§ 119 (Cal.App.) The contract providing that, if title should be found imperfect, and not to be perfected within 90 days, it should be terminated, and the deposit returned, the purchaser's right was not lost by his not declaring the contract at an end, and demanding the return till a few days after expiration of the 90 days.—Reed v. Witcher, 137 P. 294.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 133 (Cal.) Where a vendor agreed to make his title satisfactory to the purchaser and his attorney, the question was not whether the title was in fact good or marketable, but whether it was acceptable to the purchaser and his attorney.—Parkside Realty Co. v. MacDonald, 137 P. 21.

§ 143 (Colo.App.) A vendee, not being able to perform at the time specified, and not then having demanded an abstract of title, could not excuse his default by thereafter claiming that the vendors did not tender an abstract showing a merchantable title.—Hessell v. Neal, 137 P. 72.

§ 144 (Wash.) A vendor selling while his title is defective may perform his obligation if he is able to convey title when the time for performance arrives.—Zizich v. Holman Security Inv. Co., 137 P. 1028.

(D) Payment of Purchase Money.

§ 170 (Cal.) A purchaser was not bound to tender any of the purchase money to a vendor's grantees, although he knew that the vendor's deeds had been delivered to them, since there was no privity of contract between himself and them.—Parkside Realty Co. v. MacDonald, 137 P. 21.

For a purchaser to put the vendor in default it is necessary for him to make a tender of the balance to the vendor.—Id.

V. RIGHTS AND LIABILITIES OF PARTIES.

(C) Bona Fide Purchasers.

§ 231 (Cal.) An instrument not entitled to record, although recorded, *held* not constructive notice.—Parkside Realty Co. v. MacDonald, 137 P. 21.

The record of an instrument not entitled to go upon record may impart actual notice to one who has seen it of record.—Id.

§ 231 (Cal.) Where plaintiff's predecessor in title reserved right of way across plaintiff's land, plaintiff is charged with knowledge of the reservation, even though his deed, which was not directly from the original source of title, contained no mention of the reservation; the

reservation being in an instrument in plaintiff's chain of title.—*Myers v. Berven*, 137 P. 260.

§ 239 (Cal.) A bona fide purchaser without notice takes the property free from the equities of others, and his land is not burdened by an easement of which he had no notice, and of which the owner had only an equitable title.—*Myers v. Berven*, 137 P. 260.

VII. REMEDIES OF VENDOR.

(B) Actions for Purchase Money.

§ 302 (Okl.) Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default, the vendor should keep any payments made as liquidated damages, upon the purchaser's default, the vendor was not confined to an action for breach of contract, but could enforce the purchaser's liability on the notes.—*Shelton v. Wallace*, 137 P. 694.

Where the vendor took notes for deferred payments and agreed to convey upon payment, and the purchaser took possession, the contract providing that, on default, the vendor should keep any payments as liquidated damages, the vendor could sue on a past due note which the purchaser failed to pay, deciding to repudiate the contract.—*Id.*

§ 303 (Okl.) Where the vendor took notes for the deferred payments, and the purchaser took possession, and the contract provided that, on the purchaser's default the vendor should keep any payments as liquidated damages, the vendor was not compelled to resort to specific performance before enforcing the notes.—*Shelton v. Wallace*, 137 P. 694.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 339 (Cal.App.) The vendor being unable to make good title, if at all, till long after the time stipulated in the contract, and after the purchaser had declared the contract at an end, and demanded return of the deposit, it was unnecessary for the purchaser to tender balance of purchase money.—*Reed v. Witcher*, 137 P. 294.

To entitle the purchaser to declare the contract at an end, and recover his deposit for failure to make good title in the specified time, it was not necessary for him, in pointing out defects, to point out those well known by the vendors, and of such a character as to make it impossible, till removed, to pass a good title.—*Id.*

VENUE.

See Judges, § 51.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 61 (Wash.) A motion and affidavit comes too late where it was not made until after the court had granted a rule requiring defendants to show cause why an injunction should not be granted and had issued a temporary restraining order.—*Fortson Shingle Co. v. Skagland*, 137 P. 304.

VERDICT.

See New Trial, §§ 73, 78; Pleading, § 433; States, § 9; Trial, §§ 139, 178, 315-357.

VIEWERS.

See Drains, § 76.

WAIVER.

See Appeal and Error, §§ 748, 765, 770; Contracts, § 316; Criminal Law, §§ 901, 1081; Drains, § 76; Executors and Administrators, §§ 17, 19; Indictment and Information, § 154; Insurance, §§ 360, 372, 388; Landlord and Tenant, § 112; Mechanics' Liens, § 201; Mines and Minerals, § 55; Motions, § 32;

Pleading, §§ 406-433; Railroads, § 216; Trial, § 405; Vendor and Purchaser, § 143; Wills, §§ 740, 800.

WARRANT.

See Extradition, § 36.

WARRANTY.

See Sales, § 272.

WATERS AND WATER COURSES.

See Courts, § 207; Drains; Eminent Domain, § 47; Fish, § 5; Judgment, §§ 217, 678, 717, 951; Limitation of Actions, § 100; Navigable Waters; Pleading, § 236.

I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.

§ 33 (Utah) Evidence held to sustain a finding that certain improvements were necessary for the proper measurement and diversion of the amounts of water to which each of several irrigation companies was entitled.—*Salt Lake City v. Utah & Salt Lake Canal Co.*, 137 P. 638.

Evidence held not to sustain a finding that the construction of a dam and weir below the intakes of two irrigation companies would be for the joint benefit of all the companies using the water.—*Id.*

Where an original decree, after determining the rights of irrigation companies in the water of a river, provided that the parties should "construct at their own cost proper appliances for the measurement of the waters awarded to them respectively," a supplemental decree, prorating to all the cost of a dam and weir located below the intakes of two of the companies, conflicted therewith, and was void.—*Id.*

II. NATURAL WATER COURSES.

(E) Bed and Banks of Stream.

§ 89 (Wash.) Ordinarily, meander lines are not intended or recognized as boundary lines, but only as lines intended to indicate the sinuosities of the stream.—*Sartori v. Denny-Renton Clay & Coal Co.*, 137 P. 494.

§ 98 (Wash.) Evidence in action to establish the boundary line between lands on the opposite shores of a river, the witnesses testifying by reference to maps and plats and the trial court having verified their testimony, held to sustain a decree definitely fixing the location of the thread of the river as the true boundary line.—*Sartori v. Denny-Renton Clay & Coal Co.*, 137 P. 494.

VI. APPROPRIATION AND PRESCRIPTION.

§ 128 (N.M.) Laws 1907, c. 49, does not regulate community acequias constructed prior to the passage of the act, so as to affect the right to change the point of diversion from the stream into such acequias.—*Pueblo of Isleta v. Tondre*, 137 P. 86.

§ 129 (Wyo.) A municipal corporation, having acquired a valid prior appropriation of the waters of a stream for municipal purposes, could not be ousted of any part of such rights by adverse user by a junior appropriator.—*Holt v. City of Cheyenne*, 137 P. 876.

§ 144 (Wyo.) A city having an appropriation of a specified amount of water from a stream held authorized to sell surplus water within the limits of its appropriation, for use on a military reservation outside the city limits, as against appropriators holding subsequent rights.—*Holt v. City of Cheyenne*, 137 P. 876.

A city, in making an appropriation of water for municipal uses, is not limited to the needs of its citizens at the time of adjudication of its rights.—*Id.*

§ 145 (Wyo.) Where a city had a prior appropriation of the waters of a stream for municipi-

pal uses, it was entitled to change its headgate or point of appropriation, provided the change did not injure other appropriators from the same source of supply.—*Holt v. City of Cheyenne*, 137 P. 876.

§ 152 (Mont.) Rev. Codes, § 4852, providing that all water rights of parties shall be settled in one action, *held* not to authorize a single action at law against several wrongdoers for the entire damage.—*Howell v. Bent*, 137 P. 49.

§ 152 (Wyo.) Where the court, in a suit to determine water rights, in fact fixed the priorities and attempted to allot the amount of water to which each of the parties was entitled stating in figures the number of cubic feet or inches allotted to each, the decree was not void for uncertainty because of a clause reciting that it was impossible to definitely fix the amount to which each party was entitled.—*Holt v. City of Cheyenne*, 137 P. 876.

A decree establishing water priorities and fixing the amount to which each party to the suit was entitled *held* not void on its face as ambiguous, uncertain, unintelligible, and incapable of enforcement.—*Id.*

An objection to a portion of a decree fixing water rights awarding defendant city certain water to irrigate land outside the city limits *held* unsustainable, where there was no allegation that the city had used or threatened to use the water to irrigate the land.—*Id.*

IX. PUBLIC WATER SUPPLY.

§ 238 (Or.) Where a by-law of an association of water users under an irrigation project authorizes assessments against shares appurtenant to land for which water is available, the directors cannot assess shares appurtenant to land for which water is not available.—*Griffith v. Klamath Water Users' Ass'n*, 137 P. 226.

§ 257 (Colo.App.) Under Const. art. 16, § 8, providing for the establishment by the board of county commissioners of reasonable maximum rates to be charged for the use of water, the Legislature cannot fix a maximum rate, nor can the county commissioners act of their own volition.—*McCracken v. Montezuma Water & Land Co.*, 137 P. 903.

Under Const. art. 16, § 8, and Rev. St. §§ 3265 and 3268, the board of county commissioners has exclusive power to fix maximum water rates, and, when one is fixed, it is binding upon all persons in the jurisdiction until annulled by some proper court.—*Id.*

Where the board fixed water rates for a district, it must be presumed that the rate fixed was supported by ample evidence and proofs adduced at the hearing, and it cannot be presumed that the finding was fraudulent because the rate fixed was the same as one previously enjoined.—*Id.*

In fixing the maximum rate, the board of county commissioners are acting within their statutory powers, and their action cannot be collaterally attacked, and hence, in an action for compensation for water furnished, proof that defendant had paid a full amount to which the plaintiff was entitled under the rates fixed by the board of commissioners is a complete defense.—*Id.*

§ 262 (Cal.App.) An owner of an irrigation ditch is not an insurer against overflow or liable for overflows resulting from act of God or inevitable accident, but only for failure to exercise ordinary care in the construction and operation of the ditch.—*Nahl v. Alta Irr. Dist.*, 137 P. 1080.

§ 262 (Utah) Comp. Laws 1907, § 1288x29, requires the owners of irrigation canals to exercise ordinary care to prevent injury to adjoining land.—*Jensen v. Davis and Weber Counties Canal Co.*, 137 P. 635.

§ 263 (Cal.App.) In an action by a landowner to recover damages for an overflow of defendant's irrigation ditch, evidence *held* to sustain

a finding that the overflow was the result of an act of God consisting of torrential and unprecedented rainstorms.—*Nahl v. Alta Irr. Dist.*, 137 P. 1080.

§ 263 (Utah) In an action for injury to land caused by the seepage, evidence *held* sufficient to take to the jury the question of the canal owner's negligence.—*Jensen v. Davis and Weber Counties Canal Co.*, 137 P. 635.

Though evidence that after the injury defendant cemented the canal when the seepage ceased, was not competent to prove negligence, it was competent to rebut defendant's contention that the water causing the injury did not come from the canal, and that if it did, it could not have been avoided.—*Id.*

WAYS.

See Easements; Municipal Corporations, §§ 648-705, 762-809.

WEIGHTS AND MEASURES.

§ 2 (Okla.) Act approved March 7, 1913 (Sess. Laws 1913, c. 24), making the findings of the weigher of cotton as to weight conclusive, *held* unconstitutional.—*Taylor v. Anderson*, 137 P. 1183.

§ 8 (Okla.) A municipality with a population of more than 2,000, existing under a charter framed under Const. art. 18, §§ 3a, 3b, may install and maintain municipal scales for the weighing of commodities offered for sale and delivery in the city.—*Oklahoma City v. Colt*, 137 P. 859.

A municipal weighmaster may weigh on the municipal scales without interference from the county or public weigher.—*Id.*

The right of a municipal weighmaster to weigh products offered for sale and delivery in the city does not exclude the right of the public or county weigher to weigh products in such city when offered to him for that purpose.—*Id.*

WILLS.

See Executors and Administrators; Frauds, Statute of, § 129; Jury, § 19; Life Estates, § 6; Pleading, § 433; Specific Performance, §§ 25-51, 86; Taxation, §§ 859, 895.

I. NATURE AND EXTENT OF TESTAMENTARY POWER.

§ 11 (Kan.) A husband's written consent that his wife might bequeath away from him more than one-half of her property, when freely and fairly executed in strict compliance with Gen. St. 1909, § 9811, authorizing such consent, *held* irrevocable.—*Chilson v. Rogers*, 137 P. 936.

III. CONTRACTS TO DEVISE OR BEQUEATH.

§ 64 (Wash.) Where a husband and wife verbally contracted each to bequeath his or her property to the other, and executed wills pursuant thereto, the execution of a new will by the husband invalidated the oral contract.—*McClanahan v. McClanahan*, 137 P. 479.

V. PROBATE, ESTABLISHMENT, AND ANNULLMENT.

(B) Actions to Establish or Determine Validity in General.

§ 229 (Cal.) Legatee given the same amount by a subsequent will as by an earlier will *held* to have no interest to contest the will, under Code Civ. Proc. §§ 1307, 1327.—*In re Land's Estate*, 137 P. 246.

(F) Parties and Process or Notice.

§ 263 (Cal.) In a will contest, the refusal of the court to issue a citation for service on legatees and devisees residing without the state did

not deprive the court of jurisdiction to proceed with the trial as to contestant and such defendants as had been served with citation.—In re Land's Estate, 137 P. 246.

(H) Evidence.

§ 288 (Cal.) In a proceeding to contest a will, where contestant's interest is put in issue by the pleadings, the burden is on him to show his interest.—In re Land's Estate, 137 P. 246.

(I) Hearing or Trial.

§ 322 (Cal.) Under Code Civ. Proc. §§ 1307, 1327, on contested probate or contest of will after probate, the court may require the contestant to establish his interest before proceeding with the trial of the other issues.—In re Land's Estate, 137 P. 246.

(K) Review.

§ 384 (Cal.) Where contestant had no interest entitling him to maintain will contest, refusal of court to cite legatees and devisees residing without the state held not prejudicial, if erroneous.—In re Land's Estate, 137 P. 246.

VI. CONSTRUCTION.

(A) General Rules.

§ 439 (Ariz.) The court must construe a will according to the intention of testator.—La Tourette v. La Tourette, 137 P. 426.

§ 440 (Wash.) The dominant intention of the testator, as manifested in his will, must, if lawful, be given effect.—Peck v. Peck, 137 P. 137.

§ 442 (Or.) Under L. O. L. § 7347, the testator's intent is controlling, unless it cannot be carried into effect without violating the rules of the law.—Kaser v. Kaser, 137 P. 187.

§ 455 (Wash.) Courts will not slavishly adhere to mere technical rules of construction in interpreting wills.—Peck v. Peck, 137 P. 137.

§ 481 (Or.) As a general rule, a will expresses the testator's intention at the time of his death, unless a fair construction manifests a different intention.—Kaser v. Kaser, 137 P. 187.

§ 486 (Cal.) It is presumed that a will was made with knowledge that testator's power of disposition did not extend to his widow's interest in the community property but only to his separate property and an undivided half of the community property.—In re Prager's Estate, 137 P. 37.

§ 487 (Ariz.) Parol evidence is admissible to aid the court in construing a will by showing the surrounding circumstances, thereby placing the court in the position of the testator, but the intent of testator must appear from the will itself.—La Tourette v. La Tourette, 137 P. 426.

§ 488 (Wash.) It is only where the terms of a will are ambiguous, and the testator's intention is doubtful that resort may be had to adventitious circumstances to determine that intention.—Peck v. Peck, 137 P. 137.

§ 490 (Ariz.) A testator must be presumed not to intend to devise any property over which he had no power of testamentary disposition, and his will must be read as applying only to his own property.—La Tourette v. La Tourette, 137 P. 426.

(B) Designation of Devisees, and Legatees and Their Respective Shares.

§ 523 (Wash.) A gift to the testator's son and three grandsons held not a gift to a class, and hence the death of one of the grandsons before the testator results in a lapse of the legacy; the interest passing under the residuary clause.—Peck v. Peck, 137 P. 137.

Notwithstanding the surrounding circumstances, held, that a gift by testator to his son and his three grandchildren, naming them, did not carry with it the incidents of survivorship, and hence in case of lapse of one of the devisees it passed to the residuary legatee.—Id.

§ 535 (Cal.) A will construed, and held not to pass anything to appellant, the testator's heir at law, but to expressly disinherit her.—In re Winbigler's Estate, 137 P. 1.

§ 535 (Wash.) Under Rem. & Bal. Code, § 1326, providing that a testator shall be deemed to die intestate as to a child or descendant not provided for, the mention of the children of the testator as a class, with words showing that the class included children in esse and those thereafter to be born, is a sufficient naming of the children for the purpose of disinheritance.—Gehlen v. Gehlen, 137 P. 312.

(C) Survivorship, Representation, and Substitution.

§ 545 (Or.) A will providing for the contingency that any of testator's children "die leaving lawful issue," or "should marry and die" without issue, refers to death at a future time.—Kaser v. Kaser, 137 P. 187.

A will, providing that if any of testator's children die without issue the husband or wife of such child shall take nothing, refers to a definite failure of issue.—Id.

§ 547 (Or.) A testamentary disposition of personality to colegatees, naming them, does not create survivorship unless it is distinctly expressed or clearly implied.—Kaser v. Kaser, 137 P. 187.

(D) Description of Property.

§ 577 (Ariz.) Where a will executed by a husband, who, with his wife, was in possession of community property, disposed of all the property of which he died possessed to his wife for life, with gift over of what remained at her death, the wife took the interest devised and her share of the community property.—La Tourette v. La Tourette, 137 P. 426.

(E) Vested or Contingent Estates and Interests.

§ 634 (Or.) Though generally no interests vest under a mere direction to divide property in the future, yet, if postponement is to enable intermediate enjoyment for life, the remainderman's interest vests, either absolutely or defeasibly.—Kaser v. Kaser, 137 P. 187.

(I) Actions to Construe Wills.

§ 698 (Wash.) Where plaintiff's title depends upon a will, she need not bring an independent action for the construction of the will, but may sue to quiet title and in that proceeding have the will construed.—Peck v. Peck, 137 P. 137.

§ 707 (Kan.) An equitable proceeding for the construction of a will, being an action other than for the recovery of money only, or for the recovery of specific property, the court, under Code Civ. Proc. §§ 613, 615 (Gen. St. 1909, §§ 6208, 6210), may tax costs and apportion the same in its discretion.—Singer v. Taylor, 137 P. 931.

In a proceeding to construe a will in which there is an irregularity and concerning which there is a real controversy, the court may allow reasonable attorney's fees out of the estate to the defeated, as well as to the successful party.—Id.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

§ 740 (Cal.) An agreement, between testator's widow and the beneficiary, for a consideration in compromise of a disagreement, by which the beneficiary waived her objection to the widow's claim to take under the will as well as one-half of the community property, would estop the beneficiary from denying such claim by the widow.—In re Prager's Estate, 137 P. 37.

§ 740 (Wash.) Certain acts by the executrix of a noninterventional will held not to constitute a distribution which would preclude her

from claiming a lapsed devise under the residuary clause.—*Peck v. Peck*, 137 P. 137.

Certain acts of the executrix of a will, who was also a residuary legatee, *held* not to work an estoppel against her to claim a lapsed devise under the residuary clause.—*Id.*

(B) Specific, Demonstrative, and General Devises and Bequests.

§ 753 (Cal.) A gift of the sum of \$5,000 from testatrix's share of her father's estate to be obtained and placed in the care of a church conference for the purpose of establishing a theological school *held* a specific legacy, within Civ. Code, § 1357, subd. 1, defining a specific legacy.—*In re Goodfellow's Estate*, 137 P. 12.

Courts are as a rule not inclined to construe legacies as specific.—*Id.*

(C) Advancements, Ademption, Satisfaction, and Lapse.

§ 764 (Cal.) The "ademption" of a specific legacy is the extinction or withdrawal of a legacy because of some act of testator equivalent to its revocation, or clearly indicating an intention to revoke, and is affected by the extinction of the thing or fund bequeathed or by a subsequent disposition of it from which an intention to revoke is presumed.—*In re Goodfellow's Estate*, 137 P. 12.

§ 767 (Cal.) There was an ademption of a specific legacy of \$5,000 given to establish a theological school, which sum the will provided the executor should obtain from testatrix's share of her father's estate and place in the care of the church conference, where the father's estate was settled before testatrix's death and she had received her share thereof.—*In re Goodfellow's Estate*, 137 P. 12.

(D) Election.

§ 782 (Ariz.) Where a testator owning only an undivided interest in real estate disposes of his property only, and by same words gives benefits to his wife, who is his co-owner, the wife need not elect between the benefits conferred by the will and her own share in the property, but may take the benefits and her own share.—*La Tourette v. La Tourette*, 137 P. 426.

§ 782 (Cal.) In view of the value of the community and separate estates, *held* that the widow was not required to elect whether she should take her interest in the community property or take under the will, but could take both.—*In re Prager's Estate*, 137 P. 37.

That a provision in a will for testator's widow is very liberal would not justify the conclusion that it was intended in lieu of her interest in the community estate, so as to require her to elect.—*Id.*

§ 799 (Ariz.) Where a widow makes an election between the interest devised by her husband's will and her own interest on the supposition that a duty of election devolved on her, when no necessity for an election existed, the election was ineffectual.—*La Tourette v. La Tourette*, 137 P. 426.

§ 800 (Or.) Under L. O. L. § 7349, subd. 4, widow's acceptance of life use of property under will *held* not to waive her right in distribution of portion of remainder as to which testator dies intestate.—*Kaser v. Kaser*, 137 P. 187.

(H) Void, Lapsed, and Forfeited Devises and Bequests, and Property and Interests Undisposed of.

§ 865 (Or.) Where a will provided that the surviving husband or wife of a child which should die without issue should take nothing, testator died intestate as to the share of such a child.—*Kaser v. Kaser*, 137 P. 187.

Where testator leaves all his property to his wife for life, then to his seven children, but nothing to the widow of a child who should die without issue, such widow is entitled to one-seventh of one-seventh of half the property.—*Id.*

WITNESSES.

See Appeal and Error, §§ 179, 994, 1001; Criminal Law, §§ 659, 665, 698, 703, 720, 1035, 1159, 1170½, 1171; Trial, § 252.

I. ATTENDANCE, PRODUCTION OF DOCUMENTS, AND COMPENSATION.

§ 26 (Kan.) Under Gen. St. 1909, § 3674, a salaried police officer of a city is not entitled to fees as a witness for the state.—*Anderson v. Board of Com'rs of Shawnee County*, 137 P. 799.

§ 29 (Wash.) Where the business of a witness was in another state and he was compelled to come therefrom to testify, he was entitled to mileage from the state line, though his residence was within the state.—*Wohlforth v. Kuppler*, 137 P. 477.

III. EXAMINATION.

(A) Taking Testimony in General.

§ 230 (Cal.App.) Where the accuracy of an interpreter was drawn into question, evidence of his skill is admissible, but it is proper for the court to deny counsel's suggestion that the interpreter be allowed to carry on, in the presence of the jury, conversation with the witnesses so that his skill might be determined.—*People v. Ong Git*, 137 P. 283.

§ 252 (Or.) When a witness refers to a map, he should be required to designate to what he refers in such a manner that the whole testimony can be considered from the record.—*Oberstock v. United Rys. Co.*, 137 P. 195.

§ 257 (Cal.) That plaintiff is entitled as a witness to use a contract with another to refresh his memory as to the contents of his contract with defendant does make it admissible in evidence, over the objection of defendant.—*Ernst v. Ganahl*, 137 P. 256.

(B) Cross-Examination and Re-Examination.

§ 268 (Okla.Cr.App.) Where defendant's wife testified that he was at home with his family at the time of the larceny but left early the following morning, it was competent for the state to ask on cross-examination how long it was after the commission of the crime before defendant returned.—*Jones v. State*, 137 P. 121.

§ 269 (Kan.) A witness cannot be properly cross-examined as to matters not directly connected with the facts testified to in chief.—*Kuhn v. Johnson*, 137 P. 990.

§ 269 (Mont.) Questions on cross-examination were properly permitted as to matters introduced in the direct testimony.—*Smith v. Zimmer*, 137 P. 538.

§ 272 (Cal.) In an action on an account stated between plaintiff's assignor and a corporation, certain contracts, out of which the claims forming the basis of the account accrued, *held* properly admitted in evidence as a part of the cross-examination of plaintiff's assignor.—*E. W. McLellan Co. v. East San Mateo Land Co.*, 137 P. 1145.

§ 288 (Cal.App.) Under Code Civ. Proc. § 2045, it was not improper, where accused's counsel, though surprised by a witness, did not take advantage of the court's permission to examine him as to statements made before trial, but turned the witness over for cross-examination, to exclude such questions on redirect examination.—*People v. Kawasaki*, 137 P. 287.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(B) Character and Conduct of Witness.

§ 345 (Okla.) In ejectment, *held* not error to permit a witness to be asked whether he had

ever been convicted of a crime in the tribal courts of the Seminole Nation.—Perkins v. Baker, 137 P. 661.

(D) Inconsistent Statements by Witness.

§ 380 (Cal.App.) Where the testimony of a witness called by accused was not unfavorable but simply failed to come up to accused's expectations, accused is not entitled to prove that the witness made contrary statements out of court.—People v. Kawasaki, 137 P. 287.

(E) Contradiction and Corroboration of Witness.

§ 414 (Cal.App.) Where the defense was mistaken identity, two group photographs, including defendant, were properly admitted in corroboration of a witness whose testimony as to identity was attacked on cross-examination, where the witness on redirect examination testified that shortly after the homicide he was shown the photographs and identified accused as one of the persons who had participated in the killing.—People v. Ong Git, 137 P. 283.

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